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*CIVIL LAW AND COMMON LAW:*

SYSTEMIC DIFFERENCES OR CULTURAL CONTRAST?

EVALUATING INCONSISTENCIES BETWEEN THE ITALIAN, ENGLISH  
AND WELSH, FEDERAL CRIMINAL PROCEDURES THROUGH THE  
EXTENSIVE MEDIA COVERAGE OF THE KNOX TRIAL

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## *Abstract*

The dissertation, which is entirely drafted in English, hinges on a comparative study of both the Italian and British legal system - including some reference to the American jurisdiction - from the point of view of the criminal procedure rules. Through the analysis of a specific case study, namely the trial for the murder of Meredith Kercher, the paper aims to highlight what the substantial differences between *civil law* and *common law* are and the extent to which these divergencies can impact criminal proceedings. Therefore, particular attention is placed on the media coverage that the case has had, both in Italy and in United Kingdom and the United States, and on how this has - perhaps only apparently - influenced the trial and public opinion.

## *Introduction*

This dissertation is entirely written in English and aims to examine from a cultural and legal point of view how the differences between the legal systems of Italy, England and Wales, the Federal and the State of Washington were brought to light by the extreme mediatisation of the Knox case. The first chapter will notionally analyze the various criminal justice systems mentioned above, providing the basic elements for each of them for a correct understanding of the case study. The first paragraph of the first chapter essentially deals with the description of the criminal procedure in force in Italy, examining the parties involved and the development of criminal proceedings. The second paragraph of the first chapter deals with the study of the rules in force in England and Wales regarding criminal proceedings, analysing their particular legal and forensic organisation, the principles related to the prosecution and defence and the conduct of the trial itself. The third and final paragraph of the first chapter studies the basic elements of the federal criminal justice system, analyzing its legal organization, the District Attorney, the parties involved and the development of the criminal process, with particular reference to the procedures followed in Washington State. The second chapter is always divided into paragraphs and aims to highlight how the media spotlight on the trial for the murder of Meredith Kercher has brought to light, through the various international criticisms, the substantial differences present in the systems studied in the first chapter. The first paragraph of the second chapter gives an overview of the case study, providing the substantial elements of the trial useful to understand the findings made in the following paragraphs. The second paragraph of the second chapter proposes a general view, in particular regarding the States involved in the Knox process, of the impact that the international media may have on the conduct of criminal proceedings. Finally, the third and last paragraph of the chapter - and of the thesis - highlights and how the criticisms that emerged in the fervent criticism of the international media are a reflection of the legal and cultural differences between the various systems, offering a brief and incisive comparative analysis.

## CHAPTER ONE

### *A comparative study of the criminal procedure rules*

#### **1.1 Italian criminal justice system**

Italian criminal law is primarily an adversarial system, which is designed in sharp contrast to the inquisitorial one and is intended to highlight the centrality of jurisdiction in a trial conceived as a system of guarantees. It is based on the principle of dialectics, as opposed to the principle of authority, according to which the judge, who is independent and impartial, is responsible for deciding on the basis of evidence sought by the prosecution and the defence. The foremost function of a criminal trial is to present facts and evidence before a judge for the latter to determine the guilt or innocence of the accused person. The main subjects involved in the trial are set out within the first book of the Italian Code of Criminal Procedure, though it may be convenient to distinguish between public and private parties.

##### 1.1.1. Public parties involved in criminal proceedings

The public interest is basically represented by three institutions participating to trial: the jurisdiction, the prosecution, and the criminal police. As regards the first one, the term jurisdiction refers to the power of the State impersonated by bodies that have the characteristic of independence and impartiality. In Italian criminal proceedings, ordinary courts have general competence to judge all persons. They are entirely composed of ordinary magistrates, who are part of the Italian judicial system and to whom the Constitution guarantees independence and autonomy (art.104) and irremovability (art.107). Article 104 of the Constitution states that the judiciary is autonomous and independent from any other power of the State. The characteristics of independence and impartiality distinguish the judiciary from other powers of the state. The judiciary has the function of issuing judgements, i.e. to apply the law to the specific case. The judge is independent both as a judiciary and as a natural person; independence is guaranteed by the Constitution through the Superior Council of the Magistracy.<sup>1</sup> The impartiality of the judge is established by the new comma 2 of Article 111 of the Constitution, according to which every trial shall be conducted before a third, impartial judge. In situations where the judge is or appears to be partial, he has the duty to abstain and if he does not do so, the parties may reject him. Competence of the court is distributed according to the criteria of the subject matter,

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<sup>1</sup> See W.T.PIZZI, L.MARAFIOTI, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*.

territory and connection. Impartiality can only be defined in a negative sense on the basis of two fundamental criteria: impartiality in an objective way, when the judge has no connection to the parties or the matter to be decided, and impartiality in a subjective way, when the judge does not show any prejudice with regard to the matter to be decided and has not already given a decision on the same subject. The judge is obliged to abstain and may be refused if he finds himself in any of the situations of incompatibility laid down in Articles 34 and 35 of the Code of Criminal Procedure, or in the laws on the judicial system, and if he has connections with the parties or the subject matter of the proceedings. Representing the general interest of the State and of the society injured by the crime, the Public Prosecutor performs the function of public party in the criminal proceedings. The Public Prosecutor shall ensure that the laws are complied with, that justice is administered promptly, and that the rights of the state, legal persons and incapacitated persons are upheld. The fundamental task of this office is the exercise of criminal prosecution: art. 112 of the Constitution imposes on the Public Prosecutor the obligation to exercise criminal prosecution. Indeed, the Public Prosecutor has the function of incrimination, and acquires, once the criminal prosecution has been exercised, the function of procedural party (*requirente*) in support of the punitive claim which is the object of its examination. The magistrate serving in the Public Prosecutor's office has full independence of status and is irremovable in rank and location. Appointed after public competition, the magistrate carries out his duties in a preliminary hearing and debate in full autonomy. As opposed to the judge, who is obliged to abstain if he appears partial, the magistrate of the Public Prosecutor cannot be refused as he is part of the trial. However, the function performed by the Prosecutor is that of public party, which represents the general interest of the State in criminal repression. For this reason, the magistrate of the Public Prosecutor has, from the disciplinary point of view, the obligation of abstaining when he has a private interest in a certain procedure. The Prosecutor's magistrate is under an obligation of procedural loyalty. The rule whereby the Public Prosecutor is obliged to exercise criminal action if investigations lead to believe that a criminal act has been committed is aimed at preventing any opportunistic assessment on his part. However, during the investigations, the Public Prosecutor exercises wide discretionary powers<sup>2</sup>. He is not allowed to refuse to conduct investigations if they lead to the acceptance of facts that benefit the suspect. In Italian criminal proceedings, the criminal police acts "as the operative right-hand support of the Public Prosecutor"<sup>3</sup>. All Italian police forces perform the two functions of administrative police and judicial police. The administrative police is essentially concerned

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<sup>2</sup> See L.LUPÁRIA, M. GIALUZ, *Italian Criminal Procedure: Thirty Years After The Great Reform*.

<sup>3</sup> Literally, L. LUPÁRIA, M. GIALUZ, *Italian Criminal Procedure: Thirty Years After The Great Reform*.

with compliance with laws and administrative regulations and aims to prevent the commission of offences, not possessing coercive powers and reporting to the Minister of the Interior. The Judicial Police is defined by Article 55 of the Criminal Procedure Code according to which it must take notice of the crimes also on its own initiative, prevent them from being brought to further consequences, search for the perpetrators, and collect all that can be useful for the application of the criminal law. In concrete terms, as soon as the news that a crime has been committed is received, the judicial police function is exercised, with the use of coercive powers, searching persons and places where necessary, keeping in police custody and arresting those engaged in the commission of the offence. Nevertheless, each police officer remains under the dependence of an officer, up to the Minister of Justice.

