Avoiding a full criminal trial: Fair trial rights, diversions, and shortcuts in Dutch and international criminal proceedings
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Chapter 1

Full Criminal Proceedings in Decline

The contested trial is only the presentational surface of the criminal justice system, a surface which masks the reality of the criminal justice process.¹

1.1 The Full Criminal Trial

This book is based on an archetype: the full criminal trial. In archetypical criminal trial proceedings, the charges against the accused are presented in open court, they are supported by evidence that can be challenged, and the proceedings are concluded by the reasoned judgement of the court. The *ius puniendi*, the right to punish, rests firmly with the court: the court metes out punishment after it has conducted adversarial proceedings (‘une procédure contradictoire’) in which the guilt of the accused has been determined.² This implies that evidence is both presented and challenged: the factual basis for the judgement must be the result of the close scrutiny of incriminating and exonerating evidence. Considering the interests of the accused, it is essential that the accused is able to participate effectively in the proceedings. In order to ensure this, the accused is provided with all kinds of procedural rights that enable him to participate during the proceedings. These rights are properly categorised under the notion of a fair trial which is the basic notion that criminal proceedings against an accused must be conducted in a fair and decent manner. The importance of fairness

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² For the purpose of this study, the notions of ‘adversarial proceedings’ and ‘une procédure contradictoire’ refer to the opportunity for the accused to challenge the evidence during the proceedings.
in criminal proceedings is proclaimed consistently by the most authoritative judicial body on the interpretation of the right to a fair trial: the European Court of Human Rights.\footnote{E.g. Delcourt v. Belgium, in which the Court held: ‘In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 para. 1 would not correspond to the aim and purpose of that provision.’ ECtHR, 17 January 1970, App. No.: 2689/65, (Delcourt v. Belgium), par. 25.}

To study the characteristics of the full criminal trial in isolation from the ‘law in action’ would result in a distorted view on the manner in which criminal cases are processed in modern societies. Criminal cases are often diverted from full criminal proceedings: offences are decriminalised and handled in administrative procedures, they are handled solely by the prosecutor or handled by the court in a simplified manner. When being handled by the prosecutor, cases can be diverted by way of an out-of-court settlement, or by the imposition of a sentence by the prosecutor. Even when cases are brought before the courts, numerous shortcuts to proof can be discerned that speed up the proceedings. This book focuses on such avoidance mechanisms that either divert from or speed up the proceedings, thereby avoiding the full criminal trial.

Efficiency considerations play an important role in the rise of avoidance mechanisms; specifically, bargaining with the accused to settle the case without involving the court reduces the costs of the criminal justice system considerably. The rise of ‘consensualism’ in criminal matters, which entails that the accused consents to a particular procedural outlook of the proceedings, also contributed to the decline of the full criminal trial. The notion that criminal (procedural) law is first and foremost public law, which provides a procedural model that is not for the parties to decide upon, is eroded when private law notions such as party autonomy or \textit{pacta sunt servanda} become more prominent regarding the handling of criminal cases.\footnote{Such private law notions can play a role in determining whether the accused has validly waived particular procedural rights. If he has done so out of his own free will, the waiver is valid and cannot be revoked easily.}

The full criminal trial is both the ‘epistemic engine’ that strives to produce accurate fact-finding and the best context in which the accused can exercise his fair trial rights.\footnote{Laudan observed: ‘It thus seems fair to say that, whatever else it is, a criminal trial is first and foremost an \textit{epistemic} engine, a tool for ferreting out the truth from what will often initially be a confusing array of clues and indicators.’ L. Laudan, \textit{Truth, Error and Criminal Law. An Essay in Legal Epistemology}, Cambridge University Press, New York 2006, p. 2. Emphasis in original.} Any derogation from this optimal setting or ideal type must be accounted for. The focus of this study is on the fair trial implications of such derogations. Although the epistemological context is important, it is not suitable for a fruitful analysis: this would require an objective standard of accuracy that allows us to determine whether the diversion or shortcut to proof infringed upon the fact-finding tasks of the court.
Because no such standard exists, it would be inappropriate to evaluate the avoidance mechanisms in the light of accurate fact-finding. It is, however, submitted that accurate fact-finding is greatly enhanced when evidence is processed in a manner that allows for challenges and adversarial debate (‘un débat contradictoire’). In this sense, there is a relationship between accurate fact-finding and the fairness of the criminal proceedings. This should not be misunderstood: providing the accused with a fair trial does not necessarily result in accurate fact-finding. It does, however, enhance the chances that the final result will be in conformity with the truth.

