The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?

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This article examines the contribution which the European Court of Human Rights has made to the development of common evidentiary processes across the common law and civil law systems of criminal procedure in Europe. It is argued that the continuing use of terms such as 'adversarial' and 'inquisitorial' to describe models of criminal proof and procedure has obscured the genuinely transformative nature of the Court's jurisprudence. It is shown that over a number of years the Court has been steadily developing a new model of proof that is better characterised as 'participatory' than as 'adversarial' or 'inquisitorial'. Instead of leading towards a convergence of existing 'adversarial' and 'inquisitorial' models of proof, this is more likely to lead towards a realignment of existing processes of proof which nonetheless allows plenty of scope for diverse application in different institutional and cultural settings.

INTRODUCTION – CONVERGENCE OR DIVERGENCE?

The debate within comparative law scholarship as to whether legal systems within the common law and civil law traditions are converging has been revitalised within the field of criminal procedure and evidence by a combination of pressures which would seem to be supporting the convergence thesis.[1] National legal systems plagued by common problems of rising crime, concern for victims and the growing cost and delay in processing cases through the courts seem to have been led to a willingness to seek 'foreign' solutions to similar problems. In addition to these internal pressures there have been external pressures on states to find common solutions to deal with the problems of organised crime, drug trafficking and, most recently and urgently, international terrorism.[2] All this has led to a renewal of interest among teachers and students in comparative criminal justice and

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1 On the convergence thesis generally, see B. S. Markesinis (ed), *The Gradual Convergence* (Oxford: Clarendon Press, 1994) 30. Others have been equally adamant that convergence is not taking place. See P. Legrand, 'European Legal Systems Are Not Converging' (1996) 45 ICLQ 52.

2 Particularly since 9/11, however, a tension has opened up between those who would seek to deal with the problems of international terrorism through war and those who would seek to deal with it through international cooperation and law which makes the search for common legal solutions among the latter all the more urgent. See P. B. Heymann, *Terrorism, Freedom and Security* (Boston: MIT Press, 2003).

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evidence as a field of study.[3] Some commentators have detected a slow, gradual convergence in the evidentiary processes of common law and civil law systems towards a 'middle position' as the respective oral 'adversary' and written 'inquisitorial' traditions within each system are borrowed from each other.[4] The trends that have been identified in civil law countries are an increasing prominence given to parties and their lawyers, the diminishing authority of professional judges, a shift from pre-trial to trial phases of adjudication which has led to greater importance given to oral evidence and the right to confrontation, with less reliance on the accused as a source of testimonial evidence, and, finally, greater pressures to find alternatives to traditional trial processes.[5] Trends away from adversary excesses in certain common law countries, on the other hand, have been said to include greater judicial management over the criminal process, greater disclosure requirements on prosecution and defence, in some cases a curtailing of the right of silence and greater reliance on pre-trial evidence for vulnerable witnesses.[6]

While these developments would appear to lend credence to the convergence thesis, others have pointed to counter-influences at work that are actually moving the systems further away from each other. Although it is acknowledged that there have been a number of attempts at convergence, there is a growing scepticism in much recent comparative scholarship about the effects of 'transplanting' processes and procedures from one national and legal culture into another.[7] Many transplants may not have the effects that are intended. Institutional and cultural resistance within the receiving system sometimes proves too strong to achieve the impact intended, with the result that the character of the imported practice or

3 See, for example, R. S. Frase, 'Main-Streaming Comparative Criminal Justice: How to Incorporate Comparative and International Concepts and Materials into Basic Criminal Law and Procedure Courses' (1998) 100 *West Virginia Law Review* 773; P. Roberts, 'Rethinking the Law of Evidence: A Twenty-First Century Agenda for Teaching and Research' (2002) 55 CLP 297.

4 Markesinis, n 1 above, 30. See eg C. Bradley, *Criminal Procedure: A Worldwide Study* (Durham, NC: Carolina Academic Press, 1998) xxi; G. Van Kessel, 'European Trends Towards Adversary Styles in Procedure and Evidence' in M. Feeley and S. Miyazawa (eds), *The Japanese Adversary System in Context* (Basingstoke: MacMillan, 2002) 225.

5 Van Kessel, *ibid*, 227. These trends are by no means self-evident in the practices of all civil law countries. A counter-tendency to the shift from pre-trial to trial phases of adjudication, for example, is that the police have been gaining additional powers in certain jurisdictions at the expense of judicial authorities. See E. Mathias, 'The Balance of Power between the Police and the Public Prosecutor' in M. Delmas-Marty and J. Spencer (eds), *European Criminal Procedures* (Cambridge: Cambridge University Press, 2002) 459, 481.

