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International criminal trials: A normative theory

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CHAPTER 4.

TRIAL PHASE: A THEORETICAL AND COMPARATIVE OUTLOOK

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1. INTRODUCTION

This Chapter opens the theoretical part (II) of the study, whose purpose is to position the trial phase in the context of international criminal proceedings and to examine the international criminal trial as a socio-legal phenomenon. The preliminary objective of this Chapter is to conceptualize the trial as a separate stage of criminal proceedings that is relatively autonomous and distinguishable from other phases, given the specialized objectives, functions, and role in the structure of the procedural system. Thus, approaching the trial as a distinct object of inquiry raises questions about its destination and position in criminal proceedings and its own structure as a sequence of procedural steps.

To that end, the Chapter offers a framework for the examination of trial in general and perspectives relevant for theorizing on trial as a distinct object of inquiry. This framework hinges on the procedural functions the trial phase serves; and the sociological meaning and effects of the trial process which are to be distinguished from its proper functions; and the place and role of trial in the overall procedural sequence. These focal points are relevant in examining both international and national criminal trials, as a matter of phenomenological commonality between them. The subsequent chapters in this part employ the same approach in relation to *international* criminal trials as they address the purposes, position, and significance of trial in the context of international criminal proceedings.¹ By contrast, this Chapter examines the same issues in relation to *domestic* criminal trials as practiced within the different traditions of criminal procedure. By combining a comparative and theoretical perspective, it addresses the format, functions, and role of trial in the fabric of criminal process through the lenses of comparative models associated with influential procedural traditions. Domestic trials are the primary empirical material and a source of theoretical insights on the phenomenon of criminal trial. Comparative law is therefore a useful reference point in an examination of international trials.

¹ See Chapter 5 (on the functions and effects of trials) and Chapter 6 (on the role and position of the trial in the context of international criminal procedure).

The Chapter frames key concepts used in the subsequent examination of international trials ('functions', 'role', and 'effects' of trial process) and sets out, in a broad brush, the principal differences between the domestic traditions on these points. The notion of 'function' in relation to a procedural phase refers to its 'job description' as a set of tasks it discharges and specific means by which that the required result—the overall objective of the phase—is brought about. In other words, it is a 'special kind of activity proper to anything; the mode of action by which it fulfils its purpose'.² Functions of the trial phase can be distinguished from both the objectives of the phase and ultimate objectives of criminal justice. The function denotes an expected contribution of the trial to the fulfilment of those sets of objectives being the more remote goals of the system as a whole. By contrast, the notion of 'role' in the present context alludes to the importance of the phase in a broader context of criminal procedure, being a measure of its contribution to the achievement of ultimate objectives of procedure. For example, if the establishment of the truth is indeed one of the essential and overarching objectives of criminal procedure and justice in general, the role of trial is greater in a system where the bulk of fact-finding occurs in the course of trial rather than during the pre-trial or in the appeals. In other words, the role of the phase is gauged by the degree to which the objectives of criminal process can be achieved upon its completion. For instance, where the truth of the facts in the case as established in a trial judgment is not quashed on appeal, justice will have been delivered and process attained its main goal already as a result of the trial phase.

These matters present useful objects for comparative inquiries in that they allow highlighting the structural differences between domestic jurisdictions which have repercussions in international criminal proceedings and, more specifically, the layout, functions, and role of the trial phase in that context. For example, the importance of trial as an intensive oral and public 'one-day-in-court' hearing and a principal forum for the establishment of facts in a criminal case is not a universally shared conception across legal cultures and procedural systems. By a similar token, the value attached to 'truth', the prevalent interpretations of this notion, and methods deemed best suited for establishing it in criminal proceedings are matters on which the domestic approaches—and influential perspectives that have competed for recognition in international criminal tribunals—differ fundamentally. In line with considerations on the limited normative traction of the domestic comparative methodology, including the over-used 'adversarial' v. 'inquisitorial' models,³ the discussion here tackles the conceptions of criminal trial by way of background. It does not purport to draw inferences valid for international criminal procedure, nor does it aim to provide an exhaustive account of rules governing the various aspects of the organization of criminal trials in domestic jurisdictions. The Chapter's rationale is to capture the principal differences in the national approaches. A more detailed treatment of the components of trial process in domestic and international contexts is reserved for the subsequent chapters on constituent stages of trial.⁴

The following discussion is structured as follows. Drawing upon on the methodological premises regarding the appropriate uses of comparative data in the context of international criminal procedure, the next section provides clarifications of the relevant terminology and canvasses the meaning, value, and limitations of the 'adversarial' and 'inquisitorial' models in their natural habitat (section 2). The trial has a time-and-sequence dimension, in the sense that procedural actions and issues arising at trial pertain to one or more rubrics of the trial chronology. Examining how the trial process unfolds is needed before addressing it from the perspectives of evidence and actors' roles: so the chronological approach can serve as a backbone in that exposition. Therefore, Section 3 on phasing of the criminal process and trial stage in particular addresses the place of trial phase within the sequence of process and the internal structure of this phase in inquisitorial and adversarial systems. The section compares their approaches in respect of issues such as the interaction between the trial and other stages, the evidentiary continuity of the process, and finality

² *Oxford English Dictionary*, 2nd ed. (Oxford: Oxford University Press, 1989).

³ See Chapter 1.

⁴ Chapters 8 to 11.

of the decisions at trial. These insights set the stage for the subsequent examination of the location of trial in the chronology of international criminal process and sequencing of international trials.⁵

The Chapter then discusses, in section 4, what objectives are pursued and procedural functions discharged by the trial in both inquisitorial and adversarial systems. It focuses on the establishment of the truth as the principal function of trials in any criminal process, whether it is of a civil law or common law origin. The emphasis on truth distinguishes the trial phase from other procedural stages (investigation, pre-trial, and appeals) which also contribute to the discharge of this function but do so less directly. The section provides an overview of the differences between the inquisitorial and adversarial approaches to truth-finding and how this affects the nature and format of trial.

Section 5 offers a complementary, socio-legal perspective on the trial, which extends beyond its functions in the procedural system and addresses its broader communicative role. This sets the stage for the same kind of inquiry conducted in relation to international criminal trials in a subsequent Chapter.⁶ Criminal trials are complex socio-legal events that are not exhausted by the legal consequence of disposing of a case and modifying the legal status of the accused into that of a convict or an acquitted person. The trial is also a communicative process through which the court and trial participants exchange messages and convey them to observers and community members outside of it (for example, fairness, legitimacy, and authority of the court). The section shows how the corporeal and appearance-related features of the trial process—such as decorum, sequence of interventions and appearances, ritual, and etiquette, and courtroom dynamics and theatrics—through which this expressive role is exercised, inform the way in which trials are organized and conducted in different systems. Perhaps unsurprisingly, they ultimately correspond to the predominant conceptions about the optimal epistemic arrangements.

Finally, after the main differences between adversarial and inquisitorial systems in part of the nature and structure of the trial phase, procedural functions and social-legal effects have been highlighted, section 6 addresses the role of trial phase in the domestic criminal process from a comparative perspective and explains the differences in this regard between the major systems. The trial's normative significance as a procedural phase is measured by its contribution to the promotion of the objectives of criminal process. While the trial shares the truth-finding function with other phases, its autonomous role depends on whether its prerogative in this respect is intact or supplanted practices and activities taking place outside of the trial framework. Where other arrangements detract from the importance of trial as a fact-finding forum, it may become dispensable and its role reduced. As pointed out by comparative scholars, the trial in the context of national criminal justice is undergoing a serious 'crisis of confidence'.⁷ The trial-avoidance mechanisms such as negotiated justice may be seen to defy the importance of trial and its position as the primary locus for the search for truth through criminal proceedings. Similarly, the enthusiastic and far-reaching appellate review diminishes the finality of trial judgments and casts a shadow on the conception of trial as a prime phase. In conducting a general exploration along these lines, the Chapter prepares the ground for the following discussion of the normative role of the trial phase in international criminal proceedings, with reference to the law and practice on negotiated justice.⁸

⁵ Chapter 7.

⁶ Chapter 5.

⁷ E.g. J. Jackson, 'Managing Uncertainty and Finality: The Function of the Criminal Trial in Legal Inquiry', in A. Duff *et al.* (eds), *The Trial on Trial – Vol. 1: Truth and Due Process* (Oxford/Portland, OR: Hart Publishing, 2004) 124 ('the criminal trial is undergoing perhaps one of the greatest crises of confidence that it has faced since trials by ordeal came to be challenged and replaced in the thirteenth century.').

⁸ Chapter 6.

2. 'ADVERSARIAL' V. 'INQUISITORIAL' DISTINCTION: VALUE AND LIMITATIONS

The task of examining the structure, functions, and role of international criminal trials invites a preliminary overview of the same issues in respect of criminal process arrangements associated with the major legal families and related procedural models. These are represented, in particular, by the systems of 'civil law' and 'common law' rooted respectively in the Romano-Germanic (Continental) and Anglo-American traditions. This focus is by definition myopic as it leaves unaddressed other important legal families and traditions (for example, Islamic law), but it is not necessarily to be interpreted as an approval of the comparative discourse in which other systems are under-represented. While it is deemed a melancholy fact,⁹ the focus on common law and civil law traditions would still be warranted. These traditions objectively provided the basis for the formation of international criminal procedure and played a major part in the cross-cultural conversation on criminal procedure in that context.¹⁰ As Chapter 1 has shown, the approaches of those principal traditions have served as building blocks in developing the tribunals' procedural regimes.

Furthermore, a terminological clarification is in order with regard to the established 'inquisitorial' and 'adversarial' models. As these will occasionally be relied upon in the following, it is worth briefly adumbrating their meaning and limitations. Inspired by the principal domestic procedural traditions, these models are the heritage of a long history of attempts to make sense of the diversity of national approaches to legal process and to theorize on differences between them. The taxonomy is well-established and regularly employed in comparative literature on criminal justice, both national and international. While these are historically associated with the common law and civil law traditions, the uses of the terminology have often been marred with confusion. In fact, said distinction is a false dichotomy as it combines the parts of two established pairs – the dichotomy between 'accusatorial' and 'inquisitorial' procedural forms and that between the 'adversarial' and 'non-adversarial' systems. The two pairs are influential frames of reference in (domestic) comparative law and, by extension, in international criminal procedure. While the two categorical pairs do not fully overlap with one another and refer to different types of process, the interchangeable use of the dichotomies has been common.¹¹

Thus, common law systems are often referred to as accusatorial, while civil law systems tend to be incorrectly described as 'inquisitorial' whereas there are such only in a historical sense.¹² The dichotomy between 'inquisitorial' and 'adversarial' process is traced back to the 13th century continental scholarship which distinguished between the *processus per inquisitionem* and *per accusationem*, meaning respectively an inquest (*inquisitio*) conducted by a single authority acting both as an accuser and decision-maker and the inquiry instituted by a private citizen acting as an accuser.¹³ The term *inquisitio*, in particular, was used to describe the written and secret procedure instituted in the 13th century under Roman-Canon law, which, in a modified form, was in use in the secular domain well into the 19th century. The pejorative connotation it bears in view of resort to torture as a method of obtaining confession and the irregular process of clerical repression in the

⁹ See Chapter 1, section 4.3.4.C.

¹⁰ G.S. Reamey, 'Innovation or Renovation in Criminal Procedure: Is the World Moving toward a New Model of Adjudication?', (2010) 27 *Arizona Journal of International and Comparative Law* 693, at 698 n14 (noting that the nature of 'religion-based' legal systems 'does not allow the same kind of change that secular systems do' and that 'they do not provide a good barometer for worldwide change due to the tenets upon which they are founded.').

¹¹ See e.g. S. Zappalà, 'Comparative Models and the Enduring Relevance of the Accusatorial—Inquisitorial Dichotomy', in G. Sluiter *et al.* (eds), *International Criminal Procedure: Principles and Rules* (Oxford: Oxford University Press, 2013) 42 n4.

¹² For a terminological distinction, see K. Ambos, 'International Criminal Procedure: "Adversarial", "Inquisitorial" or "Mixed"?', (2003) 3 *International Criminal Law Review* 1, at 2-5.

¹³ For helpful descriptions of these models, see M. Damaška, 'Models of Criminal Procedure', (2001) 51 (3-4) *Zbornik PFZ* 477, at 478-82.

Middle Ages¹⁴ is divorced from the contemporary meaning of ‘inquisitorial’ process, both in terms of structure and the admissible investigative methods. The historical vision of the inquisitorial approach as an exclusively written and non-transparent process used as a macabre vehicle for extortion of confessions through torture without according any procedural rights is long time outdated.¹⁵

In the reformed ‘inquisitorial’ process, the powers to bring accusation and/or to investigate are vested in an investigative and/or prosecuting authority (prosecutor or investigative judge) that is separate from the trier of the case.¹⁶ This removes the element of *inquisitio* and makes most modern systems, including those of civil law that were traditionally ‘inquisitorial’, at least as ‘accusatorial’ as common law systems.¹⁷ Nor is the original meaning of *accusatio* as a private action characteristic of the thrust of contemporary criminal justice systems, where most offences are investigated and charged by public authorities. Thus, from the 19th century onwards, the historically-based distinction between the ‘inquisitorial’ and ‘accusatorial’ forms gave way to a analytical approach going beyond the internal division within the continental process by covering common law systems and acknowledging the mixed forms.¹⁸ Although it may be used for historical reference, the ‘accusatorial’ v. ‘inquisitorial’ distinction is obsolete and an inadequate descriptive framework for categorizing the modern criminal justice systems.

As for the second dichotomy, its ‘adversarial’ label denotes the process structured as a ‘contest’ or ‘clash’ between the accusing party and the accused, whereby the evidence is presented orally and publicly and the accused is guaranteed an opportunity to challenge it. It came to be firmly associated with the common law process based on a partisan contest with its characteristic reliance on lawyers, competitive style of pleadings and evidence-presentation, and lay participation as safeguards of fairness, even though most of these aspects are a relatively recent acquisition in those systems.¹⁹ In the Anglo-American legal folklore especially, the virtues of an ‘adversarial system’ were traditionally extolled by contrasting it to the ‘inquisitorial process’ as it was known from the infamous English Star Chamber and from the hypertrophied vision of a continental practice as relying on written and secretive process that favours repressive methods, which is antiquated and misleading.²⁰ These perceptions explain the negative attitude to everything ‘inquisitorial’ and a preference for a less ‘derogatory’—albeit by no means clearer—label of ‘non-adversarial’ when referring to civil law systems.²¹ However, most modern civil law systems attach a

¹⁴ Ambos, ‘International Criminal Procedure’ (n 12), at 3 (noting the historical link with the irregular and summary process against heretics (*inquisitio haereticae pravitatis*) by the ‘Office of Holy Inquisition’ as well as with the proceedings of the Star Chamber in England).

¹⁵ M. Damaška, ‘Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study’, (1973) 121 *University of Pennsylvania Law Review* 506, at 559 (‘In view of the aura surrounding that term [inquisitorial], reminiscent as it is of such odious features as unspecified charges, secret proceedings, and torture, all abandoned long ago, it seems unfair to continentals to attach it to their contemporary criminal proceedings.’). Damaška also refutes as mistaken the ‘belief that the institution of torture was essential to the inquisitorial type’ (*ibid.*, at 558).

¹⁶ *Ibid.*; C. Kress, ‘Witnesses in Proceedings before the ICC’, in H. Fischer *et al.* (eds), *International and National Prosecution of Crimes under International Law: Current Developments* (Berlin: Arno Spitz, 2001) 309 n1.

¹⁷ Ambos, ‘International Criminal Procedure’ (n 12), at 3 (the equation between adversarial systems and accusatorial forms is misleading).

¹⁸ Damaška, ‘Models of Criminal Procedure’ (n 13), at 478-82.

¹⁹ For example, in England, lawyers were allowed in felony trials not before the second half of the 17th century: see e.g. J.H. Langbein, ‘The Criminal Trial before the Lawyers’, (1978) *University of Chicago Law Review* 263, at 307; Damaška, ‘Models of Criminal Procedure’ (n 13), at 488.

²⁰ For a critique, see Damaška, ‘Models of Criminal Procedure’ (n 13), at 488-9 (reporting the common attitude, especially among American lawyers, of ‘reverence of any arrangement that can be characterized as “adversarial” and the aversion of any structure characterized as “inquisitorial”.’); Ambos, ‘International Criminal Procedure’ (n 12), at 3 (on the link assumed by common lawyers between inquisitorial process and the Star Chamber).

²¹ Damaška, ‘Models of Criminal Procedure’ (n 13), at 490 (‘in order to avoid pejorative connotations attached by their legal folklore to the term “inquisitorial”, some Anglo-American proceduralists decided to employ the neutral term “non-adversarial” in referring to continental systems of criminal procedyre [sic].’). See e.g. N. Combs, *Fact-finding without Facts: Uncertain Foundations of International Criminal Convictions* (Cambridge: Cambridge University Press,

great importance to the principles of orality, immediacy, and confrontation right, not least due to the normative influence of international human rights law and ECtHR jurisprudence.²² The adversarial v. non-adversarial dichotomy relies on the outdated view of ‘adversarial and ‘inquisitorial’ systems, is deprived of objective referents and defining features, and is interwoven with folkloric and inaccurate images of different national systems.²³ Its elements have acquired undesirable political and cultural overtones, being associated either with the process based on the liberal and democratic values, or with the authoritarian criminal process, leading to a ‘rhetorical struggle for the appropriation of these terms’ as well as varied and inconsistent use of the terminology.²⁴

Due to the ongoing legal globalization, the boundaries between the adversarial and inquisitorial systems have grown blurred. Procedural reforms, cross-fertilization, and legal transplantation (or, using Langer’s apposite expression, ‘legal translations’)²⁵ led to some approximation if not convergence between them.²⁶ Legal transplants or translations have been one classic modality of modernizing and reforming criminal process bringing about a degree of harmonization as its side-effect.²⁷ Furthermore, in the second half of the last century, the gap between the legal traditions started to close as a result of criminal justice reforms catalyzed by the supervision over states’ compliance with internationally recognized human rights standards by regional courts, in particularly by the ECtHR in the member states of the Council of Europe.²⁸ In the context of regional integration within the EU, steps were made towards possible harmonization of criminal procedures in the limited area of the protection of the financial interests of the Union, including the comparative law work in the framework of the *Corpus Iuris* project.²⁹ The extra-legal factor of relevance has been changing the popular perception of what a fair criminal justice system is, under the influence of the liberal democratic, individualist, and egalitarian ideology and values at the fore in some foreign cultures. The romanticized image of a jury trial as a courtroom drama, in which a clever lawyer wins the case by discrediting a lying witness in a skilful cross-examination,

2010) 290 n1231; D. Luban, *Lawyers and Justice: An Ethical Study* (Princeton, NJ: Princeton University Press, 1988) 93-4.

²² See also Ambos, ‘International Criminal Procedure’ (n 12), at 4.

²³ Damaška, ‘Models of Criminal Procedure’ (n 13), at 491-2.

²⁴ M. Langer, ‘From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure’, (2004) 45 *Harvard International Law Journal* 1, at 19.

²⁵ *Ibid.*, at 29-35 (proposing that the ‘legal translation’ metaphor is a superior heuristic device to the notion of ‘legal transplants’ as it captures more accurately the nature of the borrowing of legal institutes across national systems).

²⁶ On directions of and reasons for these processes, see D.M. Amann, ‘Harmonic Convergence? Constitutional Criminal Procedure in an International Context’, (2000) 75 *Indiana Law Journal* 809, at 810. But cf. Ambos, ‘International Criminal Procedure’ (n 12), at 4-5 (rightly observing that the persisting diversity of the criminal justice systems among the EU and Council of Europe Member States challenges the claim about harmonization or convergence); Reamey, ‘Innovation or Renovation in Criminal Procedure’ (n 10), at 696 (reporting that “‘civil law’” countries adopt[ed] certain “‘common law’” procedures, and “‘common law’” countries depart[ed] from the methods usually associated with the common law system’).

²⁷ A. Watson, *Legal Transplants: An Approach To Comparative Law*, 2nd ed. (Athens and London: The University of Georgia Press, 1993); M. Damaška, ‘The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments’, (1997) 55 *American Journal of Comparative Law* 839.

²⁸ J. Jackson, ‘Theories of Truth-Finding in Criminal Procedure: An Evolutionary Approach’, (1988-9) 10 *Cardoso Law Review* 475; *id.*, ‘The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?’, (2005) 68(5) *Modern Law Review* 737-64; N. Jörg, S. Field, and C. Brants, ‘Are Inquisitorial and Adversarial Systems Converging?’, in C. Harding, P. Fennel, N. Jörg, and B. Swart (eds), *Criminal Justice in Europe: A Comparative Study* (Oxford: Clarendon Press, 1995) 53-6; J.F. Nijboer, ‘Comparative Perspectives on the Judicial Role’, in S. Doran and J.D. Jackson (eds), *The Judicial Role in Criminal Proceedings* (Oxford/Portland: Hart Publishing, 2000) 30.

²⁹ M. Delmas-Marty, ‘Reflections on ‘Hybridisation’ of Criminal Procedure’, in J. Jackson *et al.* (eds), *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaška* (Oxford/Portland: Hart Publishing, 2008) 252-5; M. Delmas-Marty and J.A.E. Vervaele (eds), *The Implementation of the Corpus Iuris in the Member States*, vols 1-4 (Antwerp-Oxford: Intersentia, 2000-2002).

is one example of the global influence of the popularizations of the US legal culture through TV series and cinema.³⁰

Throughout the civil law world, a degree of approximation with common law forms can be discerned. In various jurisdictions over three decades, reforms in law and practice took place which could be deemed to challenge the core traits of the inquisitorial tradition, or to conflict with the inquisitorial theory. Thus, some of them aimed at distancing of the judiciary from investigative functions;³¹ the ‘adversarialization’ of procedure by way of bifurcating the case structure into the prosecution and defence cases, activating parties in the pre-trial investigation, and enhancing their role at trial;³² the introduction of negotiated justice for some categories of offences;³³ and reviving or experimenting with lay participation as a way to democratize the criminal justice system.³⁴ Criminal procedure in the vestiges of the ‘inquisitorial tradition’ moved towards a ‘mixed’ model – the term ‘reformed inquisitorial process’ may be preferable as it denotes a variant of the inquisitorial type rather than a point where the ‘adversarial’ and ‘inquisitorial’ truly meet.³⁵

In that process, certain civil law jurisdictions have evinced a greater degree of conservatism and loyalty to their inquisitorial legacy (e.g. the Netherlands, Belgium, France, Austria) than the others which seem to have imported adversarial features in a decisive and even revolutionary way (for instance, Italy, Germany, and particularly Latin American countries).³⁶ Overall, the adversarial

³⁰ See Reamey, ‘Innovation or Renovation in Criminal Procedure’ (n 10), at 743.

³¹ For example, the function of investigative judge was abrogated in Germany in 1975; the pre-trial judge (*Ermittlungsrichter*) is not involved in the investigative activities but only issues related warrants. In 1989, the institute of investigating magistrate (*guidice istruttore*) was abolished in Italy as part of a wide-scale and radical reform of criminal procedure making it ‘adversarial’: Langer, ‘From Legal Transplants to Legal Translations’ (n 24), at 47-8. In France, the role of an investigating judge has been in decline too, as the judges may no longer sit on the trial bench. On this tendency, see *inter alia* Nijboer, ‘Comparative Perspectives on the Judicial Role’ (n 28), at 25; E. Grande, ‘Dances of Criminal Justice: Thoughts on Systemic Differences and the Search for the Truth’, in Jackson *et al.* (eds.), *Crime, Procedure and Evidence* (n 29), at 154; Langer, ‘From Legal Transplants to Legal Translations’ (n 24), at 27.

³² Art. préliminaire (I) Code of Criminal Procedure (France) (‘La procédure pénale doit être équitable et contradictoire et préserver l’équilibre des droits des parties.’); Arts 493, 496, and 498, Code of Criminal Procedure (Italy). See e.g. Langer, ‘From Legal Transplants to Legal Translations’ (n 24), at 23 and 47. In detail on the Italian experiment, see W.T. Pizzi and M. Montagna, ‘The Battle to Establish an Adversarial Trial System in Italy’, (2005) 25 *Michigan Journal of International Law* 429, at 431; W.T. Pizzi and L. Marafioti, ‘The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation’, (1992) 17 *Yale Journal of International Law* 1; L. Marafioti, ‘Italian Criminal Procedure: A System Caught Between Two Traditions’, in Jackson *et al.* (eds.), *Crime, Procedure and Evidence* (n 29), at 81-98.

³³ On the Italian abbreviated trial procedure and negotiated settlements, see S. Maffei, ‘Negotiations “on Evidence” and Negotiations “on Sentence”: Adversarial Experiments in Italian Criminal Procedure’, (2004) 2 *JICJ* 1050; W. Pizzi and M. Montagna, ‘The Battle to Establish an Adversarial Trial System in Italy’ (n 32), at 437-45. On the import of elements of negotiated justice in Germany, see T. Weigend, ‘The Decay of the Inquisitorial Ideal: Plea Bargaining Invades German Criminal Procedure’ in Jackson *et al.* (eds.), *Crime, Procedure and Evidence* (n 29), at 39-64. On the introduction of consensual justice in the countries of the former USSR, see S. Thaman, ‘The Two Faces of Justice in the Post-Soviet Legal Sphere: Adversarial Procedure, Jury Trial, Plea-Bargaining and the Inquisitorial Legacy’, in Jackson *et al.* (eds.), *Crime, Procedure and Evidence* (n 29), at 109-12; S. Pomorski, ‘Modern Russian Criminal Procedure: The Adversarial Principle and Guilty Plea’, (2006) 17 *Criminal Law Forum* 129. In more detail on these developments, see *infra* 6.

³⁴ In the 1990s, jury trials were introduced in Spain and in the former Soviet republics. See S. Thaman, ‘The Separation of Questions of Law and Fact in the New Russian and Spanish Jury Verdicts’, in S. Doran and J. Jackson (eds), *The Judicial Role in Criminal Proceedings* (Oxford/Portland: Hart Publishing, 2000) 51-63; *id.*, ‘The Two Faces of Justice in the Post-Soviet Legal Sphere’ (n 33), at 112-6; S.A. Pashin, ‘The Reasons for Reintroducing Trial By Jury in Russia’, (1999) 72 *International Review of Penal Law* 253-7.

³⁵ Damaška, ‘Evidentiary Barriers to Conviction’ (n 15), at 555 n107; T. Weigend, ‘Is the Criminal Process about Truth?: A German Perspective’, (2003) 26 *Harvard Journal of Law and Public Policy* 157, at 161.

³⁶ J.F. Nijboer, ‘The American Adversarial System in Criminal Cases: Between Ideology and Reality’, (1997) 5 *Cardozo Journal of International and Comparative Law* 79, at 83. Suggesting a degree of similarity and convergence between the US and German criminal justice, see R. Frase and T. Weigend, ‘German Criminal justice as a Guide to American Law Reform: Similar Problems, Better Solutions?’, (1995) 18 *Boston College International & Comparative Law Review* 317. On radical adversarial reforms in Latin America, see M. Langer, ‘Revolution in Latin America: Diffusion of Legal Ideas from the Periphery’, (2007) 55 *American Journal of Comparative Law* 617; R. Vogler, A

model has had a tangible impact on the modern inquisitorial form and in the past decades there has been a powerful drive in the civil law world towards reception of legal institutes traditionally associated with common law practice.³⁷ For instance, the increased use of consensual dispositions in criminal justice, which will be discussed further in this Chapter, emerges as a common trend across the board. This movement presumably signifies convergence around the notion that in order to ensure that all parties' interests are considered, thereby curbing the possible future litigation and gaining in efficiency, judicial decisions on the guilt and sentence should be made not unilaterally, but, where possible, in consultation with the main stakeholders, including the accused.³⁸

Moving to the other side of the grand divide, common law countries have also introduced reforms in their criminal procedure, although those were generally more limited and not nearly as bold as those described above. Unlike with civil law countries, the reforms in the common law countries fell short of a move towards an 'inquisitorial' approach even though they did represent a departure from the practices traditionally associated with adversarial systems.³⁹ The examples have included relaxation of the evidentiary rules (such as regarding hearsay);⁴⁰ measures aimed at the reduction of adversarial confrontation between parties through encouraging pre-trial communication, agreements on undisputed facts, and through activation of judges in pre-trial case management and plea bargaining;⁴¹ the decreased resort to jury adjudication;⁴² and exceptions to exclusionary rules for unlawfully obtained evidence.⁴³

World View of Criminal Justice (Aldershot: Ashgate, 2005) 172 ('Compared with the deeply contested and protracted reform process in western Europe, the impact of adversariality on Latin America ... has been little short of explosive.').

³⁷ Vogler, *A World View* (n 36), at 12; Reamey, 'Innovation or Renovation in Criminal Procedure' (n 10), at 742.

³⁸ See also Weigend, 'The Decay of the Inquisitorial Ideal' (n 33), at 42 ('The outcome of criminal cases is not determined unilaterally by the court but results from interactions between the parties (and often the court), aiming at a sanctioning decision that the defendant is willing to accept without seeking further legal recourse.').

³⁹ J. McEwan, 'Ritual, Fairness and Truth: The Adversarial and Inquisitorial Models of Criminal Trial', in A. Duff *et al.* (eds), *The Trial on Trial – Vol. 1: Truth and Due Process* (Oxford/Portland, OR: Hart Publishing, 2004) 50-1 n7; C. Bradley, 'The Convergence of the Continental and the Common Law Model of Criminal Procedure', (1996) 7(2) *Criminal Law Forum* 471, at 475 (while some 'inquisitorial' systems have become more 'adversarial', the adversarial systems in the UK and the US have not undergone radical reforms despite numerous proposals to that effect); T. Weigend, 'Should We Search for the Truth, and Who Should Do It?', (2010-11) 36 *North Carolina International Law and Commercial Regulation* 389, at 404-5 ('there exists a clear trend toward an expansion of adversarial elements at the expense of "pure" inquisitorial systems. ... [N]o similar inroads of inquisitorial ideas in the common law world have been documented.'). Langer, 'From Legal Transplants to Legal Translations' (n 24), at 26 n11.

⁴⁰ In England and Wales, hearsay became admissible in principle with the adoption of the Criminal Justice Act 2003. Even before, the admission of unlawfully obtained evidence was subject to relatively liberal rules, as compared to some other common law countries. See S. Doran, 'The Necessarily Expanding Role of the Criminal Trial Judge', in S. Doran and J. Jackson (eds), *The Judicial Role in Criminal Proceedings* (Oxford/Portland: Hart Publishing, 2000) 11.

⁴¹ On the introduction of preparatory, directions and plea hearings, and measures for the identification of issues in dispute in England and Wales, see J. McEwan, 'Cooperative Justice and the Adversarial Criminal Trial: Lessons from the Woolf Report', in Doran and Jackson (eds), *The Judicial Role in Criminal Proceedings* (n 40), at 172-5. In Scotland (which is a mixed system), parties in criminal trials are increasingly obligated to reduce the scope of contested facts, see P. Duff, 'Changing Conceptions of the Scottish Criminal Trial: The Duty to Agree Uncontroversial Evidence', in Duff *et al.* (eds), *The Trial on Trial 1* (n 7), at 29 *et seq.* As compared to the US trial practice, English judges more actively participate in the inquiry at trial, which includes 'inquisitorial-style of questioning of witnesses': see Doran, 'The Necessarily Expanding Role of the Criminal Trial Judge' (n 40), at 5-6, 8-10. See also J. Jackson and S. Doran, *Judge without Jury: Diplock Trials in the Adversary System* (Oxford: Clarendon University Press, 1995) 152-9 (on Northern Ireland).

⁴² In England and in the US, jury trials are now used in very few cases: See Bradley, 'The Convergence of the Continental and the Common Law Model' (n 39), at 475 n8 and 482 (noting also that the jury system was abandoned in Japan in 1943 and in India in 1960); M. Galanter, 'The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts', (2004) 1 *Journal of Empirical Legal Studies* 459; Reamey, 'Innovation or Renovation in Criminal Procedure' (n 10), at 707; J.R. Spencer, 'Introduction', in M. Delmas-Marty and J.R. Spencer (eds), *European Criminal Procedures* (Oxford: Oxford University Press, 2002) 18. On juryless trials in Northern Ireland, see Jackson and Doran, *Judge without Jury* (n 41). However, in Japan—which is a hybrid system combining both adversarial features and the presiding judge's leading role at witness interrogation (Art. 131 Code of Criminal Procedure (Japan))—the jury was reinstated in May 2009 by law no. 64 (May 2004) according to which jurors (*saiban-in*) are to sit along with career judges as part of mixed benches. See I. Weber, 'The New Japanese Jury System: Empowering the Public,

This overview shows that the modernization and hybridization of criminal procedures across common law v. civil law divide—whether or not leading to a ‘harmonic convergence’—has reduced the relevance of ‘adversarial’ and ‘inquisitorial’ distinction as a ground for differentiating between actual criminal justice systems.⁴⁴ Even if it may be possible to identify some of the main modern prototypes of adversarial and inquisitorial systems among actual jurisdictions,⁴⁵ there currently exist no jurisdictions that fully embody them – all of them rather represent the uneven and unique mixtures of the associated elements.⁴⁶ Given the difficulty of establishing with precision what elements constitute core features of ‘pure’ systems,⁴⁷ defining such procedural mixes through those labels is neither really helpful nor conceptually impeccable. The relative language which is sometimes employed to present the ‘adversarial’ and ‘inquisitorial’ as a range or continuum (in the sense of a certain arrangement being ‘more’ or ‘less’ adversarial/non-adversarial) does not resolve the problem but rather seeks to cover it up.