Fairness has its own intrinsic value. Criminal cases should be processed in a fair manner; in other words, diversions and shortcuts do not operate in a context in which efficiency reigns supreme. They are legitimate only when they provide for a fair handling of the case. This perspective is the primary evaluating perspective of this study. Although fairness is normally associated with regular trial proceedings, it is argued that its normative scope reaches further than the trial context as such. Fairness permeates the whole criminal justice system and is a principle underlying the enforcement of criminal law. In their seminal study The Trial on Trial, Duff et al. stated:

Given that the trial is one of the central ways in which the rights of the accused are adequately protected, there is at least good reason to consider other aspects of the criminal justice process against the standards set by the criminal trial, properly understood and properly theorised.

Regarding the protection of the fair trial rights of the accused, the full criminal trial sets the proper standard.

1.2 Purpose and Scope of the Study

Avoidance mechanisms can be discerned in a great number of national as well as international criminal justice systems. The common law practice of plea-bargaining, the Italian patteggiamento and the German practice of Verständigung all provide fascinating ways to avoid the full criminal trial. These mechanisms have been studied

6 Cf. ECtHR (GC), 15 December 2011, App. No.: 26766/05 and 22228/06, (Al-Khawaya and Tahery v. United Kingdom), (French translation) par. 118. As confirmed in: ECtHR (GC), 15 December 2015, App. No.: 9154/10, (Schtschaschwili v. Germany), (French translation), par. 103.
extensively, with most such research being comparative in character; in these studies researchers compare particular criminal justice systems, describing the differences and similarities regarding these avoidance mechanisms.

This study has a different scope. This book examines avoidance mechanisms that infringe upon the ideal type of conducting full criminal proceedings in Dutch and international criminal proceedings. Such avoidance mechanisms are pervasive and entrenched in current criminal justice systems and they are not limited to particular categories of criminal offences. Both minor and serious violations of (international) criminal law can be processed outside the context of the full criminal trial. The heterogeneous character of avoidance mechanisms entails that a classic comparative approach does not suffice: to compare avoidance mechanisms that operate in different criminal justice systems would add little to our understanding of the phenomenon. Even avoidance mechanisms that can be discerned in both the Dutch and the international criminal justice system have particular features, which makes a classical comparison of limited interest. It will not provide a framework for the evaluation of the avoidance of a full criminal trial. What is of interest, however, is the question what the consequences are for the position of the accused when an avoidance mechanism is used to divert the case from the court or to speed up the proceedings. It is this perspective that is of primary interest in this book: the normative implications, in terms of fairness, of the avoidance of the full criminal trial.

Considering that avoidance mechanisms can be discerned regardless of the category of criminal offences, it is necessary to present an overview in order to outline the diversity and flexibility of these mechanisms. The avoidance mechanisms that are discussed in this study provide examples that are critically evaluated in the light of the fair trial rights of the accused. Sometimes, the examples cover ‘common ground’, such as in the case of facts of common knowledge and appeal proceedings. Those mechanisms can be discerned in both the Dutch and the international context. There is, however, also room for the discussion of ‘outliers’: avoidance mechanisms that are typical for a particular criminal justice system, such as the Dutch punitive order or the international practice of taking judicial notice of facts that have been adjudicated in other proceedings. The aim of the examples discussed in this study is to show that, despite their differences, the normative framework that is chosen can be applied to the great diversity of avoidance mechanisms.

The Dutch and international criminal justice systems have been chosen because together, they provide for a good representation of the great variety of avoidance mechanisms. The context of international criminal proceedings is of particular relevance because the nature and complexity of the crimes that are processed before the international ad hoc Tribunals (the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda) and the International Criminal Court almost inevitably lead to the avoidance of the full criminal trial. Inter-
national criminal proceedings are lengthy, costly and complex. Measures to enhance the efficiency of such proceedings are to be welcomed, provided the accused is still able to participate effectively.

The avoidance mechanisms that can be discerned in the proceedings before the ICTY, ICTR and ICC are discussed. The proceedings at the ICTY and ICTR have resulted in a considerable amount of case law, which allows for a proper analysis of the avoidance mechanisms that operate at these two Tribunals. Other international criminal tribunals, such as the Special Court for Sierra Leone, have not produced a similar amount of case law; as a result, they are not included in the analysis, apart from a single anecdotal reference. The ICC is included because the manner in which this permanent international court will handle complex and time-consuming cases is of great importance. The legitimacy of the ICC depends to a significant extent on the question whether the Court is able to process cases efficiently and within a reasonable time.