#### 1.1.2. Private parties involved in criminal proceedings

In relation to the private parties, who are represented by the accused and the victim, it might be useful to start the analysis from the first point of view. The Italian Code of Criminal Procedure clearly distinguishes the stages of the proceedings. In full compliance with this structure, the difference between the suspect and the accused must be pointed out. At the preliminary stage of the proceedings, the name of the person suspected of having committed a crime shall be entered in the Register of *notitiae criminis*. Only once the criminal prosecution has been carried out, i.e. when the actual trial begins, can the suspect be referred to as the accused. The most relevant act that directly involves the suspect is the interrogation, which can be carried out by the judge, the Public Prosecutor or the judicial police. Articles 64 and 65 of the Code are intended to protect the guarantee and dignity of the suspect, whose interrogation is subject to a particularly detailed discipline. During the interrogation phase, after having necessarily received prior notice from the trustworthy or public defender, the suspect must present himself free before the questioner, since statements can be obtained from the interrogation only if and to the extent that the suspect freely decides to make them, in accordance to Article 64 c.1. Furthermore, no methods or techniques may be used, not even for the consent of the suspect, which affect the suspect's ability to self-determine and remember the facts, in accordance with Article 64 c.2. Finally, the questioner must obligatorily challenge the facts and evidence precisely in advance, in accordance with Article 65. Law 63/2001 concerning the concept of fair trial provided for an important innovation in terms of statements made by the suspect during interrogation: the third paragraph of Article 64 in fact states that the suspect must receive a series of notices before the interrogation begins. The suspect must be informed that the statements made may always be used against him; if the investigating authority fails to issue

such a warning, the statements made by the suspect are unusable. Moreover, the suspect must be warned that he has the right not to answer any questions, and that even if he does not answer, the proceedings will still follow its course. He should also be notified that he has an obligation to answer truthfully about his personal freedom. In this respect, Article 62 provides that statements made during the trial by the suspect may not be the subject of testimony by others, as this would undermine the right to silence on the part of the accused himself. Lastly, the suspect must be made aware that, in connection with statements involving the responsibility of others, he will assume the role of witness. The omission of such notice means, firstly, that statements thus made about others are unusable to them and, secondly, that he will not assume the role of witness. Before addressing any questions to the suspect, the Public Prosecutor must make clear and precise the fact that is attributed to him, then indicate the evidence against him and finally communicate the sources of evidence, unless this would prejudice the investigation. Firstly, the suspect may refuse to answer all or part of the questions submitted. Secondly, the suspect has the right to answer, but is not under a criminal obligation to tell the truth. Thirdly, the suspect has the right to answer by stating falsely, without committing perjury, since he is not heard as a witness. After verifying the identity of the accused by means of a physical and personal identification examination, the judge must assess whether the suspect is able to participate consciously and actively in the criminal trial. In the first case, if the suspect is not able to understand and discern, the judge shall arrange for the proceedings to be suspended. In the second case, if the suspect is unable to participate actively in the trial, and specifically because of language impediments, the suspect must be guaranteed linguistic assistance. Indeed, the court interpreter is not only responsible for translating the trial documents for the judge, but must also make the conduct of the criminal proceedings understandable for the parties and especially for the suspect. Linguistic assistance is compulsory and in case of non-attendance, the interpreter, who becomes a full-fledged public official, can be conducted through compulsory escorting. While Article 7 of the Constitution states that “all are equal before the law and are entitled without any discrimination to equal protection of the law”, and Article 10 states that “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”, the supranational legislation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) states the three fundamental guarantees in favour of the suspect. First, the suspect must be informed as soon as possible, in a language he understands and in detail of the reasons for the accusation against him. Secondly, the suspect has the right to free linguistic assistance in court and in all the pre-trial stages.



Thirdly, the suspect has the right to be informed of the reasons for the arrest as soon as possible and in a language he understands.<sup>4</sup> In recent years, at least in Europe, the right to language assistance is also granted to the victim of a criminal offence.<sup>5</sup> The interpreter, who does not judge and does not defend, must carry out “well and faithfully”<sup>6</sup> the task entrusted to him, i.e. in a complete, accurate and usable manner and be objective and impartial, interpreting and translating “with no other goal than to make the truth be known”. The Code of Criminal Procedure identifies two fundamental functions of the institute: traditional and innovative. The traditional function is provided for the purpose of translating for the proceeding authority a document or for the person who wants or has to make a statement. The innovative function, on the other hand, is aimed at making the suspect aware of the accusation against him and following the completion of the acts in which he takes part. The interpreter is obliged to be truthful and to keep secret all acts performed by him or in his presence. As regards the victim, the Italian Criminal Procedure Code includes the traditional distinction between the victim, i.e. the person who has suffered the crime, and the injured person, namely the person who suffers harm as a result of the offence.<sup>7</sup> The person offended by the crime represents the protected legal interest. The Code of Criminal Procedure attributes to the injured party the title of subject of the proceedings; the title of “party” is recognised only if the injured party has exercised the damages action by becoming a civil party. If the victim intends to take an active part in the trial, he is required to sue as a civil party, according to Article 75 *et seq.* of the Code of Criminal Procedure.<sup>8</sup> The victim, as the subject of the proceedings, may exercise the rights and powers expressly granted to him by the law (art. 90 c.1). Therefore, the civil party must be notified of the right to appoint a lawyer and to have access to the Register of *notitiae criminis* upon request of the Public Prosecutor. When the latter carries out a non-repeatable technical assessment, he shall notify the offended person, the suspect and the defendants of the day, place and time of the assignment, also informing them of the possibility of appointing a biased technical consultant. Obviously, the plaintiff is entitled to be informed of the date and place where the preliminary hearing will take place, just as he is granted the right to obtain notification of the decree ordering the judgment. At the same time, the civil party is heard as a witness at trial and as a possible witness during the preliminary investigation. Although he cannot prosecute, the victim is given powers of control over the eventual inactivity of the Public Prosecutor. These

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<sup>4</sup> See C.J.GARWOOD, *Court interpreting in Italy. The daily violation of a fundamental human right.*

<sup>5</sup> See E.BALLARDINI, *À propos de la neutralité de l'interprète judiciaire.*

<sup>6</sup> Translation by C.J. Garwood, *Court interpreting in Italy. The daily violation of a fundamental human right.*

<sup>7</sup> See L.LUPÁRIA, M.GIALUZ, *Italian Criminal Procedure: Thirty Years After The Great Reform.*

<sup>8</sup> See A.DI AMATO, *Criminal Law in Italy.*

powers allow the victim to contact the G.I.P. (the investigating magistrate) and present his conclusions in two delicate cases, i.e. when the Public Prosecutor has asked the judge to extend the investigation or to dismiss it.

### 1.1.3. Development of ordinary criminal proceedings

During the preliminary investigation, the Public Prosecutor performs investigative functions, which consist in finding evidence and identifying the defendant. He can require searches, seizures and technical investigations and has the power to arrange the arrest of a person seriously suspected when a flight risk persists: all other coercive measures against the accused - police custody, house arrest, compulsory measures - can only be ordered by the judge, upon request of the Public Prosecutor. At this stage, the guarantee functions are carried out by the investigating magistrate, who does not have the task of investigating, but only of deciding on the requests of the parties. Once the preliminary investigation has been completed, the Public Prosecutor formulates its requests to the judge: he asks for the dismissal if the news of a crime is unfounded, if the prosecution is inadmissible, if the crime is extinguished or if the fact is not provided for by law as a crime; vice versa, if there are elements suitable to support the accusation during the trial, the Public Prosecutor asks for the indictment. If the case is not dismissed, the judge shall set a preliminary hearing during which he assesses the claims of the Public Prosecutor, the injured party and the suspect. The preliminary hearing takes place in the presence of all parties. The judge is responsible for verifying whether or not the charge is well-founded. In the first case, he shall issue the decree ordering the trial; in the second case, he pronounces a sentence not to proceed. During the trial, the principle of adversarial debate is implemented through cross-examination. The questions are placed directly by the Public Prosecutor and the defence attorneys, whilst the President of the panel of judges has the power to admit them or not. The President may also intervene to ensure the loyalty of the examination and the correctness of the objections, asking questions directly and even indicating new or wider issues of evidence that are useful to the completeness of the examination. When the taking of evidence requested by the parties has been completed, the judge may also order of his own motion that new evidence be taken. The trial shall be declared closed when the court delivers its judgment, which must necessarily be supported by a valid statement of reasons. Judgements are potentially appealable up to the Court of Cassation, which, however, no longer verifies the truthfulness of the facts, but the correctness of the way in which the trial is carried out.<sup>9</sup>

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<sup>9</sup> See P.TONINI, *Manuale di procedura penale*.

## 1.2. English and Welsh criminal justice system

England and Wales have an adversarial court system, whose method of verification is based on the initiative of the parties in the search for and the presentation of evidence in court, filtered through an admissibility check by the judge. English law finds its main source in jurisprudence: statute law necessarily requires the unwritten law, specifying it. Some main texts are the Police and Criminal Evidence Act, voted in order to delimit the powers of the police, and the Prosecution of Offences Act of 1985, which created a new body whose task is to reconsider the initiatives in the criminal field taken by the police. In line with this system of sources, the doctrine of *stare decisis* represents the instrument to ensure that case law acquires uniformity and coherence. By the principle of authority of the precedent, the courts are linked to the decisions rendered by higher-level authorities. Therefore, in fields which are not governed by the law, the solution of the case is to be found in previous jurisprudence.<sup>10</sup>

