Witness Evidence in Pre-Trial and Trial Procedure: Towards an Anglo-German Convergence?

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Abstract

Both in English and German criminal procedure, fewer cases than in the past are decided on the basis of live witness testimony at the trial, and the 'orality' principle has been eroded in both jurisdictions. An increased reliance on witness statements made in pre-trial procedures has however come into conflict with the jurisprudence of the European Court of Human Rights (ECtHR). As a consequence, greater attention is focused on the need to regulate the way testimony is obtained in pre-trial procedure. It is argued that the shift of emphasis towards pre-trial procedure has to be accompanied by a more robust 'search for the truth' in harmony with recent human rights law. If pre-trial procedures are embedded with human rights guarantees, cases can be properly disposed of on the evidence collected in the pretrial phase.

I. Introduction

Witness evidence continues to occupy a central place in criminal trials. Laypersons who have witnessed crimes are called to narrate their experiences in court and experts are frequently called as witnesses to explain, interpret and justify an ever-expanding range of different types of forensic evidence collected before trial.[1] Given concerns about the reliability of witness evidence, it is not surprising that it has been much discussed and is specially mentioned in the various conventions and constitutional provisions guaranteeing a fair trial.[2] Much attention has focused on the different methods for controlling the manner in which such evidence is heard and challenged through the lens of the adversarial and inquisitorial categories that have long dominated and polarised comparative scholarship.[3] More recently, however, it has been argued that although the methods for questioning witnesses still differ greatly,

[1] See, generally, Roberts (ed.), *Expert Evidence and Scientific Proof in Criminal Trials* (2011).

[2] See, e.g., ECHR Art. 6(3)(d), ICCPR Art. 14(3)(f), ACHR Art. 8(2); and the Sixth Amendment to the US Constitution. See too the relevant provisions of the various international criminal courts and tribunals: ICTY Art. 21(4)(e), ICTR Art. 20(4)(e), ICC Statute Art. 67(1)(e). For discussion see Jackson and Summers, *The Internationalisation of Criminal Evidence* (2012) ch. 10.

[3] See Langer, 'The Long Shadow of the Adversarial and Inquisitorial Categories' (2014).

a convergence between common law and civil law systems is occurring as systems adapt towards adversarial influences and human rights requirements.[4]

This paper seeks to examine how witness evidence is treated in English and German criminal procedure. Until recently comparative scholarship has seen English and German criminal procedure as strict opposites. In the 1970s and 1980s American scholars debated the pros and cons of German and other Continental procedures, both civil and criminal, and the advisability of transferring some of their features to the American system.[5] These debates, which eventually petered off inconclusively, may lead pessimists to conclude that the differences between the English and German systems attributable to their different procedural traditions are so vast that there is limited value in scholars from each tradition trying to understand and learn from the other.[6] In this paper we resist such pessimism and argue that in the use of witness testimony, there is more convergence than might be thought based on rigid caricatures of the adversarial and inquisitorial traditions. At the same time, we caution against an equally simplistic view that the systems are converging to such an extent that there may soon be little difference between them. In response to a trend in both systems that is leading to the disposal of more cases before they come to trial, we advocate in favour of a model of pre-trial procedure that would involve a more robust 'search for the truth' in harmony with the broad direction of recent human rights law; but we also discuss some of the obstacles that stand in the path of such a model.

We begin by explaining what is meant by the 'orality' principle in English and German procedure before going on to illustrate how this principle has been eroded in both jurisdictions with the result that there is now considerable reliance on witness statements made in pre-trial procedures. We then consider how this development has brought both jurisdictions into conflict with the European Court of Human Rights (ECtHR) and how this jurisprudence is suggesting the need to rethink the traditional emphasis on trial orality. We next describe how recent developments in English and German procedure have led to a shift towards basing court decisions on evidence obtained in pre-trial procedures. It is argued that if these procedures were embedded with human rights guarantees, cases could be properly disposed of on the evidence collected in the pretrial phase. The final section considers what implications this would have for the orality principle and the traditional trial in both jurisdictions.

[4] See Bachmaier, 'Rights and Methods to Challenge Evidence and Witnesses in Civil Law Jurisdictions' (2019).

[5] Cf. Langbein, 'Controlling Prosecutorial Discretion in Germany' (1974), Goldstein and Marcus, 'The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy and Germany' (1977), Langbein and Weinreb, 'Continental Criminal Procedure: "'Myth" and Reality' (1978); for a contemporaneous view from Germany see Weigend, 'Continental Cures for American Ailments: European Criminal Procedure as a Model for Law Reform' (1980). On civil procedure, see Allen et al., 'The German Advantage in Civil Procedure' (1988) and Langbein, 'Trashing the German Advantage' (1988).

[6] For an attempt at reviving the debate on legal transplants see Frase and Weigend, 'German Criminal Justice as a Guide to American Law Reform' (1995).

II. The orality principle

There has long been a consensus among Anglo-American and continental systems that witnesses should give their evidence orally and in person during the trial. This rule confusingly goes by different names in the two systems analysed here. Whereas common law jurists call it the principle of orality, Germans refer to it as *Unmittelbarkeitsprinzip* (principle of immediacy). By contrast, in German legal language the term *Mündlichkeitsprinzip* (orality principle) refers to the rule that the court may base the judgment only on what transpired at the trial (§ 261 German Code of Criminal Procedure, CCP). This rule was developed in the 19th century to mark the break with the ancient inquisitorial procedure, which was characterised by a secret, piecemeal collection of the relevant evidence, with the trial being reduced to a mere formality. The new procedural model required, in a formal sense, the oral presentation of all evidence at the trial; the court's judgment could no longer be based on the dossier of the pretrial investigation. But this principle has no bearing on what evidence may be introduced at the trial. In this article, we will follow the Anglo-American linguistic convention and employ the term 'orality principle' for the rule that live testimony of witnesses is preferred over other ways of introducing certain information at the trial.

The orality principle has deep roots within the common law psyche as part and parcel of the adversarial trial.[7] There are epistemic as well as due process reasons for this rule. One main consequence of and reason for the orality principle is the availability of witnesses for cross-examination by the opposing party in the presence of the fact-finder. The Anglo-American jurist, J. H. Wigmore, famously hailed cross-examination as 'the greatest engine for the discovery of the truth'[8] and the right to confront witnesses, firmly established in English common law and enshrined in the 6th Amendment to the US Constitution, is seen as a key due process right.[9]

In England and Wales, the principle of orality is given teeth through the hearsay rule which has been described as the principle of orality's 'alter ego' because it operates to exclude many out of court statements from the fact-finder.[10] There have been controversies about the precise scope of the rule, but in essence it prohibits witnesses from testifying about facts which they did not witness themselves but which were communicated to them by other witnesses who saw them but who are not before the court.[11]

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[7] Roberts and Zuckerman observe that 'live courtroom testimony, delivered orally by witnesses with relevant first-hand knowledge of the matters in issue, is the paradigmatic form of evidence in English criminal trials'; Roberts and Zuckerman, *Criminal Evidence* (2010), 291.

[8] Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (1974), § 1367.

[9] The House of Lords has held that 'it is a long-established principle of the English common law that … the defendant in a criminal trial should be confronted by his accusers in order that he may cross-examine them and challenge their evidence'. See *R* v. *Davis* [2008] UKHL 36, [2008] AC 1128 [5].

[10] Roberts and Zuckerman, *Criminal Evidence* (2010), 292.

[11] See Spencer, *Hearsay Evidence in Criminal Proceedings* (2014), 1.1.

The principle of orality does not have the same roots within the civil law tradition. But it is not always appreciated that long before this principle took hold in English common law, Roman-canon authorities required the judge to seek the primary source of any information brought to the attention of the court, although the epistemic justification for this was not attributed to the value of cross-examination but instead to the value of testimony obtained under oath before an 'awe-inspiring' judge.[12] The due process reasons for live oral testimony were less obvious in continental procedure where the inability to subject witnesses to courtroom testing was seen as less troubling. Nevertheless, the roots of the idea that the accused should be able to face her accusers go back to ancient Roman law,[13] and canon law decreed that in criminal matters involving the death penalty, information conveyed by derivative sources could not support the finding of incriminating facts.

We have seen that in Germany the public trial is deemed to be the exclusive locus of fact-finding and the court's judgment cannot be based on anything that has not been discussed at the trial. But the reformers of the 19th century went a step further: they sought to draw a firewall between the pretrial investigation (conducted by the prosecutor and the police) and the court's investigation of the matter at the trial. In order to guarantee the independence of the trial, German law precludes the judges from simply adopting as evidence the results of the pretrial investigation as documented in the prosecutor's dossier. The principle of orality requires that every witness is heard in person by the trial court, and the witness's testimony must neither be replaced by the protocol[14] of her earlier police interrogation nor by any other documentary evidence (§ 250 CCP). The rationale of the principle of orality is to guarantee the defendant a double check on the evidence: even if the public prosecutor deems the evidence of the defendant's guilt sufficient on the basis of the pretrial investigation, the trial court is to start with a clean slate and must evaluate the evidence as it has been presented live at the trial. Hearsay *testimony* is, however, not precluded by German law; the court may, for example, interrogate a police officer about what a person had told him during a pretrial interrogation, and a witness may likewise relate what she overheard from a conversation between other witnesses who are not available in court.[15] The court's duty to search for the truth, on the other hand, limits the use of such secondary evidence when the primary evidence is available.

Although the principle of orality as understood in Germany does not put the same emphasis as the English system on the need for direct witnesses to give their evidence orally at trial, both systems accept that witness evidence should ideally be elicited first-hand at trial and they have developed mechanisms for ensuring that this happens in practice. Increasingly, however, the principle of orality is being eroded in both systems as more and more inroads are being made to the hearsay rule in England and to the principle of orality in Germany.