As previously mentioned, the choice for the international criminal context is primarily based on the type of cases they process: complex and lengthy proceedings regarding the most heinous crimes. The *sui generis* character of the international criminal proceedings stimulates the search for efficient ways to handle such cases. In order to show the broad spectrum of avoidance mechanisms, it is necessary to include a domestic criminal justice system in the analysis as well. Domestic criminal justice systems provide for other examples of avoidance mechanisms, such as diversions regarding minor offences (which are absent in the international criminal context) and shortcuts in regular criminal proceedings, in most cases due to the existing caseload. Whereas the international context provides for avoidance mechanisms due to the type of cases, in the domestic context, ways are explored to efficiently handle the great number of criminal cases.

The Dutch criminal justice system provides for such a criminal justice system. The Dutch system is of particular relevance because, alongside out-of-court settlements based on consensus, it also provides for a special diversion from the full criminal trial: the punitive order. This diversion entails that the prosecutor can unilaterally impose a sentence and thereby avoid the criminal trial. Another important reason for the inclusion of the Dutch criminal justice system is the fact that the Dutch system has been deeply influenced by the case law of the European Court of Human Rights. The normative framework of the ECtHR that is used in this study is, therefore, of particular relevance for the Dutch criminal justice system.

This study does not address administrative procedures in which decriminalised offences are processed: rather, the focus in this study is on the context of proper criminal law and criminal procedure. It is noted, however, that the normative framework presented is applicable to such administrative procedures as well, when the proceed-
ings concern the determination of a criminal charge. This autonomous concept has been defined by the European Court of Human Rights in the famous *Engel case*.9

Another topic that is not included in this study is the (emerging) practice of mediation in criminal cases. Although cases can be diverted from the court this way, they do not result in any form of punishment. Avoidance mechanisms discussed in this study are essentially punitive in character. Finally, it is noted that the avoidance mechanisms discussed in this study are not exhaustive. Similar mechanisms can be found in other criminal justice systems, and it is also possible to discern other shortcuts in the criminal justice systems that are discussed in this study. The mechanisms chosen for examination in this study provide a representative overview of the diversity of these mechanisms.

1.3 Terminology: Diversions, Shortcuts, and a Full Criminal Trial

In this study, a distinction is made between diversions and shortcuts to proof, although both allow for the avoidance of the full criminal trial.

Diversions are avoidance mechanisms that infringe upon the principle of *nulla poena sine iudicio*. This principle entails that punishment can be meted out only by an impartial and independent court, after regular proceedings have been conducted. Diversions are those mechanisms that divert the case from the court, such as out-of-court settlements and guilty pleas.

Shortcuts to proof infringe upon the full criminal trial because they allow for an abbreviated presentation and discussion of the evidence in front of the trier of fact. In other words, shortcuts do respect the *nulla poena sine iudicio* principle, but do not allow for a regular presentation and discussion of the evidence before the court. The principle of immediacy in the formal sense, the notion that all evidence is fully presented in front of the trier of fact, is infringed upon.10

Essentially, a full criminal trial is the handling of a case through proceedings before a court, in which all the relevant evidence is presented and discussed in order to allow the accused to participate effectively. Thus, the accused is able to object to any incriminating evidence and to present his arguments to the court. In order to inform the accused on how the court has considered his arguments, the judgement contains

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9 ECHR, 8 June 1976, App. No.: 5100/71; 5101/71; 5102/71; 5354/72 and 5370/72 (*Engel and Others v. The Netherlands*).

10 A distinction can be made between the principle of immediacy in the formal sense and in the substantive or broad sense. The first notion entails that all the evidence is presented in court (including second-hand or derivative evidence). The principle of immediacy in the broad sense entails that the court is provided with the original evidence. Damaška argued that this second notion can be equated with the common law ‘best evidence’-rule. M.R. Damaška, ‘Of Hearsay and its Analogues’, *76 Minnesota Law Review*, 1992, p. 446-448; Cf. J.F. Nijboer, ‘Enkele opmerkingen over de betekenissen van het onmiddellijkheidsbeginsel in het strafprocesrecht’, *36 Nederlands Juristenblad*, 1979, p. 821-823.
the reasons for the court’s decision. The definition of the full criminal trial is closely related to the manner in which incriminating evidence is processed when a diversion or shortcut is used. For this reason a more detailed discussion of the full criminal trial in the respective criminal justice systems is presented in Chapters 3 and 4. Particular attention is paid to the manner in which the evidence is admitted, how the evidence is weighed and how the court accounts for its factual findings in the judgement.