### 1.2.1 Judicial and forensic organization

The judge is the decision-making centre of the whole procedure. The Anglo-Saxon professional model of judiciary privileges training through practice and absence of internal hierarchy, while reference group can be found outside the judicial organization, in the barristers' category. Jurisdiction *ratione materiae* at first instance is allocated between Crown Court and Magistrates' Court. Summary offences, which are less serious cases, fall within the jurisdiction of the latter, which proceeds with summary proceedings. For more serious cases, i.e. indictable offences, a more detailed trial on indictment before the Crown Court is foreseen. A category of mixed offences can also be ascribed alternatively to one of the two courts, after evaluation of competence by the Magistrates' Court. The Crown Court has an articulated dislocation in circuits. It exercises exclusive jurisdiction over indictment proceedings. It is composed of an ordinary judge and the jury and is competent for sentences pronounced by the Magistrates' Court. Concerning jurisdiction *ratione loci*, the Crown Court is considered as a single court sitting in different parts of the territory. The place where the offence is to be tried is determined by the judge at the intermediate stage of the proceedings. The territorial jurisdiction of the Magistrates' Courts is determined by the Magistrates' Court Act. There is one Magistrates' Court for each commission area, subdivided into petty sessional divisions. In the case of summary offences, the accused must be judged by the Magistrates' Court of the commission area where the offence was committed. On the contrary, to try mixed cases there are no specific rules, but

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<sup>10</sup> See generally S.RAB, *Legal Systems in UK (England and Wales): overview*;

generally the prosecution chooses to exercise the action in front of the petty sessional division of the place where the offence was committed. The Crown prosecution service is appointed to exercise criminal action and is headed by the Director of Public Prosecutions appointed by the Attorney General and placed under his authority. The preference for this supervision is explained by the need to create a single national network of responsibilities for the administration of the prosecution service, considering that the top management of this office depends on a single ministerial authority and, correlatively, on its functional relations with the executive power. However, the Director of Public Prosecutions benefits from a greater or lesser degree of autonomy, since the supervisory power attributed to the Attorney General is not a form of strict control of prosecution, but a duty to provide information on the policy adopted in relation to prosecution and consultation in cases likely to have political repercussions. Those who practice law are classified into two categories: barristers and solicitors. Regarding the latter, there is a professional organization called the Law Society, while barristers are organized in the Bar Council and the Inns of Court. Solicitors generally deal with the proceedings before the trial stage. When representing a client in the Crown Court, a barrister must necessarily establish contact with a solicitor before the trial. In England, and more generally in the United Kingdom, there is no nationally organised state police under the central government: police forces are organised on a local basis and are not under the authority of the Home Secretary or the judiciary.<sup>11</sup>

### 1.2.2. Holders of criminal-law initiative and defence of the accused

After the establishment of the Crown Prosecution Service, both powers of investigation and prosecution, originally attributed to the police, are subject to a special rule of apportionment: notwithstanding the ownership of the investigative power, the initial formulation of the charge is devolved to the police solely for minor offences, or for offences related to road traffic. However, such an hypothesis is always subject to the assessment of the criminal prosecution appropriateness by the public prosecutor, who can confirm or deny its exercise. In all other cases, the power is exclusively attributed to the Crown Prosecutor. The English territory is divided into districts, for each of which the office management is entrusted to a prosecutor. This office has the task of continuing or blocking proceedings that have been initiated by the police. Therefore, the police has the prerogative to conduct investigations independently, even if, alongside the operations carried out on their own initiative, certain acts require the prior

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<sup>11</sup> See generally *The Criminal Procedure Rules. The Criminal Practice Directions*;

authorization of the judge - which in this phase is always the justice of the peace - through the issuance of a warrant. The power of autonomous initiative of the investigations is strictly tied to the occurrence of requirements, such as the nature and gravity of the crime, and to the significance of the clues. Police authorities are in charge of forming the case file. The Attorney General promotes and supervises the prosecution of exceptionally serious and complex cases. Particularly, proceedings for crimes involving state security fall within its sphere of responsibility. The Director of Public Prosecution is the head of the Prosecutor's Office. He is in charge of the proceedings initiated by the police and is responsible for formulating the charge on the basis of information provided by the police following the investigation phase. In any case, he shall use the twofold criterion of evidence sufficiency, i.e. the consistency of evidence establishing a realistic prospect of conviction and the existence of a public interest in prosecution. The decision on whether to proceed is based on the guidelines issued each year by the Director of Public Prosecution: the prosecution must assess the real prospects of conviction on a multiplicity of elements, such as the opponent's defence and the results of the case. Once this first prognostic assessment has been carried out with positive results, the second check is performed on the public interest in prosecuting the offence. The Director of Public Prosecution also has the power to stop proceedings initiated by the police, private individuals and other bodies entitled to take criminal action. In addition, when the case is rather important or complex, the Director has the ability to initiate the proceedings himself and must submit to the Attorney General an annual report accounting for the Crown Prosecution Service activities and the difficulties encountered. As an alternative to the formulation of the charging, a conditional caution, which is intended as a formal warning, may be applied. Simple cautions are generally attributed to minor offences, assuming there is sufficient recognition of liability to justify a possible conviction and provided that there is no public interest in pursuing the case. Formal cautions are also applied if no public interest in the prosecution of the offence exists, in compliance with the probative evidence requirement for admission of responsibility, following the prior consent of the person to whom the reprimand is issued, who must be aware of the possibility that, in the event of failure to comply with the obligations prescribed by the caution, the prosecution will still be permitted. The Crown Prosecution Service can decide whether to pursue the action brought by the private party, but it is not obligated to do so. He may drop the case if he considers it unfounded or inappropriate. Victims do not have any civil claims in criminal proceedings, but have the right to bring the case directly before the courts. Such a right operates when police authorities do not intend to initiate proceedings. The recognition of criminal prosecution powers is accompanied by a simultaneous disavowal of procedural

powers, in particular when the police have not taken the initiative to act. Only exercising criminal action do victims assume the role of party and are informed of the proceedings' course. The right to go to court is not limited to the victim as such. Any citizen may decide to bring a prosecution even if they are not personally offended by the crime. The accused has the right to a trusted defence counsel before the Magistrates' Court and the Crown Court. In the second case, legal representation must necessarily be provided by a legal practitioner. In the first case, the judge may also authorise individuals not having the qualification of professional defence counsel to stand trial. Generally, in proceedings before the Crown Court, the defendant cannot be tried in absentia. On the contrary, before the Magistrates' Court the presence of the accused is not mandatory, provided that he has been properly summoned. The accused can benefit from totally or partially cost-free legal aid, in agreement with the Criminal Defence Service. Such assistance is provided if two conditions are met: the amount of personal income, which must not exceed a certain threshold, and the severity of the penalty that may be imposed on him. The principle of cross-examination allows the rights enjoyed by the accused to be highlighted and is effective at all stages of the proceedings. The defendant must be informed of the reasons for his arrest and the charges against him if police authorities decide to prosecute him. The police must also inform the arrested person of his right to be assisted by his lawyer. If he does not speak and understand English sufficiently, the accused has the right, of course, to be assisted by an interpreter at every stage of the proceedings, in the absence of which the police are not authorised to question him.

### 1.2.3. Development of ordinary criminal proceedings

Criminal proceedings are divided into three phases: a preparatory phase, an intermediate phase and a judgment phase. The preparatory phase involves two stages: investigations and initial acts by the police, followed by continuation and cessation of the proceedings by the prosecutor. The intermediate phase concerns the question of committal to trial before the Crown Court when the offence is considered serious or mixed. As for the judgment phase, it implies two possible variants depending on the body before which the case is brought. The preparatory phase has a twofold utility: it provides a basis for the conduct of the investigation and gives impulse to the proceedings. Police forces are in charge of both tasks: they combine the investigative and the impulsive functions. Police have a general power of investigation with regard to the acquisition of crime reports. When they find a summary offence, they can draw up a report, leave the individual free and ask the court to issue a summons to appear. Police authorities may also notify the accused in writing of their intention to prosecute. If the offence committed appears

to be more serious, the person may be taken to the police station, assuming conditions justifying his or her arrest are met. Criminal proceedings are triggered by a report of a crime by the victim to the police and the power to report is also given to citizens. Investigations are carried out by the police, who act by virtue of a power of their own or under a mandate from the judge. Once the phase of the initial investigation, and thus the opening of proceedings, has been completed, there is no further investigation, although there is no formal legal ban on gathering evidence after that phase. The only limitation is the prohibition to question the accused without his consent once he has been indicted by the police. The police may question the accused, informing him of the consequences of his answers, the information he may provide and any refusal to answer. Telephone tapping may only be carried out under a mandate from the Minister of the Interior for a maximum period of six months, although it may be extended. Local searches may be carried out by the police on their own initiative, i.e. on the order of the Justice of the Peace, who is not responsible for supervising the police investigation. He intervenes from time to time to authorise the police to carry out certain acts. He issues warrants for arrest, search and seizure and authorises the forces to extend the arrest warrant. The accused has several rights: he must be informed of the reasons for his arrest, the charges against him, his right to the assistance of a lawyer and his right to silence. Subsequently, the Crown Prosecution Service is responsible for reviewing the resolution to act taken by the police. The Crown Prosecution Service shall take its action on the basis of the file which has been drawn up by the police and which is forwarded to him. When the Crown Prosecution Service decides to continue the proceedings, it refers the accused back to the Magistrates' Court. If the Crown Prosecution Service does not pursue the action, it notifies the Magistrates' Court. Once the Crown Prosecution Service has reached the trial stage before the Crown Court, the prosecutor no longer has the right to halt the course of the proceedings, but can bypass this rule by refraining from presenting evidence. As a general rule, the Crown Court cannot be directly involved in proceedings: each trial on indictment is necessarily preceded by a referral to trial by the Magistrates' Court in monocratic composition in the exercise of its examining justice function, before which the defendant is either presented or summoned to appear. The search for evidence takes place during the investigative phase. In fact, the quest for evidence during the police investigation phase belongs to the police themselves who, as a rule, have a duty to seek exculpatory evidence no less than that against the accused. The latter has the right to collect evidence himself, but in practice he is given few tools to do so, as he has neither coercive powers nor sufficient financial resources. The judge participates indirectly in the search for evidence by issuing warrants enabling the police to act, as mentioned above. Once the different pieces of