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[12] Damaška, 'Of Hearsay and Its Analogues' (1992), 436, Damaška, *Evaluation of Evidence* (2019), 32.
[13] Maffei, *The Right to Confrontation in Europe* (2012), 13.
[14] The protocol is not a verbatim transcript but a more or less exact rendition of the conversation authored by the police officer.
[15] Heger, 'Öffentlichkeit, Mündlichkeit, Unmittelbarkeit' (2020), 494.

III. The demise of the orality principle

1. England

(i) Relaxation of the hearsay rule

Although the hearsay rule has deep roots in English law, the common law has long permitted certain kinds of hearsay to be admitted as evidence. The largest exception to the hearsay rule has been confessions made by the accused, which has been commonly justified on account of the unlikelihood of a person saying something to her disadvantage.[16] The scope for such an exception to nullify the orality principle was reduced, however, by the fact that the admissibility of confessions was governed by another exclusionary rule which led to frequent disputes in court between police witnesses and the accused. This rule, known as the voluntariness rule, with its origins in the mid-18th century, was formulated in *R* v*. Warwickshall* as a requirement to exclude confessions when they were 'forced from the mind by the flattery of hope, or by the torture of fear'.[17] Until confessions made in the police station came to be audio or video-recorded under what is known as the 'PACE' regime in the late 20th century,[18] and there was then an authentic record of how they were obtained, there were frequently challenges to the police record of interviews and disputes as to whether the accused had made any confession and, if so, whether it had been obtained by inducement or threats. These were resolved by the judge hearing live testimony of police officers and the accused in a procedure known as the *voir dire,* or a 'trial within a trial' held in the absence of the jury.[19]

Throughout the 19th and 20th centuries the courts made a number of other inroads into the hearsay rule by creating further exceptions to it. Exceptions were made for public records, so-called *res gestae* statements (known as 'excited utterances' in the US) and for 'dying declarations' admitting the last utterances of declarants who had died and were unable to testify at trial. These exceptions were created by the courts largely on the ground that such statements were likely to be reliable. But this tendency to create new exceptions on grounds of reliability came to an end in an important decision of the House of Lords in *Myers* v*. DPP* in 1965.[20] In this case the prosecution wished to admit microfilm identifying cars that came off a production line in order to show that the defendant had acquired stolen cars. Although there was compelling evidence that the information contained on the microfilm was accurate, the House of

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[16] Munday, *Cross & Tapper on Evidence* (2018), 590.

[17] *R* v*. Warwickshall* (1783) 1 Leach 263. This rule has since been superceded by a new rule governing the admissibility of confessions under which confessions may not be admitted where they may have been obtained by oppression or in circumstances likely to render them unreliable. See Police and Criminal Evidence 1984 s. 76. See Jackson, 'In Defence of a Voluntariness Doctrine for Confessions (1986).

[18] See PACE Codes of Practice E and F under the Police and Criminal Evidence Act 1984 (PACE).

[19] For a critique of these procedures, see Royal Commission on Criminal Procedure, *Report* (1980), 70-72. A voir dire hearing to determine the admissibility of a confession needs to be distinguished from the voir dire process in the United States whereby prospective jurors are questioned before being chosen to sit on a jury.

[20] *Myers* v. *DPP* [1965] AC 1001.

Lords held it was no longer open to the courts to create new exceptions to the hearsay rule. From this point on, Parliament has taken responsibility for creating new exceptions to the rule and over the course of the last 50 years has made ever more sweeping inroads into the rule, permitting the admission of business records of the type used in *Myers*, expert reports and also the statements of all manner of unavailable witnesses.

The latest changes codified in the Criminal Justice Act 2003 (CJA) were the culmination of considerable debate within the legal profession, the Law Commission and Parliament itself as to what the continuing rationale for the rule was.[21] We have seen that the hearsay rule buttressed the orality principle by requiring the makers of out of court statements to testify in court and be tested through cross-examination. But the courts had also recognised that there were categories of hearsay evidence that did not need to be tested by cross-examination because they could be otherwise shown to be reliable. There was a growing acceptance that the rule was hard to justify any longer on the basis that hearsay had to be excluded because it was tainted by unreliability. It was considered that educated juries, like judges, should be capable of assessing the hearsay dangers in the same way as we trust them to assess the dangers of any other evidence.[22] Rather than rely on a 'taint' theory, a better rationale was to be found in what Nance has described as an 'inducement' theory, which rests on the assumption that oral evidence which is able to be tested in the live trial is better than hearsay and that the exclusion of hearsay is needed to induce the parties to call live witnesses rather than rely on hearsay evidence.[23] The corollary to such a theory, however, is that when such witnesses are no longer available, the hearsay evidence may be admitted. Although the Law Commission was reluctant to propose radical changes along the lines of the German version of the orality principle on the grounds that German law was appropriate to 'the inquisitorial system' but was incompatible with the 'accusatorial system',[24] the broad thrust of the 2003 reforms has been to enable hearsay statements to be admitted where the witnesses who made them are unavailable for a whole host of reasons (CJA s. 116). The taint theory has been further undermined by permitting judges to exercise a new 'inclusionary' discretion to admit a hearsay statement where it would be in the interests of justice for it to be admitted (CJA s. 114(1)(d)(2)). The effect of this relaxation of the rule has been to shift the emphasis towards the inclusion rather than the exclusion of hearsay statements counterbalanced by greater focus on the need for judges to direct juries carefully on the danger of hearsay evidence when it comes to assessing its weight.[25]

These inroads into the hearsay rule have had the effect of undermining the orality principle as many more out of court statements of witnesses may now be admitted as

[21] The Law Commission published two reports on the subject. See Law Commission, *Evidence in Criminal Proceedings and Related Matters* (1995); Law Commission, *Evidence in Criminal Proceedings: Hearsay and Related Matters* (1997), Cm 3670.

[22] Cf. Lord Griffiths' statement in *R* v. *H* [1995] 2 AC 586, 613 that with better educated and more literate juries the value of the old restrictive rules of evidence is being re-evaluated and many are being discarded or modified.

[23] Nance, 'Understanding Responses to Hearsay' (1992).

[24] Law Commission, *Evidence in Criminal Proceedings and Related Matters* (1995), para. 10.31.

[25] See Judicial College, *Crown Court Compendium: Part 1* (2018), 14-1.

evidence at trial. In so far as the rationale for admitting many of these statements is that the witnesses who made them were not available to give oral evidence at trial, however, it may be claimed that it is at least still considered important that witnesses give oral evidence at trial when they *are* available. But the idea that the trial is the best forum for witnesses giving evidence about events that are in issue between the parties is also now being challenged as the focus is shifting towards the statements they have made earlier in the criminal process as a basis for drawing inferences about what happened. This has been aided by the use of technology which can capture actual recordings of what witnesses have said previously; but it can also be seen as part of a general preference towards shifting the focus of attention in criminal proceedings away from the adversarial trial – the traditional focus for matters to be contested in the criminal process – towards pre-trial processes.

(ii) Other inroads into the preference for live oral evidence at trial

The orality principle has been further buttressed by another common law rule, closely related to the hearsay rule, known as the rule against narrative. This rule provides that a witness giving evidence may not make use of her own previous statements to supplement or support her oral testimony. The CJA still retains this rule, however, it significantly extended the scope of exceptions that already existed to it. In particular it is now much easier for witnesses to refresh their memory from an earlier account which has been put into documentary or audio-form provided the witness states in oral evidence that the document or audio recording records her recollection of the matter at that earlier time and her recollection is likely to have been significantly better at that time than it is at the time of giving oral evidence at trial (CJA s. 139).[26] Furthermore, such documents or recordings and other previous consistent statements of witnesses may now be made part of the evidence in the case and be used by the fact finder as evidence of the truth in its own right rather than merely bolstering up the credibility of her oral evidence at trial (CJA s. 120(2)(3)(4)). In a similar manner, the earlier inconsistent statements of witnesses may now also be used by the fact-finder as evidence of truth and not simply as evidence with which to discredit the witness's live oral evidence (CJA s. 119).

The motivation for these changes has been that earlier statements of witnesses may often be a more reliable source of evidence than their statements at trial which are often made long after the events in question have occurred and in the stressful environment of a public trial. One trenchant critic of the narrative rule has said that 'if there are two specific scientific facts about the psychology of human memory which are clear beyond doubt, one is that memory for an event fades with time, and the other is that stress beyond a certain level can impair the power of recall. The rule against narrative stands the scientific knowledge on this question on its head requiring us to accept the following propositions: first that memory improves with the passage of time and secondly, that stress improves the process of recall.'[27]

[26] There is also no requirement that the document used to refresh memory be the witness's original statement. See *DPP* v. *Sugden* [2018] EWHC 544 (Admin); [2018] Crim LR 752.

[27] Spencer, *Hearsay Evidence in Criminal Proceedings* (2014), 15.