Essentially, this vocabulary is unfit for the purposes of differentiating between modern criminal justice systems as embodying either pure ‘adversarial’ or ‘inquisitorial’ systems.⁴⁸ It does not do justice to countless and significant nuances on which the countries pertaining to the same tradition differ.⁴⁹ While broad similarities between them can sometimes be expressed in terms of ‘dominant models’,⁵⁰ even this will often be impossible. For instance, there are numerous nuances setting the US criminal process (and that within individual states) and criminal process in the UK jurisdictions (in particular, England and Wales, Northern Ireland and Scotland) apart.⁵¹

Preserving Continental Justice’, (2009) 4(1) *East Asia Law Review* 125.

⁴³ E.g. *Herring v. US*, 555 U.S. 135 (2009) (the US Supreme Court holding the good-faith exception to the exclusionary rule applicable and evidence not subject to exclusion where it was obtained unlawfully but the mistake by the police is negligent and ‘not systematic error or reckless disregard of constitutional requirements’); *Crawford v. Washington*, 541 U.S. 36 (2004).

⁴⁴ Weigend, ‘Should We Search for the Truth’ (n 39), at 401 (noting a shift ‘from a stark division between codified and common law, to what looks more like a checkerboard of individual approaches and solutions. Each country’s rules of criminal procedure do not depend so much on its “legal culture”, its national heritage, or its adherence to one great scheme (“inquisitorial” or “adversarial”).’).

⁴⁵ E.g. Nijboer, ‘The American Adversarial System in Criminal Cases’ (n 36), at 92, 94 and 96 (while ‘inquisitorial system’ in a proper sense is a system which existed on the Continent between the 11th and 18th, the US can be identified as the prototype of the ‘adversarial system’).

⁴⁶ M. Frankel, ‘The Search for Truth: An Umpireal View’, (1975) 123 *University of Pennsylvania Law Review* 1031, at 1053; Duff, ‘Changing Conceptions of the Scottish Criminal Trial’ (n 41), at 30 (‘It is unlikely that any real system of criminal procedure is purely adversarial or inquisitorial; in practice, most systems fall somewhere between the two extremes and combine aspects of each model.’); Zappalà, ‘Comparative Models’ (n 11), at 42 (‘While it is safe to say that no system is purely one or the other, all existing procedural systems tend to be located somewhere between these two poles in relation to each specific issue, and overall represent a mix between the two models.’); Weigend, ‘Should We Search for the Truth’ (n 39), at 398 (‘The heritage of one of the competing ideal types is still discernible in individual procedural systems, but they all contain differing amounts of allow that may have entered the system because the purest doctrine of adversariness and inquisition turned out to be impractical or unfair.’).

⁴⁷ Damaška, ‘Models of Criminal Procedure’ (n 13), at 481 (‘In order to recognize mixtures one needs, of course, an idea of what constitutes a pristine procedural model: one cannot recognize a mongrel without an idea of pure breed.’).

⁴⁸ According to Pizzi, the dichromatic vision is counterintuitive; the differences between domestic legal systems do not make them white and black but rather different ‘gradations of gray’: W. Pizzi, ‘The American “Adversary System”’, (1998) 100 *West Virginia Law Review* 847, at 847.

⁴⁹ Jörg *et al.*, ‘Are Inquisitorial and Adversarial Systems Converging’ (n 28), at 41 (‘While differences *within* these systems are often regarded as incidental, those *between* them are seen as essential’).

⁵⁰ F. Tulkens, ‘Main Comparable Features of the Different European Criminal Justice Systems’, in M. Delmas-Marty (ed.), *The Criminal Process and Human Rights: Towards a European Consciousness* (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1995) 8-9 (‘nowhere is the model any longer pure; it is, for better or worse, contorted, attenuated, modified ... As a system adds, superimposes or eliminates certain features, one can now only say that it reflects a “dominant model”.’).

⁵¹ Ambos, ‘International Criminal Procedure’ (n 12), at 4 (considering the term ‘Anglo-American procedure’ a misnomer because there is no ‘such a thing as a *common* criminal procedure of Great Britain and the U.S.A.’). Illustrating this thesis on the example of witness preparation, see S. Vasiliev, ‘From Liberal Extremity to Safe Mainstream: The Comparative Controversies of Witness Preparation in the United States’, (2011) 9(2) *International Commentary on Evidence* 1 (Article 5).

Even though the respectable concepts of comparative law are unsatisfactory descriptors, they are still widely used to denote the abstract models or ideal types of procedure in the sense removed from specific historical or actual systems. Models are theoretical constructions that simplify the procedural reality for analytical purposes.⁵² As recognized by scholars who readily accept the deficient character of the typology, this is still a predominant and convenient way to refer to different procedural styles characteristic for common law and civil law.⁵³ The categories help detect and comprehend the destination of basic elements which, in different combinations, account for the present diversity of forms of procedural justice both at the national and at the international level. In this sense, they operate as analytical aids for the examination of criminal procedure which one can use to deconstruct a procedural system and comprehend the internal logic.

Thus, the distribution of responsibility and control of judges and parties over the collection and presentation of evidence is commonly viewed as a factor that essentially defines other aspects of the process, including the structure of the case to be presented and the procedural sequence at trial.⁵⁴ With regard to the pre-trial and trial process, the utility of ‘adversarial’ and ‘inquisitorial’ labels nowadays boils down to the question of who bears the primary responsibility for the collection and examination of evidence and for the ascertainment of the truth.⁵⁵ The former model denotes a party-dominated ‘contest’ before a relatively passive judge while the latter stands for judge-led ‘inquest’ whereby parties play a secondary role. Given that such understanding and use of the terminology is ubiquitous in the comparative scholarship, the terms indeed serve as ‘floating signifiers’ across the legal cultures.⁵⁶

Furthermore, the relevance of the typology as a set of analytical aid or signifiers endures in international criminal procedure.⁵⁷ The procedural systems of international criminal tribunals are built with the same bricks as the national systems.⁵⁸ For the most part, their procedural regimes are novel not due to the novelty of components but because they amount to novel combinations of compounds borrowed from domestic criminal procedure and are applied in a unique context to cases which give rise to peculiar challenges.⁵⁹ While creativity is intrinsic in the exercise of re-imagining domestic components in the tribunal context, the bulk of international criminal procedure obeys the familiar laws of ‘procedural chemistry’. The methodological value of concepts ‘adversarial’ and ‘inquisitorial’ models as vehicles for deconstructing the international procedural mixes continues in international criminal law due to the ‘ubiquity of compounds’, to use Damaška’s

⁵² On the heuristic value of the ‘two diametrically opposed ideal-types in the Weberian sense’, see Damaška, ‘Evidentiary Barriers to Conviction’ (n 15), at 562 and 577 (‘suggestive caricatures and simplifications departing from reality’).

⁵³ Ambos, ‘International Criminal Procedure’ (n 12), at 5 (‘With all these reservations the terms adversarial’/ ‘inquisitorial’ will here only be used in the general sense described to reflect the still existing common-civil law divide.’); A. Orié, ‘Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings Before the ICC’, in Cassese/Gaeta/Jones (eds), *The Rome Statute* 1441; Zappalà, ‘Comparative Models’ (n 11), at 42 (With all the caution that is called for when referring to these dichotomies when describing concrete procedural systems, these notions remain useful analytical devices.’ Footnote omitted.) McEwan, ‘Ritual, Fairness and Truth’ (n 39), at 52, note 10; Duff, ‘Changing Conceptions of the Scottish Criminal Trial’ (n 41), at 31.

⁵⁴ In this vein, see e.g. Reamey, ‘Innovation or Renovation in Criminal Procedure’ (n 10), at 699-700, 705-7.

⁵⁵ See also Ambos, ‘International Criminal Procedure’ (n 12), at 4.

⁵⁶ Langer, ‘From Legal Transplants to Legal Translations’ (n 24), at 19 (‘“adversarial” and “inquisitorial” have been central terms or “floating signifiers” through which the actors of the Anglo-American and the civil law systems have defined and differentiated their own identity, both from the identity of other traditions as well as from their own past.’).

⁵⁷ Among others, see Zappalà, ‘Comparative Models’ (n 11), at 43 (‘with all necessary caution as to their value, these notions still represent a solid reference point in the discussion of international criminal procedure and can still serve a useful purpose.’).

⁵⁸ See Chapter 1.

⁵⁹ Similarly, see Reamey, ‘Innovation or Renovation in Criminal Procedure’ (n 10), at 701 (‘These invented systems ... test new combinations of old processes—and sometimes new processes—in a public forum, arguably one that is detached from the overpowering influence of any single state’s culture, language, politics, or legal tradition.’).

expression.⁶⁰ Particularly in the formative stages of international criminal procedure, they provided an indispensable frame of reference for understanding the origins and evolution of various procedural components and the links between them as parts of one whole.⁶¹

That said, the explanatory power of ‘inquisitorial’ v. ‘adversarial’ terminology as an analytical framework has continued to be challenged both in the comparative law literature and in international criminal law.⁶² Indeed, the dichotomy comes with risks that warrant caution when employing it for analytical purposes. The first risk is the earlier noted tendency of ‘normativization’ manifesting itself in value-based judgements asserting superiority or inferiority these models generally or in relation to specific aspects of process.⁶³ Such use of the models should be avoided. Secondly, there is a considerable risk of overgeneralization of differences between systems labelled as ‘adversarial’ and ‘inquisitorial’, on the one hand, and under-appreciation of similarities between jurisdictions located on different sides of this divide, on the other hand.⁶⁴ In the present and subsequent chapters whenever the ‘adversarial’/‘inquisitorial’ terminology is employed,⁶⁵ this risk will, at least in part, be reduced by complementing the comparative discussion in terms of abstract models by references to the law and practice in specific national jurisdictions. This way, otherwise sterile models can be aligned better with the multifarious and complex reality of domestic criminal justice and their analytical potential be employed for the purpose of examining the structures of criminal procedure.

Thus, the recognition of limitations of the ‘adversarial’ and ‘inquisitorial’ terminology does not require discarding its methodological value. These considerations will be taken over to the following sections examining the trial from a comparative perspective.

3. TRIAL AS THE PHASE

3.1 Evidentiary continuity and finality of decisions

A panoramic view on the criminal process in both adversarial and inquisitorial systems reveals at least three main broad stages, subject to a wide variation across individual jurisdictions: (i) an investigative and pre-trial stage during which the charges are drawn, the evidence is collected, analyzed, and reviewed; the suspect identified, his presence and participation are ensured by means of arrest or summons; the case is sent for trial; and the necessary measures to prepare the case for trial are carried out; (ii) the trial stage during which the case is presented, charges are tested through examination of evidence by the court and the parties; deliberations are held and a judgement is rendered on the guilt or innocence of the accused and, if appropriate, a sentence is handed down; and (iii) the post-trial stage, including appeals and revision, during which the final and some of the

⁶⁰ M.R. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven, CN: Yale University Press, 1986) 241-2 (‘If the real world is one of mixtures, ... what is the point in developing pure styles? ... The answer to this query ... is similar to the one a student of chemical elements would give a critic pointing to the ubiquity of compounds: it is hoped that a kind of analytical chemistry can be performed on existing procedures and that ... some of their mysteries can be brought to the surface and observed.’).

⁶¹ Similarly, see Zappalà, ‘Comparative Models’ (n 11), at 43.

⁶² Challenging the value of the ‘inquisitorial *versus* adversarial’ terminology and respective models as analytical tools in the context of comparative criminal procedure in the national and international context, see J. Hatchard, B. Huber and R. Vogler, *Comparative Criminal Procedure* (London: British Institute of International and Comparative Law, 1996) 6; H. Jung, ‘Nothing But the Truth? Some Facts, Impressions and Confessions about Truth in Criminal Procedure’, in Duff *et al.* (eds.), *The Trial on Trial 1* (n 7), at 153; G. Boas, *The Milošević Trial: Lessons for the Conduct of Complex International Criminal Proceedings* (Cambridge: Cambridge University Press, 2007) 9 (‘it is now time to abandon the preoccupation of international criminal courts and tribunals with this dichotomy and embrace the newly created system of international criminal law as a jurisdiction in its own right.’).

⁶³ See Chapter 1.

⁶⁴ M. Damaška, ‘Structures of Authority and Comparative Criminal Procedure’, (1975) 84 *Yale Law Journal* 480, at 481; Reamey, ‘Innovation or Renovation in Criminal Procedure’ (n 10), at 702.

⁶⁵ Chapters 8-12.

interim decisions taken at trial.⁶⁶ Being a rough division, this classification may be the lowest common denominator of the two principal models of procedure. Any attempt at a more refined and elaborate distinction with view to outlining the subdivision of the stages into components or providing more accuracy regarding extra-sequential steps such as interlocutory appeals would slip in the quicksand of material differences between the two types of systems and individual jurisdictions where little to nothing in common can be detected.

While being relatively autonomous units due to the distribution of functions amongst them, procedural stages are interlinked with one another as part of a single coherent whole by virtue of interdependency of those functions. The connections between procedural activities undertaken in different stages ensure the harmony and overall consistency of criminal process that is a prerequisite for the achievement of its objectives. The significance and functions of the trial process cannot be properly understood without having regard to the rationales and scope of the pre-trial activities and the appeal review. Thus, according to Hodgson,

Any explanation of the trial must also necessarily be linked to the pre-trial phase: the ways in which the case is investigated and evidence gathered will impact on the ways in which it is then scrutinized by the court, just as the nature of the trial process will itself influence the way in which the evidence is prepared during the pre-trial phase.⁶⁷

There is also an inextricable link between the trial and post-trial stages. For example, the issues such as the modes and purpose of trial hearing in part of the examination of evidence (including the presence of a dossier, if any) and the method of arriving at a trial verdict, being a result of deliberation either by a professional bench or by lay juror predetermine the legal authority and finality of the trial court's decision. In turn, this shapes the ambit of the appellate review, including the type of decisions eligible for review, the type of alleged errors serving as grounds for review, and the scope of appellate powers. The degree of isolation or linkage between the phases depends on the continuity of evidentiary record, which denotes the deference to, and reliance on, the evidence collected and examined at a preceding stage by the relevant court, and the finality of decisions reached at a given phase.

In the adversarial systems, criminal process is phased more rigidly and the distinction between the phases in terms of evidentiary discontinuity is strictly observed.⁶⁸ Given that the process is party- rather than court-driven, parties conduct parallel investigations and amass and analyze evidence in the preparation of their respective cases. There is no single 'case of the truth' laid down in the dossier that is to be tested in the course of a substantive hearing, but rather two clashing accounts presented to the triers of fact by advocates representing each party from which the truth of the matter will emerge if the procedural rules have been duly complied with. Decision-makers at trial—often lay jurors who decide on the verdict independently from a professional judge or lay magistrates, depending on the type of the case—are not involved in the previous procedural stages. As a guarantee of impartiality, they are unacquainted with, and shielded from, the partisan evidence before it is properly adduced and tested at trial.

The isolation of adjudicators from pre-trial activities concerning evidence and the virtual lack of pre-trial function, besides issuance of warrants for coercive measures, explains the absence of a formal pre-trial phase.⁶⁹ Being a climactic and intensive event, the trial is the concentration of all

⁶⁶ See e.g. Nijboer, 'Comparative Perspectives on the Judicial Role' (n 28), at 22.

⁶⁷ J. Hodgson, 'Conceptions of the Trial in Inquisitorial and Adversarial Procedure', in A. Duff *et al.* (eds), *The Trial on Trial, Vol. 2: Judgement and Calling to Account* (Oxford/Portland, OR: Hart Publishing, 2006) 223.

⁶⁸ Weigend, 'Is the Criminal Process about Truth?' (n 35), at 163-4 ('There exists ... a precarious relationship between the pretrial and the trial stages of the criminal process. In some legal systems, especially those belonging to the common law family, the two phases of the criminal process are kept strictly separate, whereas other systems allow (more or less liberally) information to be imported from the pretrial investigation into the trial.').

⁶⁹ Damaška, *The Faces of Justice* (n 60), at 57 ('the conspicuous absence of a stage truly comparable to the preparatory proceedings on the Continent'; 'Because of th[e] absence of official investigators, the preparatory stages of the Anglo-

consequential activities regarding evidence and is therefore the primary or effectively the only main stage of criminal proceedings. This of course does not dismiss but rather underlines the importance of activities by the parties in conducting their evidentiary inquiries, conducting the analysis of evidence, preparing it for presentation (such as by means of proving witnesses), and negotiating with the opposing party about the possible consensual disposition.⁷⁰ But, in principle, there exist no channels through which the results of partisan pre-trial investigations could be imported into the trial other than the proof-taking at trial. The judicial link between the pre-trial and trial is deliberately severed, and the isolation of the fact-finder from the previous exposure to prejudicial and untested information is jealously guarded. For example, making the pre-trial and the trial stages strictly separate through limiting the access by trial judges to the evidence gathered in the pre-trial was an intended outcome of the adversarial reform in Italy.⁷¹ However, the resistance of the players in the Italian procedural system, rooted in their pre-existing ‘inquisitorial’ mindset, manifested itself in a broad interpretation by courts of the possibility to introduce the transcripts of pre-trial interrogation or written statements into the trial proceedings.

Similarly, the appellate stage in adversarial systems amounts to a separate and less than ordinary stage.⁷² This accords the trial court’s factual findings with considerable deference and is illustrative of a degree of discontinuity in the development of evidentiary record through the adversary process. Adversarial jury trials are bifurcated into two—guilt-determination and sentencing—phases, which mirrors the distribution of decision-making competence between the jury and the professional judge and the strict delimitation between their functions, as a matter of jury’s independence from the bench. The adversarial trial system entrusts the tasks of assessing and weighing evidence, deciding on the truth of facts, and rendering the verdict exclusively to lay jurors while the professional judge decided on the sentence as a matter of law. This is one manifestation of the coordinate, or decentralized mode of adjudication characteristic for adversarial settings.⁷³ Given that jurors are random peers of the defendants and community members untrained in law, they are not expected and may not be required to provide a reasoned opinion in support of the verdict.

Consequently, the appellate instance, which comprises professional judges, is prevented from knowing the grounds for the verdict. The appellate bench can therefore not carry out a meaningful and detailed review of the verdict, including the veracity of facts implied therein and its overall righteousness. Having neither examined the evidence first-hand nor observed the demeanour of witnesses, it is left to treat the jury verdict with deference and is in principle precluded from reversing the judgment on the issues of fact. As a matter of adjudicative autonomy of the jury, there is nothing in a verdict that could be reviewed in terms of correctness of reasoning or analysis of evidence. A rigorous inquiry into the congruence of factual findings underpinning the verdict would encroach upon the jury’s exclusive competence to acquit or convict.⁷⁴ It would also undermine the right of the defendant to a trial by his peers (as there is no jury in the appeal court). Therefore, the

American process in both civil and criminal matters were never as tightly integrated into the subsequent proceedings as was the case with Continental preliminary stage’).

⁷⁰ See Nijboer, ‘The American Adversarial System in Criminal Cases’ (n 36), at 94-5 (emphasizing the importance of preparatory activities by the parties in pre-trial in adversarial systems).

⁷¹ Arts 431 and 511-3, Code of Criminal Procedure (Italy). For discussion, see Weigend, ‘Is the Criminal Process about Truth?’ (n 35), at 1630-4; E. Grande, ‘Italian Criminal Justice: Borrowing and Resistance’, (2000) 48 *American Journal of Comparative Law* 227, at 237-40; Langer, ‘From Legal Transplants to Legal Translations’ (n 24), at 15, 47-8.

⁷² Damaška, *The Faces of Justice* (n 60), at 59 (‘Far from being a regular sequel to the trial, or a normally anticipated further stage of the process, superior review is more in the nature of an extraordinary and independent proceeding.’).

⁷³ Damaška, ‘Structures of Authority’ (n 64), at 512 (on the common law jury as ‘a classic example of an autonomous decisionmaking body in the administration of justice’ and a way to ‘bring to bear local conceptions of justice upon decisionmaking and adjust the crude substantive criminal law to the circumstances of individual cases’).

⁷⁴ Damaška, ‘Structures of Authority’ (n 64), at 492 (‘the largely inscrutable and often unchallengeable general verdict represents a crowning example of autonomous rather than delegated adjudicative powers’); Grande, ‘Dances of Criminal Justice’ (n 31), at 159.

trial decisions are presumed final and *res judicata*, upon which the appellate review is bound to be modest and limited to errors of law.⁷⁵

The overbearing emphasis on the trial proceedings reduces the reach of the appellate review in a number of ways. The appellate court has no or only limited independent fact-finding powers and relies on the trial record, which entails its substantial dependency on the results of the previous stage. The main function of appeals is to rectify errors of law resulting from the wrong application of law such as improprieties occurring during jury instruction by the judge or mistaken decisions on the admission of evidence. The purpose is not to conduct a trial *de novo* or to ensure the correct use of the admitted evidence.⁷⁶ Thus, as the parties are precluded from rearguing their case, new evidence is allowed only if it is relevant and was unavailable during trial, despite the exercise of reasonable diligence by the moving party.

Since no effective and direct review of a verdict is possible on the merits, the test applied by the appellate instance in its limited review of facts, is to speculate whether a hypothetical 'reasonable tribunal of fact' could have reached the impugned conclusion.⁷⁷ For instance, the principled isolation of the trial adjudication from appeals in the US system results in a conception that the completion of the trial stage largely ends the criminal proceeding and the jeopardy to the defendant posed by criminal charges.⁷⁸ An overconfident appellate review risks running afoul of the fundamental protection against the repeated prosecution for the same conduct ('double jeopardy'), which is strictly interpreted.⁷⁹ The same principle applies to prosecutorial appeals against acquittals, which are ruled out altogether or are very limited in the common law jurisdictions.⁸⁰ The absence of rigorous and regular appellate review reinforces the finality of trial judgments and decision-making autonomy of original adjudicator. Thus, the horizontal fragmentation of adjudication (between the jury and the bench) transforms into the vertical (trial to appeal) discontinuity.

By contrast, in inquisitorial systems, criminal proceedings are structured as 'a methodical succession of stages'.⁸¹ Within the sequence of the process trials are 'merely one episode in an ongoing sequence and are thus an inept symbol for describing the total effort'.⁸² To critics of the 'inquisitorial' style, this continuous procedure might rather appear as a 'Kafkaesque' and bureaucratic process in which any finding of fact or of law may be revisited and amended at every subsequent stage. This continuous procedure is in stark contrast with the common law emphasis on the trial:

⁷⁵ Damaška, 'Structures of Authority' (n 64), at 514-4 ('The lasting vitality of the notion of trial adjudication as final also accounts for the relatively limited scope of appeal'); *id.*, *The Faces of Justice* (n 60), at 48 and 57-9 (showing the weak and extraordinary character of the appellate review); Grande, 'Dances of Criminal Justice' (n 31), at 159.

⁷⁶ Damaška, 'Structures of Authority' (n 64), at 515 n87.

⁷⁷ Damaška, *The Faces of Justice* (n 60), at 60.

⁷⁸ Damaška, 'Structures of Authority' (n 64), at 514 ('Because the notion has not been entirely discarded that the decision of the trial court terminates the criminal proceeding, appellate review seems to conflict with the guarantee against double jeopardy: Review appears as a "new jeopardy" rather than the continuation of the original one.');

id., *The Faces of Justice* (n 60), at 59.

⁷⁹ E.g. Fifth Amendment to the US Constitution: 'nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb'. But see Art. 4(2) of Protocol No. 7 to the ECHR, as amended by Protocol No. 11, ETS 117, Strasbourg, 22 November 1984 (the right not to be tried or punished twice 'shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.').

⁸⁰ Damaška, *The Faces of Justice* (n 60), at 59 ('Because the fundamental notion has not really been discarded that the judgement of the trial court terminates criminal proceedings, review of acquittals is perceived as unfair, new or double jeopardy, rather than the mere continuation of the original one.'). See also *id.*, 'Structures of Authority' (n 64), at 514 (although England has moved towards the more continental-type liberal review of facts and sentence, such appeals are not a matter of right).

⁸¹ Damaška, *The Faces of Justice* (n 60), at 47-8 (the process before a 'hierarchical' officialdom, which he associates with the Continental legal process, is characterized by the multiplicity of stages each with its own functions which follows the multi-layered hierarchy of the authority).

⁸² *Ibid.*

Chapter 4: Trial Phase: A Theoretical and Comparative Outlook

The prosecutor (or the *juge d'instruction*) comes to a decision about guilt or innocence, and then passes the cases to the trial court, which also makes a decision about the guilt or innocence, and which then permits the case to be heard by the first appellate court, which is also allowed to call witnesses and review the facts bearing on guilt or innocence. This *continuous* system may have advantages in avoiding repetitive assessments of the same issues. Yet it violates the fundamental instincts of common law jurists who see the trial court as the only legitimate body entrusted with the capacity to make a decision about guilt or innocence.⁸³

The evidentiary continuity mirrors the multi-layered hierarchy of career judiciary in the 'hierarchical' officialdom associated with structure of authority in the Continental jurisdictions. The pre-trial investigations are an official activity conducted by the police under guidance of judicial authorities—the prosecution office or the examining magistrate (*juge d'instruction*)—and all evidence is assembled into a case file (*dossier*). The evidence contained in the case file may be consulted before trial by all actors involved and, to use Damaška's expression, 'remains in the wings of the trial like the prompter at an amateur play'.⁸⁴ During the trial, the dossier is relied upon heavily by the presiding judge. One of the ways to adduce evidence is reading out the documents from the dossier into the trial record.⁸⁵ To a large extent and with important exceptions presented by countries with 'reformed' inquisitorial procedure (e.g. Germany),⁸⁶ the purpose of questioning the accused and hearing witnesses and experts at trial is to verify the evidence on the case record and to certify the propriety of preceding activities, rather than to genuinely examine the evidence anew. Therefore, the inquisitorial procedure is landmarked by a higher degree of evidentiary continuity between the pre-trial and trial process.

Furthermore, the relationship between the trial phase and the appeals is quite different on the Continent than in the Anglo-American world. The continental criminal process is distinguished by a more explicit presence of a higher court in the wings of trial adjudication due to a far-reaching review and a lower threshold for intervention in the trial court's fact-finding. In the context of a 'hierarchical officialdom' and the correspondent structure of a judiciary system, interference by a higher judicial authority in the decision-making of the trial court is a regular occurrence, as a result of closer oversight.⁸⁷ Furthermore, the decision-making is not fragmented between different classes of functionaries. Either lay participation in criminal procedure is absent (e.g. Netherlands and Italy) or the jury's adjudicative autonomy is limited because jurors form part of collegial benches along with professional judges who due to their experience and autonomy naturally dominate the process and exert influence on lay assessors (e.g. Germany and France).⁸⁸ In the 'hierarchical' structure of judicial authority in inquisitorial systems, unsupervised involvement by laypersons in the administration of justice tends to be viewed with skepticism.⁸⁹ The professional (or mixed) benches

⁸³ G.P. Fletcher, 'The Influence of the Common Law and Civil Law Traditions on International Criminal Law', in A. Cassese (ed.), *The Oxford Companion on International Criminal Justice* (Oxford: Oxford University Press, 2009) 109.

⁸⁴ Damaška, *The Faces of Justice* (n 60), at 53.

⁸⁵ Damaška, 'Structures of Authority' (n 64), at 507 (despite the 'principle of immediacy' introduced after the abolition of the purely written inquisitorial procedure, 'the dossier still constitutes the backbone of criminal proceedings'). Further on the importance of the dossier in the multistage hierarchical process as a 'mechanism to integrate all its segments into a meaningful whole', see *id.*, *The Faces of Justice* (n 60), at 50 and 56 ('The file of the case is a nerve center of the whole process').

⁸⁶ Weigend, 'Is the Criminal Process about Truth?' (n 35), at 164 n20 (indicating that German procedure disfavors a direct import of pre-trial investigation materials in the trial record through the reading out of written witness statements and interrogation transcripts at trial, instead of the examination of evidence afresh); Nijboer, 'Comparative Perspectives on the Judicial Role' (n 28), at 28. On the treatment of the same issue in Italy, see n 71 above.

⁸⁷ On the historical reasons for a comprehensive appellate system on the Continent, see Damaška, 'Structures of Authority' (n 64), at 489 and n11; *id.*, *The Faces of Justice* (n 60), at 48-9.

⁸⁸ Weigend, 'Is the Criminal Process about Truth?' (n 35), at 165; C. Bradley, 'The Exclusionary Rule in Germany', (1983) 96 *Harvard Law Review* 1032; Reamey, 'Innovation or Renovation in Criminal Procedure' (n 10), at 710.

⁸⁹ Weigend, 'Is the Criminal Process about Truth?' (n 35), at 165 n22 ('inquisitorial systems are structurally adverse to strong lay participation'); Damaška, 'Structures of Authority' (n 64), at 491 (on the reason for this attitude in a 'pure hierarchical model': 'Laymen are usually unable and unwilling to look at criminal cases through the prism of general

are expected to state reasons for their decisions in order to enable future review, even though the Continental (in particular, French) judicial style is known to be considerably more formalist and impenetrable than opinions by appellate or supreme court judges at common law.⁹⁰

The unified and professional model of adjudication makes pervasive review by the higher-instance court not only possible, but also a regular and even *ex officio* duty.⁹¹ Such review is assisted by the fact that full written record in the case including the results of official investigation and the material adduced during the trial are available to the reviewing instance. Besides, the cassation court is vested with own fact-finding powers (such as calling witnesses and ordering additional investigations) and does not need to confine itself to examining the trial record. It may conduct review of a broader range of decisions and on a broader range of grounds, including the alleged errors regarding facts and sentence.⁹² Thus, unlike in common law countries, appellate process may well amount to a substantive reconsideration of the case whereby the trial court's reliance on evidence, the reasonableness of its factual findings and completeness of the evidentiary basis for the judgement will be at stake.⁹³ For example, in Germany and in France, the first level of appeals (respectively, *Berufung* and *appel*) normally amounts to a trial *de novo* on facts, as opposed to other forms of appellate review that exclusively concerns issues of law (*cassation* in France and *Revision* in Germany).⁹⁴

In many Continental jurisdictions, the appellate court is teathed with broad powers to reverse and modify the trial judgement or substitute it for that of its own. In contrast to the Anglo-American world, the appellate review is elevated to a guarantee of fairness and the right to appeal often enjoys a constitutional status.⁹⁵ As a result, the decisions of the appellate instance possess a high level of authority in the judicial system. Legal opinions of the higher judicial authority are normally adhered to by continental judges even in the absence of the obligation to do so, unlike under a common-law *stare decisis* doctrine, for the reason that decisions departing from a higher court's view stand a high chance of reversal.⁹⁶ The corollary of the accessibility of appellate review in inquisitorial systems is that the finality and enforceability of trial decisions is deferred until the exhaustion of appellate remedies. The appellate process is deemed a natural continuation of the trial for the purpose of *ne bis in idem*.⁹⁷ Since the trial and appeals count as one proceeding, this rule, being an analogy to the Anglo-American double jeopardy protection, poses no obstacle to the prosecutorial appeals against acquittals.⁹⁸ The regularity and broad scope of review deprive the trial decisions of finality and reduce the climactic character of the phase as a unique locus of truth-finding and decision-making.

rules. To laymen each case is a crisis, a unique human drama, rather than a representative of a general class.') and 491-3 (showing that the transplantation of jury on the Continent has resulted in a system of lay participation milder than in England, whereby lay influence on decision-making has remained negligible).

⁹⁰ Damaška, *The Faces of Justice* (n 60), at 49.

⁹¹ *Ibid.*, at 48 (describing the impact of superior review in a hierarchical ideal thus: 'the reviewing stage is conceived not as an extraordinary event but as a sequel to original adjudication to be expected in the normal run of the events. ... [S]upervision by higher-ups need not be conditioned ... upon an appeal by a disaffected party; it can also take place as part of the official duty of higher judicial authorities.').

⁹² Damaška, 'Structures of Authority' (n 64), at 490.

⁹³ Grande, 'Dances of Criminal Justice' (n 31), at 160; Damaška, *The Faces of Justice* (n 60), at 4-9 ('fact, law and logic are all fair game for scrutiny and possible correction').

⁹⁴ H. Jung, 'Appellate Review of Judicial Fact-Finding Processes and Decisions', (1997) 31 (1-3) *Israel Law Review* 690, at 692 and 694-5.