6 Van Kessel, *ibid*; J. McEwan, 'Cooperative Justice and the Adversarial Criminal Trial: lessons from the Woolf Report' in S. Doran and J. Jackson (eds), *The Judicial Role in Criminal Proceedings* (Oxford: Hart, 2000), 171; J. Jackson, 'The Adversary Trial and Trial by Judge Alone' in M. McConville and G. Wilson (eds), *Handbook of the Criminal Justice Process* (Oxford: Oxford University Press, 2002), 335; A. T. H. Smith, 'Criminal Law – The Future' [2004] CrimLR 971, 972–973. Not all common law countries have been so susceptible to such changes, however. For the limited impact of continental-inspired reforms on the US criminal justice system, see J. H. Langbein, 'The Influence of Comparative Procedure in the United States' (1995) 43 *American Journal of Comparative Law* 545.

7 On the notion of 'transplants' from one legal system to another, see A. Watson, *Legal Transplants: An Approach to Comparative Law* (Athens, GA: University of Georgia Press, 2nd ed, 1993). For sceptical views, see eg N. Boari, 'On the Efficiency of Penal Systems: Several Lessons from the Italian Experience' (1997) 17 *International Review of Law and Economics* 115; G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 MLR 11.

procedure is altered in the new procedural environment. As Damaška has put it, 'the music of the law changes, so to speak, when the musical instruments and the players are no longer the same.'[8] To take one example, in Italy where a new criminal procedure code was drafted along adversarial lines, commentators have highlighted a number of institutional obstacles that this transplant encountered.[9] One of them has concluded that the failure to import into the Italian system a bifurcated mode of adjudication combining judges and juries meant that the new 'adversarial' elements produced effects diametrically opposed to those expected, with the defendant less protected than before.[10] But it is not merely the institutional context in which a transplant is introduced that determines its success but also the willingness with which the actors involved are prepared to embrace it. In a recent article Langer has argued that the procedures that operate in common law and civil law systems may be understood not only as two ways of arranging legal procedure but also as two different procedural cultures reflecting normative conceptions of how proceedings *should* be organised.[11] Attempts to import 'foreign' solutions often lead to practices being 'translated' in a different way and this can lead to fragmentation and divergence rather than convergence within the systems concerned.

We appear, then, to have arrived at a paradox whereby evidentiary processes are said to be converging, yet may also be said to be diverging through attempts at convergence. The thrust towards convergence would seem to be at its strongest within Europe where supranational institutions such as the Council of Europe and the European Union provide a vehicle for strengthening cooperation within a framework of common procedural rights and guarantees laid down by the European Convention on Human Rights and, more recently, the EU Charter of Rights.[12] This article examines the particular impact of the jurisprudence of the European Court of Human Rights, which has been attempting to fashion common standards of process and procedure across the two European legal traditions for a number of years.

It has been suggested that this emerging jurisprudence is promoting a sort of convergence between the two traditions by compelling systems to become more 'adversarial'.[13] But it will be argued that although terms such as 'adversarial' and

8 M. Damaška, 'The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments' (1997) 45 *American Journal of Comparative Law* 839, 840.

9 See, most recently, W. T. Pizzi and M. Montagna, 'The Battle to Establish an Adversarial Trial System in Italy' (2004) 25 *Michigan Journal of International Law* 429.

10 E. Grande, 'Italian Criminal Justice: Borrowing and Resistance' (2000) 48 *American Journal of Comparative Law* 227, 232.

11 M. Langer, 'From Legal Transplants to Legal Translations: The Globalisation of Plea Bargaining and the Americanization Thesis in Criminal Processes' (2004) 45 *Harvard International Law Journal* 1.

12 See generally Delmas-Marty and Spencer, above n 5.

13 B. Swart and J. Young, 'The European Convention on Human Rights and Criminal Justice in the Netherlands and the UK' in P. Fennell, C. Harding, N. Jörg and B. Swart (eds), *Criminal Justice in Europe: A Comparative Study* (Oxford: Clarendon Press, 1995) 57, 86. See also I. Dennis, 'Human Rights and Evidence in Adversarial Criminal Procedure: The Advancement of International Standards' in J. F. Nijboer and J. M. Reijntjes (eds), *Proceedings of the First World Conference on New Trends in Criminal Investigation and Evidence* (Lelystad: Koninklijke Vermande, 1997) 523, 529.