evidence have been collected by the police, it is up to the parties to avail themselves of them and to process evidence at the hearing. The adversarial model is based on the parties' initiative in seeking evidence and presenting it in court after having been filtered through an admissibility check by the judge. The principle is that the parties are entitled to admit any evidence that is relevant to reach a decision. This rule suffers from an important exception in relation to the need to respect fundamental rights. These provisions prevent possible miscarriages of procedure and fix that the judge has the discretionary power to exclude evidence through the exclusionary rule, according to which it is always possible to exclude evidence produced by the prosecution when it is irregularly obtained. With the passage from the investigation phase to the trial phase, evidence is constructed. As far as relations between procedural subjects are concerned, a triangular relationship is established between the parties and the judge: the parties face each other under the arbitration of the judge. A fundamental and extremely characterising element of the English proceedings is the voluntary testimony of the accused, capable of conveying to the trial a cognitive experience relating to exculpatory evidence of facts that would otherwise have remained outside the judge's knowledge. The rule provides that the defendant is entitled, but not obliged, to testify as a witness for the defence, subject to the obligation to tell the truth, by means of statements that acquire probative value. On the other hand, the prosecutor cannot oblige him to give evidence. However, the defendant's unjustified refusal to testify or to answer individual questions is an element for the judge or the jury to draw conclusions which are also justified by further elements. Only at the hearing do the pieces of evidence definitively acquire the quality of evidence following an adversarial debate between prosecution and defence. Conversely, the defendant's guilty plea changes the number of parties involved. There is no discussion of the evidence and the accused's guilt is automatically acquired. A guilty plea is not valid if it is obtained under pressure from the judge or lawyer. Such a statement may result in a reduction of the sentence by about 30%. In the Crown Court judgment, the trial is preceded by a hearing at which the charge is formally challenged by reading the indictment, after which the accused can plead guilty or not guilty. In the trial before the Crown Court, a jury of 12 members between 18 and 70 years of age is selected, to which the verdict is entrusted. Evidence against the accused is presented and the defence is then requested. The rules of evidence are broadly the same for both courts with some important variations in certain cases. The essential difference from the procedure applicable in Crown Court lies in the presence of the jury, which decides on the guilt of the accused, while the judgement on the sentence is up to the professional judge. In case of a guilty verdict, the procedure is the same in both courts: there is no discussion of the evidence and the sentence is



automatic. The presence of the jury is therefore not necessary, as there is no need for a verdict on the guilt of the accused. A true judgment of guilt only occurs if the accused does not plead guilty. The principle of free conviction implies that the judge decides sovereignly on the criminal responsibility of the accused on the basis of the evidence gathered during the trial phase. Concerning summary offences, which are punishable by a custodial sentence of six months or less and a fine of less than £5000, it should be remembered that when the law sets the maximum, the judge must respect the ceiling imposed. It should be noted that the appeal is not framed as an obligatory step in the procedure, as the system tends to limit its use. The Crown Court, the High Court, the Court of Appeal and the House of Lords operate as courts of appeal. Decisions of the Magistrates' Court can be appealed before the Crown Court and the High Court. Appeals before the former are allowed only for the defence, while the latter can be used by both parties. The defence may appeal to the Crown Court on factual or legal issues, i. e. on grounds relating to the penalty. Appeal is admitted and must be submitted within 21 days after the sentence has been passed. Decisions made by the Crown Court can be appealed before the Court of Appeal: in such cases, however, appeals are often subject to the prior granting of a leave as a check on the admissibility of the judge, the absence of which makes the whole action unfeasible. The prosecution may appeal on the penalty, as well as on acquittal insofar as the latter is based on an error of law. The House of Lords can be appealed against decisions made by the Magistrates' Court, the Crown Court and the High Court. The possibility of appealing to the House of Lords is subject to the prior authorisation of the latter or the Court of Appeal. Only complaints relating to a point of law of particular importance are admissible.<sup>12 13</sup>

### **1.3. The United States criminal justice system**

#### **1.3.1. Federal System**

The procedural system of the United States of America is made up of a plurality of jurisdictions, endowed with autonomous judicial organization, substantive and procedural regulations: the federal one and those of the fifty States<sup>14</sup>, to which the District of Columbia and other minor jurisdictions with limited jurisdiction, such as the tribal courts in the Indian reservations, are added. Overall, while state criminal law has the typical content of any other state organization, federal criminal law, initially conceived as the exclusive protection of national interests, has experienced an enormous development through various mechanisms that allow its use for all

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<sup>12</sup> See generally J.SPRACK, *A Practical Approach to Criminal Procedure*;

<sup>13</sup> See generally A.CADOPPI, *Tra storia e comparazione. Studi di diritto penale comparato*;

<sup>14</sup> See G.B.PALERMO, V.MASTRONARDI, S.AGOSTINI, *Il processo investigativo e accusatorio negli Stati Uniti d'America e in Italia*, page 42;

crimes that in some way touch matters of federal jurisdiction. Despite this, federal prosecution only operates in cases of a certain importance and states dispose of about 95% of the total criminal burden. However, in the apparently confused picture resulting from the coexistence of many different legal systems, a common and shared element can be identified, around which a set of principles has emerged, giving a certain uniformity to the functioning of the various jurisdictions and allowing the unitary study of the procedural phenomenon. Such a nucleus of jurisprudence is embodied in the procedural clauses of the Bill of Rights, introduced as amendments to the US Constitution. Initially referring only to the federal process, they were incorporated into the state ones by the Supreme Court with a series of decisions in which the clauses are considered expressions of the two processes of law, guaranteed at state level by the Fourteenth Amendment.<sup>15</sup>

#### 1.3.1.1 The judicial organization and the District Attorney figure

In the adversarial process, the parties, accuser and accused, have equal powers in determining and conducting the various stages of the proceedings. From this point of view, the role of the judge, who is third and impartial, is particularly interesting: he assesses the evidence presented by the parties, the evidence emerging during the debate phase of the trial and then delivers a judgment that decides the case and that can be considered irrevocable and final. In order to decide the case, the American judge uses a typical formal procedure as well as the dominant ethical, religious or political rules. The judge's point of view and his assessment of the context of the case becomes in turn the subject of study by the parties' lawyers. It is no longer sufficient to know the procedure perfectly, nor the rules of law, but it is important, and sometimes essential, to understand and involve the judge, in order to impress him positively and convince him with dialectic of the guilt or innocence of the represented party. At the end of the trial, the impartiality of the judge is compulsorily compromised by the attacks suffered and the objections received. Indeed, in the American system, the guiding criteria to be followed by the judge to reach a decision can only be partially and imprecisely contained in specific rules, as they basically represent the community's expression of objectives and values. Judges' decisions often transcend the peculiarity of the case, the evidence and the arguments, to converge in a standardized response in line with the dominant jurisprudential position. In this sense, various interests coincide in judgements, including the search for truth, but also the aspiration for jurisprudential uniformity. However, in the majority of American criminal trials there is the lay

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<sup>15</sup> See V.FANCHIOTTI, *Processo penale nei paesi di Common Law*, in *Digesto delle discipline penalistiche*, vol. X, pages 156-169;

jury, whose presence shows a tendency towards a less hierarchical system and a more individualized justice. This implies a reduction in the procedural steps, so that appeals are quite rare, with first instance judgment considered sufficient in most cases. It is necessary, as well as useful, to assess the role of the jury. The jury is a lay body with no specific knowledge of the law and has a fundamental role to play: affirming the innocence or guilt of the accused. In reaching this decision, the jury is supported by the judge, who issues technical instructions that are useful and applicable to the specific case. Ultimately, the jury is more affected by the unique set of circumstances and concrete details than by an impersonal and non-emotional logic of evaluation.<sup>16</sup> The selection of jurors represents a fundamental process for the conduct of the trial. The selection is conducted by the lawyers of both parties after careful and targeted questions to each juror about his or her social status, his or her opinion on some of the laws of the judicial system of the state relevant to the case and his or her view on some social issues.<sup>17</sup> In America, the prosecution is represented by the US equivalent of the Italian prosecutor, the District Attorney, generally abbreviated to DA. The District Attorney has complete control of the situation, since the principle of mandatory prosecution does not apply, but it is the DA itself that decides whether or not to proceed and, if so, to ask for the penalty, informing the defendant's lawyer of his intention to try to obtain a plea bargain and save time and costs of justice. Should the defendant and his lawyer accept the option of plea bargaining, a real bargaining process is established, which is generally based on the seriousness of the offence, the perpetrator's personality, the costs of a possible trial and the sentence. Basically, this constitutes a real mediation between prosecution and defence, in which obviously the District Attorney has the upper hand, considering that the defendant's future is often at stake. There are practically no limits to the application of this institution in America, unlike the Italian system, which offers the possibility of plea bargaining, but to which it imposes very strict and binding limits. In American common law, the principle of "due process" always applies. The due process of law, provided for by the 5th and 14th Amendments of the American Constitution, is substantiated in procedural fairness and in the principle that an individual cannot be deprived of their life, freedom or property unless in accordance with the rules and procedures established by law. These rules certainly set out guarantees of principle, although they remain merely abstract if the lawyer does not know how to apply them for the benefit of his client. The principle of procedural fairness has rather vague outlines, and generally refers to the concept of