⁹⁵ Damaška, 'Structures of Authority' (n 64), at 490; *id.*, *The Faces of Justice* (n 60), at 49-50, 60.

⁹⁶ Damaška, 'Structures of Authority' (n 64), at 496-7 and 515 (on marginal importance of the right to appeal in the 'adversarial' systems).

⁹⁷ See *ibid.*, at 490-1.

⁹⁸ Nijboer, 'Comparative Perspectives on the Judicial Role' (n 28), at 26; Grande, 'Dances of Criminal Justice' (n 31), at 160 (citing the example of Italy, where the statute providing that acquittals may not be appealed on facts was set aside by the Constitutional Court in Decision No. 26/2007 of 24 January 2007).

3.2 Character and layout of trial

The differences between the two legal traditions surveyed in respect of the layout and subdivision of the trial stage are substantial.⁹⁹ One may debate whether the variance in the trial scheme supersedes differences in the structure of other phases, notably the pre-trial.¹⁰⁰ The diversity of the ‘faces’ of trial across the ‘adversarial’ and ‘inquisitorial’ divide is unsurprising given dissimilar understandings of ‘truth’ and entrenched perceptions of professional roles of judges and counsel.

Adversarial trials are traditionally structured as a contest between the two adverse parties before a *laissez-faire* judge and the passive lay jurors who possess no prior knowledge of the case and evidence. The adjudicators’ passivity at trial is a consequence of their lack of antecedent knowledge of partisan cases. The normative aspect of this attitude is to serve as a demonstration and guarantee of impartiality. That said, the trial judge’s passivity is a matter of degree: for example, in England and Wales judges traditionally take a more active approach at trial than in the US.¹⁰¹ Even though a common law trial judge nominally holds fact-finding powers such as calling evidence *proprio motu* and questioning witnesses,¹⁰² those are exercised with utmost restraint and rarely invoked.¹⁰³ Intervention by a judge in the examination of evidence at trial that goes beyond questions meant to clarify testimony and interruptions of repetitive or unfair questioning is undesirable. Such judicial conduct risks impeding the parties in the effective presentation and/or testing of the evidence and undermining their case strategy. Judicial activism at trial is therefore liable to be complained of to a higher court as an indication of bias against one of the parties.¹⁰⁴

An ‘ignorant and unprepared’ adjudicator who lacks familiarity with the case is in a position neither to conduct meaningful questioning nor to appreciate the potential prejudicial effects of his interventions for one of the parties. To use Judge Frankel’s famous expression, an active judge without prior access to an investigative file will become ‘a blind and blundering intruder, acting in spasms as sudden flashes of seeming light may lead or mislead him at odd times’.¹⁰⁵ The problem is that unbridled intervention in the evidentiary process is likely to confer an ‘unintended advantage’

⁹⁹ Nijboer, ‘Comparative Perspectives on the Judicial Role’ (n 28), at 27. For a vivid description of trials in several European jurisdictions from a perspective of an English observer, see S. Bedford, *The Faces of Justice* (London: Collins, 1961).

¹⁰⁰ K. Ambos, ‘The Structure of International Criminal Procedure: ‘Adversarial’, ‘Inquisitorial’ or Mixed?’, in M. Bohlander (ed.), *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (London: Cameron May, 2007) 475 (contending that ‘the trial is the procedural stage in which common law and civil law principles most strongly conflict with each other’); C.J.M. Safferling, *Towards an International Criminal Procedure* (Oxford: Oxford University Press, 2003) 371 (‘The trial is the place where the clash between common law and civil law is most obvious’). However, Damaška observed that the differences in the modes of presenting evidence are outmatched by the differences in the collection of evidence. See M. Damaška, ‘Presentation of Evidence and Factfinding Precision’, (1975) 123 *University of Pennsylvania Law Review* 1083, at 1088 n10 (‘the opposition between court and party control over what *facts* are to be determined, and the contrast between the unilateral and bilateral *collection* of evidence, both generate differences dwarfing those springing from the divergent manner of *developing evidence* at trial.’).

¹⁰¹ On the reasons for this difference, see Reamey, ‘Innovation or Renovation in Criminal Procedure’ (n 10), at 706.

¹⁰² Rules 614(a) and (b) and 706(a), Federal Rules of Evidence (US) (providing that the court may call a witness on its own motion, interrogate a witness whether called by the court or by a party, and appoint expert witnesses).

¹⁰³ Damaška, ‘Presentation of Evidence’ (n 100), at 1090 (the questions are only those that ‘cry out to be asked’ or aimed at ‘immediate clarification of points from the perspective of [adjudicator’s] cognitive needs’.); *id.*, *The Faces of Justice* (n 60), at 65 (‘If a judge in the coordinate apparatus is empowered to call witnesses on his own, ... it would not be unusual if he actually did so on the rarest of occasions.’); Langer, ‘From Legal Transplants to Legal Translations’ (n 24), at 21-22 n77 (referring to *US v. Ostrer*, 422 F. Supp. 93 (S.D.N.Y. 1976)).

¹⁰⁴ Reamey, ‘Innovation or Renovation in Criminal Procedure’ (n 10), at 705 (‘The trial court judge sits mute while the questioning is conducted by the lawyers, afraid to interject the obvious unasked question or to make the most innocuous remark for fear that a reviewing court will consider the judge’s participation to be an inappropriate comment on the evidence tainting the supposed neutrality of the jury.’).

¹⁰⁵ Frankel, ‘The Search for Truth’ (n 46), at 1042.

on the opponent and unfairly slant the contest in his favour.¹⁰⁶ In an adversarial setting, such an advantage would be difficult to justify by any ulterior goals (e.g. truth-finding), given that fair play, impartiality of the bench, and the equidistance of parties are regarded as the precondition of the truth emerging in the case.¹⁰⁷ Given the judge's authority, the jury is likely to interpret such questions as indicative of the judge's opinion about the merits of the party's case and the strength of a specific piece of evidence. In that case, jurors may inappropriately be led to form their decision as to guilt of the accused based on such perception, instead of their own appreciation of the evidence.¹⁰⁸

The trial in adversarial systems is the only forum where the evidence can be submitted to the jury for examination – 'the relevant locus for fact-finding'.¹⁰⁹ It is a stage that comprises the broadest range of procedural activities and decisions, including rulings regarding the admission of evidence. This trial paradigm is sometimes referred to as 'one-day-in-court' because all the material in the case is examined in a 'single block of time', as 'a single, continuous forensic episode'.¹¹⁰ As aptly put by Fletcher,

common law jurists ... see the trial court as the only legitimate body entrusted with the capacity to make a decision about guilt or innocence. The prosecution is supposed to decide merely whether there is probable cause to go forward, and the appellate court hears appeals solely on questions of law Thus the common law system focuses not on pre-trial and post-trial confirmation but exclusively on the decisions reached at trial. This is aptly described as a system that grants the defendant his 'day in court' (of course, the day may last a year or longer).¹¹¹

The trait of the trial being a concentrated and intensive event has implications for the general dynamic of the trial process: 'A genuinely concentrated trial, even if well prepared, requires that decisions be based largely on fresh impressions, including surprise, shock, the spell of superficial rhetoric, and perhaps even theatrics.'¹¹² The absence of an analogue of a Continental dossier serving as a script for the trial imbues the 'day-in-court' scheme with dramatic developments and unexpected turns, particularly at cross-examination.¹¹³ The intrigue is amplified by the virtual finality of the forthcoming judgment and the comparable level of knowledge of the details of the case by the jury and by the observers in the public gallery.¹¹⁴

The adversarial trial is a protracted, complex, and resource-intensive enterprise taking the form of 'an exquisite minuet of confrontational steps'.¹¹⁵ The proof-taking and partisan debates require a structure; the multiplicity of successive steps in testing evidence is ordered as a way to preserve fair play because each party must be provided with an equal opportunity to present the case to the jury. The cognitive needs of the jurors naïve about the evidence demand that the adversary combat not be led astray, that parties do not speak past each other, and that proof and refutation logically interlock. For the jury to be able to comprehend the evidence, the sequence of

¹⁰⁶ S.A. Saltzburg, 'The Unnecessarily Expanding Role of the American Trial Judge', (1978) 64 *Virginia Law Review* 1, at 55 ('the judge's questioning may confer an unintended advantage upon one party that the lawyer could not have obtained otherwise and that the opposing party cannot counteract during the trial.').

¹⁰⁷ See *infra* 4.3.

¹⁰⁸ Doran, 'The Necessarily Expanding Role of the Criminal Trial Judge' (n 40), at 12-3 ('[T]he underlying force of resistance to [more active judicial truth finding] lies in the institution of a jury. The interventionist trial judge risks revealing too much of his or her own view of witnesses to the jury, who might accord undue sanctity to the judicial opinion.').

¹⁰⁹ Weigend, 'Is the Criminal Process about Truth?' (n 35), at 160.

¹¹⁰ Damaška, *The Faces of Justice* (n 60), at 51 and 215.

¹¹¹ Fletcher, 'The Influence of the Common Law and Civil Law' (n 83), at 109.

¹¹² Damaška, *The Faces of Justice* (n 60), at 62.

¹¹³ '[T]rials may easily become noisy squabbles' (*ibid.*, at 215).

¹¹⁴ *Ibid.*, at 62.

¹¹⁵ *Ibid.*, at 64. See also Nijboer, 'The American Adversarial System in Criminal Cases' (n 36), at 94 (describing adversarial system as endowed with a 'highly structured forensic procedure').

proceedings is thoroughly regulated and made predictable, subject to limited discretion in changing the preset order.

Thus, a formal and rigid algorithm is imposed on the proceeding whereby every step—proposing evidence and raising challenges to it, making opening statements, calling and questioning witnesses, adducing rebuttal and rejoinder evidence, addressing the jury with closing arguments is to be made in strict accordance with the established chronology. A failure to raise objections, to have specific evidence or argument heard, to use procedural remedies in a timely fashion does not stand consideration chance for correction subsequently.¹¹⁶ The finality of the micro-steps of trial mirrors the logic behind the finality of the trial phase in the absence of a regular and comprehensive review. This feature of a ‘day-in-court’ scheme may have as a result the numerous interruptions of the flow of trial and discontinuity of proof-taking because the resolution of petty questions and procedural objections may be required in order to proceed forward.¹¹⁷ This stop-start mode contributes to the already significant overall length of the proceedings accumulating due to repetitive rounds of questioning on the same issues, making the ‘day-in-court’ last months.¹¹⁸

The structural sophistication and methodism of the Anglo-American version of trial is unparalleled: First of all, it is bifurcated into two phases: a guilt-determining, or proof-taking stage at which evidence relating to the verdict is heard; and a sentencing stage which takes place upon the verdict of guilty and where submissions on the appropriate sentence are received. This is a corollary of the split of adjudication on the issues of facts and issues of law. Pre-trial investigation and the preparation for trial by means of proofing witnesses shortly in advance of testimony are the responsibility of each party. Consequently, the parties determine their case strategy independently and the presentation of evidence at trial is party-driven. The ‘contest’ paradigm entails a bipartite structure of the evidentiary stage as composed of the two—defence and prosecution—cases. Each piece of evidence is presented by the party who proposes it and is then challenged by the adversary. The fact-finding stage of an adversary trial represents a ‘rival use of evidentiary sources’ whereby ‘[t]he information about the facts of the case reaches the adjudicator in the form of two alternating one-sided accounts’.¹¹⁹

The trial hearing commences with an opening statement by the party with the burden of proof (prosecution) and/or both parties. Its purpose is to introduce the case to the jury and to facilitate their comprehension of the evidence. Upon the completion of the opening phase, the prosecution presents its case-in-chief by adducing the testimony of witnesses and experts in the order it deems fit. The order of presenting witnesses interweaves with the sequence of examining witnesses. For each of its witnesses, the prosecution conducts an examination-in-chief seeking to adduce evidence supporting its case. The defence then conducts a cross-examination, which seeks to challenge the evidence contained in the testimony or the witness credibility and/or to adduce evidence beneficial to the defence case. After that, the prosecution may re-examine the witness to clarify matters arising for the first time during cross-examination and the defence may re-cross-examine on matters which arose during re-examination. Once the prosecution rests its case, the defence may file a mid-trial motion for the judgement of acquittal on the ground that there is no case to answer. In case the motion is dismissed and the accused not acquitted, the trial proceeds to the defence stage of the case whereby the defence may present its own evidence, to be examined by the parties in the same manner as the prosecution evidence. Upon the completion of the defence case-in-chief, the prosecution may present evidence in rebuttal to contradict the defence evidence and the defence

¹¹⁶ Damaška, *The Faces of Justice* (n 60), at 215 (‘Since there is no regular “next stage” before higher authority to which the loser can appeal, the party cannot afford to temporize but must say to himself “my time is now”.’).

¹¹⁷ For a critique of US trials in this vein, see W.T. Pizzi, *Trials without Truth: Why Our System of Criminal Trials Has Become an Expensive Failure and What We Need to Do to Rebuild It* (New York and London: NYU Press, 1999) 17.

¹¹⁸ Weigend, ‘Should We Search for the Truth’ (n 39), at 407-8 n90 (considering it a ‘drawback of the adversarial mode ... that it tends to consume significantly more trial time because every witness is examined by two parties who often go over the same issues; moreover, bench conferences deciding difficult procedural issues prompted by complicated rules of evidence also draw out adversarial trials.’).

¹¹⁹ Damaška, ‘Presentation of Evidence’ (n 100), at 1090-1.

may present evidence in rejoinder to contradict the rebuttal). The proof-taking stage is completed with closing arguments which present a structured debate on the evidence that was admitted and presented at trial. A judge then instructs the jury and jurors retire to deliberate in private to return a verdict of guilty or not guilty. In case of a guilty verdict, the proceedings before trial court move on to sentence-determination whereby parties makes sentencing submissions to the court including the information on aggravating or mitigating circumstances. These are the general contours of the adversarial trial structure.¹²⁰ Although the practice in common law jurisdictions evinces variation, the principal logic of confrontation between two opposing accounts is ubiquitous.

As compared to the adversarial model, continental trials have a less composite and fragmented structure. They tend to be organized around specific items of evidence contained in the dossier and follow the thematic order rather than party-based order in the first place. This enables a less dispersed and more focused examination of all evidence on an issue-per-issue basis. The judge-led rather than party-dominated character of inquisitorial trials entails that judges (and especially the presiding judge) play a leading role in eliciting evidence from the defendant, witnesses, experts, and civil parties, if any. Parties are considerably less active than in the adversarial systems – their role is to assist the bench in establishing the truth by bringing to its attention the aspects of evidence which are relevant in light of that purpose. Given that the bulk of examination and testing takes place in the pre-trial stage, continental trials tends to be relatively brief, less formalized, and an efficient way of disposing of a criminal case.¹²¹

Equipped with the knowledge of the dossier (the degree of which may vary per jurisdiction), the presiding judge would normally first interrogate the accused and then hear other evidentiary sources (experts, witnesses, and civil parties). At all times, judges may ask questions, interrupt examination or turn down proposed questions by other actors, order additional evidence, and take any measures necessary to ensure expeditious and rational proceedings.¹²² Zealous advocacy, combative litigation practices, and vigorous and probing cross-examination are misplaced in the judge-dominated context. Engagement in such practices would imply that the judges or the examining magistrate did not do their job properly, which would be a precarious litigation manoeuvre.¹²³ The function of counsel is merely to facilitate the official inquiry into the facts, not to obstruct the pace of the proceedings. Objections to the evidence in the dossier, challenges to the credibility of witnesses, and other confrontational methods of litigation are unusual and unwelcome. They take away a degree of judicial control over the progress of the case. They are inconsistent with the parameters of professional roles and the assumptions about professionalism, competence, and integrity of the judges engrained in the system run by career judiciary. The elements of surprise, theatrics, and rhetoric that targets lay rather than professional legal minds, are extraneous to the psyche of participants in a continental courtroom.¹²⁴

A typical continental trial is ‘no day-in-court trial as a culminating procedural event – at least not in the sense that the material for the decision is fully presented to the adjudicator as a whole, in one continuous block of time and in a form unmediated by prior procedural action’.¹²⁵ The trial proceedings unfold without turning points, interruptions, and sudden developments – instead, the case develops gradually and smoothly.¹²⁶ The ‘piecemeal’, or ‘instalment’ trial style sits well with

¹²⁰ For a more specific discussion, see Chapters 9-12.

¹²¹ Bradley, ‘The Convergence of the Continental and the Common Law Model’ (n 39), at 471 and 483 n45 (an average German trial in a serious criminal case lasts about one day).

¹²² Damaška, ‘Evidentiary Barriers to Conviction’ (n 15), at 583; Jung, ‘Appellate Review’ (n 94), at 693 (on the trial stage in Germany).

¹²³ Reamey, ‘Innovation or Renovation in Criminal Procedure’ (n 10), at 706-7 (‘Examination of witnesses by either side in a criminal trial is often quite limited lest the presiding judge interpret the suggested questions as implied criticism of the judge's competence.’).

¹²⁴ Jung, ‘Appellate Review’ (n 94), at 693.

¹²⁵ Damaška, *The Faces of Justice* (n 60), at 182-3.

¹²⁶ On trial in a hierarchical ideal, see Damaška, *The Faces of Justice* (n 60), at 51-2 (‘proceedings develop through separate sessions at which material is gradually assembled in a piecemeal, or installment style. ... [A]fter a matter has

the structure of the court. The absence (or a weak role) of lay adjudicators makes it possible to allow for numerous rounds of inquiry and revisit issues previously examined without fear that the jury would be unavailable in the same composition at a later stage.¹²⁷ Should an unexpected development occur causing an interruption or delay, the ‘inquest’ is simply suspended to resume ‘once the dust has settled’.¹²⁸ Being an attribute of the hierarchical officialdom associated with Continental structures of authority, this readiness to ‘take a break’ reflects the bureaucratic judiciary’s abhorrence of premature conclusions based on first impressions and rickety grounds rather than on solid investigative results contained in the dossier.¹²⁹

Characterized by syncretism, simplicity, and informality, Continental trials are structured less rigidly and the sequence of hearing evidence is more readily adjustable. There is less need for formalization and stringent regulation of the order of proceedings than in the adversarial settings. Among others, this has to do with the judicial domination and the need to preserve discretion of the presiding judge in structuring the fact-finding inquiry in accordance with the cognitive needs of the bench; the limited importance of the process as a conduit to a decision; and the emphasis on written materials rather than oral testimony. The ‘inquisitorial’ model does not contemplate a fragmentation of decision-making authority on the facts and the law between lay and career judges. Hence, there is no bifurcation into a guilt-determination and a sentencing stage; the trial judgment contains both verdict and sentence, in case of conviction.¹³⁰ Nor is there a conceptual and temporal watershed between the two cases for the prosecution and for the defence, but only one case of the court. The presiding judge decides on its internal structure and may choose to change the order of the appearance of witnesses and sequence of examination in the interests of a more efficient ascertainment of truth.

Subject to jurisdiction-specific nuances, the trial proceedings are structured as follows. First, the presiding judge asks the accused questions intended to verify his or her identity and to clarify facts of his or her biography, including the issue of prior convictions.¹³¹ After a series of preliminary questions, the prosecutor or a court clerk will read out the charges. In substance, the trial begins with the judicial interrogation of the accused on the facts that serve as the basis for the charges, and the accused is provided an opportunity to counter them by presenting a coherent version of events.¹³² This is followed by questions asked by the prosecutor, civil parties, and the defence, which are sometimes asked with leave of the presiding judges or through that judge, as a matter of judicial control over the fact-finding. The accused enjoys the right to remain silent throughout. Although silence may not result in adverse inferences against him or her, the immediate

been considered at one session, new points can emerge to be the subject of another session, and so on, until that issue seems thoroughly clear. A final session can then be devoted to pulling all strands together, reviewing interim results, and calmly reaching a decision. But even this last session is only presumptively final: any sudden development or surprise can necessitate a postponement and still another session. This bureaucratic preference for the installment style is reinforced by the existence of regular review mechanisms. It makes little sense to require the early crescendo of a day-in-court trial if it is routinely to be followed by the diminuendo of appellate procedural “rounds”.) See also *ibid.*, at 183.

¹²⁷ Weigend, ‘Is the Criminal Process about Truth?’ (n 35), at 165 (the installment schedule of trial would be inappropriate for the trial by jury, given that the same jury may not be available at any time when, for instance, new evidence emerges).

¹²⁸ Damaška, *The Faces of Justice* (n 60), at 53.

¹²⁹ *Ibid.*, at 51 and 53.

¹³⁰ Damaška, ‘Evidentiary Barriers to Conviction’ (n 15), at 536 n65 and 559. E.g. in Germany, both lay and career judges sit in the same ‘mixed’ bench: Bradley, ‘The Exclusionary Rule in Germany’ (n 88), at 1063 n163.

¹³¹ B. McKillop, ‘Behind the Faces of Justice’, (1990) 15 *Bulletin of Australian Social and Legal Philosophy* 55, at 55.

¹³² Damaška, ‘Evidentiary Barriers to Conviction’ (n 15), at 529 (as opposed to the proclaimed rationale of responding to charges, the real reason for starting the trial with the interrogation of the accused is that the accused is tacitly regarded a major evidentiary source). On the status of parties as evidentiary sources, see *id.*, *The Faces of Justice* (n 60), at 128-30.

character of communication between the accused and the president implies an expectation that the accused would speak and this indeed puts a certain pressure on him or her to do so.¹³³

If the accused speaks, he or she may not make a solemn declaration or an oath that witnesses are required to make prior to testimony and is not liable for supplying the court with false information. This is sometimes referred to as ‘the right to lie’, although the term is not fitting because the accused is of course hoped to help the court establish the truth – but by no means obliged to do so as a consequence of the right to silence.¹³⁴ The natural inclination of the accused to exonerate him- or herself is taken into account by judges when evaluating any responses or statements. Depending on the evidentiary record, the personality and demeanour of the accused, his or her statements may be disbelieved, discarded, or accorded lesser weight than other proof. A confession of guilt ensuing from the court interrogation does not result in a cessation of the hearing. The confession will be treated but as one piece of evidence like any other. The judges will still be under an obligation to ensure that the truth of the matter is established and that there is sufficient factual basis for the judgment. Hence the hearing of evidence will continue as usual: ‘An official inquiry must ... disregard possible interparty arrangements, and pursue the search for the real truth; confessions do not relieve the continental judge of his duty to conduct the trial in the usual manner’.¹³⁵

Upon the interrogation of the accused, the court will examine witnesses, experts and civil parties whom the parties will be able to question as well. Witnesses will normally testify on facts reiterating depositions given during the pre-trial stage and contained in the case file in the form of *procès-verbaux* or summaries.¹³⁶ Testimony develops in a narrative form uninterrupted by questions unless they are necessary for the purpose of clarification or ensuring relevance. Upon establishing what the witness knows about the matter, the presiding judge proceeds to questioning the witness in light of the judge’s reading of the dossier.¹³⁷ In contrast with trials in the Anglo-American tradition, the communication between the bench and the providers of evidence is kept direct and informal and does not follow the rigid question-and-answer format.¹³⁸

However, judicial interrogation also serves as an equivalent of cross-examination, given that some questions posed by the judges may go to the issues of credibility of the witness.¹³⁹ Subsequently, the parties may ask questions on issues left unaddressed by judicial interrogation. Given the judges’ leading role in eliciting evidence and the exhaustive character of their questioning, the parties’ role in this regard will be secondary and marginal, as compared to the adversary system.¹⁴⁰ Towards the conclusion of evidence, the parties may take the floor to provide and exchange their perspectives on the case and legal arguments, although such exchange will likely be not nearly as confrontational as in an adversarial setting.¹⁴¹ The defendant is permitted to address the court with a last word and thereby provide the court with a personal perspective on the

¹³³ Damaška, ‘Evidentiary Barriers to Conviction’ (n 15), at 527 (the ‘realistic concern’ that an adverse inference would nevertheless be drawn by the judge from a refusal to answer the questions, leads most continental defendants to speak, except for political trials, where silence is used to protest against the court’s authority; the pressure for continental defendants to respond is stronger than in an adversarial system); *id.*, *The Faces of Justice* (n 60), at 128 (‘Unlike the accused in common-law systems, the Continental defendant cannot choose whether or not to submit to the interrogation process; he is entitled only to refuse to answer generally or in regard to a particular question, but as a practical matter, even this more limited right is largely illusory and regularly waived.’) (Footnotes omitted).

¹³⁴ Damaška, ‘Evidentiary Barriers to Conviction’ (n 15), at 528 n44; *id.*, *The Faces of Justice* (n 60), at 130 and 166; Weigend, ‘Should We Search for the Truth’ (n 39), at 393.

¹³⁵ Damaška, ‘Evidentiary Barriers to Conviction’ (n 15), at 582.

¹³⁶ McKillop, ‘Behind the Faces of Justice’ (n 131), at 55.

¹³⁷ Damaška, ‘Presentation of Evidence’ (n 100), at 1089.

¹³⁸ Pizzi, *Trials without Truth* (n 117), at 22 (in continental trial systems, witnesses are ‘always permitted to testify in their own words and in their own way about the events in question’).

¹³⁹ Damaška, ‘Presentation of Evidence’ (n 100), at 1089.

¹⁴⁰ *Ibid.*; McKillop, ‘Behind the Faces of Justice’ (n 131), at 55; Reamey, ‘Innovation or Renovation in Criminal Procedure’ (n 10), at 706.

¹⁴¹ Damaška, ‘Presentation of Evidence’ (n 100), at 1090.

evidence heard in the case and on the proceedings in general. After this final statement, the trial concludes with judicial deliberation in private. Lay assessors (jurors) and judge(s) may deliberate jointly, or jurors are requested to respond to specific queries, for example, as to whether certain facts in the case have been established and/or whether the accused is proven guilty with respect to incriminated facts in their intimate conviction. Finally, a single written decision on the guilt and, if appropriate, sentence is returned, which concludes the trial proceedings in the case.

This concludes the general overview of the character, organization, and internal structure of the trial phase in the adversarial and inquisitorial systems. The significant differences in the appearance and layout of the trial across the grand divide leave no doubt about their non-accidental nature. It stands to reason that those differences are underlain by a more fundamental and subterranean variance in the prevalent conceptions about what the criminal trial is to achieve and how it is supposed to do so. The following section will turn to the issue of functions of the trial, with an emphasis on the core function of truth-finding, to demonstrate that the two systems interpret this notion differently and this has a bearing on their approaches towards truth-finding and respective procedural mechanisms. In the second part, that section will also address the sociological effects and external aspects of trial process, being distinct from its proper functions, and discuss how the different conceptions of truth and preferred approaches to truth-finding through criminal process are reflected on the corporeal features of the adversarial and inquisitorial process.

4. FUNCTION OF TRIALS: TRUTH-FINDING

4.1 Objectives of justice and functions of trial, and truth

The main purpose of criminal procedure as ‘adjectival law’ is to enforce the prescriptions of substantive criminal law.¹⁴² The criminal process itself is a multiple-stage operation underpinned by an ‘unruly mix of objectives [which] varies from stage to stage’.¹⁴³ The trial as a stage of criminal proceedings implements goals that inform the assigned functions in the context of the process as a whole and that distinguish it from other procedural stages.

In a specific sense, the administration of criminal justice pursues the objective of establishing whether the defendant is guilty of a crime and, if the answer is in the positive, punishing him or her.¹⁴⁴ In turn, depending on what penal theory one adheres to, punishment may be interpreted as the pursuit of retribution for the offence (‘retributive theory’); incapacitation of the offender, prevention of future violations (including both general and special deterrence), rehabilitation and re-education of the offender (‘utilitarian’ or ‘consequentialist’ accounts);¹⁴⁵ or to express the condemnation of the crime by the community (‘expressivist’ theories).¹⁴⁶ Thereby justice is meted

¹⁴² See e.g. M.S. Groenhuijsen, ‘Herstel, schadevergoeding en normbevestiging. Naar een processuele vertaling van strafdoeleinden’, in B. van Stokkum (ed.), *Straf en herstel. Ethische reflecties over sanctiedoeleinden* (Den Haag: Boom Juridische Uitgevers, 2004) 281; Weigend, ‘Should We Search for the Truth’ (n 39), at 389.

¹⁴³ M. Damaška, ‘Truth in Adjudication’, (1997-8) 49 *Hastings Law Journal* 289, at 305; A. Ashworth, *Sentencing and Criminal Justice* (London: Weigenfeld and Nicolson, 1992) 55.

¹⁴⁴ Damaška, ‘Truth in Adjudication’ (n 143), at 305.

¹⁴⁵ It is neither possible nor necessary to delve into the vexed question of rationales for criminal punishment in this context, given that there exist an extensive number of excellent analyses of the subject from a legal and moral philosophy perspectives. Suffice it to say that retributive theories defend the deontological view rooted in Immanuel Kant’s ‘categorical imperative’: see among others P. Roberts, ‘Theorising Procedural Tradition: Subjects, Objects, and Values in Criminal Adjudication’, in Duff *et al.* (eds), *The Trial on Trial 2* (n 67), at 50-2; M.S. Moore, *Placing Blame* (Oxford: Oxford University Press, 1997). For an example of modern ‘consequentialist’ accounts (traceable to Jeremy Bentham’s *An Introduction to the Principles of Morals and Legislation* (1789), see e.g. M. Bagaric, *Punishment and Sentencing: A Rational Approach* (London: Cavendish, 2001). For a classic blend of the two accounts, see H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon Press, 1968).

¹⁴⁶ The expressivist accounts draw upon the social philosophy of the French sociologist Émile Durkheim. According to Durkheim, punishment is a community act intended to delimit and identify the community’s self. See É. Durkheim, *The Rules of Sociological Method: Selected Texts on Sociology and its Method* (edited by S. Lukes and translated by W.D.

out to the offender, victims, and the society; truth of the matter is ascertained; social peace is restored and the damage inflicted by the crime is repaired; the moral blame is apportioned; and the authority of the legal norm trampled by the crime is reaffirmed.

This goal-setting can in particular be ascribed to ‘Continental legal thinking’ while Anglo-American scholarship rather tends to emphasize the conflict-solving rationale for the administration of criminal justice.¹⁴⁷ Ultimately, these types of objectives are the different sides of the same coin because, for instance, social peace cannot be truly restored, truth established, and justice done without a satisfactory resolution of the criminal case, and vice versa. ‘Satisfactory’ here refers to the outcome that is not merely agreeable to the parties in the case but rather the one that is acceptable as just and legitimate to the society at large whose interests adversely affected by the crime are represented by the prosecuting party. With most crimes, as opposed to torts, public interests are at stake and the society is an ‘invisible third party’ to any criminal case; therefore, in case of a consensual disposition ‘not just any agreement will do’.¹⁴⁸

Regardless of one’s perspective on the expected results of the criminal case resolution, the ultimate purposes of criminal justice depend on the implementation of the elementary function of ascertaining the truth of the facts, properly identifying the individual guilty of the crime, and establishing his or her degree of responsibility. The achievement of the objectives of retribution, deterrence, restoration—empirically obscure and removed from the workings of criminal process as they are—is contingent upon the identification of the alleged offender and the determination of his guilt or innocence in accordance with the procedure established by law. These outcomes are impossible without the process being a ‘search for the truth’ and an effort at an ‘accurate factfinding’.¹⁴⁹

Essentially, the truth in a criminal process is arrived at through the examination and probing of evidence that tends to corroborate or refute the charges as a factual matter. While legal issues, for example, regarding the tests for the admission of evidence at a specific stage may be objects of proof and their application *in casu*, such trial litigation is auxiliary to truth-finding.¹⁵⁰ If the search for the truth of facts is regarded as an overarching objective of the criminal process, its components should be contributing to it in specific ways. The initial steps taken in the investigation and prosecution of a criminal case during the pre-trial stage aim to make that contribution through the detection of a crime, the collection and review of evidence, the identification and apprehension of the person suspected of having committed it, the issuance and confirmation of the indictment, and the preparation for trial.

By contrast, the trial stage pursues the tailored objectives of ensuring that the relevant evidence is presented and placed on the case record, that a determination is made on that basis

Halls) (London: Macmillan, 1982). Expressive theories justify the punishment by the need to express and attribute the moral blame of the crime by the society. See among others J. Feinberg, *The Moral Limits of Criminal Law* (Oxford: Oxford University Press, 1984) 95-118; *id.*, ‘The Expressive Function of Punishment’, in *id.*, *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton: Princeton University Press, 1970). According to another account, which seems to blend the ‘retributive’ and ‘expressivist’ views, punishment is a result of communicative process of argument and persuasion through which the accused is called as a moral agent to respond to the charges and to accept the outcome, see R.A. Duff, *Trials and Punishments* (Cambridge: Cambridge University Press, 1986) 262-3.

¹⁴⁷ Weigend, ‘Should We Search for the Truth’ (n 39), at 389-90; e.g. Jackson, ‘Managing Uncertainty and Finality’ (n 7), at 124-5.

¹⁴⁸ Weigend, ‘Should We Search for the Truth’ (n 39), at 391-2.