'inquisitorial' have continued to dominate the debate on processes of proof,[14] there is a danger in seeing procedures of proof exclusively through this binary opposition. Despite difficulties in their application, these terms still seem capable of encompassing a broad range of diverse practices but they can never hope to provide a comprehensive picture of all evidentiary processes. It will be argued that the signs of harmonisation that can be detected from the jurisprudence of the European Court are better viewed not as an attempt to converge existing 'adversarial' and 'inquisitorial' models of proof but as an attempt to move beyond these towards a vision of proof that can be claimed to be genuinely *sui generis*. This may be seen as the beginnings of the development of a new rights-based model of proof. Neither traditionally adversarial nor inquisitorial in character, the new model is better classified as 'participatory' on the ground that it seeks to enable all those capable of giving relevant evidence in the proceedings to do so in as least a coercive manner as possible. Consequently, we may be witnessing a realignment of the two existing models of proof rather than simply a convergence of the two but one which gives plenty of scope for diverse application in different institutional and cultural settings. Before we come to the European jurisprudence, we will first try to identify the features and limitations of the traditional adversarial-inquisitorial dichotomy.

THE ADVERSARIAL AND INQUISITORIAL DICHOTOMY

Comparative scholars have drawn attention over the years to the dangers of using adversarial or inquisitorial labels to characterise legal processes in the common law and civil law tradition. One of the problems is that across the common law-civil law divide, the terms have been used differently and there has not been agreement about their meaning. For example, scholars have attached different meanings to the term 'accusatorial' which has often been used interchangeably with the term 'adversarial'. Within the Anglo-American tradition, there has been a tendency to use this term in an ideological manner to refer to a series of idealised features of common law proceedings, including the presumption of innocence, the privilege against self-incrimination and the use of oral testimony, which are then contrasted with counter-tendencies to be found in continental proceedings.[15] Within the continental tradition, on the other hand, the term 'accusatorial' has at times been used to describe the reformed continental procedures of the nineteenth century whereby the separate functions of prosecuting and ascertaining

14 See most recently the collection of essays in A. Duff, L. Farmer, S. Marshall and V. Tadros (eds), *The Trial on Trial: Truth and Due Process* (Oxford: Hart, 2004).

15 M. Damaška, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study' (1973) 121 *University of Pennsylvania Law Review* 506, 569. A recent example of this 'Manichaean' tendency is to be seen in *Crawford* v *Washington* (2004) 124 S Ct 1354, 8, where the US Supreme Court stated that '[t]he common law tradition is one of oral testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers'. For commentary, see S. J. Summers, 'The Right to Confrontation after *Crawford* v *Washington*: A "Continental European" Perspective' (2004) 2 *International Commentary on Evidence*, Article 3, at http://www.bepress.com/ice (last visited 23 May 2005).

facts were severed, with the former entrusted to the prosecutor and the latter to the investigating judge.[16] Similarly, the term 'inquisitorial' is more frequently used by Anglo-American commentators to characterise continental procedures while continental commentators have considered it to be quite inappropriate to use the term 'inquisitorial' to cover the different European continental legal jurisdictions.[17] The latter have tended to see modern continental procedures instead as 'mixed' systems which ought to be placed midway between the accusatorial and inquisitorial models. Recent reforms such as those in Italy have even caused some commentators to claim that some continental jurisdictions have 'crossed the Rubicon' into the zone of accusatorial systems.[18] Conversely, certain American commentators have taken such a pure view of adversarial procedures that they have been unwilling to consider that even common law countries such as England truly belong within the adversarial camp.[19]

In his path-breaking work on comparative criminal procedure, Damaška has illustrated how problematic it can be to use historically-based taxonomies in order to determine whether a system is adversarial or inquisitorial.[20] In his view, the concepts of continental and Anglo-American legal traditions are too vague and open-ended to determine what is fundamental to the accusatorial and inquisitorial type.[21] Some scholars have tried to adopt a common denominator approach to find those features which are universal within each tradition. But this proposed test of pedigree appears circular: we call a common denominator 'adversarial' or 'inquisitorial' simply because we find it across a number of systems and we then label the system adversarial or inquisitorial.[22] Another problem is that it is difficult to explain what should happen when one of the common denominators no longer inhabits a particular jurisdiction. Do we say that that system no longer belongs within the adversarial or inquisitorial camp or do we hold that this denominator is no longer common? As Damaška says, the meaning of adversarial or inquisitorial remains 'hostage' to procedural change in a single country assigned to the tradition.[23]

In the second part of the twentieth century the historical approach was superceded by an approach which tried to find a series of ideal-type features that may be classified as adversarial or inquisitorial. These are not abbreviated descriptions of actual procedures but are rather opposing ideal-types in the Weberian sense, depicting patterns that can be found within the generality of Anglo-American and continental procedures. Rather than being descriptive of actual procedures,

16 Damaška, *ibid*, 558–559.

17 See, for example, J. F. Nijboer, 'Common Law Tradition in Evidence Scholarship Observed from a Continental Perspective' (1993) 41 *American Journal of Comparative Law* 299, 305; Damaška, *ibid*, 559.