This shift in favour of front-loading witness testimony before trial has gone hand in hand with a view that just as witnesses should not have to wait until trial to give their testimony, defendants should not be shielded from giving an explanation for their conduct until trial and that a proper recording should be made of what they say in any police interview conducted before trial. Defendants have traditionally been able to exercise a right of silence before trial when questioned by the police as well as at trial. But the right of silence has been curtailed by legislation permitting the court to draw inferences from their failure to mention facts at a police interview which are later relied on in their defence at court.[28] Before being questioned, suspects are cautioned about the harm that can be done to their defence if they fail to mention such facts. The PACE regime mentioned above enables suspects to access legal advice in the police station and to have a solicitor present in the police interview.[29] But as a result of the requirement that police interviews be audio or video-recorded, defendants who have been interviewed by the police now commonly face the prospect of a video-recording of what they said or did not say at their interview being presented before the jury, so that their reaction to questions put to them, often in the presence of a solicitor, can be scrutinised by the jury, including any failure to answer questions.[30] In a widely cited passage in the Court of Appeal case of *R* v. *Howell*, Laws LJ said that the silence legislation was one of several measures enacted in recent years which had served

> to counteract a culture, or belief, which had long been established in the practice of criminal cases, namely that in principle a defendant may without criticism withhold any disclosure of his defence until the trial. Now, the police interview and the trial are to be seen as part of a continuous process in which the suspect is engaged from the beginning.[31]

His Lordship went on to say that this state of affairs represented a 'benign continuum' from interview to trial as it was in the public interest that there should be reasonable disclosure by a suspected person of what he has to say when faced with a set of facts which accuse him.[32] The effect has been to undermine long-standing principles such as the privilege against self-incrimination, the right to silence and the right not to cooperate in disclosing one's defence before trial which have long reinforced a 'no-assistance' approach towards defendant participation in the criminal process, at least until the trial.[33]

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[28] Criminal Justice and Public Order Act 1994 s. 34. This legislation also permits inferences to be drawn when suspects are silent in police interviews in other situations, for example when they fail to account for objects, substances or marks found on them or in their possession or to account for their presence at a crime scene. See ss. 36-37.

[29] Police and Criminal Evidence Act 1984 s. 58 and *PACE C: Code of Practice for the detention, treatment and questioning of persons by police officers* (revised July 2018) para. 6.8.

[30] See *PACE F: Code of Practice on video-recording with sound of interviews with suspects* (revised July 2018).

[31] *R* v. *Howell* [2003] EWCA Crim 1 [23].

[32] Ibid. [24].

[33] See Owusu-Bempah, *Defendant Participation in the Criminal Process* (2017).

2. Germany

A similar trend away from exclusive reliance on oral evidence presented at trial has occurred in German law.

The German Code of Criminal Procedure recognises the principle of orality, but from the beginning the rule has been riddled with exceptions. For example, while the written protocol of the defendant's police interrogation is not admissible as evidence, the court may (and often does) call the police officer as a witness and ask him about the statement the defendant had made when interrogated as a suspect. The judge may even read excerpts from the written protocol[34] to the police officer in order to refresh his memory. The same applies to witness testimony: although the immediacy principle precludes the introduction of the protocol of an earlier police interrogation of a witness, the court may call the interrogating officer as a witness in order to obtain the relevant information. There is one important exception to this option of introducing through hearsay testimony what the original witness does not wish to disclose at the trial: If a witness has a testimonial privilege, e.g., as the spouse or a relative of the defendant, and declares at the trial that he wishes to make use of that privilege, that decision must not be undermined by calling as a hearsay witness a police officer or prosecutor who had interviewed the witness earlier in the process (§ 252 CCP). The courts have however – without any basis in the CCP – established a counter-exception: If the witness had testified before a *judge* (in the course of the pretrial investigation[35] or at another trial) that judge may be called as a hearsay witness as to what the privileged witness had said (provided that the witness had been properly advised of his privilege at the earlier interview).[36] This tangled net of rules, exceptions and counter-exceptions demonstrates that the orality principle has a very limited impact under German law: it merely indicates a mild preference for live testimony over documentary evidence on the same issue.

Even this limited effect has been reduced by a number of further exceptions. First, protocols and video recordings of the pretrial interrogation of a witness as well as written documents containing his testimony may be introduced at the trial[37] if the witness is not readily available because, for example, he is deceased or cannot be interrogated for physical reasons. A protocol relating to an earlier *judicial* interrogation can also be used if travelling to the site of the trial court would cause serious hardship for the witness (§ 251 subsec. 1 (3), subsec. 2 (2) CCP). Moreover, any witness's live testimony at the trial may be replaced by reading a protocol or written statement if the prosecution, the defendant, and the defence lawyer agree (§ 251 subsec. 1 (1), subsec. 2 (3) CCP).

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[34] Since the case file originally assembled by the prosecutor and the police is passed on to the trial court, the protocol is readily available at the trial.

[35] The prosecutor may request a judge to take evidence in the course of the pretrial investigation (§ 162 CCP).

[36] BGH, Judgment of 15 Jan. 1952, 2 BGHSt 99; Judgment of 2 April 1958, 11 BGHSt 338. For further references see Meyer-Goßner and Schmitt, *Strafprozessordnung*, (2020) § 250 marginal note (mn.) 14.

[37] Documents are introduced into evidence at trial by being read out aloud in the courtroom by one of the judges or the clerk (§ 249 subsec. 1 CCP). However, the presiding judge may also assign a document to the judges (including lay judges) for self-reading at home (§ 249 subsec. 2 CCP).

It should be noted that German law does not regard the defendant as a witness; yet he has the right to make quasi-testimonial unsworn statements at the trial (cf. § 243 subsec. 5 CCP). The trial court may use these statements as evidence. But the principle of orality precludes the court, in principle, from using documentary evidence of statements the defendant made before trial, for example, in the course of a police interrogation. Prior self-incriminating statements of the defendant may, however, be introduced – even if the defendant remains silent at the trial – by reading[38] the protocol of a *judicial* interrogation or by replaying a video recording of that interrogation at the trial (§ 254 subsec. 1 CCP). The latter exception also applies to video-recorded confessions made at the police station. Since 2020, interrogations of juvenile or mentally handicapped suspects as well as of suspects in cases of intentional homicide must be recorded audio-visually whenever it is feasible to do so (§ 136 subsec. 4 CCP). It should be noted that any declaration of the defendant or a witness that has been made under the influence of force, threats, hypnosis, fraud, undue promises, or any other forbidden method of interrogation is inadmissible as evidence, even if the individual concerned consents to its use (§ 136a CCP).

In principle, expert witnesses also testify in person at the trial. They normally submit a written statement before trial, but in keeping with the orality principle they are expected to appear at the trial, summarise their findings and respond to questions by the court and the parties. Mostly for practical reasons, however, the Code provides a long list of instances in which the court may dispense with the expert's personal appearance (§ 256 subsec. 1 CCP). This option exists, e.g., where the statement has been prepared by a member of a public agency, where the expert witness has been generally admitted under oath as an expert in the field to which his written statement refers, and in some routine matters, e.g., findings on blood alcohol contents.

The long and ever-growing[39] list of exceptions seems to indicate that the principle of orality is honoured more in the breach than in actual operation. Yet, there is a strong counterweight: the trial court's duty to search for the truth (§ 244 subsec. 2 CCP). Whenever the judges deem it necessary for a complete investigation of the relevant facts to hear the original witness, they may – and will – order her personal appearance even though the Code may provide for the option of using some secondary piece of evidence. Thus, even if both the prosecution and the defence agree that a witness need not be heard in person, the presiding judge may nevertheless summon the witness to appear in court.

Like in the Anglo-American procedural systems, the presence of a witness in court makes a great difference with respect to the possibility of challenging her testimony. True, the presiding judge takes the lead role in questioning witnesses, and the court should encourage them to initially relate the relevant facts in their own words (§ 69

[38] With respect to judicial protocols of confessions, the option of assignment for self-reading (see note 37) does not apply (§ 249 subsec. 2 CCP).

[39] In recent years, the German legislature has added several new exceptions. For example, since 2017 documents that confirm a defendant's confession can be read in court (with the defendant's consent), and so can documents relating to financial damages (§ 251 subsec. 1 (2) and (4) CCP).

subsec. 1 CCP). In practice, the presiding judge frequently guides the witness along with questions, based on his prior knowledge of the results of the investigation from the dossier. If there are apparent differences between the witness's earlier statements and her testimony at trial, the presiding judge is likely to confront the witness with the protocol of her earlier testimony in order to clarify the matter (§ 253 subsec. 2 CCP).[40] If that is the case, the earlier statements become documentary trial evidence, and the judgment can be based on them.[41] The courts also permit confronting any witness with documents or protocols of pretrial interrogations as a means of eliciting the truth; in that case, however, the document read in court does not become trial evidence, and only the witness's response can be used for the judgment.[42]

When the presiding judge has exhausted his questions, the other members of the court (both professional and lay judges) have an opportunity to pose additional questions, and then the representatives of the prosecution, the defence (including the defendant himself) and – if present – of the victim may ask further questions (§ 240 CCP). The presiding judge is not permitted to curtail the parties' questions unless they are inadmissible or clearly irrelevant to the resolution of the case (including sentencing) (§ 241 subsec. 2 CCP). In contested cases, the questioning of adverse witnesses by the defence lawyer may look very much like an Anglo-American style cross-examination. In addition, both parties may present witnesses and adduce other evidence at the trial (§ 245 CCP), and they may request the presiding judge to summon additional witnesses and experts. In either case, the court may reject such offers of testimonial evidence only on narrow grounds of irrelevance and redundancy (§ 244 subsec. 3 CCP).

The provisions cited above have been part of the German CCP since its inception in 1877.[43] Contrary to what Anglo-American lawyers may think, German criminal procedure even in the late 19th century was no longer a one-sided 'inquisition' conducted by an almighty judge, but the representatives of the prosecution and the defence had – and have – ample opportunity to participate actively in the fact-finding process at the trial.

III. Orality, Confrontation and the ECtHR

We have seen that in both England and Germany various evidentiary rules and mechanisms which encourage the giving of oral testimony at trial are increasingly more honoured in the breach. In both systems, there is now considerable reliance on statements made in pre-trial procedures. This development has brought both jurisdictions in conflict with the ECtHR.[44]

[40] The same procedure is permissible in order to clarify contradictions between the defendant's statements in the course of a pretrial interrogation and his statement at the trial (§ 254 subsec. 2 CCP).