¹⁴⁹ Roberts, ‘Theorising Procedural Tradition’ (n 145), at 52-3 (indicating that within the retributive justice paradigm, the criminal process must fulfil three functions: accurate fact-finding; effective law application, and imposition of just censure and punishment); Weigend, ‘Should We Search for the Truth’ (n 39), at 390 (‘None of the potential purposes of the criminal process can be reached unless the judgment has been based on a search for the truth. To reach any of its goals, the process must reflect what “really” happened.’).

¹⁵⁰ Damaška, ‘Presentation of Evidence’ (n 100), at 1086 (‘it is generally agreed that the presentation of evidence is directed towards establishing the veracity of factual propositions, rather than the correctness of legal reasoning’) and n7 (‘a legal proposition may sometimes be made an object of proof ... [b]ut the aim of the evidentiary activity is to prove that a rule *exists*, and not that a certain legal solution is appropriate in the case.’).

whether the accused is guilty or innocent, and that a correct legal qualification is given to his or her conduct along with the imposition of an appropriate criminal sanction. The specialized function of the appeal in relation to the establishment of the truth is to review the trial judgment, thereby ensuring finality in the resolution of the case. As will be discussed below, besides establishing the truth about the crime during trial, facilitating that process by preparing the bases for it (pre-trial stage), and verifying its results (appeals), the criminal process in itself serves a sociological role that is distinguishable from the legalist procedural function centered on the search for the truth.¹⁵¹

4.2 Concepts of truth and criminal procedure

What is ‘truth’—a perfectly accurate reflection of the ‘objective reality’ or a fruit of a consensus—and whether ‘truth’ in its more ambitious sense can be established in principle and through criminal process in particular, are the matters of endless philosophical contention. Delving into it here cannot be afforded.¹⁵² However, it is useful to distinguish between, on the one hand, the ‘substantive’ (or ‘ontological’, ‘objective’, ‘absolute’, ‘material’) truth, as a complete reconstruction of the events as they actually occurred, and, on the other hand, the ‘procedural’ (or ‘formal’, ‘interpretive’, ‘subjective’) truth, which stands for a socially acceptable result of fact-finding by competent actor(s) in accordance with the established procedure approximating, more or less successfully, the objective reality.¹⁵³ It is clear that the ‘procedural truth’ may depart from the ‘substantive’ truth not only in nuances, but also quite significantly. It might even amount to a complete ‘un-truth’ (the antithesis of ‘substantive truth’). But, of course, such state of affairs is utterly undesirable and unacceptable in any criminal justice system, irrespective of the tradition. The greater the gap between the legal truth and objective truth, the less the legitimacy of the former and the less the social acceptability of such a flawed fact-finding process.¹⁵⁴

Some accounts deny, as a matter of principle, the possibility of reconstructing the ‘objective reality’ and the validity of the notion of ‘objective truth’, as a consequence of refutation of the existence of that reality.¹⁵⁵ But even if the possibility of a precise reconstruction of reality is accepted, the fact-finding process encounters several epistemic obstacles of subjective and objective nature, which may be either internal or external to that process.¹⁵⁶ Objective obstacles refer to the natural cognitive limitations of the subjects who perceive, convey, and process information about the events in question (e.g. witnesses, counsel, and adjudicators). The imperfection and fragility of

¹⁵¹ See *infra* section 5.

¹⁵² For in-depth analyses of conceptions of ‘truth’, see Damaška, ‘Truth in Adjudication’ (n 143), at 290-6 (overviewing philosophical theories on the possibility of acquisition of objective knowledge); R.S. Summers, ‘Formal Legal Truth and Substantive Truth in Judicial Fact-Finding – Their Justified Divergence in Some Particular Cases’, (1999) 18 *Law and Philosophy* 497; Weigend, ‘Should We Search for the Truth’ (n 39), at 394 *et seq.*; Grande, ‘Dances of Criminal Justice’ (n 31), at 146-7; Jung, ‘Nothing But the Truth?’ (n 62), at 147-50; Y. Naqvi, ‘The Right to Truth in International Law: Fact or Fiction?’, (2006) 88(862) *International Review of the Red Cross* 245, at 250-4 (providing philosophical definitions of ‘truth’).

¹⁵³ See, among others, Weigend, ‘Should We Search for the Truth’ (n 39), at 395 (discussing the ‘correspondence’ and ‘consensual’ theory of truth); Summers, ‘Formal Legal Truth’ (n 152), at 498 (distinguishing between ‘substantive’ as ‘actual truth’ v. ‘formal legal truth’ as ‘whatever is found by the legal fact-finder’); Grande, ‘Dances of Criminal Justice’ (n 31), at 146-8 (‘ontological’ v. ‘interpretive’ truth); Weigend, ‘Is the Criminal Process about Truth?’ (n 35), at 160 (on the notion of ‘procedural truth’ as euphemism for ‘an artificially generated set of facts’ opposed to the “‘true” truth’) and 170 (‘procedural truth’ as a function of criminal process).

¹⁵⁴ Summers, ‘Formal Legal Truth’ (n 152), at 498-9 (‘In a well designed system, judicial findings of formal legal truth generally [should] coincide with substantive truth’); M. Matravers, ‘“More than Just Illogical”: Truth and Jury Nullification’, in Duff *et al.* (eds), *The Trial on Trial I* (n 7), at 73; Weigend, ‘Should We Search for the Truth’ (n 39), at 391 (‘the public would be reluctant to accept a criminal judgment that is ostensibly based on a lie.’); *id.*, ‘Is the Criminal Process about Truth?’ (n 35), at 173.

¹⁵⁵ On the ‘metaphysical objection’, see Grano, *Confessions, Truth, and the Law* (n 170), at 12-3.

¹⁵⁶ Distinguishing between values ‘external’ and ‘internal’ to proof, see H.L. Ho, ‘Justice in the Pursuit of Truth: A Moral Defence of the Similar Facts Rule’, (2006) 35 (1) *Common Law World Review* 51, at 53-4. Ho refers to Wigmore’s distinction between ‘rules of probative policy’ and ‘rules of extrinsic policy’. J.H. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, Vol. 1, 3rd ed. (Boston: Little Brown, 1940) 296.

the sources and communicators of evidence, including the notorious issues of the deficient character of human perception and malleability of memory images, obstruct the accurate reconstruction of events, or even render it impossible.¹⁵⁷

Subjective barriers such as deliberate truth distortions, are more likely to impair the fact-finding task in a criminal process than in any other context. Certain actors (especially the accused) may have strong incentives not only to conceal truth but also to promote falsehood.¹⁵⁸ Moreover, the defects in the way criminal justice is administered, which cannot be justified on the normative and legal policy grounds either, will tend to decrease the fact-finding precision. The examples are inequality of resources between the parties and poor legal representation, bias and incompetence of fact-finders, etc.¹⁵⁹ These handicaps are internal to fact-finding. The extrinsic obstacles to the faithful pursuit of the truth, stemming from outside of the fact-finding process, may well be justifiable by normative reasons as they relate to the need to safeguard the legally protected interests.¹⁶⁰ The forensic inquiry is thus subjected to deliberate and legitimate exemptions: the procedural truth is not to be sought at all costs.¹⁶¹ The scope of factual inquiry and the degree of accuracy are moderated by limitations imposed on the epistemic methods in view of the concurring or collateral social values and needs that a criminal process must serve or, at least, respect.¹⁶² Such constraints on the scope and means of legal inquiry include fair trial rights and exclusionary rules,¹⁶³ the right to life, privacy and physical safety of witnesses and third parties,¹⁶⁴ the integrity of certain professions,¹⁶⁵ and national security and state secrets.¹⁶⁶

¹⁵⁷ Jung, 'Nothing But the Truth?' (n 62), at 147-50 and 154 ('It is never possible simply to reconstruct the exact actions or utterances that gave rise to the case at hand. No witness can precisely remember what was once said, heard or seen, and even the videotape of an undisputed crime cannot reveal the stage of mind of the accused.'). But see Grano, *Confessions, Truth, and the Law* (n 170), at 12 (the 'epistemological objection'—i.e. the 'dependency on the perceptions, inferences, memory, and veracity of fallible witnesses'—does not dismiss the need to promote the truth-seeking in the process).

¹⁵⁸ Frankel, 'The Search for Truth' (n 46), at 1037. See also Weigend, 'Is the Criminal Process about Truth?' (n 35), at 157 ('there is hardly an arrangement less likely than the criminal process to bring out the "truth". The reasons are obvious: crime is not something the culprit or the victim has reason to brag about (and if either does, he is unlikely to say the truth), and the impending consequences of an emergence of the truth are (at least for one party) quite unwelcome. The result is a strong incentive for passively or actively concealing relevant facts') and 160.

¹⁵⁹ Summers, 'Formal Legal Truth' (n 152), at 499.

¹⁶⁰ Grano, *Confessions, Truth, and the Law* (n 170), at 6 (while truth discovery should indeed be a dominant goal of criminal proceedings, it does mean it must be or can be made the dominant or exclusive goal).

¹⁶¹ Ho, 'Justice in the Pursuit of Truth' (n 156), at 54 (*Pearse v. Pearse* case (1846): 'Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much'); Damaška, 'Evidentiary Barriers to Conviction' (n 15), at 578 ('The pursuit of truth in the criminal process is not an untrammelled exercise in cognition.') and 588; Jackson, 'Managing Uncertainty and Finality' (n 7), at 125; Jung, 'Nothing But the Truth?' (n 62), at 147; Weigend, 'Is the Criminal Process about Truth?' (n 35), at 167; A. Eser, 'The "Adversarial" Procedure: A Model Superior to Other Trial Systems in International Criminal Justice? Reflexions of a Judge', in T. Kruesmann (ed.), *ICTY: Towards a Fair Trial?* (Graz: Neuer Wissenschaftlicher Verlag, 2009) 224 n56 ('This ... does, of course, not mean that in criminal proceedings the search for truth could and should be pursued "at any price".')

¹⁶² Damaška, 'Truth in Adjudication' (n 143), at 301 ('truth-conducive values cannot be an overriding consideration in legal proceedings: its is generally recognized that several social needs and values exercise a constraining effect on attempts to achieve fact-finding precision.') and 301, 305 (limited court time and resources); *id.*, 'Evidentiary Barriers to Conviction' (n 15), at 579 and 588 ('In the dialectics of the criminal process, there is always a point where fact-finding precision must give way to other societal values.');

Summers, 'Formal Legal Truth' (n 152), at 499-500 and 511 ('the divergence [between substantive and formal legal truth] is merely the price we pay for having a complex multi-purpose system in which actual truth, and what legally follows from it, comprise but one value among a variety of important values competing for legal realization'); A. Ashworth and M. Redmayne, *The Criminal Process*, 3rd ed. (Oxford: Oxford University Press, 2005) 24 ('The trial is not just about accurate fact-finding: ... principles of fairness lie at the heart of the trial in particular, as well as the criminal process in general. Thus, the trial is not just a diagnostic procedure, of which the sole purpose is to establish as accurately as possible (subject to the standard of proof) what happened.');

Grano, *Confessions, Truth, and the Law* (n 170), at 17.

¹⁶³ Various categories of potentially relevant and probative evidence may be excluded (e.g. illegally obtained evidence, coerced confessions, privileged communication, and hearsay). While being one aspect of rights-protection, these limitations are simultaneously internal to the truth-seeking process. Their other rationale is to ensure the reliability of

In view of these constraints, ‘procedural truth’ as the object of legal inquiry in the context of criminal process will more likely than not diverge from the ‘absolute truth’.¹⁶⁷ The question to what degree the gap between the two kinds of ‘truths’ is tolerable in criminal proceedings is of importance in comparative criminal procedure. Adversarial and inquisitorial systems may be contrasted by their implied adherence to different theories of ‘truth’, as outlined above, and this leads to them to prioritize it differently and to adopt divergent arrangements for truth-finding.¹⁶⁸

4.3 Truth in a comparative perspective

At this juncture, it is worth embedding the approaches of ‘truth’ and truth-finding in the criminal procedure approaches under the ‘adversarial’ and ‘inquisitorial’ models. Both major legal traditions posit the search for the truth as the accurate factual basis for the decision as a purpose of criminal justice and a core function of the criminal trial. In a general sense, truth-orientation is an intrinsic and assumed feature of criminal trials in both adversarial and inquisitorial systems and the epistemological premise of criminal law adjudication.¹⁶⁹

But what varies significantly among Anglo-American and Continental approaches are the procedural mechanisms and modalities deployed for that purpose, including the basic contours of professional roles assigned to the participants in a legal inquiry and fact-finding devices made available to them.¹⁷⁰ At the risk of over-generalizing consensus and downplaying diversity among jurisdictions pertaining to any given tradition, it can be said that the two models rest on different epistemological foundations and conceptions of judicial truth.¹⁷¹ Subject to the caveat about the

evidence and accuracy of fact-finding. On this duality, see Damaška, ‘Truth in Adjudication’ (n 143), at 306-7; *id.*, ‘Evidentiary Barriers to Conviction’ (n 15), at 513; Summers, ‘Formal Legal Truth’ (n 152), at 502-3.

¹⁶⁴ Arts 2 and 8 ECHR; *Doorson v. the Netherlands*, Judgment, Application No. 20542/92, ECtHR, 26 March 1996, paras 70-1.

¹⁶⁵ This results in the institution of profession-specific and personal testimonial privileges and immunities for next kin, medical staff, legal counsel and judges in the same case, clergymen, etc. On the status of professional and personal testimonial privileges in Germany, see Weigend, ‘Should We Search for the Truth’ (n 39), at 400 (noting that in Germany such privileges are recognized to a larger extent than in most common law jurisdictions).

¹⁶⁶ Weigend, ‘Is the Criminal Process about Truth?’ (n 35), at 168.

¹⁶⁷ Eser, ‘The “Adversarial” Procedure’ (n 161), at 225 n56 (‘courts established and performed by human beings—and not by an omniscient God—will realistically never reach more than “procedural” truth.’).

¹⁶⁸ Grande, ‘Dances of Criminal Justice’ (n 31), at 146 (‘far from one procedural type being more committed to the truth than the other, the systemic difference ... is to be located in the paths that the systems follow in searching for the truth and in the assumptions about what type of truth is deemed discoverable through the criminal process’); Hodgson, ‘Conceptions of the Trial in Inquisitorial and Adversarial Procedure’ (n 67), at 225.

¹⁶⁹ Jörg *et al.*, ‘Are Inquisitorial and Adversarial Systems Converging’ (n 28), at 56 (‘the quest for the truth ... is too self-evidence a goal of modern criminal justice to waste words on’); T.L. Steffen, ‘Truth as Second Fiddle: Reevaluating the Place of Truth in the Adversarial Trial Ensemble’, (1988) 1988 *Utah Law Review* 799, at 803 (on the truth as the ‘reigning’ and ‘paramount’ objective of every trial).

¹⁷⁰ J.D. Grano, *Confessions, Truth, and the Law* (Ann Arbor: The University of Michigan Press, 1993) 16 (‘If, as is now being suggested, the discovery of truth will be a dominant concern of any rational criminal justice system, one should expect this actually to be the case in existing systems regardless of their ideological differences. From this perspective, the Anglo-American and European systems may be seen as differing more in the means they employ than in their ends.’); H.-H. Jescheck, ‘Principles of German Criminal Procedure in Comparison with American Law’, (1970) 56(2) *Virginia Law Review* 239, at 240-1 (‘the object of both trials [in the Continental as well as Anglo-American system] is the same search for the truth within the permissible legal framework. ... The difference between German and American procedural law does not lie, therefore, in the high ideals which have been set, but rather in the methods chosen to obtain them.’); Weigend, ‘Should We Search for the Truth’ (n 39), at 414 (‘Inquisitorial and adversarial models of trying criminal cases do not differ so much in their aim—the finding of the “truth”—but in the allocation of responsibility for reaching it.’).

¹⁷¹ S. Zappalà, *Human Rights in International Criminal Proceedings* (Oxford: Oxford University Press, 2003) 16 (‘this differentiation reflects two opposing epistemological beliefs: while for the inquisitorial paradigm there is an objective truth that the “inquisitor” must ascertain, for the accusatorial approach the truth is the natural and logical result of a pre-determined process.’); F. Gaynor, ‘Evidence, Truth and History in International Trials’, (2012) 10 *JICJ* 1257, at 1259 (‘The extent to which a criminal trial is essentially a truth-finding exercise is one of the philosophical fault-lines which divide the inquisitorial and adversarial systems. The core purpose of inquisitorial systems is to get as close to truth as

elusiveness of the purist distinctions in the modern world of procedural amalgams, adversarial systems can generally be deemed to gravitate towards the ‘consensus’ interpretation of ‘truth’ whereas inquisitorial systems cling to the ‘correspondence’ theory.¹⁷² This philosophical divide, in turn, explains their preferences for specific fact-finding strategies and stark differences, which derive from them.¹⁷³

The general attitude in common law jurisdictions about the postulate that the ‘objective truth’ is discoverable and must be pursued through criminal trials is sceptical.¹⁷⁴ Given that no human cognitive process is fully neutral, what can be ascertained is not the ultimate truth, but a consensual or interpretive truth arrived at as a result of the clash of two partisan positions on the matter.¹⁷⁵ This agnostic vision entails that the criminal process ought not to be a pursuit of objective truth but a way of having the parties present their opposing accounts with view to resolving a dispute and, if possible, reconciling them.¹⁷⁶ The aim of the process is to arrive at a ‘truth’ agreeable to the parties, which is the concept of ‘truth’ that is consensual and relative.¹⁷⁷ But where agreement is not forthcoming and the ‘truth’ remains contested, it must be ascertained in a fair evidentiary contest between the adversary parties. The truth is then presented essentially as the outcome of a dialectic clash between the two opposing accounts that contend for the status of the ‘truth’.¹⁷⁸ The compliance with the rules of the contest safeguarding fair and equal opportunities for the parties to make their case is mandatory. Due to tenuous grounding of ‘interpretive truth’ in the objective reality, the rules of adversarial combat are the only real guarantee that the truth can emerge from the proceedings.¹⁷⁹

possible. Not so the party-driven adversarial system, which is more oriented to ensuring that the evidence submitted by the parties conforms with rules designed to preserve the fairness of the trial.’).

¹⁷² Weigend, ‘Should We Search for the Truth’ (n 39), at 396, 398.

¹⁷³ Grande, ‘Dances of Criminal Justice’ (n 31), at 146 (‘At the core of this [inquisitorial v. adversarial - SV] polarisation lies a very different attitude toward the search for the truth’); Weigend, ‘Should We Search for the Truth’ (n 39), at 395 (‘The different approaches toward truth-finding ... have a direct impact on the function and structure of the criminal process.’).

¹⁷⁴ Hodgson, ‘Conceptions of the Trial in Inquisitorial and Adversarial Procedure’ (n 67), at 225 (describing the common law interpretation of the ‘legal truth’ as something ‘which is contingent, existing not so much as an objective absolute but as most plausible or likely account, established after the elimination of doubt’); Weigend, ‘Is the Criminal Process about Truth?’ (n 35), at 168 (the idea of truth as a procedural concept ‘comports well with an entrenched Anglo-American skepticism about man’s ability to discover the “substantive” truth’).

¹⁷⁵ E.g. *United States v. Cronin*, 466 US 648, 655 (1984) (‘Truth is best discovered by powerful statements on both sides of a question.’). See also G. Goodpaster, ‘On the Theory of American Adversary Criminal Trial’, (1987) 78 *Journal of Criminal Law and Criminology* 118, at 121; Grande, ‘Dances of Criminal Justice’ (n 31), at 147; Damaška, ‘Presentation of Evidence’ (n 100), at 1104-5 (in the Anglo-American conception, ‘the truth appears elusive, often a matter of feeling and intuition’ and ‘a matter of perspective’); Weigend, ‘Should We Search for the Truth’ (n 39), at 397 (‘If no pre-conceived “objective” truth exists, but different people entertain different (interest-driven) notions of the relevant facts, then it makes sense to have these different notions presented in court and to base the decision on that version which, on balance, appears more plausible to the trier of fact.’).

¹⁷⁶ Damaška, ‘Evidentiary Barriers to Conviction’ (n 15), at 563 and 581; Goodpaster, ‘On the Theory of American Adversary Criminal Trial’ (n 175), at 125.

¹⁷⁷ Langer, ‘From Legal Transplants to Legal Translations’ (n 24), at 10 (‘The adversarial conception of truth is more relative and consensual: if the parties come to an agreement as to the facts of the case, through plea agreements or stipulations, it is less important to determine how events actually occurred’); Weigend, ‘Is the Criminal Process about Truth?’ (n 35), at 170-1.

¹⁷⁸ Damaška, ‘Truth in Adjudication’ (n 143), at 295 (‘truth tends to be equated with whatever is agreed upon following inquiry free of distorting constraints, or with whatever has been successfully defended against all comers.’); *id.*, ‘Presentation of Evidence’ (n 100), at 1105 (characterizing the adversarial method as ‘a variation of the dialectic method for the divination of the elusive truth.’ Footnotes omitted.); Goodpaster, ‘On the Theory of American Adversary Criminal Trial’ (n 175), at 120 (describing the adversary method as a dialectic process of persuasion and ‘a dramatic contest aimed at shaping two mutually inconsistent interpretations of common data’) and 124 (criticizing an ‘invisible hand’ theory, according to which the truth emerges inadvertently from the vigorous opposition between the two advocates none of whom directly aims at establishing it).

¹⁷⁹ Weigend, ‘Should We Search for the Truth’ (n 39), at 396 (if ‘whatever emerges from a fair and rational discourse among the parties can be accepted as the “truth”, the content of the rules that determine the process becomes more

Chapter 4: Trial Phase: A Theoretical and Comparative Outlook

Hence, the adversarial justice is done with a more persuasive version of ‘truth’ prevailing over the other, or with the emergence of a ‘consensual truth’ that puts an end to the dispute and becomes the basis for the decision and sanction. The objective of definitively settling the dispute at trial imposes stringent limits on the scope of factual inquiry that the court can conduct and on the ambit of the decision. The inquiry may not extend beyond what is necessary for achieving that. The competitive quest for the ‘winning’ version of the ‘truth’ demands a confrontational or dialectical method of fact-finding by the parties who are candidly biased and present their evidence in the most favourable light possible.¹⁸⁰ The impartial search of the truth by an ostensibly neutral investigative authority is a utopian and fallacious idea. Least of all can one demand impartiality and detachment from the parties with an obvious interest in the outcome of the case. Therefore, the partisanship and self-interest are acknowledged as the cornerstone of the adversarial concept of justice.

Subject to limited and elastic rules of professional ethics, zealous pursuit of the prosecution and defence is encouraged and invigorated at all stages of criminal process. The parties are expected to strive to ‘win’ the case and are provided with a suitable ‘battleground’ for presenting evidence to corroborate their account of ‘truth’ and to challenge the ostensible ‘untruth’ of the opponent.¹⁸¹ They are free to define the scope of the case and to dispose of it consensually, to collect and prepare ‘their’ evidence, and to defend their interpretation of facts in a trial contest. The latter is organized as a public and oral hearing before a passive and neutral arbiter with no prior knowledge of evidence. As it is the evidentiary duel between the parties and not an official inquest that should tease out the ‘truth’, cross-examination by the opponent lawyer rather than a judicial investigation is traditionally viewed as an ultimate tool for the discovery of the truth. Hence the famous celebration of cross-examination as the best truth-finding method by Wigmore:

It may be that in more than one sense [cross-examination] takes the place in our system which torture occupied in the mediaeval system of the civilians. Nevertheless, it is beyond any doubt the greatest legal engine ever invented for the discovery of truth. However difficult it may be for the layman, the scientist, or the foreign jurist to appreciate this, its wonderful power, there has probably never been a moment’s doubt upon this point in the mind of a lawyer of experience. ... [C]ross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial-procedure.¹⁸²

Consequently, the concept of ‘truth’ in the adversarial model can be defined as ‘the ideal end of a properly structured inquiry’.¹⁸³ The central question of the adversary model is *how* (meaning under what procedure) the outcome has been arrived at, rather than what the requirements are towards the very outcome. The emphasis is therefore on the construction and strict observance of the rules which are apt to ensure fairness, rather than on the discovery of ‘objective truth’ in the first place.¹⁸⁴ In a segment of US scholarship, this reverence for procedural regulation has been

important than the outcome itself, and adherence to these rules acquires paramount importance for truth-finding.’); Damaška, ‘Evidentiary Barriers to Conviction’ (n 15), at 581 (‘the emphasis shifts here from problems of cognition to the concern that parties abide by the rules regulating their “battle”.’).

¹⁸⁰ Weigend, ‘Is the Criminal Process about Truth?’ (n 35), at 159 (‘In this system, the truth ideally is discovered by testing differing versions of the relevant facts through cross-examination of the respective proponents, each side striving to present the facts favourable to its case in the best light possible while disparaging the opponent’s version.’).

¹⁸¹ Weigend, ‘Should We Search for the Truth’ (n 39), at 396.

¹⁸² Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (n 156) §1367.

¹⁸³ Damaška, ‘Truth in Adjudication’ (n 143), at 294 (noting ‘the shift of emphasis from truth to the process of justification of claims of knowledge. ... [I]f there is no clear access to truth, we should at least arrive at fact-finding decisions in proper ways. As a consequence of this shift of emphasis, the line has become thin between a belief that is properly justified and a belief that is true.’); Goodpaster, ‘On the Theory of American Adversary Criminal Trial’ (n 175), at 127-8 (‘The connecting idea [between truth and fairness] appears to be that a fair procedure represents a means of ensuring that the truth will be discovered’). See also *Polk Country v. Dodgson*, 454 US 312 (1981) (‘The system assumes that adversarial trial testing will advance the public interests in truth and fairness.’).

¹⁸⁴ See also Zappalà, *Human Rights* (n 171), at 16 (‘from an accusatorial viewpoint the process *per se* is what really matters. The establishment of historical truth cannot be ensured other than through respect for procedural rules, which

diagnosed as an obsession with procedures.¹⁸⁵ In practical terms, this means among others that the party whose claim is righteous might still lose on procedural grounds.¹⁸⁶ The corollary of the conception in which truth is contingent on fairness is that whatever is decided *fairly*, is *true*.¹⁸⁷

The format of adversarial fact-finding generally comports with the type and structure of state authority and to a certain extent is influenced by the predominant conceptions about the role of the state, which are the ideological grounding of legal process.¹⁸⁸ The adversarial legal culture is deeply interwoven with the liberal ideology based on the primacy of individual interests, personal autonomy, mistrust towards state officials, and minimization of state involvement and paternalism.¹⁸⁹ Liberal values pervade most aspects of the adversarial paradigm and, importantly, the vision of the proper roles of participants and the balance between them.¹⁹⁰ Being real masters of their cases, parties possess full control over evidence at all stages of process, including pre-trial preparation of witnesses, and thus are deemed to ‘own’ their witnesses.¹⁹¹

By contrast, triers of fact are granted no prior access to materials as a safeguard of impartiality and remain passive during the hearing to live up to that expectation until the verdict, which reflects ‘both the idea of limited government and the horizontal division of authority’.¹⁹² Autonomy and party control over proceedings are harmonious with the view that the best truth the criminal process can produce is consensual.¹⁹³ The parties should be able to retract their dispute from the adjudicator once there is no need for a contest. The defendant should be free to elect a suitable arrangement, including a plea of guilty and waiving his right to a trial, despite that one might deem it preposterous.¹⁹⁴ A judge is not in a position to make such judgements because the

constitute the method for reaching “judicial truth”.); Gaynor, ‘Evidence, Truth and History in International Trials’ (n 171), at 1259.

¹⁸⁵ For a parallel between over-regulation in the favourite American sport game—football as opposed to the Continental soccer—and the ‘over-proceduralization’ of the US criminal process, see Pizzi, *Trials without Truth* (n 117), at 18 (‘we have a weakness: we are procedure junkies and always prefer to add more procedure’) and 25 (discussing ‘the judicial obsession with adjudicative perfection’ and ‘worship of proceduralism’ in the US legal culture).

¹⁸⁶ Damaška, ‘Evidentiary Barriers to Conviction’ (n 15), at 581-2 (‘In the conceptual realm of the party contest, it seems perfectly acceptable that a party, perhaps in the right on the merits, “lose” on a technicality – if he violated the rules regulating the contest.’).

¹⁸⁷ Goodpaster, ‘On the Theory of American Adversary Criminal Trial’ (n 175), at 128.

¹⁸⁸ Damaška, ‘Structures of Authority’ (n 64), at 529 (renouncing the idea that ‘the genesis of procedural systems [is] reduced essentially to a more or less consistent derivation from the tenets of prevailing political ideology.’).

¹⁸⁹ For a detailed discussion of the procedural implications of Classic Liberalism in the adversary system, see Damaška, ‘Structures of Authority’ (n 64), at 534-9; *id.*, ‘Evidentiary Barriers to Conviction’ (n 15), at 583; Roberts, ‘Theorising Procedural Tradition’ (n 145), at 40 (liberalism as a moral and political philosophy is an ‘official philosophy of all western states’ and its values ‘constitute the deep structure of English criminal procedure law and practice’); Grano, *Confessions, Truth, and the Law* (n 170), at 6-10 (defending a dominant role of the discovery of the truth and yet acknowledging the powerful influence of the ideological constraints in the US); Jörg *et al.*, ‘Are Inquisitorial and Adversarial Systems Converging’ (n 28), at 45 (‘common law ways of thinking about accountability and state derive initially from a negative image of the state and a minimalist view of its function’).

¹⁹⁰ Thus, the judicial role in English trials transmogrified into that of an umpire due to distrust for public officials and state intervention inspired by classical liberalism: Grande, ‘Dances of Criminal Justice’ (n 31), at 151-2.

¹⁹¹ Damaška, ‘Evidentiary Barriers to Conviction’ (n 15), at 525; Pizzi, *Trials without Truth* (n 117), at 21-2 (noting the utmost importance of thorough pre-trial preparation of witnesses by the calling party, including mock cross-examinations).

¹⁹² Damaška, ‘Structures of Authority’ (n 64), at 536.

¹⁹³ M.D. Dubber, ‘The Criminal Trial and the Legitimation of Punishment’, in Duff *et al.* (eds), *The Trial on Trial 1* (n 7), at 94 (a confession or a plea of guilty, ‘most dramatically if it occurs in open court, can be regarded as the ultimate exercise of the accused’s active autonomy, in that he literally applies the relevant provisions of the criminal law to himself.’).

¹⁹⁴ Damaška, ‘Structures of Authority’ (n 64), at 535-6 (‘The defendant is presumed to know what is best for him, and since no one else can establish better knowledge, no official has the right to impose his views on the defendant.’); J. Iontcheva Turner and T. Weigend, ‘Negotated Justice’, in Sluiter *et al.* (eds), *International Criminal Procedure* (n 11), at 1403-4 (‘in common law jurisdictions the judge herself will know little or nothing about the case in advance of trial and is therefore not in a good position to second-guess the wisdom of the defendant’s plea.’); Langer, ‘From Legal Transplants to Legal Translations’ (n 24), at 13-4, indicating that both the prosecution and the defence possess more

accused is a party and autonomous ‘subject’, rather than ‘object’ of proceedings, who will make her own strategic choices. Where the parties proceed a trial contest, the emphasis is made on procedural fairness and equality between the unequally resourced contestants, the defendant and the state.¹⁹⁵ Since forensic predominance is essential to ‘winning’ the case,¹⁹⁶ procedural fairness rather than ‘truth’ becomes synonymous of justice.¹⁹⁷

The truth-generating potential of the adversarial process has been a bone of contention in the scholarship. The partisan setup of truth-finding and formidable obstacles posed by values extrinsic to legal inquiry, particularly in the US, have widely been seen as factors preventing the truth from becoming the dominant goal of criminal procedure.¹⁹⁸ Jerome Frank has even famously compared the American trial method to ‘throwing pepper in the eyes of a surgeon when he is performing an operation’.¹⁹⁹ Many continental scholars have also been critical about the adversarial method of truth-discovery.²⁰⁰ The sum of two ‘half-truths’ does not necessarily amount to a whole truth and two ‘wrongs’ do not make a right.²⁰¹ The adversarial court’s decision is invariably based on a ‘limited picture of reality’ formed by two biased accounts.²⁰² As a consequence of its realist perspective on forensic truth that tolerates a gap between ‘substantive’ and ‘procedural’ truth as long as the inquiry follows the optimal design,²⁰³ the adversarial process is often believed to evince a weaker normative commitment to the discovery of truth than its inquisitorial counterpart.²⁰⁴ This claim will be revisited shortly upon the overview of the position in inquisitorial systems regarding

powers in the adversarial system, e.g. the defence does its own pre-trial investigation, while in the inquisitorial system broad investigatory powers are given to the judge.

¹⁹⁵ Damaška, ‘Structures of Authority’ (n 64), at 530 (‘Because state officials cannot be trusted and consummate devilry on their part cannot be ruled out, the best procedural design is one in which the individual and the state engage as adversaries in a highly formalized battle.’).