18 M. Damaška, 'Models of Criminal Procedure' (2001) 51 *Zbornik* 477, 485. (hereafter referred to as 'Models').

19 See, for example, R. Posner, 'An Economic Approach to the Law of Evidence' (1999) 51 StanLR 1477, 1500 n 49.

20 M. Damaška, 'Adversary System' in S. H. Kadish (ed), 1 *Encyclopedia of Crime and Justice* (London: MacMillan, 1983) 24; *The Faces of Justice and State Authority* (New Haven: Yale University Press, 1986) 4–6; 'Models', n 18 above, 478–482.

21 'Models', *ibid*, 481.

22 *ibid.*

23 *ibid.* For other difficulties with this approach, see Langer, n 11 above.

they represent particularly distinctive trends and features that contain enough essential elements of Anglo-American and continental processes to enable any particular system to be located somewhere along a spectrum of the two extremes. Although these models are simplistic, it is widely assumed that this approach is not only a valuable heuristic tool for theorising about different influences at play in Anglo-American and continental processes but that it also provides a useful independent standard for comparing different systems and determining how convergent or divergent they are.[24] The difficulty once again, however, lies in determining how these ideal types should be characterised and what level of detail should go into them.

There is a broad consensus that the essence of the contrast in the context of criminal proceedings lies in arranging proceedings around the notion of a dispute or contest between two sides – prosecution and defence – in a position of theoretical equality before a court which must decide on the outcome and arranging them around the notion of an official and thorough inquiry driven by court officials.[25] From this essential contrast two different models of proof can logically be constructed. In the contest model the prosecution prepares the case, brings the charge and is responsible for presenting the evidence and proving the offence charged. If contested the defendant attempts to rebut the charge by presenting evidence and arguments against the prosecution. The proceedings are presided over by a neutral adjudicator whose function is to see that the parties play by the rules of the contest but not to take an active part in the presentation of the evidence. In the inquest model the court takes centre stage in the handling of the evidence. The prosecution may first decide the charge but officials of the court then have the responsibility for gathering, testing and evaluating the evidence. Any role the prosecution and defence play in the proof process is minimal and subordinate to the court's function of finding the truth.

Although these are familiar and simple models, there is considerable uncertainty beyond this as to whether other features commonly associated with the models should be included within them. Some features are commonly included: for example, the notion of the contest model is said to require a continuous trial while the inquest model is said to require a series of inquiries; oral evidence is a feature of the contest model, while written evidence is a more common feature of the inquest model.[26] Other contrasts, on the other hand, are not usually considered essential characteristics of the models. These include the fact that in the contest model the proceedings are in public whereas in the inquest model they are more often in private and the fact that a lay jury sitting separately from the professional judge in a divided trial court will often decide the outcome of the case in

24 For defences of the use of adversarial and inquisitorial models in order to analyse criminal procedure systems, see N. Jörg, S. Field and C. Brants, 'Are Inquisitorial and Adversarial Systems Converging?' in Fennell *et al*, n 13 above, 41; L. Ellison, *The Adversarial Trial Process and the Vulnerable Witness* (Oxford: Clarendon Press, 2001) 142; Langer, n 11 above, 5; P. Duff, 'Changing Conceptions of the Scottish Criminal Trial: The Duty to Agree Uncontroversial Evidence' in Duff *et al*, n 14 above, 31.

25 See, for example, Damaška, n 15 above, 563–565; P. Roberts and A. A. S. Zuckerman, *Criminal Evidence* (Oxford: Oxford University Press, 2004) 45.

26 See, for example, Roberts and Zuckerman, *ibid*, 47.

the contest model whereas in the inquest model judges sitting in a unitary court with or without lay judges will decide the case.[27] Decisions as to what factors should and should not be included are not easy to make on the basis of logic.[28] Logic does not dictate that we should include a continuous trial as a necessary feature of the contest model but conclude that a jury system is not necessary. It would be possible to divide proceedings arranged around the notion of a contest into a series of phases of proof. Conversely, it could be argued that a jury is a more essential feature of the contest model as this imposes a necessary restraint on judicial fact-finding which might otherwise overwhelm the principle of party presentation.