[41] Kreicker, ‚§ 253' (2016) mn. 3, 4; Kudlich and Schuhr, ‚§ 253',(2020), mn. 3.

[42] See BGH, judgment of 23 Sept. 1952, 3 BGHSt 199.

[43] They were originally §§ 239 and 240 of the *Reichsstrafprozeßordnung*.

[44] See *Al-Khawaja and Tahery* v. *UK* (2012) 54 EHRR 23; *Schatschaschwili* v. *Germany* (2016) 63 EHRR 14.

The lever for the ECtHR's interference with national laws on the principle of orality is Article 6 (3) (d) of the European Convention on Human Rights (ECHR), which provides:

> (3) Everyone charged with a criminal offence has the following minimum rights:
> …
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him …

This confrontation right is necessarily at stake whenever a witness for the prosecution does not appear at the trial but his prior statements are introduced as evidence.

1. England

It is a sign of the extent to which the legal system in England and Wales has diverged from its roots in the orality principle that the UK government has had to defend itself before the ECtHR for failing to safeguard the defendant's right to examine witnesses. In the landmark case of *Al-Khawaja and Tahery* v. *UK,*[45] the accused Al-Khawaja, a gynaecologist, had been convicted of indecent assault largely on the basis of a statement made by a witness who subsequently committed suicide, and there was no suggestion that her death was connected with the alleged assault. The accused Tahery was convicted of wounding with intent to do grievous bodily harm by stabbing the victim in the back. The main evidence against Tahery was the statement of a witness who subsequently refused to attend the trial out of fear.

In both these cases the English Court of Appeal upheld the judge's ruling to admit the statements under recognised hearsay exceptions covering absent witnesses, despite the lack of any opportunity given to the defendants to examine the witnesses on whose statements they were convicted.[46] It might be noted that if these cases had occurred in Germany, in the Al-Khawaja case the deceased's statement would have been introduced on the ground that the witness was not readily available at trial (§ 251 subsec. 1 no. 3 CCP). In Tahery's case, it is likely that if the witness refused to attend trial, the judge would call the interrogating officer who had interviewed the witness in order to inform the court of what he had said.

The use of the absent witnesses' statements to convict the accused in the Al-Khawaja and Tahery cases did not find favour with the Chamber of the ECtHR. The English courts' position appeared to breach a rule that the ECtHR had developed in its jurisprudence on how the right to examine witnesses under Art. 6 (3)(d) ECHR should be interpreted. The rule had been formulated as follows:

> … where a conviction is based solely or to a decisive degree on depositions made by a person whom the accused has had no opportunity to examine or

[45] *Al-Khawaja and Tahery* v. *UK* (2012) 54 EHRR 23.
[46] See *R* v. *Al-Khawaja* [2005] EWCA Crim 2697; *R* v. *Tahery* [2006] EWCA Crim 529.

> to have examined, whether during the investigation or at trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6.[47]

In its initial decision in *Al-Khawaja and Tahery*, the ECtHR declared that there had been a breach of Article 6 ECHR on account of the fact that the applicants had been convicted on the 'sole or decisive' basis of unexamined statements.[48] The English Court of Appeal and the UK Supreme Court in *R* v. *Horncastle and others*[49] subsequently took strong issue with the reasoning for the 'sole or decisive' rule mainly on the ground of its absolute nature, making no allowance for the fact that sole or decisive hearsay statements of unavailable witnesses could be perfectly reliable and their exclusion risked acquitting guilty defendants.

When the cases were referred to the Grand Chamber, the ECtHR appeared to backtrack from its earlier position by conceding that the rule should not be applied in an inflexible manner. It acknowledged that a fair trial is possible when an accused is unable to question sole or decisive witnesses provided there are sufficient counterbalancing factors in place, including measures to permit a fair and proper assessment of the reliability of their evidence.[50] The Court concluded that the safeguards contained in the CJA, supported by other legislation and the common law, were in principle 'strong safeguards designed to ensure fairness'.[51] It referred in particular to measures for protecting the defendant against unreliable hearsay such as the court's power to admit any evidence relevant to the credibility of the absent witness and the court's discretion to exclude unreliable hearsay or to stop the proceedings altogether where the prosecution case is based on unconvincing hearsay evidence.

The ECtHR here appeared to prioritise the reliability of hearsay evidence over any intrinsic right to examine witnesses. At the same time, it refused to give the safeguards a complete bill of health by stressing that everything depended on how they were applied in individual cases. This has introduced an element of uncertainty into the Court's jurisprudence as was seen in the very case-specific manner in which it went on to dispose of the two cases before it. The ECtHR held that in the Al-Khawaja case there was sufficient corroborating evidence to make the complainant's evidence reliable whereas in the Tahery case the absence of corroboration meant that the unfairness caused by the accused's inability to examine the witness who had refused to give evidence out of fear was not sufficiently counterbalanced.

Uncertainty as to whether the sole or decisive reliance on unexamined witness statements at trial will be found to be compatible with Article 6 ECHR places both the prosecution and the defence at a disadvantage. From the defence point of view, it encourages the prosecution to proceed with prosecutions on the basis of such

[47] See *Luca* v. *Italy* (2001) 36 EHRR 46 [40].
[48] See *Al-Khawaja and Tahery* v. *UK* (2009) 49 EHRR 1).
[49] See *R* v. *Horncastle and others* [2009] EWCA Crim 964, [2009] UKSC 17.
[50] *Al-Khawaja and Tahery* v. *UK* (2012) 54 EHRR 23 [147].
[51] *Al-Khawaja and Tahery* v. *UK* (2012) 54 EHRR 23 [151].

unexamined statements when the witnesses who made them become unavailable at trial or are unwilling to give evidence through fear. But prosecutors know that if they do go forward with prosecutions on this basis, there is a risk that the witnesses' statements may not be admitted by the judge at trial and their case may collapse.

One way round the uncertainty would be to introduce greater opportunities for the defence to question trial witnesses before they become unavailable at trial. Such pre-trial confrontation would seem to be compatible with the ECtHR's jurisprudence. In *Al-Khawaja and Tahery* the ECtHR began its analysis, perhaps surprisingly for judges coming from a tradition that is not commonly equated with subscribing to the orality principle, by affirming that Article 6 (3)(d) ECHR enshrines the principle that 'before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument'.[52] This statement seemed to give considerable weight to the orality principle. However, the Court went on to say that exceptions could be made provided the accused was given 'an adequate and proper opportunity to challenge and question a witness against him' not necessarily at the public trial but 'either when that witness makes his statement or at a later stage of proceedings'.[53] So long as opportunities exist for challenging witnesses *before* trial, the absence of an opportunity to examine them *at* trial is not fatal to compliance with Article 6 ECHR.[54] However, English procedures have yet to embrace the idea of pre-trial confrontation.

2. Germany

In *Al-Khawaja and Tahery* the Grand Chamber had noted that much of the impact of Article 6(3)(d) ECHR was on continental procedures which allowed an accused person to be convicted on the basis of evidence from witnesses whom he had not had an opportunity to challenge.[55] Given the absence of any concept of confrontation right from German legal thinking, it was not surprising that tensions should arise on this issue between the ECtHR and the German high courts. Although § 240 subsec. 2 CCP grants the defendant and his lawyer the right to ask questions of witnesses at the trial, the concept of a confrontation right based on the premise of an adversarial procedure appeared rather alien to German lawyers and judges and was simply ignored for the first decades of the applicability of the ECHR in Germany.[56] It was only when the ECtHR found Germany and neighbouring countries in violation of Article 6 (3)(d) ECHR[57] that

[52] *Al-Khawaja and Tahery* v. *UK* (2012) 54 EHRR 23 [118]. This is a principle that has been frequently voiced in previous jurisprudence. See *Barberá and others* v. *Spain* (1989) 11 EHRR 360 [78]*, Windisch* v. *Austria* (1991) 13 EHRR 360 [26]; *Kostovski* v. *Netherlands* (1990) 12 EHRR 434 [41]; *Krasnikiu* v. *Czech Republic*, Application no. 51277/99, 28 February 2006, [75]; *Al-Khawaja and Tahery* v. *UK* (2009) 49 EHRR 1 [34] (fourth section).

[53] *Al-Khawaja and Tahery* v. *UK* (2012) 54 EHRR 23 [118].

[54] For previous jurisprudence along these lines see *Kostovski* v. *Netherlands* (1990) 12 EHRR 434*; SN* v. *Sweden* (2004) 39 EHRR 13.

[55] *Al-Khawaja and Tahery* v. *UK* (2012) 54 EHRR 23 [129].

[56] Germany ratified the ECHR in 1952. The Convention entered into statutory force in Germany in 1953.

[57] See, e.g., *Unterpertinger* v. *Austria* (1986) 13 EHRR 175, *Doorson* v. *Netherlands* (1996) 22 EHRR 330, *Windisch* v. *Austria* (1991) 13 EHRR 281*, Kostovski* v. *Netherlands* (1990) 12 EHRR 434*, Schatschaschwili* v. *Germany* (2016) 63 EHRR 14.

the German courts deemed it necessary to address the requirements the ECtHR derived from the confrontation clause. For the German courts, it was not so much the defence right to confront adverse witnesses at the *trial* that created problems; it was the indirect ramifications the confrontation right was said to have for the relationship between the pretrial and the trial phases that was difficult to grasp and accept. The reason for this difficulty lies in the porosity – explained above – of the wall between the pretrial and the trial phases that exists in Germany in spite of the general recognition of the principle of orality. For example, if a witness relies on a testimonial privilege (e.g., as a relative or lawyer of the defendant) and does not testify at the trial, then there is – from a German perspective – no one for the defence to confront, although the witness's earlier statements may be introduced through other means, e.g., hearsay testimony of a judge who had interrogated the witness before trial.