1.4 Research Question

In the chapters on Dutch and international criminal proceedings, the particular diversions and shortcuts of the respective systems are discussed. They are critically evaluated in the light of the fair trial rights of the accused. The question is asked to what extent the accused is able to participate properly in the handling of his case when a diversion or shortcut is applied. The normative framework that is used for the evaluation is the concept of fairness in criminal proceedings, in particular the manner in which the European Court of Human Rights has interpreted the concept of fairness in its rich and voluminous case law. The question is answered to what extent avoiding the full criminal trial infringes upon the fair trial rights of the accused, in particular his ability to participate effectively regarding his case.

The research question can then be formulated as follows:

How should the concept of fairness regulate and limit avoidance mechanisms in criminal proceedings?

1.5 The Normative Framework

The European Court of Human Rights has, over the past decades, developed an unprecedented amount of case law in which the notion of fairness in criminal proceedings has been defined in great detail. The diversity of the legal systems in the signatory states of the Convention provided the Court the opportunity to define the concept of fairness in criminal proceedings regardless of the particularities of a specific criminal justice system. The Court’s interpretation transcends the classical inquisitorial-adversarial dichotomy and provides for an overarching notion of fairness in criminal proceedings. The interpretation of Article 6 of the Convention in relation to criminal proceedings has been one of the primary tasks of the Court. Considering this and the fact that the criminal justice systems that are discussed have been deeply influenced themselves by the interpretation of the right to a fair trial by the Court, the Court’s interpretation of fairness in criminal proceedings is the proper normative framework.

To take the concept of fairness in criminal proceedings as the normative framework has an important advantage; to be specific, the evaluation of the diversions and short-
cuts will not be limited to particular minimum rights contained in Article 6 of the Convention. Instead, a holistic approach is taken in which the minimum rights are incorporated. This provides for a comprehensive framework that does not focus solely on the relationship between an avoidance mechanism and a particular minimum right.

1.6 Outline of the Book

The outline of the book is as follows. In Chapter 2, the concept of fairness in relation to diversions and shortcuts is discussed. This Chapter provides the framework that is used to evaluate the diversions and shortcuts in the following chapters. The case law of the European Court of Human Rights regarding the concept of fairness in criminal proceedings provides the basis for the normative framework that is used to evaluate the avoidance mechanisms. In particular, the participatory model of proof, as developed by legal scholars John Jackson and Sarah Summers, is presented and justified as the suitable normative framework for the analysis.

In Chapter 3, the diversions and shortcuts in the Dutch criminal justice system are discussed. In order to fully understand how the full criminal trial is avoided, the Chapter starts with an overview of the characteristics of the Dutch full criminal trial. The manner in which evidence is processed is of particular relevance: adversarial proceedings enhance the quality of fact-finding. After the characteristics of the full criminal trial have been discussed, three diversions from the full criminal trial are analysed: the punitive order, the transaction and the conditional dismissal. These diversions are mechanisms that divert the case from the court and enable the prosecutor to impose a sentence or reach a consensual settlement with the accused. The chapter concludes with a discussion of the shortcuts to proof.

In Chapter 4, a similar approach is taken within the context of international criminal proceedings. First, an overview is provided of the full criminal trial in international criminal proceedings. Subsequently, the chapter presents a discussion of the diversions from the full criminal trial: the guilty plea and the admission of guilt. Finally, the use of shortcuts to proof is discussed.

Chapters 3 and 4 provide the examples of avoidance mechanisms in the different criminal justice systems. In order to fully grasp the workings of these mechanisms in the respective systems, they are described in some detail.

In Chapter 5, the diversions and shortcuts that have been discussed in the two previous chapters are evaluated in the light of the normative framework that was presented in Chapter 2: the participatory model of proof. The chapter focuses on the question of to what extent the accused can properly participate when the full criminal
trial is avoided by a diversion or a shortcut. In the final Chapter, general conclusions are drawn.

The research for this study was concluded on 1 January 2016.