Another feature which is commonly considered to be an essential characteristic of the contest model in contrast with the inquest model is the need for rules of evidence. Logic may dictate that in a party dominated system there is a need for rules to allocate the burden of proof and to regulate the contest. But beyond this it is unclear how essential other rules are. Disclosure rules are commonly justified in the contest model in order to ensure 'equality of arms' between the parties, particularly in the criminal context where there is such an imbalance of resources between prosecution and defence.[29] But there is a natural tendency in a contest model for parties to be reluctant to disclose all evidence material to the case and these rules inevitably rub up against this more natural inclination to hold one's cards close to one's chest. Other means of improving the imbalance such as providing for strong defence representation might prove just as effective.[30] A number of exclusionary rules including hearsay are also sometimes said to be justified by the adversary system as they provide incentives for parties to adduce the best evidence.[31] But there are structural difficulties in making these rules effective unless we import into such a system a bifurcated structure of decision making, allowing judges as the tribunal of law to screen the evidence from a specially appointed tribunal of fact. Mandatory directions can also be used to try to influence the manner in which fact-finders should reason but again it is not so clear that these need to be exclusive to fact-finders in the contest model. Although freedom of proof is closely associated with continental fact-finding,[32] again there is no reason why this should be a necessary feature of an inquest model.

All this serves to make the point that it is very difficult to add features to the core contrast between proof by contest and proof by inquest that can be

27 *ibid.* Others, however, would include the jury within the adversarial system: see, eg Jörg, Field and Brants, n 24 above, 42; Langer, n 11 above, 10.

28 Damaška, 'Models', n 18 above, 483.

29 A. S. Goldstein, 'The State and the Accused: Balance of Advantage in Criminal Procedure' (1960) 69 YaleLJ 1149; R. J. Traynor, 'Ground Lost and Found in Criminal Discovery' (1962) 39 *New York University Law Review* 228, 249; J. Jackson and S. Doran, *Judge without Jury: Diplock Trials in the Adversary System* (Oxford: Clarendon Press, 1995) 62; Roberts and Zuckerman, n 25 above, 52–56.

30 In Scotland, for example, there has been a tradition which is now changing of non-disclosure by the Crown of any evidence helpful to the defence case: see A. V. Sheehan and D. J. Dickson, *Criminal Procedure* (Edinburgh: Butterworths, 2nd ed, 2003) para 164.

31 D. Nance, 'The Best Evidence Principle' (1988) 73 Iowa Law Review 227. On the wider relationship between rules of evidence and the adversary system, see M. Damaška, *Evidence Law Adrift* (New Haven: Yale University Press, 1997) ch 3.

32 M. Damaška, 'Free Proof and its Detractors' (1995) 43 *American Journal of Comparative Law* 343.

said to be essential characteristics of the two models. As soon as we start to flesh out the models, we tend to ascribe features to them either on an empirical basis from what we see happening in the Anglo-American or continental tradition or on a normative basis from what we believe ought to be included within each model. But this inevitably leaves scope for different views as to what should or should not be included within each model with the result that there will be scope for disagreement when it comes to locating particular systems within the spectrum.

Even if we could agree on what represents the core features of adversarialism and inquisitorialism, difficulties can arise in reaching agreement on how these concepts are to be applied. Certain non-common law countries, for example, insist that they now have adversary systems.[33] But Anglo-American commentators are much less likely to view the recent changes in a number of reformed continental processes as 'Copernican'.[34] Pizzi has observed that there are features of German trials that are deeply adversarial in the sense that witnesses' versions of events are strongly contested by defence lawyers, yet judges retain considerable procedural control.[35] Are these trials adversarial or non-adversarial? He has also taken the example of Norway where the parties have the responsibility for presenting the evidence, yet at the beginning of the trial defendants are asked to respond to the charges, quite unlike Anglo-American trials. Again, are these trials adversarial or non-adversarial? There can also be considerable variation *within* systems as to the way in which proceedings are organised, with the result that it becomes even more difficult to locate the system as a whole on the adversarial/inquisitorial spectrum. It is commonly said, for example that many of the pre-trial proof processes in the Anglo-American criminal systems are just as inquisitorial as continental systems.[36] How then are we to place systems which manifest extreme characteristics of inquest pre-trial followed by extreme characteristics of contest at trial? There can also be a different emphasis put on 'adversarial' and inquisitorial' features depending on the type of trial within any one system. It has been suggested, for example, that although there are similarities between the process of proof in the *tribunaux correctionnels* and the *cours d'assises* in France, in practice more oral testimony is heard in the proceedings of the higher court.[37] Similarly, in Anglo-American trials it has been suggested that the absence of the jury causes an adversarial deficit even though the rules of procedure and evidence remain the same in both jury and non-jury trials.[38] Some have even detected con-

33 W. T. Pizzi, 'The American "Adversary System"' (1998) 100 *University of West Virginia Law Review* 847, 848. See also C. Brants and S. Field, 'Legal Cultures, Political Cultures and Procedural Traditions: Towards a Comparative Interpretation of Overt and Proactive Policing in England and Wales and the Netherlands' in D. Nelken (ed), *Contrasting Criminal Justice* (Aldershot: Dartmouth Ashgate, 2000) 77, 79.