The tension between German and ECtHR concepts came to a head in the case of *Schatschaschwili* v*. Germany*.[58] In that case, the complainant had been convicted on the testimony of two women from Lithuania who had been robbed in Germany. The witnesses had testified before a police officer and a judge early in the pretrial investigation, then returned to their home country and refused to further participate in the criminal process against the defendant. From the perspective of German law, since the witnesses were unavailable it was not problematic to introduce their statements into the trial by reading in open court the protocols of their interviews with the police and the judge (§ 251 subsec. 1 no. 3, subsec. 2 CCP).[59] The defendant's right to ask questions under § 240 subsec. 2 CCP was deemed to be unaffected since it applies only to witnesses present at the trial.[60] Many German lawyers were surprised to read that the ECtHR found Germany in violation of Article 6 (3)(d) ECHR. The Grand Chamber based its judgment on the premise that the confrontation right under Article 6 (3)(d) ECHR transcends the trial phase; confrontation before trial may therefore be necessary if witnesses become unavailable at trial and reliance is placed on their pre-trial testimony. The Chamber criticised the German law enforcement authorities for failing to anticipate the witnesses' departure; they should have made certain that the defendant or a lawyer appointed for him could attend the judicial interview with the witnesses and ask questions.

In the wake of *Schatschaschwili*, the German legislature in 2017 amended the CCP to permit the pretrial judge to appoint a lawyer in advance of an interrogation if participation of a lawyer 'appears to be necessary for protecting the suspect's rights in light of the significance of the interrogation' (§ 141 subsec. 3, clause 4 CCP).

IV. Frontloading the taking of evidence?

[58] (2016) 63 EHRR 14.

[59] If the case had been tried in England, the trial judge could also have admitted the statements the women had given to the police on the ground that they were outside the UK and it was not reasonably practicable to secure their attendance; see CJA s. 116(2)(c).

[60] If the trial court had found it necessary to summon the police officer or the judge who had interrogated the victims, the defendant would have had the right to put questions to these persons.

In the previous section we saw that the jurisprudence of the ECtHR may suggest the need to rethink the traditional emphasis on trial orality, that is the concept of presenting all relevant evidence live at the trial. Several recent developments have led to a diminished role for the trial as a means of administering criminal justice.

1. Oral trial as a mechanism for finding the truth?

We started out by claiming that there exist good epistemic and due process reasons for adhering to the principle that witnesses give their evidence orally and in person during the trial. In the 19th century both the English and German legal systems favoured the idea of creating a forum where the accused and witnesses were confronted with each other and gave evidence publicly before a decision maker who would take personal responsibility for the eventual judgment. That arrangement was considered the best way of uncovering the truth and far preferable to written alternatives.[61]

Somewhat different procedures were employed in each system. In the adversary trial the parties tested witnesses through examination and cross-examination, while in the continental trial the judge was given the responsibility to search for the truth by questioning the accused and witnesses, albeit assisted by the parties. However, in each system the principle of orality became central to safeguarding the search for the truth. Jurists of the day on both sides of the English channel were suspicious of the way evidence was obtained in the investigation phase where written confessions may have been obtained by devious means or under compulsion and where secret, incompletely recorded or false witness evidence could be obtained on the basis of leading questions.[62] The principle of orality was also important in safeguarding fairness as it enabled the accused to directly challenge adverse witnesses in court. Where the evidence was obtained in a secret preliminary investigation, by contrast, the accused was unable to challenge the content of the evidence or the manner in which it was obtained.

But it has become increasingly more difficult to justify basing convictions solely or mainly on the evidence presented in the trial. Over the course of the 20th century, an abundance of social science and other research has demonstrated that live oral testimony is not a particularly accurate form of fact-finding. The idea that witnesses who give evidence at the trial based on 'original' memories of events they have perceived is now considered a fiction. Gaps in memory come to be filled increasingly by intuitive association, stereotypical thinking, and witnesses' interactions with others.[63] The longer the period between the witness's testimony and the events in question, the greater the risk that this will happen. As regards the testing of witnesses' accounts at trial, there are (pace *Wigmore*) increasing grounds for doubting the effectiveness of cross-examination in uncovering the truth. While adversarial style cross-examination may uncover perjury, it may also confuse and alienate children and

[61] See Summers, *Fair Trials* (2007), 50.
[62] Ibid. 55-58.
[63] Roberts, 'The Frailties of Human Memory and the Accused's Right to Accurate Procedures' (2019).

vulnerable witnesses who become less able or willing to speak the truth.[64] There is also evidence that cross-examination is less effective in ascertaining the truth from honest witnesses whose evidence may have been based on memories that have been compromised.[65] Finally, the many experimental studies which show that demeanour is not a good indicator of truth-telling cast doubt on the frequently made claim that the fact finder needs to be provided with an opportunity to observe the witness giving evidence.[66]

On top of all this experimental evidence, it is also increasingly being realised that the stress of having to testify in a public forum can impede a witness's ability to give her best evidence.[67] This does not only have epistemic ramifications. There are fairness issues involved for the witnesses as well. Although the defendant's ability to confront witnesses at trial may serve to enhance the fairness of the proceedings so far as the defendant is concerned, it can come at the cost of fairness to the witnesses involved as they are obliged to endure a 'degradation ceremony' in front of the public.[68]

2. Oral trial as the apex of the criminal process?

The ancient idea that the dice are cast only at the trial and that therefore the investigation is nothing but an informal, largely unregulated, and legally inconsequential phase of collecting information no longer comports with reality. In both legal systems analysed here, the traditional contested trial has become an exceptional way of disposing of criminal cases. For the great majority, the public battle between prosecution and defence has been replaced by bureaucratic ways of administering sanctions for more or less evident violations of the law, and by 'consensual' methods of case disposition which appear in different guises in different systems, including 'open – shut' formal trials.

This development has not come about by chance, nor is it just a devious ruse invented by greedy and/or lazy lawyers who wish to reach a disposition quickly without the regular trial process. The concept of finding the truth in a brief court battle between opposing parties may have fit the criminal process of the 19th century, which mostly dealt with relatively simple crimes against the person and with theft offences that could be tried within a short time before a jury taken from the locality where the crime occurred. By contrast, prosecutors and courts today often have to deal with white-collar crime, frequently with international ramifications, which does not lend itself to the same on-the-spot process of finding the truth through examining a few eye witnesses. The *Schatschaschwili* case, moreover, demonstrates the procedural complications engendered by globalisation and international traffic, even in cases with relatively simple facts.

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[64] See the empirical research cited in Plotnikoff and Woolfson, '"Kicking and Screaming"' (2012). For a critique of adversarial cross-examination from an international perspective, see Combs, *Fact-Finding without Facts* (2010), 303-312; Ambos, *Treatise on International Criminal Law* (2016), 467.

[65] Roberts, 'The Frailties of Human Memory and the Accused's Right to Accurate Procedures' (2019), 922-24.

[66] See e.g. Bond and DePaulo, 'Accuracy of Deception Judgments' (2006).

[67] See Advisory Group on Video Evidence*, Report* (1988).

[68] Dennis, 'The Right to Confront Witnesses' (2010).

The crisis of the trial as the locus of fact-finding has thus had the effect of moving the decision-making forward in time. In some jurisdictions, there already exist types of proceedings in which the results of the pretrial investigation – as collected in a comprehensive dossier – form the basis of the disposition of the case.[69] In Germany, the penal order proceeding (§ 407 CPP), which is used frequently in practice, represents this type of procedure: the prosecutor drafts a complete judgment based on the results of the pretrial investigation and sends it to a judge along with the dossier. The judge can either sign the draft, thereby turning it into a valid conviction (still subject to appeal by the defendant), or she can reject the draft, which leaves the prosecutor with the options of dismissing the case, filing an amended draft of a penal order, or going to trial based on a regular indictment. In the great majority of cases, German judges simply sign the penal order and rely on the defendant to file an appeal if he does not wish to accept the disposition.

In the Anglo-American procedural system, plea bargaining may be regarded as a similar type of disposition: since there is no trial, the defendant's conviction rests on the persuasiveness of the results of the investigation coupled with his consent. But there are some critical differences.[70] Firstly, the Anglo-American pretrial investigation is not conducted in a 'neutral' spirit; secondly, there is no official dossier of the investigation on which a judge could rely for her decision whether to accept or reject a proposed plea bargain; thirdly, in many Anglo-American jurisdictions the defendant does not have sufficient or adequate information about the case against him and thus must make his plea decision behind a veil of (at least partial) ignorance about the strength of the prosecution case.

Regardless of such differences between the systems, in all instances mentioned above the 'pretrial' investigation, for all intents and purposes, *is* the criminal process. This, by itself, is a strong argument in favour of devising a pretrial procedure that permits and indeed requires a full-fledged 'search for the truth', which implies an option for the defence to actively contribute to the process. The defendant should, of course, be able to freely choose between active participation and a defence that relies on silence and passivity.[71] The freedom of devising a defence strategy coincides with the recognition of individual rights of the suspect that attach at the very beginning of the process, such as the right to withhold cooperation with the police, the right to be free from unreasonable searches and seizures, the right to professional assistance by a lawyer, the right to privacy and to respect for his dignity, and the right to retain his freedom (unless a restriction is indispensable for averting an illegal interference with the investigation). Any legal rules concerning the pretrial process must respect these rights, which need to be emphasised given the temptation for law enforcement officers to exploit the suspect as a valuable source of relevant information.

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[69] For an overview, see Ambos and Heinze, 'Abbreviated Procedures in Comparative Criminal Procedure' (2017).

[70] For discussion of the differences between plea bargaining and abbreviated trial procedures in non-adversarial systems, see Langer, 'From Legal Transplants to Legal Translations (2007); Hodgson, *The Metamorphosis of Criminal Justice* (2020), 13-23.