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<sup>16</sup> See S.KOWALSKA, K.KARYPIDOU, *Ruolo del giudice, processo di parti e prova : Italia e United States of America a confronto*;

<sup>17</sup> See G.B.PALERMO, V.MASTRONARDI, S.AGOSTINI, *Il processo investigativo e accusatorio negli Stati Uniti d'America e in Italia*, pages 44-45;

legal fairness, which remains in the American legal system rather blurred, but which coincides with the concepts of legal, substantive and procedural fairness.<sup>18</sup>

#### 1.3.1.2. Parties involved in criminal proceedings

In the US trial, the parties have enormous powers. The accused can choose the form of the trial, for example, waiving the debate phase, preferring a jury trial, admitting sometimes unreliable fact-finding techniques, or limiting the probative value to the pre-trial file if the prosecution agrees. With regard to evidence, the parties play the central role in the entire trial: they are required to collect it in their own interest and to resist attacks by the other party, even overcoming the probative value of the evidence presented. Both parties determine the boundaries of the case, the extent of the subject matter of the trial and the evidence presented in order to affect the judge's decision. The parties also have the burden of supporting their arguments publicly and orally before a judge and, in most cases, a jury. Even in the American trial there is an “equality of arms” ( João Tiago Silveira, *Equality of Arms as a Standard of Fair Trials* 2015) principle, i.e. equal rights and powers between the prosecuting body, represented by the district attorney, and the defendant, represented by his lawyer. These oppose each other by confronting each other at trial in order to convince the judge and the jury of the validity of the evidence presented and the position sustained. The core of the trial is certainly represented by the cross-examination, which constitutes the pure expression of the adversarial system. According to this model, in fact, the third and neutral party – the judge – is placed in the best position to evaluate the reality of the case and give a definition approaching the truth. The judge is obliged to ensure fair play, considering the parties in an abstract way, as holders of equivalent procedural rights. However, this fairness of powers and impartiality of judgment are often damaged by the disparities, which are often determined by heritage, race or religion, between the parties. Although the United States Constitution’s Sixth Amendment ensures every citizen the right to a fair trial, but this right and the right to live were stripped on May 25, 2020 from George Floyd during an arrest for presumably using a counterfeit bill.<sup>19</sup> Unfortunately, such episodes are becoming more and more frequent because of the American relatively faulty law enforcement system. The Black Lives Matter movement is working, also from a legal point of view, for the claim and protection of minority rights, which in the United States are less and less safeguarded.<sup>20</sup> By attributing enormous powers and freedom of action to the parties, the

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<sup>18</sup> See A.LANCIOTTI, C.PARNETTI, *Le "incursioni pericolose" del processo a stelle e strisce nel processo italiano*, page 5;

<sup>19</sup> See [https://en.wikipedia.org/wiki/Killing\\_of\\_George\\_Floyd](https://en.wikipedia.org/wiki/Killing_of_George_Floyd);

<sup>20</sup> See <https://www.nytimes.com/2020/06/12/us/protests-george-floyd-black-lives-matter.html>;

American trial suffers greatly from the differences between the parties, even though it promotes a fair and just procedure. Furthermore, according to the American adversarial scheme, the parties enjoy the possibility of formulating the questions of fact, while the definition of the parameters of law should, theoretically, be up to the judge.

#### 1.3.1.3. Development of ordinary criminal proceedings

With particular reference to the criminal aspect of the system, it is essential to examine the various stages of investigation, prosecution and judgement. As regards the investigation of the scene of the crime and the indictment of the possible perpetrator, the police, after receiving reports from both persons directly concerned and citizens who are not involved in the crime, come to the scene and, after having circumscribed it, begin preliminary investigations to ascertain whether there has been a crime. If police officers deduce from a panoramic view of the crime scene that there has been a crime, the investigation will pass into the hands of a police inspector specialised in conducting criminal investigations, who will gather information about the victim and what happened from the crime scene. In most cases, the so-called District Attorney (DA) has to base the investigation on the report of the investigator and experts of all kinds. If the DA deduces that there is probable cause to indict the suspect, he will have the judge issue a warrant unless the suspect has already been put in jail by the police who came to the crime scene. At this point, the alleged offender is in jail. It is necessary to point out that the U.S. citizen who is presumed guilty of a crime is highly protected by constitutional laws which reaffirm, in the V and XIV amendments, what is practically part of the due process of law. The Constitution of the United States of America stipulates that the state or federal government must act impartially and fairly in cases where an individual's life, freedom and property are at risk. In addition, the Fifth Amendment states that the accused may not answer questions from the court that may incriminate him or her. The detainee will shortly face a magistrate in the intake court, where he or she is essentially arraigned. The judge informs the accused about the charge of a certain crime, about the right to be represented by a lawyer and explains that, if he or she has no means, the court will assign one of its own to him or her; it ends with a request from the court as to whether he or she pleads guilty or not guilty of the offence charged against him or her. The judge also sets the bail or caution, according to which the accused can be released until the day of the trial, but in this case he or she must remain in the same district where the crime took place. In serious cases there is no bail and the accused remains in prison. In addition to the above, there will be another meeting of the parties before the trial in the courtroom. This is the so-called pretrial conference, i.e. an official meeting before the debate in the courtroom. It

should also be noted that the defendant has a constitutional right to this pretrial conference. During this meeting, lawyers may bargain upon acceptance by the judge. At this point, in the absence of sufficient evidence, the judge may dismiss the charge against the suspect. If this is not the case, the date of the trial is set and the judge sitting at the conference informs the accused. In the debate that follows in the Circuit Court, the DA has the duty to prove the guilt of the defendant. The DA opens the debate by declaring the culpability of the defendant before the jury and the judge for the alleged facts regarding the defendant for which evidence will be produced. Subsequently the defence lawyer will make statements claiming that the alleged facts do not exist or do not constitute a crime for the client and that his innocence will be proved at trial, hoping that the jurors, at the end of the trial, will vote not guilty. After the trial has been conducted with witnesses for the prosecution and the defence and after the verbal and written statements of the police investigator have been heard, the lawyers, both from the prosecution and the defence, will conclude with the closing statements, highlighting their position before the judge and the jury. After the lawyers' closing statements the case is referred back to the jury to decide whether the defendant is guilty or not. In the U.S. trial, although objective truth does not seem to be the immediate purpose, the judgment is based on evidence, which is subject to strict admissibility and relevance under procedural law. Through the so-called fair play trial, in which the rules of the game are the same for both parties, an attempt will be made to reach the truth under the watchful and discretionary eye of the judge. Once the verdict is reached, the jury returns to the courtroom, gives its written answer to the clerk of the court, who presents it to the judge. The judge, after reading it, requests the clerk to read it aloud in the courtroom. If the verdict is of complete innocence the judge orders the immediate release of the defendant, whereas if the verdict is guilty, the judge and the lawyers set the date for sentencing. In this case, the accused will usually return to prison. In the preparatory stage, a pre-judgement officer will fill in a report for the judge about the accused's characteristics, both positive and negative, in which he reports the accused's past crimes if there are any, and his chances of recidivism if he is released. It should be noted that both the victim, if survived, and the family members can testify against or in favour of the defendant. The defendant himself can ask the judge before sentencing to be merciful to him. The judgment can be appealed to the Court of Appeal, both by the DA and the defence. The judgment may consist of: detention, probation, community

service, or therapeutic programmes. Finally, the judge is required to summarize the trial for the state archives.<sup>21</sup>