34 'Models', n 18 above, 491.

35 n 33 above.

36 See, for example, A. S. Goldstein, 'Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure' (1974) 26 StanLR 1009.

37 B. McKillop, 'Readings and Hearings in French Criminal Justice: Five Cases on the *Tribunal Correctionnel*' (1998) 46 *American Journal of Comparative Law* 757, 779.

38 S. Doran J. Jackson and M. Seigel, 'Rethinking Adversariness in Non-Jury Criminal Trials' (1995) 23 *American Journal of Criminal Law* 1.

flicting forces at work within the same trial, with judges taking both passive and active stances towards the evidence presented at various stages of the process.[39]

All this does not mean that 'adversarial' and 'inquisitorial' models of proof cannot contain some explanatory power in our attempt to determine the extent to which processes of proof are converging or diverging. If we limit our definition of these terms to those features that flow logically from the contest-inquest polarity, the contrast would seem to be incapable of encompassing the diversity of processes of proof that are evident across the many Anglo-American and European systems. But if we take a more expansionist view, the models can be used to cover quite a wide variety of practices, ranging beyond the degree to which the proof process is driven by party contest or court officials to other factors such as the concentration of criminal proceedings on the trial stage as opposed to the proceedings being spread over a number of different stages, the reliance at trial on oral as opposed to written testimony, the extent to which decision making is organised in a bifurcated or unitary manner and the use of exclusionary rules of evidence as opposed to free proof. In recent times there has been a tendency on the part of scholars to associate the models even more broadly with other typologies which are less concerned with rules of procedure and proof and more with the positions that key actors such as police officers, prosecutors and judges occupy within organisational structures and the roles they play in the processes of proof. Damaška, for his part, contrasted two ideals of officialdom which he labelled 'hierarchical' and 'coordinate', the former exaggerating certain features of continental judicial organisation with its emphasis on officials organised in a hierarchy applying technical norms, and the latter based on certain tendencies within Anglo-American justice to hand over decision making to lay persons applying community norms with considerable discretion.[40] More recently, a number of scholars have concentrated on whether police officers and prosecutors are motivated by considerations of case-building or with truth-finding.[41] 'Coordinate' and 'case construction' models have tended to be associated with adversarial processes and 'hierarchical' and 'truth-finding' models with inquisitorial processes, although there can be differences of view as how to categorise particular stages of a criminal investigation. When we probe the processes of proof in Anglo-American justice, for example, we find that at a certain stage of an inquiry a process can be transformed from one in which actors are primarily interested in truth-finding to one more interested in constructing a case against the suspect. But it may not be easy to determine at what point a process moves from the 'inquisitorial' zone into the 'adversarial' one.[42]

39 See, eg., Pizzi, n 33 above.

40 M. Damaška, 'Structures of Authority and Comparative Criminal Procedure' (1975) 84 YaleLJ 480.

41 For case construction in England, see eg M. McConville, A. Sanders and R. Leng, *The Case for the Prosecution* (London: Routledge, 1991). For recent analysis of the roles of police officers, prosecutors and judges in the French criminal justice system, see J. Hodgson, 'The Police, the Prosecutor and the Juge d'Instruction' (2001) 41 *British Journal of Criminology* 342. For a recent comparative analysis of the role of prosecutors in evidentiary processes, see J. Jackson, 'Legal Culture and Proof in Decisions to Prosecute' (2004) 3 *Journal of Law, Probability and Risk* 109.

42 Commentators have differed as to how to characterise police questioning in England and Wales, some referring to it as an 'adversarial' process and others as 'inquisitorial'. Cf R. Evans, *The Conduct*

The imposition of these extra dimensions on to models that are already laden with opaque meaning can lead to disagreements as to whether systems are converging or diverging. An analysis which focuses simply on the rules and procedures of proof is more likely to accept at face value some of the 'transplants' or changes that have been made away from the extreme of either model and more likely to conclude that we are seeing a convergence in proof processes somewhere closer to the centre of the two poles than at either extreme. Conversely, however, an analysis which probes deeper into what the rules mean to the actors themselves is more likely to detect cultural resistance to the changes that are being made and, as these are translated into the local culture, is more likely to encounter divergences rather than convergences occurring.