[71] See Owusu-Bempah, *Defendant Participation in the Criminal Process* (2017).

The ECtHR has played an important part in influencing the extension of suspects' rights in the pre-trial phase as it has acknowledged the impact that events during the pre-trial phase can have on the fairness of the trial. In *Murray* v. *UK*, for example, it held that the provisions of Article 6 ECHR could be 'relevant before a case is sent for trial if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions'.[72] The upshot of this re-thinking of the pretrial process should be a comprehensive regulation of the rights and obligations of the participants. As we note below, EU law has in recent years made important steps in that direction,[73] and national jurisdictions have likewise moved toward tighter regulation of what was formerly a largely informal way of collecting information and potential evidence.

3. Fairness guarantees in pretrial proceedings

The difficulty in both the jurisdictions discussed here with the shift towards basing decisions of guilt on evidence obtained in pre-trial procedures is that it has not gone hand in hand with a transfer of the kind of procedural guarantees that have been built into the trial. Several features of the pretrial process are of particular importance for safeguarding fair proceedings.

(i) Right to a Lawyer

One of these features is the presence of defence lawyers at interrogations both of suspects and witnesses, including a right to ask questions of witnesses. In *Murray* the ECtHR emphasised the 'paramount importance' for the rights of the defence that an accused has access to a lawyer at the initial stages of police interrogation when it reviewed legislation restricting the accused's right of silence in pre-trial police interviews in Northern Ireland.[74] Under this legislation, accused persons were confronted with a fundamental dilemma relating to their defence: if they chose to remain silent, adverse inferences could be drawn against them, but if they chose to answer questions, they might prejudice their defence. The ECtHR ruled that as long as access to a lawyer was not granted, inferences should not be drawn from the suspect's silence. The UK government responded by amending the silence legislation in Northern Ireland and England and Wales to provide for this.[75] Then in its landmark decision in *Salduz* v. *Turkey* in 2008 the ECtHR held that Article 6 (3) ECHR required that, *as a rule*, access to a lawyer should be provided as from the first interrogation of a suspect unless there are compelling reasons for restricting the right.[76] This decision provided the impetus for the EU to redouble its efforts to produce procedural safeguards that could be applied uniformly across the EU.[77] This has included

[72] *Murray* v. *UK* (1996) 22 EHRR 29 [62].
[73] See Ambos, *European Criminal Law* (2018), mn. 142-151.
[74] *Murray* v. *UK* (1996) 22 EHRR 29 [62]. See Criminal Evidence (NI) Order 1988 Arts. 3-7 and commentary on the legislation in Jackson, 'Recent Developments in Criminal Evidence' (1989).
[75] Youth Justice and Criminal Evidence Act 1999 s. 58.
[76] (2009) 49 EHRR 19.
[77] See Jackson, 'Cultural Barriers on the Road to Providing Suspects with Access to a Lawyer' (2016).

Directives on the right to interpretation and translation, the right to information, the right of access to a lawyer and the right to legal aid.[78] These initiatives reinforced and sped up the process of strengthening the position of the defence in the early phase of the investigation in a number of European jurisdictions.[79]

Both the German and English legal systems have made important steps toward this goal. Since the inception of the German CCP in 1877, a criminal suspect has been able to avail himself of the assistance of a lawyer at any time before trial – but only if he is able to pay the lawyer's fees (§ 137 CCP). Originally, the lawyer could not be present at interrogations of witnesses or the client, except (since 1974) when the interrogation was conducted by a judge. Moreover, the lawyer had a right to give advice but had only very limited access to information before the close of the investigation because the public prosecutor could preclude the lawyer from inspecting the greatest part of the dossier until the investigation was closed and the indictment was ready to be filed (§ 147 subsec. 2 CCP). The (official) rationale behind these limiting rules was the exclusiveness of the trial as a basis for the court's eventual judgment: under the principle of orality, it was said, whatever transpired before trial had no impact on the judgment and therefore could be done in secret by the police and the prosecutor. The insight that the supposed wall between the investigation and the trial was riddled with holes led to the erosion of that dogma. It became clear that the trial in many cases served only to check and (mostly) affirm the results of the pretrial investigation. It therefore became imperative for the defence to be able to obtain information on and participate in the pretrial investigation.

Consequently, the suspect now has a right to have a lawyer appointed for him, without cost,[80] as soon as it becomes apparent that the assistance of a lawyer will be necessary in the course of the proceedings (§ 141 subsec. 3 CCP). The 'necessity' of a lawyer is defined by the Code using criteria that are mostly related to the seriousness of the charges and the incapacity of the suspect/defendant to conduct his own defence. Importantly, since 2018 the defence lawyer has a right to be present during any interrogation of his client by a judge, a prosecutor, or a police officer as well as during *judicial* interviews of witnesses (§ 163a subsecs. 3 and 4, § 168c subsec. 1 and 2 CCP). If a defence lawyer is present at a pretrial interrogation of a witness, she has the right to ask questions of the witness.

[78] Directive 2010/64 on the right to interpretation and translation in criminal proceedings [2010 OJ L280]; Directive 2012/13 on the right to information in criminal proceedings [2012 OJ L142]; Directive 2013/48 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings [2013 OJ L294/1]; Directive 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings [2016 OJ L297].

[79] See Giannoulopoulos, 'Strasbourg Jurisprudence, Law Reform and Comparative Law' (2016). Note, however, that the UK did not opt into the directives on access to a lawyer and legal aid.

[80] The State pays the lawyer's fees in accordance with a schedule set up by statute. If the defendant is convicted, the lawyer can claim from him the regular fees of a retained defence lawyer if the defendant can pay these fees without jeopardising his and his family's subsistence (§ 52 *Rechtsanwaltsvergütungsgesetz* [Law on Lawyers' Fees]; the schedule can be found in *Teil 4* of this statute).

In England and Wales, we have seen that the principle that suspects can have access to a lawyer before being questioned by the police has been accepted since the introduction of PACE.[81] But the traditional focus on the adversarial trial as the forum for admitting and contesting evidence has meant that it has been difficult to instil a culture of active defence participation during the investigative phase, despite the activism promoted by the ECtHR and the EU directives.[82] It is true that the EU Directive on the right to information led to the PACE Code on Police Detention and Questioning being revised to require that before suspects are interviewed, they and their solicitor must be given sufficient information to enable them to understand the nature of any suspected offence and why they are suspected of committing it in order to allow for the effective exercise of the rights of the defence.[83] However, the Code goes on to state that whilst the information must always be sufficient to understand the nature of any offence, this does not require the disclosure of details which might prejudice the criminal investigation. It would seem that the investigating officer is given plenty of discretion to determine what might prejudice the investigation and the result is that, despite the Directive, the police can continue to withhold much of their evidence before questioning a suspect.[84] It has been perceptively pointed out that although the Code does adequately transpose the provisions of the EU Directive into domestic English law as they relate to the investigative stage of the criminal process, it envisages a more limited role for the defence by stating that pre-interview disclosure is for the 'effective exercise of defence rights' rather than, as the Directive has put it, for the effective exercise of defence rights *and* to 'safeguard the fairness of the proceedings'.[85] This points to a reluctance on the part of the English authorities to acknowledge that the police interview has been transformed into a formal part of criminal proceedings and that fairness demands as a consequence that fair trial standards such as formal disclosure are introduced into these proceedings.[86]

The same reluctance to acknowledge fairness pertains at the stage when defendants formally plead guilty. Large numbers of cases end up in guilty pleas or in being diverted out of the criminal process on the basis of an admission of guilt.[87] This may be seen as

[81] Before PACE, suspects in custody were able to request access to legal advice under Judges' Rules which were a set of rules devised by judges for the conduct of police interrogation. But these were rarely backed up with sanctions when they were breached by the police as they frequently were. See Zuckerman, *The Principles of Criminal Evidence* (1989), 314. For a history of these rules, see McConville and Marsh, *The Myth of Judicial Independence* (2020). In Scotland the right to access legal advice before police questioning begins was not recognised until 2010 when the UK Supreme Court ruled that Scotland had to follow *Salduz* and fall into line with the rest of Europe. See *Cadder* v. *HM Advocate* [2010] 1 WLR 2601 and Giannoulopoulos, '"North of the Border and Across the Channel"'(2013).

[82] See Jackson, 'Responses to *Salduz'* (2016).

[83] *PACE C: Code of Practice for the detention, treatment and questioning of persons by police officers.* Revised July 2018, para. 11.1A.

[84] See Sukumar, Hodgson and Wade, 'Behind Closed Doors' (2016).

[85] Cape, 'Transposing the EU Directive on the Right to Information' (2015).

[86] Jackson, 'Silence and Proof' (2001).

[87] Guilty plea disposals take place even in the most serious offences triable in the Crown Court. Government statistics in 2019 indicated that around 66% of defendants entered a guilty plea to all the counts against them at the Crown Court. The rate was lower for sexual offences (41%). See Ministry of Justice, *Criminal Court Statistics Quarterly* (2019).

a beneficial development in so far as it saves witnesses the ordeal of having to give evidence in court, but it is surely only fair to inform defendants of the evidence in the case, including any exculpatory material, before they are expected to choose whether to plead guilty.[88] Yet the fact that larger sentence discounts are granted if the defendant pleads guilty early in the process may persuade defendants to formally admit guilt without having been given access to the evidence.[89] This, as we shall see, appears to be part of a more general reluctance to shed the premise that the proper forum for defending the accused and contesting criminal accusations is in the adversary trial and not at the pretrial phase of proceedings.