¹⁹⁶ On ‘conflict-solving type of proceedings’, see Damaška, *The Faces of Justice* (n 60), at 101 (‘Proceedings conceived as a contest of two adverse parties before a neutral conflict resolver generate structural pressures toward judgement in favor of the party who wins the courtroom disputation. ... Judgements tend to be justified procedurally – that is, by victory in the forensic contest.’).

¹⁹⁷ Grande, ‘Dances of Criminal Justice’ (n 31), at 147-8 (in the adversarial system, justice and fairness are ‘inevitably strictly equated ... because only a fair contest can bring about just results’) and 163; Weigend, ‘Is the Criminal Process about Truth?’ (n 35), at 168 (‘the fairness of proceedings becomes the main foundation of the verdict’s legitimacy, and any result that has been found in conformity with procedural rules becomes acceptable’).

¹⁹⁸ Particularly strong criticisms were made by American scholars in relation to the US criminal procedure. See Pizzi, *Trials without Truth* (n 117), at 5; S. Saltzburg, ‘Lawyers, Clients, and the Adversary System’, (1986) 37 *Mercer Law Review* 647, at 651 (the American adversary system is ‘misdescribed as a search for truth’); Frankel, ‘The Search for Truth’ (n 46), at 1032 and 1052 (‘we are too much committed to contentiousness as a good in itself and too little devoted to truth’); Goodpaster, ‘On the Theory of American Adversary Criminal Trial’ (n 175), at 125 (‘structurally truth-dysfunctional’); G. Van Kessel, ‘Adversary Excesses in the American Criminal Trial’, (1992) 67 *Notre Dame Law Review* 538-539 (‘The excesses of our adversary system include a diminished respect for the discovery of truth.’); P. Arenella, ‘Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction without Adjudication’ (1980) 78 *Michigan Law Review* 463, at 476-7 (the US criminal justice system does not operate as if the discovery of truth were its reigning objective); *id.*, ‘Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts’ Competing Ideologies’, (1983) 72 *Georgetown Law Journal* 185, at 197-202.

¹⁹⁹ J. Frank, *Courts on Trial: Myth and Reality in American Justice* (Princeton: Princeton University Press, 1949) 85.

²⁰⁰ Jung, ‘Nothing but the Truth?’ (n 62), at 151; Weigend, ‘Should We Search for the Truth’ (n 39), at 407-8.

²⁰¹ Weigend, ‘Is the Criminal Process about Truth?’ (n 35), at 159 (‘This system is built on the theory that two halves (of the truth) make one whole, that the truth will appear like a bright streak of light born of the tension between the opposite poles.’).

²⁰² Grande, ‘Dances of Criminal Justice’ (n 31), at 156.

²⁰³ Damaška, ‘Truth in Adjudication’ (n 143), at 295 (‘According to [the realist view of truth], what is “really” true need not square with what has been decided to be true; factual findings need not match reality, even though inquiries leading to them were optimally designed.’).

²⁰⁴ E.g. Damaška, ‘Evidentiary Barriers to Conviction’ (n 15), at 580 (‘the continental non-adversary system of procedure is more committed to the search for truth than is the Anglo-American adversary system’) and 587; *id.*, *Evidence Law Adrift* (New Haven, Yale University Press, 1997) 122. Cf. Naqvi, ‘The Right to Truth in International Law’ (n 152), at 245-6 (noting, however, that despite differences in the methods of inquiry, the outcome of a suit in both systems is determined by the same factor – whether the adjudicators are convinced of guilt).

the conception of ‘truth’ and optimal truth-finding arrangements for the purpose of clarifying the comparative differences.

As indicated previously, the interpretation of ‘truth’ and the respective structure of the truth-finding mechanisms under the inquisitorial model are in stark contrast with the adversarial paradigm. Inquisitorial systems generally embrace a less instrumental approach to truth-finding and proceed on the belief that ‘ontological’ or ‘material’ truth is attainable or, at least, that the purpose of investigation is to come as closely as possible to it.²⁰⁵ This does not mean that the search for the ‘objective’ and ‘absolute’ truth becomes a boundless exercise – like in adversarial systems, it is qualified by the need to ensure respect for other legally protected values.²⁰⁶ But the inquisitorial criminal process sustains a normative belief in the need for the court to establish the truth whenever feasible and remains faithful to this commitment.

On the Continent, the courts are expected to undertake a purposeful effort to establish facts as they occurred – in order to genuinely ‘solve the case’, rather than merely to ‘settle the dispute’ and let the outcome point incidentally to the ‘truth’.²⁰⁷ The discovery of truth enjoys a prominent place among other priorities and is deemed an overarching goal of the criminal proceedings.²⁰⁸ Truth is a ‘prerequisite to a just decision’,²⁰⁹ which must establish, to intimate conviction of judges, whether the alleged crime occurred, whether it was committed by the defendant and, if so, what penal measure corresponds to it. The inquisitorial model is less tolerant toward gaps between ‘substantive’ and ‘procedural’ truth: the outcome is considered ‘just’ if it reflects the ‘objective’ truth or comes close to it.

This attitude comports with the hierarchical organization of officialdom and the role of the state as a ‘benevolent and most powerful protector and guarantor of public interest’ which can be entrusted the task of pursuing the ultimate truth in an unbiased and detached fashion.²¹⁰ The forensic machinery and the attribution of the responsibility for fact-finding to no one but judges mirror this trust. The legal inquiry takes the form of an inquest by an active and non-partisan judicial officer (judge or prosecutor) who does a first-hand investigation into both types of evidence.²¹¹ One official version of ‘truth’ is consolidated as a result of pre-trial investigation to be verified at trial. The scope of private initiative in investigating facts is reduced: the court investigator can do better than rely for the ascertainment of the truth upon parties with incentives to

²⁰⁵ Damaška, ‘Evidentiary Barriers to Conviction’ (n 15), at 581 n199 (‘The revered continental concept of substantive truth (*Materielle Wahrheit*) is rooted in the Germanic tradition of philosophic inquiry); Grande, ‘Dances of Criminal Justice’ (n 31), at 146; Hodgson, ‘Conceptions of the Trial in Inquisitorial and Adversarial Procedure’ (n 67), at 225; Gaynor, ‘Evidence, Truth and History in International Trials’ (n 171), at 1259.

²⁰⁶ As stated by the German Federal Supreme Court, it is ‘no principle of criminal procedure to explore the truth at any price’ (Bundesgerichtshof in Strafsachen – BGHSt 14 [1960] 358, at 365 (cited in Eser, ‘The “Adversarial” Procedure’ (n 161), at 224-5 n56). See also Jung, ‘Nothing But the Truth?’ (n 62), at 155; Weigend, ‘Is the Criminal Process about Truth?’ (n 35), at 168.

²⁰⁷ Langer, ‘From Legal Transplants to Legal Translations’ (n 24), at 10-11; Damaška, ‘Evidentiary Barriers to Conviction’ (n 15), at 564; Weigend, ‘Is the Criminal Process about Truth?’ (n 35), at 168 (the Continental process ‘insists that substantive truth can be found if enough effort is made and that the criminal process is, in principle, a search for substantive truth’).

²⁰⁸ Zappalà, *Human Rights* (n 171), at 16 (‘The inquisitorial perspective generally considers that the objective of the criminal process is ascertaining the truth; this is and should be the overriding concern of the rules of criminal procedure.’)

²⁰⁹ Damaška, ‘Evidentiary Barriers to Conviction’ (n 15), at 581; *id.*, *The Faces of Justice* (n 60), at 128-30 (‘getting the facts right is normally one of the preconditions to realizing the goal of the legal process in the activist state.’).

²¹⁰ Damaška, ‘Structures of Authority’ (n 64), at 530 (‘state officials need not be mistrusted, they need not be limited to a passive role in the proceedings, and the ample powers they exercise need not be confiscated because of occasional abuse.’); Jörg *et al.*, ‘Are Inquisitorial and Adversarial Systems Converging’ (n 28), at 44.

²¹¹ Damaška, ‘Presentation of Evidence’ (n 100), at 1090 (‘the decisionmaker is active; he used the informational sources himself. Information does not reach him in the form of two one-sided accounts; he strives to reconstruct the “whole story” directly.’); Hodgson, ‘Conceptions of the Trial in Inquisitorial and Adversarial Procedure’ (n 67), at 224.

conceal or embellish it.²¹² The defence's evidentiary role is limited to assisting in the effort of assembling the dossier and probing evidence at the substantive hearing, for example, by drawing attention of the court to exculpatory information or aspects of evidence.²¹³

Guided by the duty of unravelling the 'objective truth' and equipped with relevant competences, the investigator bears responsibility for the factual accuracy of the outcome and to ensure that the decision is based on complete evidence that can be procured.²¹⁴ The existence of the single 'case of the truth' rather than two partisan cases implies that parties do not 'own' evidence. Nor are they allowed to shape evidence by substantively preparing witnesses and experts.²¹⁵ In a system that entrusts court investigators with interrogating witnesses in the pre-trial and emphasizes the need for spontaneous rather than rehearsed testimony at trial, party contact with witnesses outside of the courtroom may be qualified as an attempt to taint the court's evidence.²¹⁶

Fact-finding under the inquisitorial model is not limited to perspectives of two parties but it is a 'collective enterprise' dominated by the presiding judge.²¹⁷ Any evidentiary input that is relevant and promotes the search for the truth-finding is in principle admissible. The accused is allowed to contradict the charges and prosecution evidence with his or her account of facts and thus contributes to the establishment of the truth.²¹⁸ He or she is a full-fledged party who is not reducible to a witness and, therefore, may neither testify under oath nor be held liable for perjury. The flexible and pluralist approach to truth-finding in continental criminal proceedings enables accommodating participatory rights and evidentiary contributions by victims, who may be added as civil parties or as auxiliary or subsidiary prosecutors. This would be incompatible with the parties' monopoly over fact-finding and a delicate balance between them in adversarial systems; there, victims may only participate as witnesses or deliver statements on the impact of the crime.

Some features of the adversarial fact-finding model that restrict the evidentiary basis for the decision are not present in the inquisitorial model. The principle of free proof renders all probative evidence admissible and the standard of 'personal conviction' epitomizes freedom in its evaluation.²¹⁹ In the modern inquisitorial form, there exist rules for the exclusion of evidence obtained in violation of human rights and other extrinsic limitations of the fact-finding inquiry, but their number and reach are more limited than in adversarial systems.²²⁰ The pursuit of the objective truth is a goal on its own and the concept of 'justice' is not exhausted by 'due process' and compliance with procedural rules.²²¹ Importantly, the reforms of criminal procedure undertaken by Continental jurisdictions by way of transplanting some of the 'adversarial' features neither shook

²¹² Weigend, 'Should We Search for the Truth' (n 39), at 398 ('Neither in theory nor in practice does the inquisitorial; process produce "truth" through an interaction between the prosecution and the defense, but it is the court, albeit assisted by the parties, that conducts a methodical search').

²¹³ Jörg *et al.*, 'Are Inquisitorial and Adversarial Systems Converging' (n 28), at 47 (the presumption of impartiality of the prosecution or investigative judge allows the defence to depend on them in most matters of investigation); Hodgson, 'Conceptions of the Trial in Inquisitorial and Adversarial Procedure' (n 67), at 232 (in France the function of the defence counsel is to 'reread' the dossier in the way favourable to the accused, and not bring witnesses and challenging police action as would be the case in England).

²¹⁴ Grande, 'Dances of Criminal Justice' (n 31), at 147.

²¹⁵ Damaška, 'Evidentiary Barriers to Conviction' (n 15), at 583; Bradley, 'The Convergence of the Continental and the Common Law Model' (n 39), at 472.

²¹⁶ Damaška, 'Presentation of Evidence' (n 100), at 1088-9; Pizzi, *Trials without Truth* (n 117), at 22-3 (discussing the emphasis on spontaneity and impropriety of pre-trial preparation in the Continental procedure).

²¹⁷ Grande, 'Dances of Criminal Justice' (n 31), at 154-5.

²¹⁸ J.R. Spencer, 'Introduction', in M. Delmas-Marty and J.R. Spencer (eds), *European Criminal Procedure* (Oxford: Oxford University Press, 2002) 23-4.

²¹⁹ Damaška, 'Free Proof and its Detractors' (n 249), at 347 ('free evaluation of evidence has been evaluated to the tank of a regulative principle of considerable importance in legal argumentation against binding rules of weight.').

²²⁰ *Ibid.*, at 348; C. Bradley, 'The Exclusionary Rule in Germany', (1983) 96 *Harvard Law Review* 1032, at 1048; Weigend, 'Is the Criminal Process about Truth?' (n 35), at 168 (noting the prevalence of the exclusionary rules in the adversarial system); *id.*, 'Should We Search for the Truth' (n 44), at 400-1 (with further references to German jurisprudence mandating the exclusion of evidence obtained in violation of one's constitutional rights).

²²¹ Grande, 'Dances of Criminal Justice' (n 31), at 155 and 159.

the normative faith in ‘material truth’ nor supplanted it with the ‘interpretive’ truth.²²² Since the legal transplants were integrated in and adjusted to the inquisitorial context, their systemic effects and functions diverged from those of their historical precursors or common law prototypes. Thus, the provision of jury trials in civil law systems does not necessarily replicate common law arrangements regarding lay jury. Insofar as jurors on the Continent sit in a mixed bench together with professional judges, their function in truth-finding and decision-making process is different than at common law: they fully participate in the examination of evidence and deliberations on the guilt and sentence.²²³ By the same token, allowance for negotiated justice in inquisitorial systems is limited to minor offences and does not relieve the court from verifying the factual basis for the consensual disposition.²²⁴ The consequences of these innovations did not reach as far as to reverse the orientation of inquisitorial systems at ‘material truth’.

4.4 A superior model for truth-finding?

The foregoing overview of the interpretations of ‘truth’ and its implications for the truth-finding structures in the criminal procedure under both inquisitorial and adversarial models has referred to the claim that the former is stronger committed to the ‘truth’ than the latter. However, such a comparison is misleading for it assumes that the comparator—the very notion of truth—is the same whereas its conceptions in adversarial and inquisitorial contexts are fundamentally different. The comparison cannot be made without a prior choice for a specific interpretation. Before the normative grounds for that choice are agreed and universally shared, the comparison is bound to remain contentious, being based on subjective and impressionistic judgement.

It has been noted previously that a manifestly inaccurate outcome, such as the conviction of innocent, would be deemed unacceptable in the adversary system as in any other system whose claim to legitimacy is justified.²²⁵ Clearly, truth remains an aspiration, commitment, and fundamental value in adversarial criminal procedure.²²⁶ It is exalted as such in the relevant jurisprudential and courtroom rhetoric.²²⁷ This may co-exist with the more instrumental attitude

²²² Weigend, ‘Is the Criminal Process about Truth?’ (n 35), at 161 (‘[in] a “reformed” inquisitorial process ... truth-finding remained the primary objective but ... nonetheless accommodated, to a greater or lesser extent, the interests of individuals to keep certain (or all) information private.’). *Ibid.*, at 161-2 (discussing the example of Germany).

²²³ Damaška, ‘Evidentiary Barriers to Conviction’ (n 15), at 510 n4; Reamey, ‘Innovation or Renovation in Criminal Procedure’ (n 10), at 710.

²²⁴ On the examples of Italy and France, see Grande, ‘Dances of Criminal Justice’ (n 31), at 153, 155-7. Despite the 2004 reform of French criminal procedure introducing, for crimes punishable by one-year imprisonment, an analogue of a guilty plea leading to an abbreviated trial procedure (*comparution sur reconnaissance préalable de culpabilité*, Art. 495-7 Code of Criminal Procedure (France)), ‘it remains the responsibility of the court to satisfy itself that the offence has been fully investigated and the case against the accused made out’. See Hodgson, ‘Conceptions of the Trial in Inquisitorial and Adversarial Procedure’ (n 67), at 224 n6.

²²⁵ Erroneous acquittals are considered less troublesome and adversary trials are apt to err on this side: see Grano, *Confessions, Truth, and the Law* (n 170), at 11 and Goodpaster, ‘On the Theory of American Adversary Criminal Trial’ (n 175), at 127 and 135.

²²⁶ Weigend, ‘Is the Criminal Process about Truth?’ (n 35), at 172-3 (‘legal systems cannot openly declare the will of parties to be the supreme value; if they did, they would undercut the very foundations on which the administration of law—as a social institution—rests’); *id.*, ‘Should We Search for the Truth’ (n 44), at 398-9 (given the truth-orientation of common law of evidence, ‘it would be at least an overstatement to claim that adversarial systems are not interested in “substantive” truth.’); Steffen, ‘Truth as Second Fiddle’ (n 169), at 842; Grano, *Confessions, Truth, and the Law* (n 170), at 11 (‘the system’s retention of arguably less than optimal truth discovery procedures need not mean that truth is not a dominant consideration’) and 16.

²²⁷ Damaška, *Evidence Law Adrift* (n 204), at 123 (in the Anglo-American legal environment, ‘one finds a plethora of solemn judicial statements proclaiming that the discovery of the truth is the basic purpose of all trials’, but ‘these proclamations should not be taken at face value’). See e.g. *Tehan v. United States ex rel. Shott*, 382 US 406, 416 (1966) (‘[t]he basic purpose of a trial is the determination of the truth’); *Williams v. Florida*, 399 US 78, 82 (1970) (cited in Damaška, ‘Truth in Adjudication’ (n 143), at 301 n31). See also Weigend, ‘Is the Criminal Process about Truth?’ (n 35), at 159 (‘nothing can compare with the adversarial trial in demonstrating the importance of getting at the truth. Lawyers bring their skill to bear to expose falsehood, lies and inaccuracies; they bring up overlooked details and build and shatter hypotheses about what the “true” facts of the case may be’).

towards ‘truth’, which is seen as a means to achieve the primary goal of settling the dispute rather than as a primary objective.²²⁸

Damaška rejects the idea that truth discovery is valued equally in the two systems and explained this by the fact that ‘the adversary system is less committed to discovery of the truth’ as ‘the system is ... more attuned to other important values’.²²⁹ This does not explain how the fundamentally different ways of prioritizing the truth in the two systems can be compared at all. While there is considerable divergence in the character of that commitment, which is coloured by distinct ideologies and legal cultures, the appropriateness of describing the difference in relative terms (‘more’ or ‘less’) is precarious. The varying interpretations of ‘truth’ and disparities in the methodological premises for its discovery in criminal process are too significant to be eligible for a straightforward comparison. It may be akin to comparing different styles of architecture based on their commitment to aesthetical principles. A stronger adherence to other values besides ‘truth’ does not necessarily mean a less emphatic commitment to ‘truth’.²³⁰ This is especially so since the ‘truth’ is defined otherwise than ‘objective truth’ and deemed compatible with the goal of dispute resolution.²³¹ Indeed, instead of discussing the value of ‘truth’ in terms of a systemic commitment, it is preferable to speak of the ability of the system in question to produce substantively accurate outcomes, or its ‘relative suitability to lead to the truth’.²³² The following will review the inquisitorial and adversarial arrangements in this light.

From this perspective, some of the historically predetermined and typical elements of the adversarial system are deemed to have a truth-defeating potential.²³³ According to Langbein, at the end of the 13th century adversarial criminal trials acquired certain traits that obstructed rather than promoted truth-finding as a subterranean way of counterbalancing the harshness of criminal law whereby ‘too much truth meant too much death’.²³⁴ The need to perfect the adversarial method and promote policies other than the conviction of those *de facto* guilty was therefore a strong determinant in the evolution of criminal process. The goal of ‘truth discovery’ became identified with, or replaced by, the ‘axiomatic commitment to an adversarial or accusatorial mode of procedure’.²³⁵ This is why many insiders of the adversarial system have criticized it for rating truth too low among other values.²³⁶ Several typical aspects of the system come under attack in this respect.

First, numerous and stringent admissibility rules associated with adversarial process entail exclusion of potentially probative evidence. Among others, these are meant to prevent the juries from crediting it with more weight that it deserves and to enforce the discipline of law-enforcing

²²⁸ Summers, ‘Formal Legal Truth’ (n 152), at 499 n2 (‘The trial is a proceeding not for the discovery of truth as such, but for the establishment of a basis of fact for the adjustment of a dispute between litigants. Still it must never be forgotten that its prime objective is to have that basis as close an approximation to the truth as practicable.’ (citing E.M. Morgan, *Some Problems of Proof Under the Anglo-American System of Litigation* (New York: Columbia University Press, 1956) 128); Matravers, ‘Truth and Jury Nullification’ (n 154), at 72 (‘trials are designed to find not the substantive truth, but rather a definite winner’); Ho, ‘Justice in the Pursuit of the Truth’ (n 156), at 54 (‘the claim is that the pursuit of truth is the main goal, and not that it is the absolute or overriding end’).

²²⁹ Damaška, ‘Evidentiary Barriers to Conviction’ (n 15), at 580 n197.

²³⁰ Grano, *Confessions, Truth, and the Law* (n 170), at 12 (‘That a system pursues objectives other than truth does not prove that truth discovery is not a dominant concern.’).

²³¹ Grande, ‘Dances of Criminal Justice’ (n 31), at 148 n9.

²³² Damaška, ‘Presentation of Evidence’ (n 100), at 1088.

²³³ Frankel, ‘The Search for Truth’ (n 46), at 1036; Grano, *Confessions, Truth, and the Law* (n 170), at 6-7; McEwan, ‘Ritual, Fairness and Truth’ (n 39), at 66 (‘many of the rules of evidence which owe their existence to the structural demands of the adversarial system are incompatible with the uncovering of the truth’).

²³⁴ J.H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford: Clarendon Press, 2003) 6. On the history of adversarial trials, in addition to Langbein’s seminal work, see A. Duff *et al.* (eds), *The Trial on Trial, Volume 3: Towards a Normative Theory of the Criminal Trial* (Oxford/Portland, OR: Hart Publishing, 2007) 22-53; Grande, ‘Dances of Criminal Justice’ (n 31), at 148-52.

²³⁵ Grano, *Confessions, Truth, and the Law* (n 170), at 8.

²³⁶ See e.g. on the US trial system, *supra* n 198.

agencies in the collection of evidence.²³⁷ Although some exclusionary rules do serve to promote fact-finding accuracy by mandating the exclusion of inherently unreliable material (e.g. hearsay rule),²³⁸ they also limit the scope of potentially relevant and reliable evidence as the possible basis for the decision.²³⁹

Second, the adversarial proof-taking is deemed by some as a sub-optimal means for finding the truth due to its emphasis on partisanship.²⁴⁰ The problem exacerbated by the limited ability of the adversary system to guarantee the defendant equal access to the resources for obtaining and presenting evidence and utter dependence on the quality of legal representation.²⁴¹ In trying to win the ‘battle’, adversary parties are allowed and encouraged to employ all means available except for the extreme lines of conduct such as conniving or suborning perjury. The consequence of that is that they only bring to the table evidence favourable to their own case and cast it in the best possible light in trying to make their case seem stronger than it actually is.²⁴² Moreover, parties would do their best to challenge the evidence and reduce the credibility of sources relied upon by the other party, even if the evidence may be reliable and probative of the charge.²⁴³ The partisan zeal and one-sidedness are an expectation in a system where the lawyer’s ‘prime loyalty is to his

²³⁷ Weigend, ‘Is the Criminal Process about Truth?’ (n 35), at 165-6 (the rationale behind US exclusionary rules is to shield the jurors from the information they may be unable to process correctly, such as items appealing to emotions, prior sexual conduct, or criminal record evidence). On the rationales for the Anglo-American exclusionary rules, see Damaška, ‘Evidentiary Barriers to Conviction’ (n 15), at 514-25 (while such rules are intrinsic to fact-finding and familiar to both major systems, the ‘poisonous fruit’ doctrine is alien to continental procedure).

²³⁸ Weigend, ‘Should We Search for the Truth’ (n 39), at 398-9.

²³⁹ Goodpaster, ‘On the Theory of American Adversary Criminal Trial’ (n 175), at 122-3; Steffen, ‘Truth as Second Fiddle’ (n 169), at 833 (‘Truth and criminal accountability are the primary victims of the exclusionary rule’).

²⁴⁰ See e.g. Damaška, ‘Truth in Adjudication’ (n 143), at 306 (‘[trial] appears complicated and arduous for reasons other than the pull of non-epistemic procedural objectives. ... [T]he method of introducing evidence in two clashing cases, each presented in the most favourable light, further contributes to the perception of fact-finding difficulties. The role of rhetorical argumentation increases, skilful cross-examination reduces the credibility of almost any testimony, and the identification of uncontroversial propositions is made harder.’).

²⁴¹ Weigend, ‘Should We Search for the Truth’ (n 39), at 407.

²⁴² Frank, *Courts on Trial* (n 199), at 81 (‘frequently the partisanship of the opposing lawyers blocks the uncovering of vital evidence or leads to a presentation of vital testimony in a way that distorts it’.); Damaška, ‘Presentation of Evidence’ (n 100), at 1093 (‘It may be in the narrow interest of only one party, or in the common interest of both, that some items of information which the witness possesses do not reach the adjudicator – even though their relevancy to the quest for the truth is beyond dispute. Evidence unsupportive of one’s case has no function in the adversary litigation process, nor do matters which the parties decide to leave out of the disputation. ... Accordingly, the factual basis for the decision may be incomplete’, footnotes omitted); Jörg *et al.*, ‘Are Inquisitorial and Adversarial Systems Converging’ (n 28), at 43 (criticizing the ‘inordinate faith in the notion that partisan manipulation of evidentiary materials, even under equality of arms, can put an independent judge in a position to determine truth’ as ‘an assumption at best unproven, and at worst highly implausible’); Bradley, ‘The Convergence of the Continental and the Common Law Model’ (n 39), at 473 (‘in their efforts to advance only the view of the case most favourable to their side, the attorneys may skew the truth-finding process’); Goodpaster, ‘On the Theory of American Adversary Criminal Trial’ (n 175), at 120 (‘The parties and their attorneys are also attitudinally and ethically committed to winning the contest rather than to some other goal, such as discovery of truth or fairness to the opposing side.’ Footnote omitted), 122, 124 (discussing truth-defeating effects of adversary ethos); Weigend, ‘Should We Search for the Truth’ (n 39), at 407.

²⁴³ Frankel, ‘The Search for Truth’ (n 46), at 1039 (the litigator’s ‘devices are like other potent weapons, equally lethal for heroes and villains. ... [T]he gladiator using the weapons in the courtroom is not primarily crusading after truth, but seeking to win.’); Damaška, ‘Presentation of Evidence’ (n 100), at 1094 (‘Even with the best of intentions on the cross-examiner’s part, reliable testimony may easily be made to look debatable, and clear information may become obfuscated.’); *id.*, *Evidence Law Adrift* (n 204), at 123 (in the US courts the conduct of defence counsel that aims at anything but the search of truth is tolerated: ‘to confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, is countenanced as an acceptable course for counsel to take.’ Footnotes omitted); McEwan, ‘Ritual, Fairness and Truth’ (n 39), at 59 (‘Cross-examination is an extraordinarily oppressive way to challenge witness testimony, even when it is ostensibly polite and low-key. Frequently the questions are designed to confuse or humiliate witnesses by enmeshing them in minutiae of marginal or no relevance.’); Weigend, ‘Should We Search for the Truth’ (n 39), at 407.

client, not truth as such'.²⁴⁴ Although cross-examination is potentially a powerful device for exposing lies in case of dishonest witnesses,²⁴⁵ critics have raised doubts as to whether it indeed is a supreme truth-generating technique.²⁴⁶

Another truth-related challenge to the adversarial arrangements is the partisan preparation of witnesses for giving testimony in court, which is a structural necessity in the adversarial system. Subject only to limited policing and deontological regulation which varies per jurisdiction and relies largely on the assumption of professional integrity of counsel,²⁴⁷ this practice is fraught with the risks of unintentionally distorting original recollections and deliberate abuse or coaching.²⁴⁸ More than anything, the perils of witness proofing cast a shadow on the adversarial system's notion that the 'truth' can be a sum of two 'half-truths'.

Third, the adversarial system delegates the tasks of deciding on the facts and determining guilt to a lay jury, which is the case in many though not all common law countries (e.g. except for Israel and South Africa). The institute of jury symbolizes the community control over decision-making of professional judges and its ability to block unjust outcomes.²⁴⁹ Being an important safeguard for the defendant who is entitled to a 'trial by his peers', participatory justice injects the local sense of justice into the verdict and ensures the local acceptance of the trial outcome. At the same time, the jury emotionalizes the trial as lawyers perform in a way allowing them to meet cognitive needs of laypersons; it also reduces the evidentiary basis for the decision as many exclusionary rules are tailored for shielding the jury from inappropriate information that it may be not in a position to weigh properly.²⁵⁰ The truth-finding by jury is anything but rational or scientific; in fact, it appears a counter-intuitive and rather absurd way of arriving at a truthful and just outcome.²⁵¹ The verdict is decided by a number of randomly selected laypersons untrained in

²⁴⁴ Frankel, 'The Search for Truth' (n 46), at 1035 *et seq.* (citing Lord Brougham: 'an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expediting, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments the destruction which he may bring upon others'); *id.*, 'The Search for Truth Continued: More Disclosure, Less Privilege', (1982-3) 54 *University of Colorado Law Review* 51 (the lawyer-client privileged communication and the 'work product' concept are conducive to the concealment of the truth within the US legal system).

²⁴⁵ Frankel, 'The Search for Truth' (n 46), at 1039 (recognizing its 'utility in testing dishonest witnesses, ferreting out falsehoods, and thus exposing the truth'); Damaška, 'Presentation of Evidence' (n 100), at 1092 (accepting that interrogation by an actor hostile to the witness is better suited to reveal truth distortion); Weigend, 'Should We Search for the Truth' (n 39), at 407.

²⁴⁶ J.S. Applegate, 'Witness Preparation', 68(2) *Texas Law Review* (1989-90), at 309 ('Whether cross-examination deserves the praise heaped upon it or the faith placed in it is an open question. ... [T]here are hundreds of cross-examinations that are barely serviceable.');

McEwan, 'Ritual, Fairness and Truth' (n 39), at 68 (calling faith in cross-examination naïve); Weigend, 'Should We Search for the Truth' (n 39), at 407 ('The adversarial system's reliance on the power of cross-examination may likewise be overstated.')

²⁴⁷ For an overview of common law approaches, see Vasiliev, 'From Liberal Extremity' (n 51).

²⁴⁸ Applegate, 'Witness Preparation' (n 246), at 324 *et seq.*; Damaška, 'Presentation of Evidence' (n 100), at 1094 ('The damage to testimony inflicted by the preparation of witnesses is very serious. Parties can be hardly expected to interview the potential witnesses in relatively detached ways that minimize the damage of interrogation to memory images. During the sessions devoted to "coaching", the future witness is likely to try to adapt himself to expectations mirrored in the interviewer's one-sided attitude. As a consequence, gaps in his memory may even unconsciously be filled out by what he thinks accords with the lawyer's expectations and are in tune with his thesis. Later, in court, these additions to memory images may appear to the witness himself as accurate reproductions of his original perceptions.' Footnotes omitted.)

²⁴⁹ M. Damaška, 'Free Proof and its Detractors', (1995) 43 *American Journal of Comparative Law* 343, at 344-5; Roberts, 'Theorising Procedural Tradition' (n 145), at 54 (trial by jury 'symbolise[s] something about the political covenant between a government and its people, perhaps that this polity is committed to a certain kind of participatory democracy').

²⁵⁰ Weigend, 'Is the Criminal Process about Truth?' (n 35), at 165-7; Reamey, 'Innovation or Renovation in Criminal Procedure' (n 10), at 707.

²⁵¹ B.S. Oppenheimer, 'Trial by Jury', (1937) 11 *University of Cincinnati Law Review* 141, at 142 ('We commonly strive to assemble 12 persons colossally ignorant of all practical matters, fill their heads with law which they cannot comprehend, obfuscate their seldom intellects with testimony which they are incompetent to analyze or unable to

law who may easily be misled by lawyers.²⁵² The jury decision is not justified by a reasoned opinion, the process of reaching it is non-transparent and unaccountable, while the results, even if patently erroneous, are unreviewable and incorrigible.²⁵³ It may be based on irrational considerations and amount to a deliberate effort to misrepresent the truth in order to misapply unsatisfactory law ('jury equity', or 'nullification').²⁵⁴ Moreover, jury adjudication implies that the evidence not available on the day of trial will never be part of the basis for the decision.²⁵⁵ Accordingly, the institute of jury is often declared as less desirable or even ill-suited for the discovery of the truth.²⁵⁶

Fourth, the passivity of judges at trial—a consequence of their ignorance about the case and the way of upholding the appearance of impartiality—means that ensuring fact-finding accuracy of outcome is not their responsibility.²⁵⁷ The parties hold an instrumentalist attitude to truth and may be disinterested in discovering it, which means that the establishment of the truth is no one's goal.²⁵⁸ The interpretation of the adjudicative role as that of a neutral arbiter does not result from an actual lack of powers but from the bounds within which it may be exercised imposed by the adversarial system and reinforced by the fear of reversal on the ground of abuse of discretion. In fact, an Anglo-American judge may 'abandon his detached stance and vigorously intervene in the conduct of the trial' to restore fairness and procedural balance between the parties.²⁵⁹ The judicial role does not extend so far as to enable an active search for the truth, although some have argued that judges should exercise a more active role at certain stages of the process.²⁶⁰

remember, permit partisan lawyers to bewilder them with their meaningless sophistry, then lock them up until the most obstinate of their number coerce the others into submission or drive them into open revolt.');

A Review of the Criminal Courts of England and Wales by The Right Honourable Lord Justice Auld, September 2001, Chapter 5, available at <http://www.criminal-courts-review.org.uk/> (last visited 1 August 2013), para. 105 ('I regard the ability of jurors to acquit, and it also follows, convict, in defiance of the law and in disregard of their oaths as more than just illogicality. It is a blatant affront to the legal process and the main purpose of the criminal justice system—the control of crime—of which they are so important a part.') (Footnotes omitted.); Reamey, 'Innovation or Renovation in Criminal Procedure' (n 10), at 743.