### 1.3.2. Washington State system

The State of Washington offers a system of courts specific to its own territory, in which laws specifically designed for that state are applied. At the base, there are the courts of limited jurisdiction. District courts and municipal courts fall into this category. The former are county courts and cover a certain portion of territory between counties. The second, are those created by cities and towns. Seven out of every eight cases registered in the county courts are filed at this level, as they have extensive jurisdiction over cases involving road traffic and misdemeanours. It is possible to appeal to the highest courts, but only if legal errors have been made. In fact, it is not allowed to introduce further evidence or testimony. The superior courts have general jurisdiction, as there is no limit to their competence and they can hear and judge any type of civil and criminal case. As already mentioned, the superior courts are also authorized to review cases appealed by the courts of limited jurisdiction if miscarriages have been committed. In order to appeal a higher court judgment, reference must be made to the Courts of Appeal, although some cases are transferred directly to the Supreme Court. Most cases appealed by the Superior Courts are sent to the Court of Appeal. The Court of Appeals is a non-discretionary court, which means that it is obliged to judge whatever case is submitted to it. It can reverse, remand back to the lower court, modify or affirm the decision established by the lower court. The Supreme Court constitutes the highest court in the state. Expressed judgments become law and set a precedent for future similar cases in the State of Washington. This court generally has jurisdiction over petitions against state officers, and has jurisdiction to review lower court cases only when the value of the property involved exceeds \$200. This limit is negligible if the case involves the legality of a tax, duty, municipal fine, or the validity of a statute. A direct review of the Supreme Court case can only be requested when a state officer is involved, when a court has established an unconstitutional law or ordinance, and when the subject matter of the case is of broad public interest and requires a prompt and final decision. Of course, any case involving the death penalty is directly reviewed by the Supreme Court. In all other cases, the request for review of the Court of Appeal's ruling is discretionary. In some cases the discussion and the decision can be taken in both state and federal courts. Concurrent jurisdiction allows more than one court to have the authority to hear the same case. Different

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<sup>21</sup> See G.B.PALERMO, V.MASTRONARDI, S.AGOSTINI, *Il processo investigativo e accusatorio negli Stati Uniti d'America e in Italia*, pages 42-45;

courts have concurrent jurisdiction over a case when all of them have the power to hear it. In fact, states courts with general jurisdiction might have concurrent jurisdiction with more specialized courts in the same state. Concurrent jurisdiction can also occur between federal courts and state courts, as they might both have jurisdiction to hear many types of cases. All cases filed in the Washington State courts can be civil or criminal. When criminal cases are brought by the government against individuals accused of committing a crime, prosecuting attorney have the duty to prosecute the defendant on behalf of the government. The defendant must be proved guilty beyond a reasonable doubt by the prosecution before the judge or jury, who will later determine the innocence or guilt of the accused on the basis of the various procedural elements. The law of the State of Washington guarantees absolute dignity and respect for victims and witnesses in criminal trials. Should these principles of behaviour be violated and victims and witnesses be threatened or treated with violence, they are entitled to absolute protection. State law provides nine rights guaranteed to these two categories involved in the proceedings, including the right to know the outcome and possible cancellation of the trial. In the State of Washington, the judges of the Superior Court pass sentences on the basis of a certain sentencing system, which provides a uniform set of guidelines. These guidelines assist the judge in formulating a judgment, but do not eliminate his or her discretion. The judge may choose to deviate from these guidelines if certain circumstances exist in the case to be judged. The judge's decision can only be appealed if it is made without taking into account the guidelines imposed.<sup>22</sup>

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<sup>22</sup> See *A Citizen's guide to Washington Courts*, Eleventh Edition, pages 3-25.



## CHAPTER TWO

### *The media coverage of the Knox Trial as evidence of the systemic contrast*

#### **2.1 Background and conduct of the trial**

Meredith Kercher, an English student in Italy on the Erasmus programme, was killed in Perugia on the night between the first and second of November 2007. Her life was taken from her in her bedroom in Via della Pergola, a stone's throw from the Università per Stranieri, where she had been staying for just over a month with other girls. Stabbed in the throat, her body was rolled up in a duvet, her credit cards, her mobile phones and the money in her bag stolen. The corpse was found around lunchtime by some inhabitants of the house: her American roommate Amanda Knox together with her boyfriend Raffaele Sollecito from Bari and two officers of the postal police who broke down the bedroom door and found the lifeless body. Amanda Knox, Raffaele Sollecito and Patrick Lumumba were arrested for the murder of the young English student by the agents of the mobile squad of the police headquarters in Perugia who declared in a press conference: "the case is solved". All three arrested declared themselves innocent. However, after a very long interrogation, Amanda Knox accused Lumumba of killing Meredith, but Lumumba said that he was at work at his pub on the night of Meredith's murder. As confirmed by a Swiss university professor, who returned to Perugia to testify this. Amanda and Raffaele also claimed that they spent the night at Raffaele's house and were totally unrelated to the crime. Meredith Kercher's DNA was found on the blade of a kitchen knife seized at Raffaele Sollecito's house. On the handle, forensics experts found Amanda Knox's DNA. Sollecito's DNA was also found on the strap of Kercher's bra. Forensics ran several tests, including a blood-printed handprint found on the pillow left under Meredith's body. This print appears to belong to Rudy Guede, a young Ivorian resident in Perugia, well-known in the nightlife of the city. He told the prosecutor that he entered Meredith's house and had a sexual encounter with her, went to the bathroom and heard a scream, that he came out and met two unspecified people, a man and a woman, that he reached out to Meredith in agony and tried to block her wound, and that he finally ran away in fear. The magistrates filed a request for indictment: Meredith Kercher was killed by Amanda, Raffaele and Rudy during an attempted sexual assault. According to their reconstruction, Amanda allegedly stabbed her to death while the two men were holding Meredith down during a sex game. The trial before the Court of Assizes of Perugia began. Amanda Knox and Raffaele Sollecito were accused of voluntary manslaughter aggravated by futile motives, sexual assault, theft, and for Amanda Knox also slander against Patrick

Lumumba. Amanda Knox and Raffaele Sollecito were respectively sentenced to 26 and 25 years in prison by the Court of Assizes of Perugia, which delivered its verdict after almost 11 hours in the council chamber around midnight on December 4, 2009. Amanda was given an extra year for slander against Lumumba. The lawyers of Amanda Knox and Raffaele Sollecito appealed against the judgment of first instance. They requested that the trial be reopened and the two acquitted. The Public Prosecutor's Office also appealed, for a life sentence to be imposed. Thus began the appeal trial: the defendants requested a *super partes* expert opinion on the strap of Meredith Kercher's bra and the knife that was identified as the murder weapon at the original trial. The Court granted the partial reopening of the trial and the use of genetic expertise by the defences, also allowing the examination of certain witnesses. Rudy Guede, whose sentence with an abbreviated rite had been confirmed by a decision of the Supreme Court, was questioned in the courtroom as a witness. In a confused manner, citing a letter he had sent to some media, he accused Amanda and Raffaele of Meredith Kercher's murder. The court-appointed experts deposited their expert opinion on the knife and hook of the bra, which challenged the results of the forensic police, deeming them unreliable and therefore not usable against the defendants. Amanda Knox and Raffaele Sollecito were acquitted by the Court of Appeal of Perugia for "lack of proof of guilt". The Attorney General's Office filed a request with the Court of Perugia for an appeal to the Court of Cassation against the acquittal sentence. An appeal was also filed by the Kercher family through their lawyer. The Supreme Court of Cassation overturned the sentence issued by the Court of Appeal of Perugia, ordering that the documents be sent to the appeal court for a new trial, but this time in Florence. The sentence for slander against Amanda Knox was confirmed. The Italian Prosecutor General defined the sentence of the Court of Appeal of Perugia a "rare concentration of violations of law and illogicality". At the trial before the Court of Appeal in Florence, the two former lovers did not appear at the hearings: Knox was living in Seattle while Sollecito was often abroad. The Court of Florence ordered a new expert report on the trace found on the knife seized in Sollecito's house. The trace had been isolated by experts during the appeal trial, though never analysed. The task was assigned to the Ris of Rome, which confirmed that the trace of DNA on the knife belonged to Knox. The Assistant Attorney General of Florence therefore demanded 30 years in prison for Amanda and 26 for Raffaele. In a subsequent hearing, the two defendants' lawyers attempted to unhinge the accusation by claiming their innocence. The Florence Court of Appeal once again found Amanda and Raffaele guilty of the murder of Kercher. The Court recognized the aggravating circumstance for the crime of slander against Patrick Lumumba and therefore increased Amanda's sentence to 28 years and six months of imprisonment, while for Sollecito

it confirmed the sentence of 25 years of imprisonment inflicted at the original trial in Perugia. The Court then accepted the Court of Cassation's recommendation on the crime of slander which, in light of the new reading of the facts, was aggravated by the fact that it was committed in order to ensure impunity. Knox and Sollecito's lawyers filed their appeal with the Supreme Court on June 16, 2014, asking for the judgment to be set aside without postponement. The sentence of March 27, 2015, pronounced by Supreme Court Judge Gennaro Marasca after ten hours in the council chamber acquitted Sollecito and Knox of the charge of murder, "for not having committed the fact", overturning the second appeal verdict and accepting the defence's request for annulment without postponement. Knox had already served 3 years in prison, thereby extinguishing the conviction for slander against Lumumba. According to the judges, the "evidentiary complex was so contradictory" that it was impossible to overcome the incongruities and that it would have been "absurd to arrange a new trial counting on such labile clues". In May 2016, the ECHR grants on a preliminary basis the appeal against Italy filed by Knox, alleging that the American woman had suffered an unfair trial and mistreatment during the interrogation. The Court finds the file submitted by the lawyers to be valid and communicates the appeal to the Italian Government so that it can defend itself. On 24 January 2019, the court rules in the Knox against Italy case that there had been a violation of the defendant's rights of defence, even though no evidence of physical abuse was found. Italy will have to compensate Amanda Knox to the sum of €18,400, calculated between moral damages and reimbursement of legal costs for the appeal in Strasbourg.<sup>23 24 25</sup>