The situation is similar in Germany. Although the defence lawyer has a general right to inspect the prosecution file, the prosecutor may deny the lawyer access to sensitive parts of the dossier until the end of the investigation, if inspection of the dossier would jeopardize the purpose of the investigation (§ 147 subsec. 2 CCP). This can occur if the lawyer shares sensitive information with the suspect,[90] who might then use it in order to destroy evidence or to unlawfully influence witnesses. Yet, disclosure rights of the defence even during the investigation phase have been extended, and the defence lawyer of a detained suspect may file an appeal against the prosecutor's denial of access to the dossier (§ 147 subsec. 5, clause 2 CCP).

Although these recent modifications of the law are commendable in that they recognise the importance of the pretrial phase and the need to grant the defence participation options, Germany still does not have a Legal Aid scheme, so that the availability of a lawyer for suspects (and indeed for defendants too) often depends on their financial means. The statutory criteria for the 'necessity' of appointing a State-paid lawyer are vague and rather narrow, and it remains to be seen whether the German concept is in compliance with the EU Directive of 2016 on legal aid for suspects and accused persons.[91]

In England and Wales, the lack of defence participation in pre-trial procedures for questioning witnesses would need to be addressed if the trend towards relying on the statements of such witnesses for the purpose of conviction is going to meet fair trial standards. The use at trial of statements made by suspects in police interviews also raises questions as to whether suspects' rights are being sufficiently safeguarded. The PACE regime recognised that if suspects are questioned routinely in the police station after being arrested, they need to be given access to a lawyer to advise them of their rights including their right of silence. But as we have noted, later legislation restricted this right by enabling the police to caution suspects before any interview begins that

[88] Hodgson, *Metamorphosis of Criminal Justice* (2020), 146-7.
[89] See Sentencing Guideline Council, *Reduction in Sentence for a Guilty Plea* (2017). In order to secure the maximum sentence reduction, a defendant has to plead guilty 'at the first stage of proceedings' which is normally the first hearing at which a plea is sought.
[90] Neither the prosecutor nor a judge may order a defence lawyer to withhold from his client information relevant to the case.
[91] Art. 4 (4) of the EU Directive 2016/1919 of 26 October 2016 does, however, permit Member States to use a 'merit test' for appointing a lawyer, which may be satisfied by present German law on the subject.

their failure to mention facts may harm their defence.[92] This rule reinforced the importance of suspects obtaining legal advice and being assisted by lawyers who are active in unearthing any possible defence that suspects might have. But they have little opportunity to do this. The trigger for active defence participation has traditionally been activated only *after* the police investigation.[93] There has certainly never been any obligation on the police to disclose their case before they question suspects, and without knowledge of the case against them it is difficult to construct any meaningful defence.

(ii) Recording police interrogations

If one wishes to turn the pretrial investigation into a reliable basis for criminal judgments, it is necessary to record its steps so that a decision-maker can later determine with accuracy what was said and done. We have seen that both legal systems have opened the door toward indirectly introducing earlier witness statements through using a written protocol or hearsay testimony of the interrogating officer as evidence at trial. Admitting such evidence is, however, problematic since there is no independent verification of how exactly the witness was interviewed when her statement was taken. For example, in German police interviews with suspects and witnesses there is no verbatim transcript of the witness's statement but the police officer notes in her own words what the witness has said. This problem can be resolved, to a large extent, by recording the police interview on audio tape or, preferably, on video. Steps in that direction have been taken in both jurisdictions, but there is not yet any systematic effort at recording all relevant acts of investigation.

Since 1998, German law provides for the option of video-recording a witness's pre-trial interrogation (§ 58a CCP), specifying that a recording 'should' take place if there is a risk that the witness cannot be heard at the trial and the recording is necessary for the determination of the truth. Similarly, police interviews of vulnerable suspects and of persons suspected of intentional homicide shall be recorded (§ 136 subsec. 4 CCP). Still, video-recording of witness interrogations remains rare in police practice. If a tape has been made it may be introduced as evidence at the trial; however, § 255a subsec. 1 CCP requires that available adult witnesses still be present at the trial for questioning.[94]

In England and Wales we have seen that police interviews with suspects are recorded, but there is no such requirement in the case of interviews with witnesses. However, a number of 'special measures' have been taken to enable vulnerable and intimidated victims and witnesses to give their evidence more effectively and there is an official Code of Practice for taking evidence from such witnesses.[95] One of these measures

[92] See Criminal Justice and Public Order Act 1994 s. 34.
[93] See Jackson, 'Responses to *Salduz*' (2016).
[94] Juvenile victims and witnesses of sexual offences and certain other crimes should be protected from having to testify multiple times. Therefore, a video recording of their prior interrogation by a judge may replace their testimony at trial, if the defendant and his defence lawyer had an opportunity to attend the prior judicial interrogation (§ 255a subsec. 2 CCP).
[95] See Ministry of Justice, *Achieving Best Evidence in Criminal Proceedings* (2016).

has been to permit video-recordings of their evidence taken before the trial to be admitted as part of their evidence in chief at trial.[96] This is bolstered by a further provision which has not come fully into force but is presently being piloted in parts of England whereby the whole of the vulnerable witness's evidence including cross-examination may be video-recorded ahead of trial with a view to the video-recording replacing the witness's live evidence.[97]

The CJA has gone further to provide a general power for the court to admit the video-recording of an earlier account of *any* witness in place of that witness's evidence in chief in any proceedings for a serious offence where the witness's recollection of events is likely to be significantly better when the recording was made than it would be if she were to testify at trial (ss. 137 and 138). Importantly, there is no provision for such a video-recording to incorporate any cross-examination of the witness so that the witness still has to be present at trial to be cross-examined on its content. As with the video-recordings of vulnerable and intimidated witnesses, such proceedings need not constitute the whole of a witness's evidence in chief, but where live evidence is also given the court may order that it should not cover matters adequately dealt with in the recording. The CJA also provides that before a judge gives leave to admit the police statement of a witness who does not give evidence through fear, she must have regard to whether a direction has been made for admitting the witness's evidence through special measures such as by means of a video-recording which could constitute the witness's evidence in chief (s. 116(4)(c)).

These practices have not proved easy to implement. It costs money for the technology to be put in place in police stations for recordings to be made and in courtrooms to allow them to be viewed, and playing video recordings in court rubs against the ingrained tradition that live witness testimony at a contested trial is the preferred form of adducing evidence.[98] The general video recording provisions have yet to be brought into force. But the new practices reflect a growing sea change in attitude at least on the part of policymakers that there should be no need to wait until trial to get oral statements formally admitted into evidence.

The coronavirus pandemic is forcing courts to become more conversant with the idea of using technology to take evidence from witnesses outside the courtroom. The Coronavirus Act 2020 has considerably expanded the scope for criminal trials to be conducted remotely by enabling witnesses, the parties, the judge (but not jurors) and even the accused to participate by a live audio or video link.[99] It may be that the pandemic will provide a catalyst for the video-recording of greater numbers of witnesses. The sooner a witness gives evidence, the better its quality is likely to be, and its quality may also be enhanced where it does not have to be given in the forbidding surroundings of a public trial.

[96] See Youth Justice and Criminal Evidence Act 1999 s. 27.
[97] Youth Justice and Criminal Evidence Act 1999 s. 28.
[98] For a critique of the painfully slow progress that has been made in implementing the special measures, see Spencer and Lamb, *Children and Cross-Examination* (2012).
[99] Coronavirus Act 2020 s. 53, sch. 23, amending CJA s. 51.

(iii) Judicial interrogations before trial?

Another possible means of creating a reliable basis for fact-finding before or even without a trial may be to entrust a judge with interrogating suspects and witnesses. Formal depositions taken by magistrates are a much better means of taking statements from witnesses than when they are taken by the police with no authentication of what was actually said by the witnesses.

In England and Wales there have in the past been procedures which have enabled magistrates to take formal depositions on oath from certain witnesses (e.g., young children and person who were dangerously ill) for use at trial. There were also oral committal proceedings whereby witnesses were examined on oath before magistrates in the presence of the defence. However, the defence were not given advance disclosure of the case against the accused before the witnesses were questioned and defence lawyers rarely availed of the opportunity to cross-examine them. The depositions taken could be used at trial in place of oral testimony in certain circumstances.[100] But most of these procedures have since been abolished[101] and, those remaining (e.g., the provisions relating to taking depositions from young children) are rarely used.

In its review of the hearsay rule, the Law Commission considered that the introduction of a new system for judges to take evidence on commission would constitute a radical change to English criminal procedure and it did not pursue the idea.[102] Its final report focused instead on making witness statements obtained by the police more widely admissible at trial without proposing any formal rules and safeguards governing how these should be obtained.[103]

In Germany, the prosecutor may request a judge to interrogate a witness in the course of the pretrial investigation (§ 162 CCP). The protocol of this interrogation may be introduced at trial instead of hearing the witness if appearing in court would cause her hardship or if she is unavailable due to death or disease (§ 251 subsec. 2 CCP).[104] It is also possible to make an audio or video recording of the interrogation, which can be replayed at the trial in lieu of the witness's examination (§§ 58a, 255a CCP) under the same conditions as the reading of a judicial protocol. It is only the prosecutor that may request a judicial interrogation; neither the defence lawyer nor the judge himself can

[100] See, e.g., Children and Young Person Act 1933, ss. 42 and 43, Magistrates' Courts Act 1980 s. 105, Criminal Justice Act 1925, s. 13.

[101] Criminal Procedure and Investigations Act 1996, s 47, sch 1. For more detailed commentary, see Spencer, *Hearsay Evidence in Criminal Proceedings* (2014), 71-72.

[102] Law Commission, *Evidence in Criminal Proceedings and Related Matters* (1995), para. 11.31.

[103] See Law Commission, *Evidence in Criminal Proceedings: Hearsay and Related Topics* (1997), Cm 3670.