²⁵² Goodpaster, 'On the Theory of American Adversary Criminal Trial' (n 175), at 122.

²⁵³ Weigend, 'Should We Search for the Truth' (n 39), at 413 ('From the perspective of truth-finding, jurors deciding alone may be a less desirable feature of the process because it is important that the rationality of the determination of guilt is supported by written reasons and can be subject to meaningful review.');

id., 'Is the Criminal Process about Truth?' (n 35), at 166; Damaška, 'Free Proof and its Detractors' (n 249), at 347; S. Doran, J.D. Jackson, and M. Seigel, 'Rethinking Adversariness in Nonjury Criminal Trials', (1995) 43 *American Journal of Criminal Law* 1, at 48.

²⁵⁴ Matravers, 'Truth and Jury Nullification' (n 154), at 72 ('Jury nullification occurs when a jury acquits (or convicts) with deliberate disregard for the outcome that is dictated by the law and the facts as the jurors believe them to be'. If the purpose of a guilty verdict is to express the community's condemnation of the offender, the goal of trial would not be achieved in the absence of such condemnation, thus juries serve as a kind of 'buffer' or 'cushion' between the citizen and the coercive powers and laws of state. See *ibid.*, at 79-80; Roberts, 'Theorising Procedural Tradition' (n 145), at 60 (allowing jury to acquit against the evidence realizes another value of criminal process, 'mercy'); Summers, 'Formal Legal Truth' (n 152), at 507.

²⁵⁵ Weigend, 'Is the Criminal Process about Truth?' (n 35), at 165 ('clumsy apparatus of a jury' is not adjustable to the 'installment schedule' of trial).

²⁵⁶ Frank, *Courts on Trial* (n 199), at 108-45; Goodpaster, 'On the Theory of American Adversary Criminal Trial' (n 175), at 122; Weigend, 'Should We Search for the Truth' (n 39), at 413.

²⁵⁷ Reamey, 'Innovation or Renovation in Criminal Procedure' (n 10), at 706 ('Even if justice might be subverted by the failure of a lawyer to object to evidence, ask an important question, make a particularly effective argument, or avoid harmful strategies, the American trial judge sits and watches and listens without intervening.');

²⁵⁸ Langbein, *The Origins of Adversary Criminal Trial* (n 233), at 338: 'Adversary criminal trial depends upon the deeply problematic assumption that combat promotes truth, or put differently, that truth will emerge even though the court takes no steps to seek it.'

²⁵⁹ Damaška, 'Structures of Authority' (n 64), at 523-4 Hence the paradox: while Anglo-American powerful judges whose decisions are largely inscrutable tend to adopt a passive stance, while the active Continental judges are not vested with broad autonomy and are subjected to comprehensive review in all respects of their decisions.

²⁶⁰ E.g. A. Goldstein, 'Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure', (1973-4) 26 *Stanford Law Review* 1009, at 1024; L.L. Weinreb, *Denial of Justice: Criminal Process in the United States* (New York: Free Press, 1977) 117-46.

Finally, the practice of plea-bargaining pervading any adversarial justice system may be viewed as diminishing its ability to produce the ‘objective’ truth.²⁶¹ In the interest of avoiding a costly trial on the allegations that might well be supported by the facts, a court merely certifies the ‘subjective truth’ negotiated by the parties in relation to a lesser charge. This risks distorting the truth and resulting in an incommensurate sentence for not all aspects of criminal conduct will be highlighted and receive a penal sanction. Moreover, the pressure on an innocent defendant to waive the right to a trial by pleading guilty tends to be higher, given that the prosecutor is more likely to make a favourable plea offer where its evidence is weak.²⁶² Where an attractive plea offer prevents accused from raising a defence that may have a factual basis, an inaccurate outcome will ensue.²⁶³ But conviction would stand given that truth-finding is subordinate to party autonomy.²⁶⁴ In view of this host of features, the truth may appear as a side-effect rather than mandatory outcome of adversarial criminal proceedings.²⁶⁵

However, this exposé of perceived weaknesses of the adversarial method of truth-finding does not entail that the inquisitorial procedure necessarily fares better in that regard. As noted, the historical meaning of the now almost derogatory term ‘inquisitorial’ does not correspond to the present reality of reformed inquisitorial systems, so it is unnecessary to elaborate on why *inquisitio* is a sub-optimal arrangement for finding the truth and may have little to do with it. Under the influence of the adversarial culture and international and regional human rights standards which are strongly informed by the Anglo-American thinking,²⁶⁶ modern systems on the Continent provide defendants with the full range of human rights protections – not least because coercive methods such as forced confessions of the accused are apt to result in unreliable evidence which defeats the objective of truth-finding.²⁶⁷

However, the inquisitorial method arguably retains elements which may still be less than ideal for that end. One of them is that the inquisitorial system rests on the assumption or positively expects that evidentiary sources would be willing and ready to supply information to a court investigator. This entails that ‘an inquisitorial judge is left with empty hands in his quest for the truth if those who possess relevant information refuse to cooperate’ or is only able to collect evidence that reflects the ‘half-truth’ rather than a complete truth.²⁶⁸ Moreover, one may still discern a tension between truth-finding as the goal of the process and fairness as its method. Modern jurisdictions of inquisitorial tradition may still covertly harbour the remnants of the ancient ‘inquisitorial system’ taking the form of quasi-coercive elements of procedure.²⁶⁹ For instance, in the eyes of a common law lawyer, the initial interrogation of the defendant by the presiding judge at

²⁶¹ Grano, *Confessions, Truth, and the Law* (n 170), at 6-7 (describing plea bargaining as ‘[p]erhaps the biggest compromise with truth’); Damaška, *The Faces of Justice* (n 60), at 224 (‘as a result of bargain struck, the truth-revealing potential of criminal judgements may be severely diminished’); Weigend, ‘Is the Criminal Process about Truth?’ (n 35), at 171-2.

²⁶² Bradley, ‘The Convergence of the Continental and the Common Law Model’ (n 39), at 474 (‘the weaker the prosecution’s case, the more likely it is that a favourable bargain will be offered to the defendant’). See also S. Schulhofer, ‘Plea Bargaining as a Disaster’, (1992) 101 *Yale Law Journal* 1979, at 1981-7.

²⁶³ Damaška, *The Faces of Justice* (n 60), at 224-5.

²⁶⁴ McEwan, ‘Ritual, Fairness and Truth’ (n 39), at 58 (in accepting a guilty plea, a judge is concerned with the voluntariness of a plea rather than with factual guilt, which renders truth ‘subservient to defendant autonomy, or the appearance of it’).

²⁶⁵ Frankel, ‘The Search for Truth’ (n 46), at 1037 (‘the process often achieves truth only as a convenience, a byproduct, or an accidental approximation.’).

²⁶⁶ Weigend, ‘Should We Search for the Truth’ (n 39), at 405-6.

²⁶⁷ Grande, ‘Dances of Criminal Justice’ (n 31), at 158.

²⁶⁸ Weigend, ‘Is the Criminal Process about Truth?’ (n 35), at 160.

²⁶⁹ McEwan, ‘Ritual, Fairness and Truth’ (n 39), at 59 (‘Defendants in continental trials are at the mercy of the presiding judge, lacking the protective shield of the Anglo-American exclusionary rules about bad character’) and 64 (‘A system designed to pursue the truth does not easily accommodate the individual right to be protected from degrading treatment.’); Weigend, ‘Should We Search for the Truth’ (n 39), at 406 (reporting ‘the persistent rumor that the suspect in the inquisitorial process is regarded as a mere object of confessions, rather than a party with rights of its own.’).

trial unavoidably generates an impression that the defendant is put under psychological pressure to incriminate himself or confess; that adverse inferences are drawn by judges from the exercise of the right to silence; and that judges do not demonstrate sufficient impartiality.²⁷⁰

As is known, modern inquisitorial systems invest considerable trust in the integrity and impartiality of officials tasked with pre-trial investigations and trials.²⁷¹ Insofar as judicial and prosecutorial failures to preserve objectivity and neutrality puts the accuracy of truth-finding in peril, continental jurisdictions take additional measures to rule out bias. In some countries, judges are disallowed to be actively involved in investigations or even to access the case file ahead of trial,²⁷² being in part a response to the “‘lack of neutrality” problem raised since the end of the seventeenth century by English classical liberalism’.²⁷³ The supposedly neutral character of the judges should guarantee that their interrogation is not one-sided but properly truth-oriented and that any adverse implications of active judicial involvement are such that the truth-finding goal demands. However, the idea of a fully neutral and impartial investigator is bound to raise scepticism because of the high risk of forming early hypotheses about the facts that may be difficult to reverse subsequently.²⁷⁴

The judicial questioning at trial will often be based on a dossier compiled with no or little input from the defence which tends ‘to shore up the police-constructed prosecution case’.²⁷⁵ The dossier system generates a ‘tendency [of the court] to comply with the public prosecutions department’s official perspective’ and ‘to look for confirmation of the account of events or image of the case like it is presented in the files’.²⁷⁶ This drawback is absent in the adversarial method of proof-taking which openly recognizes partisanship and makes it an organizing principle of the system.²⁷⁷ The professional affiliation of career judiciary in inquisitorial systems is another possible source of perceived bias. For example, in the US the judicial function is clearly distinguished from that of district and defence attorneys, but in France both the *procureurs* and *juges d’instruction* are *magistrats* (respectively *magistrates du parquet* and *magistrates du siege*). As opposed to lawyers in private practice, they receive common training, are members of the same professional associations and represent public interests.²⁷⁸ The perception by the judges of their role as servants of public interests and their belonging to the same class of officials as the prosecution (magistracy) is said to create psychological alignment between them with regard to professional matters.²⁷⁹

²⁷⁰ Hodgson, ‘Conceptions of the Trial in Inquisitorial and Adversarial Procedure’ (n 67), at 237 (‘To the common lawyer, this direct judicial questioning of the accused may seem overbearing [because i]n England and Wales, the defendant is protected from such interrogation and is not questioned directly unless she chooses to take the stand to give evidence.’).

²⁷¹ McEwan, ‘Ritual, Fairness and Truth’ (n 39), at 63 (noting that the inquisitorial system ‘places its faith in the integrity of the State and its capacity to pursue truth unprompted by partisan pressures of individual self-interest’).

²⁷² See n 31 (the examples are Italy, Germany, and France). According to, these reforms were a response to “‘lack of neutrality” problem raised since the end of the seventeenth century by English classical liberalism’.

²⁷³ Grande, ‘Dances of Criminal Justice’ (n 31), at 155.

²⁷⁴ Damaška, ‘Presentation of Evidence’ (n 100), at 1092 (a Continental judge’s ‘prior knowledge is ... a considerable shortcoming from the epistemological point of view. Being somewhat familiar with the case, the judge inevitably forms certain tentative hypotheses about the reality he is called upon to reconstruct. More or less imperceptibly, these preconceptions influence the kinds of questions he addressed to witnesses. More importantly, there is an ever-present danger that the judge will be more receptive to information conforming to his hypotheses than to that which clashes with them.’ (Footnotes omitted.); *id.*, ‘Epistemology and Legal Regulation of Proof’, (2003) 2 *Law, Probability and Risk* 117, at 121.

²⁷⁵ Hodgson, ‘Conceptions of the Trial in Inquisitorial and Adversarial Procedure’ (n 67), at 237.

²⁷⁶ Nijboer, ‘The American Adversarial System in Criminal Cases’ (n 36), at 93.

²⁷⁷ Damaška, ‘Presentation of Evidence’ (n 100), at 1092 (adjudicators in the adversary mode of proof-taking can afford to practice ‘the art of suspended judgement’ as they ‘are not driven by the duty to lead an inquiry into forming early tentative theories about the facts of the case’).

²⁷⁸ See J.H. Langbein and L.L. Weinreb, ‘Continental Criminal Procedure: “Myth” and “Reality”’, (1977-8) *The Yale Law Journal* 1549, at 1559; Hodgson, ‘Conceptions of the Trial in Inquisitorial and Adversarial Procedure’ (n 67), at 232.

²⁷⁹ Nijboer, ‘Comparative Perspectives on the Judicial Role’ (n 28), at 29; McEwan, ‘Ritual, Fairness and Truth’ (n 39), at 64.

Arguably, these factors make it easier for continental judges to convict, or at least an impression may be created to that effect.

Finally, the absence of a vigorous and zealous defence which possesses full control over the collection of exculpatory evidence and does not have to rely on court investigators for carrying out investigation, necessarily creates a guised deficit of ‘adversariality’. Obviously, this is bound to raise not only the fairness-related concerns but also the question as to whether the inquisitorial method necessarily leads to the more accurate truth-finding in all cases.²⁸⁰ This claim in fact results from an understatement of the systemic weaknesses of inquisitorial arrangements for the purpose of truth-discovery.

To conclude, the advantages of a specific interpretation of the notion of ‘truth’ and relative advantages and downsides of epistemological methods in both adversarial and inquisitorial systems may be contrasted and debated. But it does not solve the contentious issue of whether the fact-finding methods in these systems are superior to the other.²⁸¹ There is no—and most likely may be no—straightforward answer to this question. Such assessments tend to be marred by insufficient knowledge or understanding of the other system²⁸² and/or underlying value judgements rooted in one’s own conceptions of truth and best ways of arriving at it, essentially shaped by the legal-cultural background.²⁸³ As observed by Damaška, such pronouncements ought to be treated with utmost suspicion: conclusions favouring one model in disregard of its weaknesses and advantages presented by the counterpart model are liable to criticism as attempts to ‘idealize the real’.²⁸⁴ Worse still, they may be a disguised form of ‘comparative chauvinism’, which is a more serious problem.²⁸⁵

As previously noted, this problem is not an imaginary one in the study of international criminal procedure because its formation has been informed by an almost ideological struggle between the adversarial and inquisitorial models. In this context, ‘comparative chauvinism’ may be

²⁸⁰ Bradley, ‘The Convergence of the Continental and the Common Law Model’ (n 39), at 472; Hodgson, ‘Conceptions of the Trial in Inquisitorial and Adversarial Procedure’ (n 67), at 234-5.

²⁸¹ Damaška, ‘Epistemology and Legal Regulation of Proof’ (n 274), at 121; McEwan, ‘Ritual, Fairness and Truth’ (n 39), at 65; Weigend, ‘Is the Criminal Process about Truth?’ (n 35), at 158 (arguing that none of the systems has been particularly successful in reaching the goal of truth-finding); *id.*, ‘Should We Search for the Truth’ (n 39), at 408 (‘Neither the adversarial nor the inquisitorial mode can guarantee a fair trial outcome based upon the “truth”.’).

²⁸² Frankel, ‘The Search for Truth’ (n 46), at 1053 (‘Our commitment to the adversary or “accusatorial” mode is buttressed by a corollary certainty that other, alien systems are inferior. We contrast our form of criminal procedure with “inquisitorial” system, conjuring up visions of torture, secrecy, and dictatorial government. Confident of our superiority, we do not bother to find out how others work.’). In a similar vein, see Bradley, ‘The Convergence of the Continental and the Common Law Model’ (n 39), at 477-8.

²⁸³ Damaška, ‘Presentation of Evidence’ (n 100), at 1095 (‘it is treacherous to make definitive pronouncements about which of the two manners of presenting evidence is a more effective tool in the search for the truth. Speculation about these problems is made even more intractable because the narrow epistemological problem involved can hardly ever be totally separated from a cluster of attitudes and values comprising the larger legal culture.’). Likewise, see *id.*, *The Faces of Justice* (n 60), at 4.

²⁸⁴ Damaška, ‘Evidentiary Barriers to Conviction’ (n 15), at 588-9 (‘At times opinions will be voiced in both systems that one type of procedure is superior to the other both in terms of its fact-finding precision and in terms of its fairness. These views, often in a panegyric form, must be examined with suspicion, for it often happens that what is gained on one front is lost on another. Thus, in the criminal process, concern for individual rights will often set limits to the pursuit of truth and conflict with the desire to establish the facts of the case. This potential “zero-sum” effect is denied mostly by those who claim that they have established an ideal social order. Actual failure to realize the ideal leads them to idealize the real.’). See also *ibid.*, at 569 (critical of ‘Manichean’ polarization ‘between the old continental inquisitorial procedure at its historical worst, and a variable selection of somewhat idealized features of modern American criminal proceedings’ in the US literature).

²⁸⁵ Using the label ‘chauvinism’ in the context of a debate about the value of German civil procedure practices in the US, see J.H. Langbein, ‘The Cultural Chauvinism in Comparative law’, (1997) 5 *Cardozo Journal of International and Comparative Law* 41, at 47-8 (‘Cultural chauvinism—the claim that cultural differences prevent us from adopting and adapting the superior procedural devices of other legal systems—is an effort to switch off the searchlight of comparative law.’).

particularly counterproductive and detrimental.²⁸⁶ Whenever evaluating the procedural arrangements of international tribunals in light of their relative ability to contribute to the establishment of the ‘truth’, it must be borne in mind that their implications and effects may be notably different in this new procedural context than in their original habitat – inquisitorial or adversarial procedure. The satisfactory answer to the question about the appropriate understanding of the notion of ‘truth’ and the optimal truth-finding arrangements in international criminal proceedings can only be given having taken into account the relevant systemic and contextual factors. These include, at least, the specifics of the tribunals’ procedural systems and fact-finding devices they employ (in particular, the roles and competences of judges, parties, and other participants); the circumstances in which the evidence is gathered, processed, vetted, and presented; and the tribunals’ special objectives, to the extent they may inform the structures of criminal process.²⁸⁷

5. COMMUNICATIVE ROLE AND EFFECTS OF TRIALS: A SOCIO-LEGAL VIEW

Although this study’s perspective is predominantly legal, it should be admitted that the conception of the trial as a singly legalist phenomenon pursuing the procedural function of searching for the truth does not exhaust its nature as a socio-legal event and communicative process: despite what lawyers may think, law does not have a monopoly on it. The truth-finding function alone does not fully explain why domestic criminal trials across the common law *v.* civil law divide look and proceed in the way they do. This section, therefore, complements the theoretical inquiry on the trial in light of its systemic function, by a socio-legal perspective that focuses on the outward manifestations and appearance of the trial process, its intended communicative role and expressive effects. This outlook is promising for our understanding of criminal trials as complex phenomena. In particular, it helps identify the link between the way in which adversarial and inquisitorial trials are organized and conducted in practical terms, on the one hand, and the relevant conceptions on the optimal fact-finding arrangements, on the other.

From a traditional lawyer’s point of view, the criminal procedure is comprised of ‘incorporeal’ elements which constitute the *legal* reality: procedural norms, practices, acts, and decisions. The exclusively legal vision overlooks the sociological and anthropological meaning of the trial and tends to underestimate the regulatory power of rituals.²⁸⁸ The trial is a social event or a sequence of events taking place within a certain time and space in the implementation of the procedure ‘in the books’. This is the *social* reality of the trial which breathes life in the procedural texts. In laymen’s eyes, in the eyes of the media, and in the popular culture, criminal trials are firmly associated with the *mis-en-scène* of the proceedings – a set of recognizable ‘corporeal’ and verbal features objectified in the spatial-temporal dimension.²⁸⁹

²⁸⁶ See Chapter 1, section 4.3.4.C.

²⁸⁷ On ‘truth-finding’ as a function of international criminal trials, see Chapter 5. On the relationship between the objectives of international criminal justice and procedural arrangements, see also Chapter 3.

²⁸⁸ See also H. Jung, ‘Rituals Forever?’, (2010) 18 *European Journal of Crime, Criminal Law and Criminal Justice* 67, at 68 (noting the tendency of ‘overestimating ... the regulating power of argument or underestimating the stabilising function of rituals for the social order.’).

²⁸⁹ Roberts, ‘Theorising Procedural Tradition’ (n 145), at 48, (referring to ‘indubitably corporeal’ features such as ‘police officers on the beat, crime laboratories, courthouses, the accused in the dock, robed judges and bewigged barristers, and gaol’); B. van Roermund, ‘The Political Trials and Reconciliation’, in Duff *et al.* (eds), *The Trial on Trial 2* (n 67), at 184 (describing trial as a metonymy of ‘an institutionalised space’, which is ‘not provided by law; rather it is law itself, understood as space’, and pointing, in particular, to ‘standardised vocabulary, regimented speech turns, ... checked moves within spatio-temporal area’).

The features imbue the trial process with powerful symbolism and turn it into a ‘dramatic production, a ceremony or a ritual to be played out’.²⁹⁰ The important elements of courtroom decorum and etiquette include, among others, the layout of the court, clothing of the members of the bench and counsel, the peculiar patterns of communication including the preset sequence of appearances and alternating turns the participants take when speaking, the formal language, and signs connoting the participants’ role. According to Jung, the *architecture parlante* and material particulars of the judicial ritual ‘taken together transform rendering justice into a performance which is somewhat distinct from everyday life.’²⁹¹ Across legal cultures, the legal rituals are associated especially strongly with the trial of all stages of the criminal process – the public, oral, and solemn character makes them a ‘face of justice’.²⁹²

The mere aspiration to adhere to tradition is no satisfactory rationale for retaining all of these traits, which, if one pauses to think about them, appear superfluous and illogical, overly formal and archaic, or altogether bizarre. Nevertheless, it is common to consider these corporeal features as a given, without attempting to explain them and to relate to principles underlying the fact-finding inquiry.²⁹³ Another way of looking at it is to accept that the trial form is not merely accidental but also an integral component of the procedural system, which should be attuned to the local imaginations of criminal justice if it is to be an effective regulator.²⁹⁴ It is at least as historically determined and deliberately preserved, as are its relevant rules, institutions, and normative ideas about what the trial should achieve and how it is to do so. Indeed, seen through a sociological lens, the trial process is permeated with symbols: each of its externalities has a carefully chosen meaning and discharges specific informative or expressive functions. Being elementary tools of power-distribution and social control, these procedural symbols and rituals orient the participants in the process, convey messages to those who follow the trial, and exert potent effects on the society.²⁹⁵ Corporeal elements of the process are auxiliary to and serve the legalist function of truth-finding, being formalized in procedure. Others have no direct bearing on the search of truth but possess an intrinsic expressive value and are therefore made part of practical arrangements.

As noted earlier, sociological accounts regard punishment as an act of moral condemnation by the community.²⁹⁶ Durkheim’s concept that by defining and punishing criminal conduct the community delimits the bounds of acceptable behaviour and hence defines itself can be extended to the domain of criminal procedure. Not only the outcome of the trial and the final ritual—the act of punishment or acquittal—has such a defining function but also the entire process leading to the final act. Goodpaster outlines the ‘norm theory’ of trial derivative from Durkheim’s concept of social rituals, arguing that it is ‘the most overarching of all the theories’ and ‘seems to hold the greatest promise of revealing [their common] origin’, although it is underdeveloped because it proffers no ‘schedule of defendant’s rights’.²⁹⁷

²⁹⁰ Hodgson, ‘Conceptions of the Trial in Inquisitorial and Adversarial Procedure’ (n 67), at 226 (describing trial as ‘an important process (or ritual), during which the state’s exercise of its legitimate monopoly on violence is open to public scrutiny’); Goodpaster, ‘On the Theory of American Adversary Criminal Trial’ (n 175), at 145 and 147 (for both participants and observers, a jury criminal trial is ‘all of these: drama, spectacle, performance, competition, community meeting and decisional forum’).

²⁹¹ Jung, ‘Rituals Forever?’ (n 288), at 69.

²⁹² McKillop, ‘Behind the Faces of Justice’ (n 131), at 57.

²⁹³ Goodpaster, ‘On the Theory of American Adversary Criminal Trial’ (n 175), at 147 (‘these features do not fit easily with standard purposive explanations and are generally ignored as simply coincidental similarities between criminal trial and certain other human activities.’).

²⁹⁴ E.g. Jung, ‘Rituals Forever?’ (n 288), at 69 (‘Rituals “work” because of this distinction as long as they are not out of the intellectual or emotional reach of the community at large.’).

²⁹⁵ Goodpaster, ‘On the Theory of American Adversary Criminal Trial’ (n 175), at 148 (‘The ritualistic aspects of an adversary jury trial are important. Ritual stems from and creates identifiable feelings and attitudes, and it imprints solemnity, propriety, regularity and formal rightness on events, occasions and proceedings.’).

²⁹⁶ On expressivist theories, see *supra* n 146.

²⁹⁷ Goodpaster, ‘On the Theory of American Adversary Criminal Trial’ (n 175), at 140-4.

The accounts which view the criminal trial as a communicative forum whereby moral messages are conveyed to the public and the authority of the legal norms violated by the crime are reasserted are illuminating in relation as regards the forms the legal process takes. The trial thus can be seen as an interaction in a courtroom regarding the criminal charges against the accused, alleged facts, evidence, and responsibility between the actors exercising their procedural functions. It is also a public event subject to public scrutiny and open to public attendance. The process is ritualistic since every actor is assigned a specific role and is expected to exercise it professionally and not go beyond it.²⁹⁸ The role-playing, appearances, and interaction in the courtroom turn the process into a communicative device for transmitting didactic messages ‘between the lines’ of procedural conduct.²⁹⁹ The courtroom decorum creates in the observers the feeling of being implicated in a sacred ritual or historical event.³⁰⁰ Thus trial procedures educate the members of the society, express moral reprobation of the crime, and reaffirm the value of the norm breached.

According to communicative theories such as offered by Anthony Duff and others, the criminal trial is a process by which the defendant is ‘called to account’ and the state justifies the imposition of punishment to both the defendant and the society.³⁰¹ Echoing Durkheim’s view, just as any other social ritual, the trial ritual produces a solidarity effect which unites the members of the community and helps define it by reaffirming the shared communal values and by determining whether its member must be (temporarily) excluded.³⁰² The didactic and expressive functions played by the trial attest to its ‘broader social role’ beyond mere determination of criminal responsibility.³⁰³

On the one hand, the ceremonial features of trial procedure seek to promote or facilitate, in a practical way, the goals of the legal inquiry. The ritual is aimed at upholding the order in the courtroom and indicating to the participants their roles and obligations. This facilitates the smooth conduct of the proceedings and ensures effective truth-finding and a complete and truthful evidentiary basis for the decision. The notable example is the rituals of the swearing in of witnesses who pledge to speak ‘the truth, the whole truth, and nothing but the truth’ and admonishing them of legal consequences of false testimony or failure to respond to the examiner’s questions. Clearly, neither the solemn declaration nor the warning can in itself guarantee the truthful and complete testimony. But the ceremony serves to ensure that the witness understands his or her role, takes on

²⁹⁸ Nijboer, ‘Comparative Perspectives on the Judicial Role’ (n 28), at 23 (‘Rituals matter, and the roles of most participants are “dictated”.’); Goodpaster, ‘On the Theory of American Adversary Criminal Trial’ (n 175), at 148 (‘Within the framework set by trial formalities, etiquette and evidentiary rules, the jurors watch a show, produced and directed by the lawyers, who are also the principal actors. ... The lawyers remain on stage throughout the trial, playing their parts and directing the gradual and detailed unfolding of stories of past events by serially bringing forward other actors to advance their stories.’).

²⁹⁹ T.M. Arnold, *The Symbols of Government* (New Haven: Yale University Press, 1935) 128-9 (‘The judicial trial thus becomes a series of object lessons and examples. It is a way in which society is trained in right ways of thought and action, not by compulsion, but by parables which it interprets and follows voluntarily.’); L. Mather, ‘Courts in American Popular Culture’, in K.L. Hall and K.T. McGuire (eds), *Institutions of American Democracy: The Judicial Branch* (New York: Oxford University Press, 2005) 252 (‘The importance of trials in society lies less in their contributions to dispute settlement than to social control. A public trial provides a stage for the performance of law, rhetoric and persuasion, teaching moral lessons, and engaging popular passions and the emotional involvement of a lay audience of citizens.’).

³⁰⁰ Goodpaster, ‘On the Theory of American Adversary Criminal Trial’ (n 175), at 147 (transcription of proceedings reinforces the feeling that everything uttered is ‘virtually sacred’).

³⁰¹ Duff, *Trials and Punishments* (n 146), at 115 (‘The aim of a criminal trial is not merely to reach an accurate judgement *on* the defendant’s past conduct: it is to communicate and justify that judgement—to demonstrate its justice—to him and to others.’); Ho, ‘Justice in the Pursuit of Truth’ (n 156), at 55 (‘a process that seeks to justify an adverse decision to the person against whom it is taken’); Matravers, ‘Truth and Jury Nullification’ (n 154), at 80.

³⁰² Goodpaster, ‘On the Theory of American Adversary Criminal Trial’ (n 175), at 146, 148 (‘Participation in ritual is also a way of acknowledging, or accepting, membership in the community that uses the ritual. Depending on its forms, ritual may also invoke and symbolically enact some community value or ideal. Engaging in ritual both expresses and creates community; it is a way of participating, sharing, binding and confirming.’).

³⁰³ *Ibid.*, at 143-4 (the trial’s role under the ‘norm theory’ is ‘the generation and promulgation of norms reflective of contemporary community standards’).

the commitment, and accepts the adverse consequences of a failure to tell the truth. The procedural system relies upon the ritual for increasing the pressure to testify truthfully and for promoting the decisional rectitude. The ritual is deemed so valuable that it is formally recognized and prescribed by procedural law as an indispensable element of the testimonial process.

On the other hand, as noted, some externalities of trial process and messages it emits have as a rationale promoting goals broader than truth-finding: emphasizing the fairness and legitimacy of the trial process, reinforcing the authority of the court, and facilitating the societal acceptance of the judgement. Some of the trial symbols are so entrenched in the procedural system that they acquire a constitutional status as guarantees of fairness and integrity of the process.³⁰⁴ Jury trials are an example of such an arrangement. Unless one understands the ‘trial by peers’ as an important community ritual, it becomes difficult to justify given the tensions with the truth-finding goal and the strict application of law in the case of jury nullification.³⁰⁵ As a symbol of the involvement by the local community, the jury counterbalances the power of a professional judge over the verdict and enhances the perceived legitimacy of the outcome.³⁰⁶

Trial rituals have a meaning if one accepts that trials are conducted not only to obtain the fair and just outcome but also for their own sake: i.e. the process has an intrinsic value. Courtroom customs are meant to preserve decorum and solemnity of the proceedings and imbue the participants and the public with respect for the authority of the court and its prospective decision. Secondly, the trial script assists the participants—especially witnesses, experts, and participating victims (civil parties)—in orienting themselves in the proceedings and in comprehending better their and other actors’ procedural roles.³⁰⁷ The differences in the role and status of the functionally equivalent actors (judges, prosecutors, and defence counsel) in adversarial and inquisitorial trials are mirrored by the divergence in the trial rituals,³⁰⁸ although the latter do not always neatly fall along the lines dividing the two models.³⁰⁹ The degrees of formalism and ritualism constitutes one noticeable difference between ‘adversarial’ and ‘inquisitorial’ systems. Adversarial trials are characterized by a more central position given to ritual throughout.³¹⁰ In discussing the highly formalized nature of the adversarial jury criminal trials, Goodpaster noted:

The ritual features of an adversary jury trial are entwined with its dramaturgical and contest features. In addition to being a ritual event, a criminal trial is a kind of drama or morality play, as well as a competition. ... The drama presented is unusual and has elements both of the rehearsed and the extemporaneous, as though it were simultaneously a scripted play and a spontaneous happening.³¹¹

³⁰⁴ See Jung, ‘Rituals Forever?’ (n 288), at 71 (‘judicial ceremoniality might work as an additive [to legitimacy] that we should not leave out completely.’), citing O. Chase, *Law, Culture and Ritual* (New York/London: New York University Press, 2005) 123 (‘The “repetitive elements” of the dispute ritual themselves lend a legitimacy to the result.’).

³⁰⁵ On the ritualistic character of jury as an institution, see McEwan, ‘Rituals, Fairness and Truth’ (n 39), at 54, citing Coke on the symbolic meaning of the number of jurors in England and Wales (twelve): ‘The law delighteth herself in the number twelve ... [which] is much respected in Holy Writ, as in twelve apostles, twelve stones, twelve tribes’. E. Coke, *First Part of the Institute of the Laws of England* (New York: Gryphon, 1823) 154 (a).