## **2.2 Impact of the media in criminal trials**

In present-day reality, trials are being increasingly influenced by the usually negative impact of the mass media. The media process, in which everyone can play a role, make judgements, contribute to create, worsen or improve the figure of the offender, is attracting a constantly growing public interest. The judicial trial has recently undergone transformations in order to adapt to new needs, maintaining as its only purpose the search for truth and the protection of rights. The Italian Constitution expressly sanctions the freedom of communication and the press, but equally expressly informs that these rights meet a limit in the respect of the supreme values of the human person, such as life, freedom, honour and reputation. As Donatella Stasio writes in the "Sole 24 Ore" on October 5<sup>th</sup>, 2011:

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<sup>23</sup> See generally L.GAROFANO, P.RUSSELL, G. JOHNSON, *Assassini per caso: Luci e ombre del delitto di Perugia*;

<sup>24</sup> See generally [https://it.wikipedia.org/wiki/Omicidio\\_di\\_Meredith\\_Kercher](https://it.wikipedia.org/wiki/Omicidio_di_Meredith_Kercher);

<sup>25</sup> See generally <https://velvetnews.it/2015/03/26/processo-kercher-le-fasi-spiegate-in-10-punti/>;

"The 3rd millennium's trial now offers itself without veils to the mediatic gaze, which sets up parallel trials outside the courtrooms, their rituals, their symbols and their rules. Or rather, it takes possession of the rites, symbols and rules of the process and reproduces them with a different language, that of the media". (my translation)

The spectacularization of procedural reality is often based on emotional truths, other than historical and procedural facts, and creates a collective conviction bound to take root in the common conscience to the point that, if the judgment does not meet expectations, the doubt as to whether the decision is unfair arises. The procedural truth often does not coincide with the media truth, which has a resonance and language very different from the legal one. Nowadays, major court cases are analysed and vivisected by the media, thus creating two different trials: a mediatic one, in which a conclusion is hastily reached, and a traditional one, which is dictated by the rules of procedure. As a result, there is an inevitable conditioning of public opinion that risks nullifying the efforts of those seeking the truth. Almost all media cases concern private murders in family environments, in which relatives, friends, neighbours or roommates come to the centre of attention, and the media clearly do not miss a chance to turn a crime story into a TV show. The media aspect of some criminal cases may far outweigh the judicial aspect of trials. The Italian justice system foresees regulations to ensure a fair trial free from external influences. Article 114 of the Code of Criminal Procedure sanctions the prohibition of public disclosure of acts not covered by secrecy, until the preliminary investigations are concluded or until the end of the preliminary hearing. Article 329 of the Code of Criminal Procedure establishes that the acts of investigation carried out by the Public Prosecutor or the Judicial Police are covered by secrecy until the defendant can become aware of them, and in any case, no later than the conclusion of the preliminary investigations. The term "mass media" refers to the means of communication through which it is possible to spread a certain message to an indistinct plurality of subjects. Evidently, the relationship between the judicial system, the conduct of criminal proceedings and the media is highly contaminated and malfunctioning. In the past, the English justice system, together with the Scottish one, has paid particular attention to the so-called 'trial by media', both in civil but especially in criminal cases in which the lay jury is present. In particular, a concern has emerged that judging cases that are over-mediatised may not result in a fair trial, as the jury may act in a not entirely impartial manner due to the influence of public opinion. The English law provides a wide range of post-publication sanctions for proprietors, editors and journalists, which in theory include substantial fines and even imprisonment. In addition, there are basic restrictions imposed by the English system, which enables any information published about trials, victims and witnesses to be kept under

control.<sup>26</sup> English special laws play an important role in protecting a jury from media influence or prejudice, so it is possible to state that most juries are sophisticated enough to put aside media reports when asked to give a verdict. Concerns about the mediatisation of trials is obviously not an exclusively Italian, Scottish or English and Welsh concern. In America, as everywhere else in the world, most people entrust the media as their primary source of information, giving wide credibility to news about crimes. Media coverage of criminal case news often provides prejudicial information that may be legally inadmissible at trial, but which is disclosed to the public. In particular, certain types of evidence that the court considers dangerous for a neutral and impartial judgment may be excluded from presentation at trial, including the mention of a defendant's past criminal record, negative testimony about the character or reputation of a defendant, previous confessions and sensationalized descriptions of the crime. This concern carries such considerable weight that the American Bar Association has set new standards for media coverage of criminal cases in order to protect the accused's right to a fair trial. Obviously, the extreme publicity of trials that often follows criminal cases can compromise the defendant's constitutional right to be tried by an impartial jury.<sup>27</sup> The potential impact of prejudicial and pre-trial publicity may have a considerable effect on jurors' evaluations of the defendant's guilt. The public's interest in criminal cases is always very wide, especially when sexual issues, mysteries and well-known personalities are involved. The trial for the murder of Meredith Kercher has become a huge and endless TV drama due to its strong media pressure. The last appeal of Amanda Knox and Raffaele Sollecito was filmed by a camera and broadcasted by numerous television channels. Within the Kercher case, it should be noted how, since the beginning of the case, media communication has been interested in providing a very specific image of the accused Amanda Knox, primarily depicting her as a diabolical personality obsessed with her depravity. From this point of view, her behaviour has often been (mis)interpreted by the media. Several journalists, considering the international uproar and resonance of the case, have ridden the wave making completely opposite portraits. Indeed, while the Italian and English media painted an almost demonic portrait of the defendant, eloquently nicknaming her "Foxyknoxy" and portraying her as a "sex-crazed liar" (Associated Press, 2010)<sup>28</sup>, in the United States Amanda Knox was often described as a young and innocent college student undergoing the judicial hell of the Italian system. The most striking aspects of

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<sup>26</sup> See I.CRAM, *Reconciling Fair Trial Interests and The Informed Scrutiny of Public Powers? An Analysis of The United Kingdom's Contempt of Court Laws*, in *Il rapporto tra giustizia e mass media. Quali regole per quali soggetti*, pages 63-65;

<sup>27</sup> See generally S.BAKHSHAY, C. HANEY, *The media's impact on the right to a fair trial: A content analysis of pretrial publicity in capital cases*;

<sup>28</sup> See M.S. BOYD, *Representation of Foreign Justice in The Media: The Amanda Knox Case in Critical Approaches to Discourse Analysis across Disciplines*, Vol.7, Page 33;

the Kercher case are clearly the personality of Amanda Knox, but above all the violent and pseudo-sexual nature of the crime and the figure of prosecutor Giuliano Mignini. Moreover, after the beginning of the trial, a story had appeared in the West Seattle Herald, the local newspaper of Amanda Knox's hometown, which suggested the mental instability of the prosecutor, who has always categorically denied the reliability of this description. In any case, the diffusion in the Italian media of the idea that Amanda and her boyfriend Raffaele had taken a lax attitude and seemed to be very little concerned about the process in which they were involved has progressively contributed to define the belief that they would be the authors of an erotic game that tragically ended with the stabbing of Meredith.

### **2.3 International criticisms of the trial development through UK and US media**

In the light of what was analysed in the previous chapter, it is difficult to imagine how the Knox trial would have developed if it had taken place in England and Wales, or in the United States. In any case, public opinion of the above-mentioned countries has eloquently expressed its scepticism about the conduct of the trial through sharp criticism in the various media. In line with this critical attitude towards the Italian criminal justice system, investigative journalist Graham Johnson identified a series of procedural elements that would have facilitated the acquittal of Amanda Knox and Raffaele Sollecito. According to his theory, which has gained great importance and validity within the English and Welsh media, the Italian appeal process offers defendants more guarantees than any other legal system in the world, where only the weakest evidence is dealt with, not the whole case. In fact, Knox argued several times that some of the evidence presented against her, such as reports of her strange behaviour after her arrest and the prosecution's emphasis on her sexuality, was nothing more than an effort to demonize her to cover up a weak case. However, Amanda Knox's defence lawyers managed to raise reasonable doubt in the jurors' minds about the quality of the tests on Meredith Kercher's bra strap, on which Sollecito's DNA was found and the knife the prosecutors claimed was the murder weapon. While the prosecution asserted that Knox's DNA was on the handle of the kitchen knife, with Ms. Kercher's DNA on the blade, the defence contended that the amount of Meredith Kercher's DNA on the blade was too small to be tested. Subsequently, an independent examination challenged the prosecution's claims. Certain mistakes made by the police at the crime scene, such as the contamination of certain samples, lost evidence and repeatedly contested procedures, were properly described as representing generalised incompetence of the Italian judiciary. Furthermore, an external examination raised doubts as to the attribution of some of the DNA traces, which were collected at the crime scene 46 days after the murder.