[104] The judge who conducted the interrogation may be called as a (hearsay) witness. The judge may also testify on the contents of the statement of a witness who had testified before the judge but at the trial claims a testimonial privilege (BGH, Judgment of 15 Jan. 1951, 2 BGHSt 99; for further references and details see Kudlich and Schuhr, '§ 252' (2020), mn. 20-24. Due to this rule, ‚sensitive' victims of intra-family crime are often brought before a judge to testify early in the investigation; if the witness later refuses to testify based on a testimonial privilege of relatives of the defendant (§ 52 CCP), relevant information may still be introduced by way of the judge's testimony.

initiate such an act. This means that the defence have no adequate means for introducing evidence into the pretrial investigation. The Code grants the suspect the right to request the prosecutor or – in case of a judicial interrogation - the judge to take evidence on his behalf (§§ 163a subsec. 2, 166 subsec. 1 CCP). But it is left to the discretion of the prosecutor or the judge whether to follow up on the suspect's suggestion, and these officers are unlikely to do so if they regard the taking of possibly exonerating evidence as a waste of their time or even as detrimental to their goals.

It would be helpful if the defence had a *right*, under circumstances defined in the Code, to request a judge to take evidence on their behalf, in parallel with the respective right of the prosecutor (§ 162 CCP). If that were the case, the defence could make certain that (possibly) exonerating evidence is taken while it is still available and may be preserved for trial. One might even re-think the abolition of the former 'investigating judge', which occurred in Germany without much debate in 1974. Placing the pretrial investigation, at least in the most serious cases, in the hands of a judge might well contribute to a more reliable, fair and trustworthy process of gathering evidence.[105]

Summarising the trends that can be seen in both England and Germany, we may state that there is a move toward establishing guarantees of an objective and reliable fact-finding process in the pretrial investigation. The participation of defence lawyers from the very start of the investigation has increased, not least due to developments on the European level, and preserving suspects' and witnesses' statements on tape for later use is on the rise. What is still missing is the involvement of a neutral magistrate or judge, who could bring into the investigation an essential element of objectivity, professionalism and detachment. If these trends are re-enforced and strengthened in the jurisdictions under review here, they might create an investigation with strong elements of adversariness and enhanced reliability of the findings. Imagine an investigation conducted by a judge, with active participation of a defence lawyer from the beginning. The lawyer would have the right not only to cross-examine any witness interrogated by the judge or an officer on the judge's behalf, but could also request the judge to take evidence for the defence. Everything of relevance would be digitally recorded, interrogations stored on video tape.

If such a system were in place, one could well imagine basing the disposition of the case on the evidence collected in the pretrial phase, with the option of hearing additional evidence that may have been discovered later. The question then arises – would there still have to be a traditional trial available, subject to the principle of orality?

V. What Becomes of the Trial?

We have seen that even today the traditional contested trial has become an exceptional way of disposing of criminal cases in both systems analysed here. *If* the metamorphosis of the pretrial process into a fair, rights-oriented procedure with

[105] French law has still preserved the investigating judge; see arts. 49-51, 79-190 French Code of Criminal Procedure.

broad participation options for the defence actually succeeded – would there still be a need to retain the trial process as we know it, especially the principle of orality?

Even if in a future procedural system trials still take place (and we will consider below arguments in favour of retaining the concept), there are three strong arguments in favour of abolishing or at least restricting the orality principle. First, demanding a completely new presentation of evidence at the trial is likely to reduce the factual basis on which the finders of fact can base their judgment, because evidence that was taken and documented in the course of the pretrial investigation may not be available at the date and place of the trial. Second, the trial will to some extent merely rehash the evidence that is already on record; for example, a witness at the trial will more or less repeat what he had said at an earlier interrogation, especially if the defence lawyer had attended that interrogation and had an opportunity to question the witness then. Third, the rationale for the principle of orality would largely have disappeared: if guarantees for comprehensiveness and fairness are inserted into the pretrial procedure, it is no longer a police-dominated black box that produces unreliable results.

Yet, truth finding and fairness are not the only considerations that come into play when we seek a justification for the orality principle. The 19th century scholars also put great store on the need for a public trial.[106] This was not only on the ground that publicity would help encourage witnesses to be truthful and any questioning to be conducted fairly but, perhaps more importantly, that it helped to emphasise the public nature of criminal prosecution and the need for verdicts to be publicly justified and accepted. Where the evidence is not provided orally, the public are prevented from seeing how it was obtained.

However, the need for verdicts to be publicly justified and accepted can be satisfied *without* strict adherence to the orality principle. A written or electronic record of the evidence taken before trial followed by a reasoned judgment could also satisfy the requirement that decisions are publicly justified. Here again, however, we encounter a difference between the two systems. In England and Wales, the chief way in which verdicts are publicly justified in serious cases is by means of the jury system whereby citizens randomly selected from the public determine what the verdict should be. Juries do not give reasoned judgments because their verdict after due deliberation is itself an expression of the public will. But as we are unable to scrutinise the jury's output and the jury becomes the ultimate arbiter of the 'truth', it becomes all the more important to ensure that juries are able to see and hear all the crucial evidence at first hand unmediated by previous procedures, including the evidence of available witnesses. In this context the orality principle takes on considerable importance.

Of course, with modern technology it is possible to let juries see witnesses being questioned in earlier phases of the criminal process and it is becoming increasingly common, as we have seen, for the evidence of vulnerable witnesses to be video-recorded before trial. Nevertheless, it is interesting to observe that although the

[106] Summers, *Fair Trials* (2007), 38-47.

courts may raise the issue as to whether a special measures direction of this kind should be given,[107] applications for special measures such as video-recording are generally made by the parties to the proceedings. Except in the case of children where the 'primary rule' is for their evidence in chief to be video-recorded, the parties retain considerable control over whether evidence should be presented in this way; they may elect not to make an application for video-recorded evidence on the ground that video-recordings will lack the impact that giving live testimony before the jury would have.[108] Ultimately, the parties, not the judge, retain considerable control over not only the content of the evidence that is presented but the way in which it is presented to the jury.

In non-jury systems such as Germany, professional judges or professional and lay judges, not the parties, have the ultimate responsibility for searching for the truth, and the ultimate justification for any determination of guilt is to be found in the reasoned judgment. If the court can justify why it was not necessary to hear even crucial witnesses because they were tested sufficiently in pre-trial procedures with the participation of the defence, then the orality principle may not need to be adhered to. As a consequence, German law leaves much room for non-trial dispositions of criminal cases based on the results of a comprehensive and fair investigation; and one could theoretically also imagine a trial that mostly consists of reading excerpts of the dossier and viewing recordings of witness testimony. However, such a trial does not promise much added value beyond what the decision-maker can gain from reading the dossier and watching videos prepared during the pretrial process.

To the extent that trials take place, we would therefore opt for maintaining the principle of orality, albeit in a somewhat reduced form. In order to maintain the trial's specific significance, the court (or jury) may base the judgment only on what has been discussed in open court (the German version of orality or *Mündlichkeitsprinzip*). Crucial evidence should be presented in court, subject to questioning by the parties (the English version of orality). However, the strict rules against accepting secondary instead of the primary evidence should be relaxed. If evidence has been taken in the course of the pretrial investigation and the defence had an opportunity to participate and/or to challenge the source of the evidence, it should be possible to introduce that evidence at the trial indirectly, that is, by using written records, video recordings or hearsay testimony. It is a matter for further discussion whether this possibility should be limited to instances in which the original evidence is not easily available at the trial or whether the judges should have discretion in that matter. Even this 'soft' version of orality would not necessarily violate the defendant's confrontation right. The ECtHR has consistently held that confrontation of prosecution witnesses does not need to take place at the trial but can be granted at an earlier time. Consequently, a prosecution witness's statement may be introduced at the trial by indirect means if the defendant or his lawyer had an opportunity to confront the witness in the course of the pretrial process.

[107] Youth Justice and Criminal Evidence Act 1999 s. 19.

[108] Although practitioners have often highlighted such concerns about pre-recorded testimony, there is little empirical support for the view that it has in fact a negative effect on juries. See Munro, *The Impact of the Use of Pre-Recorded Evidence on Juror Decision Making* (2018).

The key question in such a mixed inquisitorial / adversary trial system is how often a trial is still necessary – and who should decide whether it is. One approach (modelled after the Italian *giudizio abbreviato*[109]) might be for a pretrial judge (who may or may not have been actively involved in the pretrial investigation) to review the results of the investigation and on this basis draft a judgment (including a proposed sentence). If both parties accept the judgment, no trial is necessary. If either party rejects the draft judgment and demands a trial, the law may either provide for automatic trial (with or without a guarantee that the sentence will not be more severe than the one suggested by the pretrial judge), or for a review of the draft judgment by another judge, a trial being held only if this second judge regards it as necessary because he disagrees with the draft judgment. Several variations are possible on this model. But it would in any event be designed to reduce the number of full trials and would emphasise the reliability of the recorded results of the investigation. The proposed model would, on the other hand, replace the unregulated plea bargaining process which makes the outcome depend on the relative bargaining strength of the parties. It might thus reconcile the adversarial and inquisitorial procedural traditions and might lead to the best of both worlds.

VI. Conclusion

The concept of orality of proof-taking is linked to the criminal process of the past that had the public trial as its indispensable apex. With the advent of abbreviated forms of case disposition and with the growing importance of written and digital evidence, the emphasis in the process of truth-finding has shifted from the trial to pretrial proceedings, and it becomes more and more difficult to present 'live' evidence in the courtroom within a limited period of time. But the purpose of orality is still valid: to enable the defence to effectively challenge prosecution evidence. It will be necessary, however, to integrate this important function into pretrial proceedings. If that goal has been achieved, it may be legitimate, under proper safeguards, to base the judgment on the results of the pretrial investigation.

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