³⁰⁶ Goodpaster, ‘On the Theory of American Adversary Criminal Trial’ (n 175), at 146 (‘only a body taken from a cross sectional representative group of the community can meaningfully protect community norms. ... [T]he jury represents the community, both symbolically and actually, and brings community consciousness, community values and culture into the trial system.’). *Ibid.*, at 152 (‘Jury decision is a key element in the public acceptance of criminal trial decisions. ... When a jury convicts, society may also assume that the defendant is guilty and that his conviction represents a referential norm expressive of community sentiment in similar cases.’).

³⁰⁷ Jung, ‘Rituals Forever?’ (n 288), at 70 (‘rituals orientate. They set the scene and mobilise a traditional pre-understanding. We will all realise instantaneously that this is a court session. The discourse will be channelled and administered in public. Thus rituals underscore the institutional quality of the process.’).

³⁰⁸ Hodgson, ‘Conceptions of the Trial in Inquisitorial and Adversarial Procedure’ (n 67), at 226.

³⁰⁹ Nijboer, ‘Comparative Perspectives on the Judicial Role’ (n 28), at 23.

³¹⁰ McEwan, ‘Rituals, Fairness and Truth’ (n 39), at 54 (‘the need for spectacle is part of the *raison d’être* of criminal proceedings’; in adversarial systems, ‘theatricality is at its most blatant’).

³¹¹ Goodpaster, ‘On the Theory of American Adversary Criminal Trial’ (n 175), at 147-8.

Interestingly, professional participants—judges and advocates—are expected to wear special attire (wigs, robes, or gowns etc.) as indicia of their special status and role during trial.³¹² In England and Wales, the members of the bar (judges and barristers) wear wigs and gowns, but not magistrates and solicitors. Similarly, in France judges, prosecutors and defence lawyers wear robes; but judges and prosecutors are ‘grandly and colourfully robed’, which denotes their affiliation with *magistrature*, while defence counsel wear a ‘relatively simple black gown’ because they do not belong to the same class of officials.³¹³ Except for less formal hearings before judges of peace, lawyers of the Belgian bar wear gowns in court, which symbolizes their procedural equality with the members of the *magistrature*.³¹⁴

The appearance of judges in a courtroom and their retirement for recess, adjournment, and deliberations are accompanied by an usher’s announcement and everyone is expected to rise in silence in recognition of the authority and special status of judiciary. The language in the courtroom displaces social conventions and introduces specialized hierarchies. Throughout the pleadings, the participants—parties and witnesses alike—should address the judges with emphatic reverence (‘Your Honour’), whereas the judges and parties refer to each other with pronounced courtesy at all times. Witnesses, experts, and counsel are often named by their formal roles in the process. By contrast to repeat players, the accused bears no tokens of status behind which to hide and has to actively participate in, or passively undergo, a sort of ‘public dissection’, with his or her life circumstances, character, and past record being disclosed and scrutinized.³¹⁵ The juries remain a passive audience and are provided with only limited information about the formalities and their own role through a jury instruction. But, being decision-makers in the case, most of that they will learn indirectly from ‘the imbedded cues of ritual, authority, space, position, place, tone and the directions and modelling of the principal actors’.³¹⁶

In this light, the courtroom language is an essential aspect of the trial communication: specific linguistic formulae and ‘stock phrases’ must be used by repeat players to convey certain messages and to landmark the turning points in the process.³¹⁷ It orients actors and spectators in the complexities of the unfolding trial action and works as a ‘spell or incantation’ that produces legal consequences. Thus, a common-law plea of guilty is to be phrased in a certain way for the court to be able to accept it as informed, voluntary, and unequivocal. The answers to the question of whether the accused pleads guilty or not guilty to the charges that are apt to trigger the consequences would be either ‘guilty’ or ‘not guilty’. Other expressions to a similar effect or a failure to respond would be followed by the entry of a plea of not guilty. By contrast, in France the language in equivalent situation is less ritualistic and less significance is attached to the form of expression than in England and Wales.³¹⁸

The structure of the proceedings being a partisan contest or an official inquest has implications for the general tone of the language and advocacy at the trial hearing. The goals pursued by the parties are either to convince a passive and lay trier of fact by challenging the opponent’s perspective on the case or to assist professional judges in testing the ‘case of the truth’, respectively. Adversarial jury criminal trials are more formalized and theatrical, with both counsel being allowed to resort to emotive language, persuasion, and rhetoric calculated to impress the jury

³¹² For observations on the costumes of magistrates, prosecutors, and counsel, see Hodgson, ‘Conceptions of the Trial in Inquisitorial and Adversarial Procedure’ (n 67), at 227-8.

³¹³ For impressions of a French courtroom by a common law scholar, see McKillop, ‘Behind the Faces of Justice’ (n 131), at 56.

³¹⁴ K. Lemmens, ‘But Pasteur Was French: Comments on Lasser’s *The European Pasteurization of French Law*’, in N. Huls, M. Adams and J. Bomhoff (eds), *The Legitimacy of Highest Courts’ Rulings: Judicial Deliberations and Beyond* (The Hague: T.M.C. Asser Press, 2009) 158 (gowns are lawyers’ signs of distinction *vis-à-vis* the public symbolizing ‘the mental gap between the public and the judiciary’ and reinforcing the latter’s legitimacy).

³¹⁵ Hodgson, ‘Conceptions of the Trial in Inquisitorial and Adversarial Procedure’ (n 67), at 235.

³¹⁶ Goodpaster, ‘On the Theory of American Adversary Criminal Trial’ (n 175), at 148.

³¹⁷ *Ibid.*, at 147.

³¹⁸ Hodgson, ‘Conceptions of the Trial in Inquisitorial and Adversarial Procedure’ (n 67), at 227-8.

and to undermine the credibility of the rival story of the other party. In inquisitorial trials, even before a mixed bench, such tactics would be misplaced because trial proceedings are less confrontational, being a multilateral search for the truth, and the evidence and pleadings are addressed to the judges, not to lay assessors alone.³¹⁹ It is not unusual for the judges to speak with paternalist overtones and to act as a higher moral authority vis-à-vis the defendant, as if the process itself were a tool of re-education.³²⁰

Turning to the interior of a courtroom, a physical layout of the court is imbued with symbolism and in itself serves as a coded message. Every participant is allocated a specific place to situate him or her in the context of the proceedings.³²¹ Some have compared the interior of a courtroom to a theatrical ‘stage production’ or church.³²² The different layout in common law and civil law criminal trials points to the divergences in the balance of functions and powers. In criminal trials at common law, judges (magistrates) are seated behind their desks on an elevated podium facing the room. The court clerks and typists are located in front and below and jurors are seated in a row along the side of the courtroom. The prosecution and the defence are seated separately behind the bar table on the floor level in front of the judges – facing them or being half-turned towards one another. This alludes to their antagonistic procedural relation and equality of status. The witness stand is on the judges’ right or left hand and is facing the jury and the parties. The dock with the accused and the public gallery are at the back of the room behind the bar table. The placement of the accused signifies a secondary role and passivity in the trial orchestrated by lawyers and only indirect involvement in it other than when taking a witness stand.

In continental criminal trials, the prosecutor’s desk is placed on a podium next to that of the judges and/or somewhat lower than it. This implies the prosecutor’s equivalent status (but not equal authority) to that of the judges and their membership of magistracy.³²³ The witness stand is situated next to the defence desk and the accused and defence counsel are located on the floor level in the middle of the courtroom facing the judges and the prosecution, which facilitates direct contact between the judge and the accused. This layout symbolizes the role of both the accused and witnesses as evidentiary sources and subjects of an official judge-led inquiry.³²⁴

Finally, another outward manifestation of the divergence in the roles of participants at trial in various jurisdictions as seen from the public gallery is the possibility for them to move around the courtroom in the course of the proceeding. It is not accidental that attorneys in the US may move relatively freely during the pleadings – some choose to approach the jury when questioning a witness and to come closer to the judge—after having requested a permission—when making a legal argument.³²⁵ By contrast, continental lawyers have their fixed places and remain there until the hearing is adjourned. To Pizzi, this denotes the predominant role of lawyers in adversary trials in the US and the subordinate function in the fact-finding inquiry discharged by their counterparts

³¹⁹ E.g. S. Franken, ‘Finding the Truth in Dutch Courtrooms: How Does One Deal with Miscarriages of Justice?’, (2008) 4 (3) *Utrecht Law Review* 218, at 220 (describing Dutch criminal trials as ‘very efficient’ and ‘mostly very dull’).

³²⁰ Hodgson, ‘Conceptions of the Trial in Inquisitorial and Adversarial Procedure’ (n 67), at 236.

³²¹ *Ibid.*

³²² Goodpaster, ‘On the Theory of American Adversary Criminal Trial’ (n 175), at 147 (‘This setting conveys the austere dignified effect of a sacred precinct, a kind of civic temple reserved for the rites of a civic religion. Indeed, the focal arrangements of furniture and seating in many trial courtrooms are reminiscent of those in churches, with the bench and jurybox replacing the altar and choirbox, and the spectator benches replacing the pews.’); Jung, ‘Rituals forever?’ (n 288), at 69 (‘their historical affinity and structural similarity with religious rites cannot be overlooked.’).

³²³ McKillop, ‘Behind the Faces of Justice’ (n 131), at 56 (in a French trial he observed ‘the prosecutor entered the court through the same door as the judges, while defence counsel entered through a door at the bottom of the court-room’).

³²⁴ Comparing courtrooms in England and Wales with French courtrooms in connection with the participants’ roles, see Hodgson, ‘Conceptions of the Trial in Inquisitorial and Adversarial Procedure’ (n 67), at 227 (parties) and 235-6 (accused); A. Zahar and G. Sluiter, *International Criminal Law: A Critical Introduction* (Oxford: Oxford University Press, 2007) 45 (for a similar analysis of the layout of Dutch courtrooms).

³²⁵ Goodpaster, ‘On the Theory of American Adversary Criminal Trial’ (n 175), at 147-8.

in inquisitorial trials.³²⁶ In addition, the importance of non-verbal language as a part of trial advocacy is more important for lawyers where they are expected to persuade the jury of the merits of their case than where they merely assist judges in establishing the truth.

This completes the brief overview of the ‘faces’ of criminal justice and some of the key corporeal features of criminal trials across the adversarial *v.* inquisitorial divide. This discussion provides the basis for general reflections on the correlation between the procedural function and communicative aspects of the trial process. The procedural legalism view recognizes the establishment of the truth in relation to the facts in a case in order to determine the guilt or innocence of the accused and an appropriate sentence, if any, as the primary function of the trial process.³²⁷ But the conceptualization of trial solely as a forensic inquiry geared to establish the truth does not exhaust the nature of the trial as a multifarious social phenomenon. One may think that different appearances and outward aspects of trial procedure in various criminal justice systems are merely coincidental and no more than an under-rationalized tribute to tradition. But the obvious links between the externalities of the process and its rationales and modalities in different systems rather point to a limited and unconvincing character of such a view. It discards, too simplistically, the importance of rituals and symbols in the conduct of criminal trials that possess a significant explanatory power regarding how trials are organized and conducted in different jurisdictions.

The legalist view may therefore be usefully complemented by a socio-legal perspective, which conceives of the trial as a socio-legal event. This perspective helps to appreciate and explain the corporeal features and communicative effects of the trial procedure. Those features and effects may either be related to the primary truth-finding function as a means of facilitating or be autonomous from it, while seeking to enhance the court’s legitimacy and societal acceptance of the trial outcomes. It is warranted to conclude that, in addition to the function of truth-discovery, the trial procedure contributes to a set of broader sociological objectives, as an informational, communicative, and didactic tool. With the design of trial proceedings being rooted in a given society’s legal culture, the trial setup is a carefully and consciously chosen way to facilitate those objectives.

In terms of the relationship between the truth-finding function and the communicative aspects of the trial process, it will be that of balance and consistency, as long as the communicative role of procedure is supportive of the primary function and/or is an innocuous side-effect thereof. However, where the trial participants place an excessive emphasis on the broader sociological effects and unjustifiably employ the trial ritual and formalities as a tool of didacticism and dialogue with the outside audience, tensions may arise with the legalist function and with the objective of establishing the truth.³²⁸ One may discern a sort of regularity in the relationship between the truth-finding function and the intended sociological effects of the process: The less extrovert and audience-oriented the trial process, the greater focus on the effective truth-finding and decisional accuracy; in turn, the more theatrical the process, the lesser concern with the discharge of the primary functions of the process such as the establishment of the truth in the case. This link comes to the fore in the political trials in the domestic jurisdictions and in international criminal trials which bear the greatest risk of the process being turned into a ‘show trial’. The tension between the

³²⁶ Pizzi, *Trials without Truth* (n 117), at 23.

³²⁷ See also Weinreb, *Denial of Justice* (n 260), at 1-2 (‘The function of criminal process is to determine criminal guilt with a view toward imposing a penalty. If it provides a civic education for some people (which is doubtful) or a public entertainment, so much the better; but these are not its function, any more than it is the function of the judicial system to provide comfortable berths for the friends of successful politicians, as it does.’).

³²⁸ Jung, ‘Rituals Forever?’ (n 288), at 70 (‘since the legitimacy of justice depends on its potential to find the truth, rituals should not jeopardize this very aim’) and 71 (‘If we ask ourselves about the legitimacy of the judiciary and judicial adjudication, rituals will certainly not be the first thing which come to mind. It is the search for truth and procedural justice elements which count.’); Goodpaster, ‘On the Theory of American Adversary Criminal Trial’ (n 175), at 144 (the American trial system has multiple purposes—truth-finding, fairness, and norm generation—which ‘co-exist in an unstable tension’); Grano, *Confessions, Truth, and the Law* (n 170), at 5 (arguing for the need to prioritize among the goals of the trial as a precondition for its normative assessments).

legalist functions and the intended broader socio-political effects of the trial process in the international criminal law context will be examined in the next chapter devoted to the functions and effects of international criminal trials.³²⁹

6. ROLE OF THE TRIAL PHASE: IMPACT OF PRE-TRIAL PROCESS AND BARGAINING

The final cross-cutting theme in a phenomenological inquiry on the trial is the role and normative significance of this procedural phase. The different interpretations of ‘truth’ in adversarial and inquisitorial systems and divergence in the structure of proof-taking have implications for the position of trial in the context of criminal procedure. As noted, the two systems place the weight of key decisions regarding evidence and the momentum of truth-finding on different procedural stages. Hence the significance of the trial stage in the adversarial and inquisitorial paradigms of justice varies significantly.³³⁰

In adversarial systems, the evidentiary discontinuity between pre-trial, trial and post-trial, the attribution of the factual inquiry function exclusively to the trial, and the high degree of finality of trial judgments result in the trial becoming the prime stage. It is viewed as the absolute centrepiece of criminal proceedings and essentially as its only stage.³³¹ Damaška aptly refers to the ‘original decision making’ at trial as ‘a focal point, overshadowing in importance whatever preceded it and whatever might follow it’.³³² It is not accidental that the ‘trial’ is often identified with the criminal process as a whole.³³³ The investigation and pre-trial activities are but a prelude to the trial performed by and between parties; they dwell in obscurity being carried out in private and out-of-court in the virtual lack of judicial scrutiny.³³⁴ The absence of the judicial investigative function and single official case file means that the judge and jury remain unapprised of the details of the case prior to the trial. Only the evidence admitted and examined at trial counts for the purpose of the verdict. Therefore, the trial is the locus of litigation and fact-finding, being the first and last opportunity for the parties to present the proposed evidence to the triers of fact.³³⁵ The earlier noted limited nature of the appellate review reinforces the importance of trial as a metaphorical basket into which the parties are compelled to put all their eggs. It compels the parties to ensure that they can present all the evidence material to their cases at trial and not at a later stage.

The concentration of fact-finding and litigation in one single stage is bound to result in lengthy, costly, and cumbersome proceedings. The jury trials with all the due process paraphernalia and evidentiary rules become prohibitively expensive and unaffordable, which makes them an

³²⁹ Chapter 5.

³³⁰ Damaška, *The Faces of Justice* (n 60), at 49 (‘It is ... a mortal sin for a comparativist to assume that the significance of trials is identical in proceedings before an officialdom gravitating toward the hierarchical or toward the coordinate ideal.’); McKillop, ‘Behind the Faces of Justice’, *supra* note 292, at 57-8 (noting the difficulties comparativists may face because the trial phase in the common law is of higher relative importance than that in the Continental system’).

³³¹ Hodgson, ‘Conceptions of the Trial in Inquisitorial and Adversarial Procedure’ (n 67), at 223 and 240; Jackson, ‘Managing Uncertainty and Finality’ (n 7), at 123-4.

³³² Damaška, *The Faces of Justice* (n 60), at 56 and 65.

³³³ Describing trial before the ‘coordinate’ officialdom as a ‘proper synecdoche for the legal process as a whole’, see Damaška, *The Faces of Justice* (n 60), at 57; *id.* ‘Models of Criminal Procedure’ (n 13), at 489-90 (noting that the English translation of the title of Kafka’s *Der Prozess* is ‘The Trial’ rather than ‘The Process’). For an example of such use of the notion of ‘trial’, see R. May and M. Wierda, *International Criminal Evidence* (Ardsley, NY: Transnational Publishers, 2001) 1-48 *passim*.

³³⁴ M. Marchesiello, ‘Proceedings before the Pre-Trial Chambers’, in Cassese/Gaeta/Jones (eds), *The Rome Statute Commentary* 1231; Hodgson, ‘Conceptions of the Trial in Inquisitorial and Adversarial Procedure’ (n 67), at 230 n31 (the judicial function in common law focuses on trial adjudication, even through the judges are increasingly tasked with managing pre-trial proceedings and issuing warrants for coercive measures).

³³⁵ Weigend, ‘Is the Criminal Process about Truth?’ (n 35), at 160; Hodgson, ‘Conceptions of the Trial in Inquisitorial and Adversarial Procedure’ (n 67), at 225; Nijboer, ‘The American Adversarial System in Criminal Cases’ (n 36), at 94.

exception rather than a rule.³³⁶ Simply put, having contested proceedings in every criminal case would by far overreach the limited capacities of the criminal justice system, possibly leading to a full paralysis.³³⁷ Therefore, the same attributes which endow the adversarial trial with the status of a prime phase in common law jurisdictions—the inherent complexity, resource-intensiveness, and significance as a truth-finding locus—result in a systemic inclination towards trial-avoidance mechanisms. Guilty pleas, especially as a result of plea-bargaining, compensate for an overcomplicated trial apparatus.³³⁸

A guilty plea is an in-court formal acceptance of responsibility by the accused in relation to certain charges, which theoretically can be unprompted (made purely out of remorse) but more likely will be negotiated with the prosecution and motivated by the expectation of a more lenient sentence or other concessions by the prosecutor and the court. Plea-bargaining is the process of out-of-court negotiation between the parties on the conditions of a guilty plea which may or may not result in a plea agreement. Such an agreement may stipulate, for instance, that the accused shall plead guilty to some charges and cooperate otherwise (for example, testify against other accused, waive the right to appeal the sentence which does not exceed the recommended maximum) in exchange for concessions. Those include not presenting certain facts that would aggravate responsibility without altering a charge ('fact bargaining'), dropping a more serious charge ('charge bargaining'), or recommending to the court a more lenient sentence ('sentence bargaining').³³⁹

In order to avoid the bankruptcy of the criminal justice system, many of the common law jurisdictions have no other option than to counterbalance the complexity of trials by their tolerance towards, and encouragement of, negotiated settlements. Those allow doing away with contested proceedings, possibly at the cost of the (full) truth.³⁴⁰ As noted, plea-bargaining leads to an agreement between the parties according to which the accused makes a legal statement of his or her guilt, which has the effect of a guilty verdict, in relation to a lesser charge in exchange for the prosecution's dropping a more serious one or in the reasonable expectation of a sentencing discount by the court. The factual basis for the plea agreement is likely to be more limited than that which could be established as a result of contested proceedings, not least because some of the factual allegations and/or charges are abandoned by the prosecution.

After the court validates a guilty plea by satisfying itself that it is voluntary, informed, and unambiguous, it shall formally pronounce the accused guilty on the relevant charge and holds a sentencing hearing, thereby accepting the consensual 'truth' proposed by the parties and expeditiously disposing of a case on that basis. Therefore, the effects of a valid guilty plea on the trial format and structure are no less than dramatic: it results in the bypassing of the fact-finding component of the trial or in its abrupt termination whenever the plea is changed to 'guilty'. A guilty plea is a binding legal act, both for the court and for the parties, whereby the accused gives up his right to a contested trial and puts an end to the dispute. It is tantamount to auto-conviction and supplants the need for the court (jury) to examine facts and to issue the verdict. Guilty pleas and

³³⁶ J.H. Langbein, 'Land Without Plea Bargaining: How the Germans Do It', (1979) 78 *Michigan Law Review* 204, at 205 ('Over the two centuries since the Americans constitutionalized jury trial, we have transformed it, submerging it in such time-consuming complexity that we can now employ it only exceptionally.');

Pizzi, *Trials without Truth* (n 117), at 74 ('A criminal justice system ... is all plea bargaining—due to a tremendously expensive and not very reliable trial apparatus').

³³⁷ Damaška, 'Evidentiary Barriers to Conviction' (n 15), at 551 ('it is probably true that the machinery of criminal justice in most common law countries would come under great strain, and perhaps even be paralyzed, if the great majority of defendants insisted on being tried under the full panoply of evidentiary rules.');

Bradley, 'The Convergence of the Continental and the Common Law Model' (n 39), at 474 and 482-3.

³³⁸ F. Tulkens, 'Negotiated Justice', in M. Delmas-Marty and J.R. Spencer (eds.), *European Criminal Procedures* (Cambridge: Cambridge University Press, 2002) 663 ('plea-bargaining to some extent counterbalances a system which is heavy and demanding in terms of the evidence it requires').

³³⁹ On this distinction, see Ashworth and Redmayne, *The Criminal Process* (n 162), at 269-70.

³⁴⁰ Frankel, 'The Search for Truth' (n 46), at 1040 ('When a fair trial entails a trial so tortured and obstacle-strewn as our adversary process, we make the system barely tolerable, if not widely admired, only by contriving that most of those theoretically eligible get no trial at all.')

bargaining are clearly rooted in a libertarian mindset and reflect the emphasis on the party autonomy and empowerment in the adversarial systems.³⁴¹

Thus, it is paradoxical that the strong focus on the trial as the ultimate tool of criminal law adjudication results in the phenomenon of trial-avoidance and that such emphasis is responsible for the normative vulnerability and even the decline of the trial in a broader context of a criminal justice. Damaška refers to the systemic tendency of trial-avoidance as a ‘neurotic symptom’ caused by the repression of the *id* of the criminal process (the aspiration to identify and punish the perpetrator) by its *super-ego* (the due process guarantees).³⁴² Consensual dispositions are not merely tolerated but encouraged due to what is a dependency on negotiated justice.³⁴³ The latter alleviates the burden and financial strain on the judicial system and prevents its bankruptcy that would be unavoidable if all or most of the criminal cases had to be decided through full-blown trials.³⁴⁴

As a result, in common law countries, the absolute majority of cases are settled through plea bargains and never come to trial.³⁴⁵ The guilty-plea rate is no less than 90% in the US and some provinces of Canada (e.g. Ontario),³⁴⁶ about 65% in England and Wales in cases before the Crown Court and 90% in the proceedings before the magistrates, and 74% in Australia.³⁴⁷ Thus, full-blown trials are effectively a ‘minority phenomenon’ in the common law world.³⁴⁸ Even in serious cases, accused choose not to contest guilt on a lesser charge ‘because they have been led to expect (through an express bargain or through information about the court’s sentencing practice) a lesser sentence as a reward for their cooperation’.³⁴⁹ The guaranteed prospect of a lesser sentence in case of accepting a bargain will often present itself as a more appealing option than submitting oneself to a contested trial with an uncertain outcome and, not unlikely, a harsher sentence. The courts at common law are formally not bound by bargains, but for the most part they honour the parties’ agreements. This renders the plea-bargaining system predictable and makes it work. The judicial connivance has to do with the bifurcated structure of authority, whereby the adjudication of matters of fact and on matters of law is split between the judge and the jury. If the court refuses to comply with a sentence recommendation of the prosecutor, the guilty plea will be withdrawn and the case will have to be retried by another jury.

³⁴¹ Langer, ‘From Legal Transplants to Legal Translations’ (n 24), at 20 (‘Plea bargains seem to have their origin in a criminal procedure system understood as a dispute between parties’).

³⁴² Damaška, ‘Truth in Adjudication’ (n 143), at 307.

³⁴³ Langbein, ‘Land without Plea Bargaining’ (n 336), at 204 (‘Our criminal justice system has become ever more dependent on processing cases of serious crime through the non-trial procedure of plea bargaining.’) and 205 (‘We indulge in this practice of condemnation without adjudication because we think we have to, not because we want to.’) See also *Santobello v. New York*, 404 US 257 (1971), at 260 (‘If every criminal charge were subjected to a full-scale trial, the States and the federal government would need to multiply by many times the number of judges and court facilities.’) and 270 (describing plea bargaining as ‘an essential component of the administration of justice’).

³⁴⁴ Langbein, ‘Land without Plea Bargaining’ (n 336), at 205 (‘the *raison d’être* of American plea bargaining ... is after all nothing more than simple expediency’).

³⁴⁵ Nijboer, ‘The American Adversarial System in Criminal Cases’ (n 36), at 94; Bradley, ‘The Convergence of the Continental and the Common Law Model’ (n 39), at 474 (citing the findings of the National Center for State Courts that in 13 US jurisdictions, the percentage of jury trials in felony cases ranges from 2.1% in Texas to 6.9% in Alaska).

³⁴⁶ *Brady v. United States*, 397 US 742 (1970), at 752 n10. According to the US Sentencing Commission’s statistics for the years 1999 through 2003, the proportion of criminal cases disposed through guilty pleas in the US was respectively: 94.6% (1999), 95.5% (2000); 96.6% (2001); 97.1% (2002), and 95.7 % (2003). See further N.A. Combs, ‘Procuring Guilty Pleas for International Crimes: The Limited Influence of Sentence Discounts’, (2006) 59 *Vanderbilt Law Review* 69, at 70; M. Harmon, ‘Plea Bargaining: The Uninvited Guest at the ICTY’, in J. Doria *et al.* (eds), *The Legal Regime of the International Criminal Court: Essays in Honour of Igor Pavlovich Blischenko* (Leiden/Boston: Brill, 2009) 165 nn 10-11.

³⁴⁷ Harmon, ‘Plea Bargaining’ (n 346), at 165 n11.

³⁴⁸ T. Weigend, ‘Why Have a Trial When You Can Have a Bargain?’, in Duff *et al.* (eds.), *The Trial on Trial 2* (n 67) 211.

³⁴⁹ Weigend, ‘Why Have a Trial’ (n 348), at 211; Langbein, ‘Land without Plea Bargaining’ (n 336), at 204 (on the threat of a ‘sentencing differential’ as the inducement to waive the right to trial that makes plea bargaining work).

As an alternative way of ‘settling a dispute’, plea-bargaining and guilty pleas oust the contested trial from the pedestal of an ultimate truth-finding device and result in a formal acceptance of the ‘interpretive truth’ produced by the parties. In this sense, negotiated settlements detract from the fact-finding function associated with the trial process and downgrade the significance of the trial in the overall context. In that context, the effects of plea-bargaining as a ‘recent and transparent evasion of [the] cherished common law tradition of criminal trial’ generated scholarly concern.³⁵⁰ Most objections to the widespread plea bargaining advanced in the Anglo-American literature appear to relate to the inherent risks of abuse and coercion, not to the idea of resolving criminal cases without adjudication.³⁵¹ The ‘bargaining as disaster’ is that the accused, especially those in a less privileged position, are put under pressure to give up their trial rights and to plead guilty even if they are innocent, as a supposed way to be ‘better off’.³⁵²

Even though statistically adversarial contested trials are exceptional as a way of disposing of cases, they retain a symbolical meaning in the adversarial procedure: more than any other stage, the trial is associated with the ideals of due process and adversariness. That said, the possibility of returning to a contested mode and having a full-fledged trial remains an important and constant consideration in the parties’ determination of their case strategy, risk-assessment, and negotiating on the plea offer. In case a plea negotiation fails, the defendant may refuse to waive his right to a trial and submit himself to the contested proceedings. As a possibility, the trial beacons over the pre-trial investigations and the partisan negotiations even though the absolute majority of criminal cases eventually do not go for trial. Thus, in normative terms, the trial continues being the most essential phase of criminal proceedings under the adversarial model. But in terms of actual resort to it in common law jurisdictions, its normative potential as the prime forum for fact-finding comes to be realized only in very few cases.

In ‘inquisitorial’ systems, the trial *per se* does not amount to a central procedural stage.³⁵³ The emphasis on the trial as an oral and public hearing reserved for the first-hand inquiry into the facts is stronger in jurisdictions which have reformed their criminal process for it to reflect the ‘adversarial’ values.³⁵⁴ But even there, the significance of the trial within the procedural chronology will not reach that characteristic for the adversarial jury systems. As will be discussed in a moment, this is not because the relevance of trial in civil law is substantially reduced by the use of negotiated justice – even though this indeed occurs to some extent as a repercussion or counter-impulse of ‘adversarial’ reforms. From the outset, the reason for the weaker emphasis on the trial in the unadulterated inquisitorial vision lies in the fact that in such systems the bulk of fact-finding conducted by the police and/or judicial authorities occurs before trial. The evidence is compiled into the dossier by the authorities in the course of investigation and the fact-finding inquiry is half-completed.³⁵⁵ Where the investigative material can be imported into the trial record with relative ease, the weight of truth-finding inquiry shifts to the stages preceding the trial. It does not matter as much if the trial is structured in an adversarial manner: once the ‘imports’ are allowed in the trial,

³⁵⁰ Langbein, ‘Land without Plea Bargaining’ (n 336), at 204.

³⁵¹ Weigend, ‘The Decay of the Inquisitorial Ideal’ (n 33), at 41. But see Pizzi, *Trials without Truth* (n 117), at 72 (discussing the avoidance of trial in the US as a weakness of its trial system).

³⁵² On the problems of a plea-bargaining system in the US, see J.H. Langbein, ‘Torture and Plea Bargaining’, (1978) 46(1) *University of Chicago Law Review* 3, at 12 (drawing a parallel between the practice of judicial torture in the mediaeval Europe and the American plea-bargaining system); S. Schulhofer, ‘Plea Bargaining as Disaster’, (1992) 101 *Yale Law Journal* 1979; *id.*, ‘Is Plea Bargaining Inevitable?’, (1984) 97 *Harvard Law Review* 1037; A. Alschuler, ‘Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System’, (1983) 50 *University of Chicago Law Review* 931.

³⁵³ Damaška, ‘Structures of Authority’ (n 64), at 481 n1 (‘the trial is much less crucial a stage in the continental than in the common law system’).

³⁵⁴ Germany is one example: see *supra* n 86.

³⁵⁵ Jung, ‘Nothing But the Truth?’ (n 62), at 153-4 (claiming that, in an inquisitorial system, ‘often enough the case is already “settled” before the trial starts’); *id.*, ‘Appellate Review’ (n 94), at 693 (noting that ‘within the German and even more so, within the French or Austrian criminal procedure, the enquiry phase—or in the French setting “l’instruction”—has a tendency to pre-fabricate the end product.’).

‘the momentum of the truth-finding process shifts to the (inquisitorial) pretrial stage’ and the contest-like features become ‘little more than window dressing’ for an essentially inquisitorial arrangement.³⁵⁶

The premium on the official functions of investigative authority (police, prosecution and/or investigating judge) and on the activities conducted in the pre-trial confers on it the attributes of ‘the central and high point of the process’.³⁵⁷ While the trial stage is certainly not a mere *pro forma* event for rubberstamping the results of pre-trial inquiry in modern inquisitorial systems,³⁵⁸ it serves to verify the hypotheses formulated by the police and/or an investigating judge and the version of events as it arises from the dossier, rather than being an examination of evidence from a blank slate.³⁵⁹ The dossier is essential and the presiding judge will have studied it thoroughly before the trial, given that only a part of evidence will be presented orally at trial.³⁶⁰ The judge may, for example, refuse to hear a witness if the testimony would be superfluous in light of the dossier and if the court is already convinced of the relevant factual claim.³⁶¹ From a common law perspective, such a conception of trial might seem an ‘absolute negation of any principle of fairness’ and incompatible with the idea of “trial” in the true sense of the word’,³⁶² being ‘essentially an audit of work done before or an appeal from the findings of preliminary investigation’.³⁶³ Moreover, the regularity and generous scope of the appellate review diminishes the finality of trial adjudication, which—to borrow Damaška’s expression, ‘acquires an aura of provisionality’.³⁶⁴

The thesis that the normative significance of trial in the procedural system is inversely proportional to the scope of judicial function at a pre-trial phase finds support in the data regarding the effects the pre-trial reforms in civil law jurisdictions had on the formal of trial proceedings. It was reported that the abolition of the function of the investigative judge in Germany enhanced the role of the trial and turned German courtrooms into the ‘venues of serious investigative activities, examination and debates’.³⁶⁵ Similarly, the cardinal 1989 reforms in Italy among which the abolition of the judicial investigation resulted in shifting the emphasis from pre-trial investigation to the trial.³⁶⁶ But in the countries that retained ‘instruction’ (e.g. *rechter-comissaris* in the

³⁵⁶ Weigend, ‘Is the Criminal Process about Truth?’ (n 35), at 164.