Additionally, no compelling evidence existed that Amanda Knox and Raffaele Sollecito were actually in the room when Meredith Kercher died. The presence of Amanda Knox's blood and fingerprints in the house was also successfully explained. Her defence argued that Knox's blood could have been there because she also resided in that house. Guede, who is serving a prison sentence for sexual assault and murder, claimed he heard her voice at the scene but did not see her face. His confused statements had low impact on the development of the trial. Most importantly, there was no credible motive for the murder. The prosecution stubbornly stuck to the justification of a sex game that ended in tragedy, even though the prosecution's medical examiner stated that there was no evidence of rape in the days following the murder. As the trial progressed, a more or less credible second motive arose, which was based on the inexplicable disappearance of Meredith Kercher's 200 euros for rent. One of the key witnesses in the original trial, a homeless man named Antonio Curatolo, publicly admitted being a heroin addict, irreversibly compromising his statements that he saw Knox acting suspiciously on the crime scene the night of the murder in November 2007. The Italian judiciary argued that because of Knox's nationality, the case was handled differently from the traditional procedure, so as not to offend the United States.<sup>29 30</sup> Apparently, the axes on which media objections to the conduct and management of the Knox case are founded are rooted in the respective nationalities of the victim and the defendant. The British media have of course launched themselves against the American's controversial personality, claiming her guilt and incriminating her by using aspects of her private sphere, sometimes not even considered for trial. Likewise, the British public opinion has developed a form of disappointment and dissent regarding the total acquittal of the accused and Guede's conviction, deeming the trial to be a resounding miscarriage of justice disguising the truth for matters of convenience. Italy was therefore tried in the media because of its government at the time which particularly disagreed with an overly ferocious High Council of the Magistracy and benefited from miscarriages of justice as evidence of a poorly functioning body. The entire Italian judicial structure was placed under an analytical eye, which revealed an internal weakness and an exaggerated indulgence in the treatment of the accused. Naturally, English public opinion was largely fuelled by the contrast between Meredith's impeccable and irreproachable personality and the figure of Amanda, generally portrayed as a demoniac femme fatale and fervid murderer. The support, sometimes aggressive, of all England and Wales went to the total innocence of Kercher, presumably in defence of her status as a victim, and therefore innocent by definition, and of her

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<sup>29</sup> See generally G. JOHNSON, *Darkness Descending: The Murder of Meredith Kercher*;

<sup>30</sup> See <https://www.bbc.com/news/world-europe-15157384>, <https://www.bbc.com/news/world-europe-15159828>;

own nationality, as well as of a traditional English family which, on several occasions, desperately made comments claiming the absolute incomprehensibility of the acquittal sentence. Evident example of such statements is that of her father John in the "Mirror" on the 28th April 2012.<sup>31</sup>

"We would never want innocent people put in prison. But when you're presented with that whole body of evidence, by forensic investigators, and it is just overturned without question, it is very hard."

The same opinion has gradually made its way into the collective consciences of the United Kingdom, which still today report articles, even defamatory ones, on the new life of the defendants, always presuming their guilt. The second axis on which the criticism is based is logically related to the American nationality of the defendant Amanda Knox. The American media have fought for years to restore an appropriate and dignified image of the accused, who has been continually harassed by the rest of the world. In the American newspapers and television networks, the image that was offered of her was very far removed from the image of a depraved killer: Amanda was generally portrayed as an innocent young college student, victim of a miscarriage of justice and of the procedural hell of the Italian legal system. In particular, the investigation and the conduct of the trial provoked criticism not only from the media, but also from American legal experts, who believed the case was an international scandal on the basis of a series of criticisms of the Italian legal system. First of all, America widely condemned the possibility that in the Italian legal system various types of trials can be conducted together and simultaneously. In the Knox case, the defendant supported three trials of various kinds: the first was of a legal nature and saw her accused of the murder of Meredith Kercher, the second was of a civil nature, which had been requested by the Kercher family, and the third was animated by the defamation against Diya Lumumba caused by Knox's statements during questioning, which led to his arrest. Jurists and American public opinion argued that this system could undermine the evidentiary value of the evidence in any trial, thus risking that evidence not admissible in some proceedings, but fundamental to the conduct of others, would end up influencing the jury's theoretically impartial judgment. An example of such evidence are the statements made by Knox in interrogation, according to which she was in the apartment where she and Kercher lived and incriminated Lumumba as Meredith's murderer. These statements were never taken into account for the purposes of the criminal sentence, but were fundamental in the cause of defamation against Lumumba. This American view of the probative value of

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<sup>31</sup> See <https://www.mirror.co.uk/news/uk-news/meredith-kercher-dad-john-why-would-809729>;



certain evidence presented in the various proceedings is fuelled by the value that the same situation would have had in a US trial. Knox's statements and the evidence against her would have compromised the verdict of the trial, as they would have been considered excessively prejudicial, despite their belonging to other cases. A second criticism was made by the American public opinion regarding the use of the defendant's personality and personal sphere that the prosecution made at trial. In particular, the elements that mostly compromised Knox's presumed innocence were her insistent use of social media during the trial and her obsessively erotic tendency, fuelled by images of her and Sollecito kissing and hugging continuously at the police station when Meredith's body was found. Further scepticism about the Italian justice system was further fuelled by the court's refusal to withdraw the jury. Judges chose at the beginning of the trial not to withdraw the jury until it was time to decide on the innocence or guilt of the accused. This choice unleashed the media and some American jurists, who found the possibility of the jury being influenced externally by the sensationalism of certain stories about Knox unacceptable and harmful to the trial. It is clear, given the course of the trial, that it would have been impossible to withdraw the jury for such a long time, but the American media did not allay their scepticism. The Knox case had as a founding theorem of Knox's guilt - at least at certain stages of the proceedings - the expert opinions on the evidence. At the trial phase, DNA evidence was fundamental to prove Knox and Sollecito's presence on the crime scene. The main source of criticism from America was obviously the DNA evidence and the weight that the court attributed to it for sentencing purposes. Both American journalists and Knox's defence argued that DNA evidence should not have been admitted and would not have been admissible in a US trial because of the blurred and unclear method by which it had been collected. In addition, further criticism arose from the very small amount of DNA tested by remarkably weak examinations. These accusations were fuelled by the fact that no trace of Knox's DNA was found in the room where the murder took place and by the various mistakes in the conduct of the investigation, as portrayed in the videos in which investigators do not use different cotton swabs to collect samples of blood drops. Numerous were the doubts about the possibility of Knox, Sollecito and Guede being together in the same place. As a result of various hypotheses, the court developed a theory according to which the excessively amorous and erotic attitude of Knox and Sollecito would have attracted the attention of Guede, who would have already been in Kercher's apartment. According to the vision provided by the court, Knox and Sollecito heard noises coming from Kercher's room and, under the influence of the drug they both admitted taking, participated in Guede's assault on Meredith. However, the hypothesis presented by the court had no basis in the evidence gathered during the investigation, causing

further scepticism and criticism from the U.S. public opinion. As demonstrated, the diffidence towards the Italian conduct of the case can be attributed to the structural differences between the three systems involved, the foundations of which are evidently found in their cultural backgrounds.<sup>32 33</sup>

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<sup>32</sup> See generally J.G.MIRABELLA, *Scales of justice: assessing Italian criminal procedure through the Amanda Knox Trial*;

<sup>33</sup> See generally M.GIALUZ, *La violazione dei diritti fondamentali nuoce alla ricerca della verità: la Corte di Strasburgo condanna l'Italia per il procedimento nei confronti di Amanda Knox*.

## *Conclusions*

As this analysis shows, it is clearly impossible to obtain a universally valid judgment that meets the expectations of the various countries involved as well as those of the media. The ambition for an increasingly uniform legal system remains in current jurisprudential trends, despite cultural difficulties and distance. The history and legal culture of the countries analyzed in this study constitute a fundamental criterion of discord at the international level, which makes it impossible, at least for now, to establish a universally valid and acceptable jurisprudential vision. In any case, Italian civil law is increasingly tending towards a progressive adaptation to common law. This rapprochement is highlighted above all by the adoption of the adversary model and by the constitutional and legislative guarantees granted to the parties involved. The legal contrast is then reflected from a cultural point of view, with the international mass media which, often unaware of the distances between the various legal systems, fervently criticize any situation that is not analogous to its own context recognized as always fair and unparalleled. Undoubtedly, this analysis aims to study only partially the differences between the cited systems using a case study that has represented one of the most mediatic and controversial processes of recent years. This dissertation therefore opens up a perspective of expansion to the study of the cultural and systemic contrast between common law and civil law, with particular reference to the role that the mass media and public opinion play in the information and conduct of major criminal trials.

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