The real limitation in using 'adversarial' and 'inquisitorial' models as benchmarks for determining the extent to which systems are converging or diverging, however, is not that the models cannot encapsulate a wide variety of evidentiary processes evident across the common law and civil law divide, nor that there can be disagreements on how the terms 'adversarial' and 'inquisitorial' should be used and applied. There are difficulties endemic in any exercise which attempts to make cross-cultural comparisons between legal systems and so long as we are careful to explain what we mean by these terms, they can still be useful in analysing shifts in direction within and between systems. The limitation is that, however broadly we attempt to use the terms, they cannot claim to be comprehensive, all-inclusive categories and that by using them as though they were we may lose sight of certain processes at work which cannot be categorised as either 'adversarial' or 'inquisitorial' at all, no matter how broad or deep our perspective. It has been argued, for example, that some of the developments that have taken place within United States civil processes in the last 20 years, and more latterly, within the procedures of the International Criminal Tribunal for the former Yugoslavia, are better described through a third procedural model labelled 'managerial' rather than as falling into either of the traditional adversarial or inquisitorial models of procedure.[43] Similar trends may be discerned within the English civil process in the aftermath of the Woolf reforms and increasingly also within English criminal procedure.[44] Others have detected processes at work at the sentencing stage of common law processes which are hard to categorise within either traditional model.[45] Another recent development which does not fit easily into either traditional model is the growth in restorative justice processes where offenders are brought face to face with victims in order to find ways of addressing offender behaviour.[46] Although these processes look forward to changing the offender's

of Police Interviews with Juveniles (London: HMSO, 1993); and E. Cape, 'The Revised PACE Codes of Practice: A Further Step towards Inquisitorialism' [2003] *Criminal Law Review* 355.

43 M. Langer, 'The Rise of Managerial Judging in International Criminal Law' (2005) 53 *American Journal of Comparative Law* (forthcoming).

44 See *Access to Justice: Final Report by Lord Woolf MR to the Lord Chancellor on the Civil Justice System in England and Wales* (1996). On the rise of managerialism in England criminal procedure, see McEwan, n 6 above; Smith, n 6 above.

45 J. Shapland, *Between Conviction and Sentence: The Process of Mitigation* (London: Routledge & Kegan Paul, 1981).

46 There is a very large and expanding literature on restorative justice processes: see G. Johnstone, *Restorative Justice: Ideas, Values and Debates* (Cullompton: Willan, 2001), K. McEvoy, H. Mika and

behaviour, they can involve trying to reach a consensus covering the circumstances of the offence. This process of proof is not easily categorised as 'adversarial' or 'inquisitorial' and might be better described as 'problem solving'.[47] The point here is that the traditional adversarial/inquisitorial dichotomy may not always prove a useful framework for analysing the complexity of real-life processes of proof. As one critic has put it, 'dichotomies provide only two-dimensional slices through reality: they give us black and white and – depending upon their degree of refinement – innumerable shades of grey . . . But they do not give us the reds and greens and blues'.[48]

As we turn to examine the evidentiary jurisprudence that has been evolved by the European Court of Human Rights, we will argue that the adversarial/inquisitorial dichotomy has obscured the truly transformative nature of the Court's jurisprudence. Although the Court has commonly referred to 'adversarial' rights and principles, its conceptions do not match existing practices within the adversarial tradition and it is misleading to consider that these are leading to a convergence in the direction of traditional adversarial processes. We have seen that on the broadest interpretation of the adversarial model, we would expect to see one or more of the following characteristics: party control of the proof process, concentration on a climactic trial and reliance on oral testimony, trial by jury and exclusionary rules of evidence. Yet we shall see that the European Court has not required contracting parties to adopt any of these practices. Instead it will be argued that they are being required to realign their processes in accordance with what is better described as a new model of proof altogether.

THE EVOLUTION OF EVIDENTIARY HUMAN RIGHTS NORMS

The right to a fair trial

A number of countries have long included within their constitutions a system of fundamental rights, but after World War II 'a constitutional and civil rights revolution' occurred when these rights began to be enforced through judicial machinery at a national and international level.[49] States not only began to sign up to common human rights norms, they also acceded in various treaties to certain forms of review that would be exercised by international authorities. Thus the Inter American Court is tasked with applying the American Convention on Human Rights, the African Commission applies the African Charter on Human and People's Rights and the UN Human Rights Committee applies the International Covenant on Civil and Political Rights. The most advanced example of supra-national application of human rights norms, however, has been that of the European Convention on Human Rights by the (now abolished) European

B. Hudson (eds), *Practice, Performance and Prospects for Restorative Justice* (2002) 42 *British Journal of Criminology* 469.

47 Shapland, n 45 above, 141.

48 I. Markovits, 'Playing the Opposites Game: On Mirjan Damaška's *The Faces of Justice and State* Authority' (1989) 41 *Stanford Law Review* 1313, 1340–1341.