³⁵⁷ Hodgson, ‘Conceptions of the Trial in Inquisitorial and Adversarial Procedure’ (n 67), at 223 and 240.

³⁵⁸ Nijboer, ‘The American Adversarial System in Criminal Cases’ (n 36), at 81 (noting an occasional misconception to this effect in the common law literature). Cf. H.B. Kerper, *Introduction to the Criminal Justice System* (St. Paul, MN: West Pub Co., 1972) 182-3 (‘In the Continental system of law, for example, the state is supposed to satisfy itself as to the guilt of the accused before it brings him to trial. Thus, when the trial begins he is presumed to be guilty, and must prove himself innocent.’).

³⁵⁹ Hodgson, ‘Conceptions of the Trial in Inquisitorial and Adversarial Procedure’ (n 67), at 225 and 240 (‘confirmation of an earlier set of data-collecting moments’); Franken, ‘Finding the Truth in Dutch Courtrooms’ (n 319), at 220 (‘*De auditu* statements can be used as evidence, even if the judge is not confronted with the witness himself at the trial. If there is no need to present all the evidence at the trial, truth finding in courtroom becomes essentially a matter of verifying the work that has been done by the police in the preliminary stage. This verification process is primarily based on the paperwork completed in the investigation stage. ... [J]udges decide in most cases on the basis of this *dossier*, with few questions being posed to the defendant and no witnesses being heard at the trial.’).

³⁶⁰ McEwan, ‘Ritual, Fairness and Truth’ (n 39), at 64; Damaška, ‘Evidentiary Barriers to Conviction’ (n 15), at 516 n14 and 544 (‘the continental trial is typically conducted in such a manner that the presiding judge is required to study the file of the case in advance of the trial’).

³⁶¹ Damaška, ‘Evidentiary Barriers to Conviction’ (n 15), at 516 n14.

³⁶² Marchesiello, ‘Proceedings before the Pre-Trial Chambers’ (n 334), at 1231.

³⁶³ Damaška, *The Faces of Justice* (n 60), at 53 and 224.

³⁶⁴ *Ibid.*, at 49 (‘The great significance attributed to “quality control” by superiors in a hierarchical organization inevitably detracts from the importance of original decision making: the latter acquires an aura of provisionality.’).

³⁶⁵ Nijboer, ‘Comparative Perspectives on the Judicial Role’ (n 28), at 25 and 28 (‘Differences within the group of continental systems can be explained by the difference in the pre-trial stage: where one finds an extensive full investigative stage under the authority of the investigative judge, there is a tendency to abbreviate the courtroom session.’).

³⁶⁶ Pizzi and M. Montagna, ‘The Battle to Establish an Adversarial Trial System in Italy’ (n 32), at 435.

Netherlands), the examination of witnesses and experts in court takes considerably less time because the trial is essentially based on the dossier.³⁶⁷

To return to the issue of the effects of negotiated justice' on the role of the trial phase in the civil law criminal process, the starting point is that the notion of a court ratifying the outcome arrived at through bargaining rather through genuine inquiry, is extraneous to the inquisitorial model. Bargaining is antithetical to its paternalistic and hierarchical ideal of an official investigation vested with a mission to ascertain the truth.³⁶⁸ In the inquisitorial process, the admissions of guilt take the form of confession that is treated as evidence, as opposed to a legal statement of guilt. The accused is invited to make a statement after the charges are read at the beginning of the trial. He is to a certain degree expected to admit incriminating facts and may even be prodded to do so by the judge during the interrogation. But this not an invitation to 'enter a plea' in the common-law sense and does not dispense with the need for the judicial determination of guilt based on facts.³⁶⁹ The 'queen of all proof', confession is not a self-sufficient basis for a judicial finding of guilt and must be evaluated in light of the dossier, like any other item.³⁷⁰

In its paradigmatic form, the inquisitorial trial process is sufficiently manageable and expeditious. Unlike with the 'one-day-in-court' trials before the jury encumbered by the complexities of evidence admission and exclusion, the long duration and inefficiency of trials is not a factor that would create strong incentives for the avoidance of full trials or a structural need to adopt the dock-clearing strategies.³⁷¹ However, with the increased emphasis on the oral and confrontational examination of evidence at trial in the 'reformed' inquisitorial systems (Germany and Italy being the prime examples), negotiated justice penetrated into the criminal practice – informally at first and making its way into the codes eventually.³⁷² While these reforms pursued distinct rationales and present important nuances, it is plausible that the need to enhance efficiency of criminal process in disposing of the ever-growing dockets has been the primary concern.

As comparative studies show, the discernible and decisive move towards the wider use of negotiated arrangements occurred. Partially this should have been due to the Anglo-American legal-cultural influence – and partially because of the tectonic changes occurring in those systems independently of external influence.³⁷³ Thus, the sophistication of substantive law and the development of the role of defence into that of 'irritants' in the 'conformist' official inquest scheme—active and professional participants who represent clients with zeal and creativity and vigorously test the merits of the case—were bound to turn trials into more resource-intensive affairs and imbued them with the contest elements.³⁷⁴ The negotiated justice was the natural compensatory

³⁶⁷ M. Groenhuijsen and J. Simmelink, 'Netherlands', in R. Vogler and B. Hüber (eds), *Criminal Procedure in Europe* (Berlin: Duncker & Humblot, 2008) 435-6.

³⁶⁸ Weigend, 'The Decay of the Inquisitorial Ideal' (n 33), at 41 ('equal-level negotiations between the defendant and state officials' as an 'extravagant aberration').

³⁶⁹ Damaška, *The Faces of Justice* (n 60), at 95 (on confessions in the policy-implementing model: 'The question "are you guilty?" ("how do you plead?"), if it is asked at all, is not a vehicle to ascertain whether a process-sustaining controversy exists... Instead, the question is no more than an invitation addressed to the defendant to confess to the facts of the crime.');

Langer, 'From Legal Transplants to Legal Translations' (n 24), at 11.

³⁷⁰ Langer, 'From Legal Transplants to Legal Translations' (n 24), at 22; S. Trechsel, *Human Rights in Criminal Proceedings* (Oxford: Oxford University Press, 2005) 161.

³⁷¹ Bradley, 'The Convergence of the Continental and the Common Law Model' (n 39), at 472; Langbein and Weinreb, 'Continental Criminal Procedure' (n 278), at 1562 (the rapidity of German trial procedure provides the prosecutor with no particular incentive for trial-avoidance).

³⁷² See *supra* n 33. On the recent German legislative reform, see R. Rauxloh, 'Formalization of Plea Bargaining in Germany: Will the New Legislation Be Able to Square the Circle?', (2010) 34 *Fordham Journal of International Law* 296

³⁷³ M. Damaška, 'Negotiated Justice in International Criminal Courts', (2004) 2 *JICJ* 1018, at 1024.

³⁷⁴ Langer, 'From Legal Transplants to Legal Translations' (n 24), at 3 and 37-8 (explaining the importation of plea bargaining by some civil law jurisdictions in part by the US influence and in part by the need to deal efficiently with the increased crime rate); Weigend, 'The Decay of the Inquisitorial Ideal' (n 33), at 50 nn45-7 (rejecting the idea that the 'backdoor invasion' of plea bargaining in Germany resulted from the wish to emulate the US practice and attributing it to internal factors among which the activation of the defence at trial); Rauxloh, 'Formalization of Plea Bargaining in

move to counterbalance the increasingly complex and lengthy trial process.³⁷⁵ This version of ‘plea-bargaining’ consists in informal out-of-court discussions about the prospect of obtaining a confession (as opposed to a guilty plea) and rewarding it with a more lenient sentence. The negotiation can be held between the parties or principally between the presiding judge and the defence counsel, with the prosecutor playing a more detached role, unlike in the common-law plea-bargaining.³⁷⁶

Several specific examples can demonstrate the character of this shift. Under the ‘plea-bargaining’ system in Germany (*Absprachen*), which is now entrenched and still much debated, the trial is not avoided altogether. It follows a summary, abridged procedure following the non-contestation of facts by the accused. The confession, and not the guilty verdict, is part of the agreement, and it does not affect the duty of the court to establish the truth under Art. 244(2) of the German Code of Criminal Procedure.³⁷⁷ Consequently, in certain circumstances the judge is obliged to hear evidence in order to satisfy herself of the truthfulness of the self-incriminatory statement of the accused.³⁷⁸ Decades ago, bargains with the defendant were deemed inappropriate and incongruent with the foundations of the criminal justice system – leading to John Langbein’s famous laudation of Germany as a ‘land without plea-bargaining.’³⁷⁹ It is an ironic fact that already at that time, bargaining was widely practiced in defiance of the existing legislation, being a ‘dark side’ of the court practice.³⁸⁰

Fierce public and scholarly debates ensued, and eventually the higher courts authorized the practice, with the Federal Appeal Court stating that negotiated judgments are ‘an indispensable procedural device for disposing of criminal proceedings within a reasonable time frame’.³⁸¹ Nowadays the courts are openly pro-active in securing the sentencing deals and routinely use trial hearings for ratifying the outcomes of the bargains. If the agreement is reached before trial, the latter becomes a largely *pro forma* event meant to certify the results of a bargain struck in the pre-trial phase. After the opening of the trial and the reading out of charges by the prosecutor, the defendant makes a statement conceding to the incriminating facts or to the effect that he does not contest the charges; the court shall announce that the deal has been struck and place on the record its commitment to a maximum sentence as a consequence of a confession; and the hearing is then

Germany’ (n 259), at 298-9 (‘it was the multiplying duration of the individual proceedings that led practitioners to look for new means of coping with the caseload’).

³⁷⁵ Vogler and Hüber (eds), *Criminal Procedure in Europe* (n 367), at 14 (‘the emphasis on the trial encourages compensatory moves towards the use of the guilty plea, plea bargaining and an expedited pre-trial, in which outcomes are achieved by negotiation between the parties rather than by hearing in open court.’); Damaška, ‘Negotiated Justice’ (n 373), at 1019 (‘while the old mode of cooperation was for defendants to make damaging admissions in the mere expectation of more lenient treatment, the novel mode is for authorities to offer concessions to defendant in exchange for an act of self-condemnation which permits avoidance of the full adjudicative process or at least its facilitation.’).

³⁷⁶ Weigend, ‘The Decay of the Inquisitorial Ideal’ (n 33), at 45-6; Langer, ‘From Legal Transplants to Legal Translations’ (n 24), at 40-1.

³⁷⁷ Art. 257c(1) and (2), Code of Criminal Procedure (Germany). See also Bradley, ‘The Convergence of the Continental and the Common Law Model’ (n 39), at 483 n44; J. Hermann, ‘Bargaining Justice: A Bargain for German Criminal Justice’, (1992) *University of Pittsburgh Law Review* 755, at 763 (‘Unlike a guilty plea, a confession does not replace a trial but rather causes a shorter trial.’).

³⁷⁸ Turner and Weigend, ‘Negotiated Justice’ (n 194), at 1402 (‘German courts ... can—and sometimes must—try to establish the truthfulness of the defendant’s self-incriminatory statement and may hear witnesses or experts for that purpose.’).

³⁷⁹ Langbein, ‘Land Without Plea Bargaining’ (n 336), at 205 *et seq.* (observing that West German legal system ‘successfully avoided any form or analogue of plea bargaining in its procedures for cases of serious crime’ and dismantling the ‘misconception’ that ‘a clandestine plea bargaining system lurks behind veils of German pretense’).

³⁸⁰ Weigend, ‘The Decay of the Inquisitorial Ideal’ (n 33), at 47-53; R. Rauxloh, *Plea Bargaining in National and International Law: A Comparative Study* (New York: Routledge, 2012) 66-8.

³⁸¹ Weigend, ‘Why Have a Trial’ (n 348), at 211-2 nn19-20 (citing also the relevant jurisprudence of the Federal Court of Appeal (*Bundesgerichtshof*), including Decision of 28 August 1997, (1997) 43 *Entscheidungen des Bundesgerichtshofes in Strafsachen* 195 and Decision of 26 November 2003, (2004) 24 *Neue Zeitschrift für Strafrecht* 164; *id.* ‘The Decay of the Inquisitorial Ideal’ (n 33), at 43; Langer, ‘From Legal Transplants to Legal Translations’ (n 24), at 40-3.

concluded with brief closing statements, followed by conviction and the handing down of the agreed sentence.³⁸²

By contrast, the radical reform of the Italian criminal procedure code (1989) that resulted in the addition of negotiated justice elements was a legislative project rather than a surreptitious judicial operation. Therefore, it enjoyed greater political support and legitimacy and could go further than the German system in drawing inspiration from the US when incorporating the elements of negotiated justice.³⁸³ One may be uncertain as to whether it did so in fact, save for the more passive judicial role in the negotiation process, in comparison to Germany. The Italian Code features several avenues for consensual or negotiated disposal of cases. Under the arrangement known as *patteggiamento sulla poena* ('bargain over punishment'), parties may submit to the preliminary investigating judge a joint request for the imposition of a pecuniary punishment or a short-term deprivation of liberty.³⁸⁴ Secondly, the accused may resort to a summary judgment procedure (*guidizio abbreviato*) by requesting a preliminary investigating judge to decide a case, with the consent of the prosecutor, which results in the reduction of sentence by one-third.³⁸⁵

The *patteggiamento* only applies to relatively minor cases the penalty for which, after having been reduced by up to one-third, does not exceed the maximum of five years' imprisonment as such or jointly with the pecuniary punishment.³⁸⁶ The range of cases suitable for bargaining is more limited than in the US, as *patteggiamento* cannot be used in cases involving serious offences. Nor does it involve, at least formally, any form of charge-bargaining, even though such practice might in fact be taking place.³⁸⁷ Furthermore, it is not identical to a guilty plea because the judge may reject the deal and acquit the accused despite the agreement and on the basis of the evidence in the dossier.³⁸⁸ According to Langer, these features reflect the Italian system's mistrust towards, or ambivalence about, the pure plea-bargaining forms.³⁸⁹ The proportion of cases disposed of via abbreviated procedure is substantially lower.³⁹⁰

As noted earlier, there are other examples of civil law countries which have accommodated the plea-bargaining analogues. This includes, but is not limited to, Poland,³⁹¹ France,³⁹² and

³⁸² Weigend, 'The Decay of the Inquisitorial Ideal' (n 33), at 46; Langer, 'From Legal Transplants to Legal Translations' (n 24), at 40. If the deal is struck when the trial is underway, the hearing is interrupted, the defendant makes a statement, and the same steps follow.

³⁸³ Langer, 'From Legal Transplants to Legal Translations' (n 24), at 47-8.

³⁸⁴ Arts 444-448, Code of Criminal Procedure (Italy) (the official title of the procedure is *applicazione della pena sulla richiesta delle parti*). See further Langer, 'From Legal Transplants to Legal Translations' (n 24), at 49-50 n236.

³⁸⁵ Art. 438-443, Code of Criminal Procedure (Italy). See Langer, 'From Legal Transplants to Legal Translations' (n 24), at 48 n232.

³⁸⁶ Art. 444(1), Code of Criminal Procedure (Italy). Langer, 'From Legal Transplants to Legal Translations' (n 24), at 49-50 n236.

³⁸⁷ Pizzi and Montagna, 'The Battle to Establish an Adversarial Trial System in Italy' (n 32), at 438 (pointing out dissimilarities between the US 'plea bargaining' and the Italian *patteggiamento*, including the category of criminal cases and the object of bargaining).

³⁸⁸ Reamey, 'Innovation or Renovation in Criminal Procedure' (n 10), at 717.

³⁸⁹ Langer, 'From Legal Transplants to Legal Translations' (n 24), at 50-1.

³⁹⁰ Pizzi and Montagna, 'The Battle to Establish an Adversarial Trial System in Italy' (n 32), at 444-5 (about 85 per cent of all cases go to trial). See also Langer, 'From Legal Transplants to Legal Translations' (n 24), at 52-3 (citing the statistics that between 1990 and 1998 resort to *patteggiamento* varied from 17-21 percent to 34-42 per cent, depending on the court level).

³⁹¹ Art 335 and 343, Code of Criminal Procedure (Poland). The Polish Code (*Kodeks postępowania karnego*) of 1997 provides that where the facts are clear and the objectives of the proceedings can be reached without trial, the court may convict without conducting evidentiary proceedings if the prosecutor, with the consent of the accused, submits a motion to convict and impose a penalty with an extraordinary mitigation or a penal measure, to waive the imposition of a penalty, or to adopt a conditional stay on the execution of the penalty. Art. 387 provides that, until the conclusion of the first examination at the first-instance hearing, the accused may submit a motion for a decision to convict and sentence him to a specified penalty or penal measure without evidentiary proceedings.

³⁹² See Arts 41-2, 41-3, Code of Criminal Procedure (France) provides for the *composition* procedure: the accused may pay a fine, undertake community work or carry out other obligation in exchange for the dismissal of charges. See Langer, 'From Legal Transplants to Legal Translations' (n 24), at 59. As a result of amendments of 9 March 2004, Arts

Spain.³⁹³ Reviewing these developments in any greater detail goes beyond the present purpose. Suffice it to say that none of the jurisdictions has uncreatively imported the Anglo-American model of guilty pleas and plea-bargaining. Each of them adjusted the institute of negotiated justice to its own legal context and procedural culture without displacing the core premises underlying criminal procedure or surrogating them by the common law philosophy. In fact, the reforms amounted to a formal recognition of practices that had been regularly used ‘behind the scene’ of the judicial system and to an attempt to submit such practices to a regulatory framework. The comparative method and Anglo-American reference enabled legislators in those countries, who were confronted with serious incongruence between the practice and the sterile inquisitorial theory and legal framework, with possible solutions that could help close the gap.

Despite dissimilarities among the negotiated justice solutions ultimately adopted in ‘inquisitorial’ jurisdictions,³⁹⁴ the ‘legal translations’, or rather civil law courts’ own ‘grassroots’ practices, share features setting them off clearly from the classic ‘guilty pleas’ and ‘plea-bargaining’ at common law. To recap, a self-condemning statement by the accused as the basis for the summary disposal of the case essentially amounts to a confession of facts rather than to a legal act of admission of responsibility, as is the case with guilty pleas. Consequently, the legal and practical consequences are different from guilty pleas. Unlike the latter, non-contestation does not trigger legal consequences as it does not relieve the judge of a duty to satisfy herself of the sufficient evidentiary basis for the decision. Thus, while it is likely to lead to a considerable shortening of the trial it does not result in its full avoidance, so the trials are not dispensed with as such. The judge must still establish the grounds for the conviction and, if necessary, examine further evidence beyond the statement about facts and charges. Theoretically, she may disregard the confession or agreement and enter an acquittal. While judicial powers and duties in this context vary per jurisdiction, a judge generally retains some degree of control over the bargaining process and outcome. She may do so in particular through being a party to out-of-court discussions on the sentence, by reviewing the admission in light of the dossier, and by giving an indication of the likely sentence. Further difference is that serious cases carrying the maximum sentence that exceeds a certain threshold are commonly excluded from those that may be disposed of through an abbreviated procedure. Lastly, charge bargaining as opposed to sentence-related bargains is disallowed.

The straitjacket in which consensual justice is shrouded in civil law settings gives away the continuing ambivalence towards bargaining in civil-law criminal justice. This is a result of its ideological inconsistency with the inquisitorial ideals of truth-discovery and consistent treatment of defendants.³⁹⁵ For these reasons, the pervasion of negotiated arrangements in inquisitorial systems has so far not been such as to upset the deeper structure and epistemological foundations in those systems. Negotiated settlements are applied sparingly in relation to categories of criminal cases and sentence reductions are limited. While the increased resort to negotiated settlements may have

495-8 to 495-12 added the possibility for the accused except for minors to plead guilty (*plaider coupable*) before the initial appearance (*comparution avec reconnaissance préalable de culpabilité*), provided that the relevant crime is subject to pecuniary punishment or imprisonment up to 5 years (the consensual sentence is limited to one year’s imprisonment). Offences not eligible for the procedure include involuntary homicide, political and media-related offences as well as crimes prosecutable under special laws. See Langer, ‘From Legal Transplants to Legal Translations’ (n 24), at 58-62; H.-D. Bosly, ‘Admission of Guilt before the ICC and in Continental Systems’, (2004) 2 *JICJ* 1040, at 1045; M. Delmas-Marty, ‘Reflections on ‘Hybridisation’ of Criminal Procedure’, in Jackson *et al.* (eds), *Crime, Procedure and Evidence* (n 29), at 254; Turner and Weigend, ‘Negotated Justice’ (n 194), at 1401.

³⁹³ See Arts 655, 688-699, Law of Criminal Procedure (Spain) (*Ley de enjuiciamiento criminal*) concerning the procedure of *conformidad*, whereby the parties submit a position on the qualification of the alleged offence to which the prosecutor attaches a sentencing recommendation. If the sentence is within the established maximum and the accused does not object to it, the court may follow the prosecutor’s recommendation without continuing the trial.

³⁹⁴ Langer, ‘From Legal Transplants to Legal Translations’ (n 24), at 6 and 69 (arguing that civil-law arrangements on negotiated justice only confirm the ‘weak’ version of ‘Americanization thesis’); Damaška, ‘Negotiated Justice’ (n 373), at 1025-7.

³⁹⁵ Langer, ‘From Legal Transplants to Legal Translations’ (n 24), at 36-7.

contributed to a slight 'decline' of trial in jurisdictions with mixed arrangements, negotiated justice does not appear to be a fatal challenge to the relevance of trial in the inquisitorial systems.

To sum up, the significance of trial in the procedural chronology across domestic procedural traditions is a volatile parameter that is defined by several variables. It is difficult to measure due to nuances distinguishing individual jurisdictions relating to the evidentiary communication between the pre-trial and trial, the ambit and grounds of appellate review, and the practice of resort to negotiated settlements. From a quantitative perspective, at present neither adversarial nor inquisitorial systems can boast using full-blown contested trials for disposing of the majority of criminal cases.³⁹⁶ To varying extents, criminal court dockets across the board are dealt with outside of the trial framework through diversionary decisions, informal sanctions and 'understandings' reached by the parties, or plea-bargaining. In the 'inquisitorial' jurisdictions which have shown a greater resistance to negotiated justice, the weight continues on an extensive and seminal pre-trial stage where the thrust of factual inquiry and testing of evidence occurs. These features are interrelated because the increasing emphasis on the trial will pull the system to embracing the trial-avoidance.

Despite these considerations, the normative position of trial as the 'face' of procedural justice and the stage at which the truth of the matter is established continues unscathed. Ensuring that the truth can duly be ascertained outside of the trial framework is a universal and enduring challenge.³⁹⁷ Still, under either model, it is incumbent on the prosecution and/or the judge to be able to rely on an adequate factual basis underpinning the consensual disposition in case the accused goes to trial. That basis is subject to verification by the judge who acts as a truth-seeker in an inquisitorial scheme and by the defence as a negotiating party in an adversarial scheme. The anticipation of the trial is the core premise of the adversarial system. The trial remains in the wings of the criminal process as more than a hypothetical possibility because a defendant is entitled to defend himself in an adversarial contest and may refuse to waive trial rights. In renovated inquisitorial systems, the 'adversarialization' process resulted in a greater weight being attached to the principles of orality and immediacy of proof-taking and served to enhance the systemic role of trial as a case-resolution mechanism. The use of negotiated settlements in those contexts is subject to normative limits and is not representative as a main paradigm of the administration of criminal justice, especially in serious cases. While the future of a criminal trial may be clouded, the preoccupation expressed by some scholars about the trial-free future of criminal justice appears an overstatement, at least at present. The trial will remain the centerpiece of criminal proceedings in more than symbolic way.

7. CONCLUSION

The Chapter has proffered a framework for the inquiry into the criminal trial seen both as a stage in criminal proceedings and as a complex socio-legal phenomenon. Three main perspectives are proposed: the 'functions' of the trial procedure, the sociological effects, and the role of trial phase in a procedural system. This threefold structure has then been employed in the comparative overview of the key features of adversarial and inquisitorial trial procedure. The combined conceptual and comparative outlook highlighted the principal differences and similarities in the nature and format of the trial across the domestic procedural traditions. The 'adversarial' v. 'inquisitorial' distinction has been influential in the formation of international criminal procedure

³⁹⁶ Jung, 'Nothing but the Truth?' (n 62), at 155; Weigend, 'Should We Search for the Truth' (n 39), at 410 ('Regardless of the choice of an adversarial or an inquisitorial trial structure, most criminal cases are no longer decided on the basis of a traditional "full" trial.');

id., 'Why Have a Trial' (n 348), at 207 (in Germany, only 15.6% of cases with a known suspect were disposed of by trial).

³⁹⁷ Weigend, 'Should We Search for the Truth' (n 39), at 411 and 415 (pointing to 'the important issue as to what safeguards can be devised to make sure that sanctions without trial are based on an honest search for the truth, and not the power differential between the state and the accused' as the arena for 'the procedural battles of the twenty-first century').

and is a recurring issue in that context. Given that the texture of international criminal procedure has a domestic provenance, the comparative angle is indispensable to any theoretical inquiry on the international criminal trial. Furthermore, the dual approach optimally sets the stage for the subsequent methodical examination of the trial proceedings in international criminal tribunals which are equally apt to be appraised in light of their procedural functions, systemic role, and expressive potential.³⁹⁸

As the first step, the Chapter pays the tribute to the seasoned nomenclature of comparative law ('adversarial'/'non-adversarial' and 'inquisitorial'/'accusatorial'). It clarifies the original and contemporary meaning of these categories, its uses, and the enduring value. There are several reasons for confusion regarding this terminology, among which the common tendency to merge the two dichotomies into one, to use them for describing the actual domestic systems of criminal procedure, and even for attributing the normative superiority (or inferiority) to systems deemed to embody either one or the other. The distinction is imperfect and outdated if used for describing and classifying the actual domestic systems. As a result of legal transplants and the impact of international human rights law, the continuous cross-fertilization and realignment of the boundaries between the domestic traditions has made the 'pure' adversarial and inquisitorial systems a historical curiosity or fiction. But the dichotomy is still a valuable heuristic device for deconstructing the criminal process and comprehending the logic of interaction among its structural elements. It is appropriate to conceive of 'adversarial' and 'inquisitorial' systems as abstract theoretical models that are only remotely linked to the domestic procedural traditions of common law and civil law. As such, the terminology still holds explanatory power in the comparative law domain and not least so in the universe of international hybrid systems of procedure.

Next, the Chapter has examined the objectives of justice and functions of the trial process in the domestic criminal procedure. From a legalist perspective, truth-finding, i.e. the establishment of the facts as a fair and accurate basis for the decision, constitutes the primary and elementary function of the criminal trial in any procedural tradition. The differences in the nature and the format of the adversarial and inquisitorial trial process derive from the fact that the respective systems gravitate towards diverging philosophical interpretations of the basic concept of 'truth' as the principal trial objective. Although rather sweeping, the association of adversarial trial arrangements with the 'interpretive', or 'consensual' vision of truth and of the inquisitorial trial scheme with the search for the 'material', or 'objective' truth, may account for the structurally different approaches to truth-finding through criminal procedure. As long as the differences in the epistemic beliefs and fact-finding methods in the inquisitorial and adversarial systems subsist, the approximation between the two models of procedure will be subject to irreducible limits. Hence the adversarial and inquisitorial distinction is unlikely to 'lose ... much of its theoretical significance and become an issue of mere trial technique.'³⁹⁹

Neither the intensity of the normative commitment to the 'truth' that is ascribed to the adversarial and inquisitorial models nor the supposed superiority of one model over the other constitute persuasive explanations for the variation in the nature and format of trial across the board. Both types of systems are genuinely committed to the search for the truth, but they are so in fundamentally different ways that cannot be usefully compared. Until the universal definition of 'truth' is produced, the discussion of the models of procedure in terms of epistemic superiority is bound to be an ideological and ill-fitting line of argument. The survey of the basic parameters of truth-finding modalities under the adversarial and inquisitorial models in this Chapter illustrates that none of them is a fail-proof device for the ascertainment of the truth.

Each of them presents a number of relative advantages for the end of truth-finding. But both also possess features with truth-defeating potential which are *intrinsic* to the fact-finding effort, next to deliberate and legitimate fetters placed on it with view to protecting essential legal values (fair trial rights, privacy, privileged communications etc.). The example of intrinsic obstacles to

³⁹⁸ Chapter 5.

³⁹⁹ Weigend, 'Should We Search for the Truth' (n 39), at 414.

truth-finding is the adverse impact of excesses of partisanship and the difficulty of ensuring the defence equal access to investigative resources in adversarial systems. One may also point out the inclination of official investigating authorities in inquisitorial settings to form early, and often irreversible, epistemic hypotheses, combined with the possibility of mounting pressure on the defendant to cooperate by confessing incriminating facts. The key point is that neither of the models *per se* is flawless when it comes to ascertaining the truth through the criminal process. Even if they were, there are always things that can go wrong in the application of the models in practice, with presumably virtuous aspects turning into vices in case of incompetence or the lack of integrity.⁴⁰⁰ These insights can be expected to be equally relevant in the assessment of the truth-finding function of international criminal trials.

The inquiry then turned from the function-related perspective on the trial, which hinges on the legalist view and emphasizes the search of the truth, to a broader sociological view on the trial as a socio-legal event. Drawing upon the expressivist accounts and Durkheim's concept of social rituals, this perspective focuses on the trial's *mis-en-scène* constituted by the distinctive corporeal and ceremonial characteristics such as the layout of the courtroom, formal language, appearance and indicia of participants. The Chapter shows how the symbolic and ritualistic aspects of trial procedure in adversarial and inquisitorial systems relate to their diverging concepts about the preferred truth-finding arrangements, as a way to explain why the trials look differently across the great divide. It is further argued that the corporeal and ritualistic features enable the trial process to exercise a communicative role and to convey certain messages within the courtroom and to the outside audiences. Some communications serve to facilitate the smooth conduct of the proceedings and the proper discharge of the function of legal inquiry, being subordinate to it. But the trial process may also have an intrinsic expressive value and potential, serving to convey a variety of the didactic messages to the observers beyond the courtroom.

The expressive role attributed to the trial process should not go further than appropriately conveying messages of procedural fairness and authority of the court, as incidental effects of a fair trial process. The communicative aspects and broader sociological effects of the operation of the court should neither compete with nor supplant its proper procedural functions. This premise is revisited in a further chapter in the context of international criminal trials. The importance of delimiting the legalist functions and communicative aspects is attested by the adverse implications of conflating the two categories in that context, namely the danger of 'show trial'.⁴⁰¹

In the final section the Chapter addresses the systemic role and significance of the trial across the domestic procedural traditions in light of differences between 'adversarial' and 'inquisitorial' systems. Even though the trial is considered the most important procedural phase in the former systems given their adherence to the 'one-day-in-court' trial scheme, its position as the true locus of fact-finding is diminished in practice by wide resort to guilty pleas dispensing with the need to hold full contested trials. Despite the statistical predominance of trial-avoidance, the contested trials remain always—at least, in theory—the option available to defendants and an incentive enforcing the prosecution duty to ensure the adequate factual basis for the accusation before entering in plea negotiations.

By contrast, the thrust of the truth-finding effort in the 'inquisitorial' systems traditionally occurred during the pre-trial while the trial proceedings were typically dossier-based and brief, being limited to the verification of the evidence contained in the dossier. As a result of reforms seeking to move the trial process in the 'adversarial' direction, a number of continental countries put an ever-growing emphasis on the principles of orality and immediacy in the proof-taking. This had the effect of shifting the weight of litigation and examination of evidence to the trial phase and, hence, boosting the importance of the trial as the forum for fact-finding and decision-making. Being limited to less serious crimes, resort to negotiated settlements in those contexts is not apt to turn the

⁴⁰⁰ See also Reamey, 'Innovation or Renovation in Criminal Procedure' (n 10), at 708 ('It is not the adversarial model that puts justice at risk; it is the inappropriate application of that model.')

⁴⁰¹ Chapter 5.

Chapter 4: Trial Phase: A Theoretical and Comparative Outlook

trials into an exceptional arrangement in the context of the criminal justice system to the extent contemplated in some common law countries. Admittedly, the majority of criminal cases are still disposed of by means other than full-blown trials across the adversarial/inquisitorial divide, and this tendency will subsist given the high cost and complexities of contested proceedings. Even so, the significance of trial as the true ‘face of criminal justice’ and the prime locus of the truth-finding is not bound to wane in domestic jurisdictions. The ‘normative attack’ on the trial—posed by negotiated justice and consensual settlements—does not deprive the trial of its status as the ultimate mechanism for the disposition of criminal cases.