49 M. Cappelletti, *The Judicial Process in a Comparative Perspective* (Oxford: Clarendon Press, 1984) 207.

Commission of Human Rights and by the European Court of Human Rights.[50] Over a number of years these bodies have attempted to apply common standards to legal systems within the common law and civil law traditions. Although the Court was established in 1959, it took some time for its judicial machinery to exert a material impact on the national legal systems of member countries because of the delay by a number of states in granting the right to individual petition to the Court and in accepting the jurisdiction of the Court. Today, however, it is estimated that taken together both the text of the European Convention and the jurisprudence of the Commission and Court have inspired several hundred national constitutional court decisions.[51] It is true that the Convention and Court can hardly be said to have created a truly independent legal order as their role has been merely to correct rather than supplant national legal norms. But it can be argued that this distinction has become blurred as the jurisprudence of the Commission and Court has come to complete and enrich the often vague text of the Convention and in this manner arrive at a set of norms that seems more and more to be that of a true supranational legal order.[52]

The key vehicle in the development of evidentiary human rights norms has been the fair trial right in Article 6 of the European Convention. The right to a fair trial finds its roots deep in the history of human rights and is given expression in the UN Universal Declaration of Human Rights.[53] Article 6(1) of the Convention contains a general definition of the right which closely follows Article 10 of the Declaration, whilst Article 6(2) enshrines the presumption of innocence which is contained in Article 11 of the Declaration. But Article 6 goes further than the Declaration by enumerating a number of other specific safeguards, including in Article 6(1) the right to be brought to trial within a reasonable time and in Article 6(3) a number of defence rights for those charged with a criminal offence, including the right to have adequate time and facilities for the preparation of the defence, the right to legal assistance, the right to examine or have examined witnesses against the defence and to obtain the attendance and examination of witnesses under the same conditions as prosecution witnesses.

In many respects the inclusion of these specific rights may be seen as a triumph for those British lawyers steeped in the common law tradition who argued against their civil law counterparts in favour of a more specific set of rights in preference to a mere restatement of the principles in the Universal Declaration. In his masterly account of the formation of the Convention, Simpson has shown how the final draft of the Convention was a compromise between civil law and common law approaches towards the protection of individual rights.[54] The civil

50 The Commission was abolished in 1998 under Protocol 11 and the Court now has sole jurisdiction to determine applications: see http://www.echr.coe.int/ENG/EDocs/HistoricalBackground.htm (last visited 23 May 2005).

51 M. Delmas-Marty, *Towards a Truly Common Law* (Cambridge: Cambridge University Press, 2002) 67.

52 *ibid*, 63–64.

53 A. H. Robertson and J. G. Merrills, *Human Rights in Europe* (Manchester: Manchester University Press, 3rd ed, 1993) 87.

54 A. W. B. Simpson, *Human Rights and the End of Empire* (Oxford: Oxford University Press, 2001) chs 13 and 14.

law approach favoured setting out the enumerated rights in brief general terms, leaving the detailed working out to be done by member states with a Court of Human Rights responsible for elaborating a jurisprudence of rights. The common law approach, on the other hand, was distrustful of bills of rights and reluctant to place its trust in the evolution of a jurisprudence derivative from very general principles of law. Instead it put its weight behind a more precise specification of the rights and limitations to the rights and in the provision of effective remedies. The resulting compromise was one which appeared to favour both sides. On the one hand, the ultimate text that was agreed appeared to favour the common law approach of a more specific delineation of the rights than that outlined in the Universal Declaration. On the other hand, the establishment of a Commission and Court to enforce the rights was a victory for the civil law approach, albeit that the Convention did not require member states to accept either the right of individual petition or the jurisdiction of the court.

Taken at face value, the specific rights incorporated in Article 6, drafted as they were largely by the British, not unnaturally appeared to favour an approach which had greater resonance in the common law than in civil law tradition. Although the right to a trial within a reasonable time has not been an independently recognised right in either tradition, the emphasis in Article 6(3) on the rights of the defence and in particular the concern to buttress the role of the parties in presenting and challenging evidence appears to give the Convention a decidedly adversarial mould.[55] Any victory which the common law tradition was able to claim from the enumeration of defence rights in the Convention, however, was over time reined back by the interpretation that came to be given to these rights by the Commission and the Court in subsequent jurisprudence. The very development therefore that the British had resisted at the time of the drafting of the Convention, namely that the rights would come to be interpreted by an international court with binding effect on national courts, was one that came to pass. In the process, some of the adversarial purity of the written text was sacrificed.

Although the European Commission and Court have emphasised that the right to a fair trial holds a prominent place in a democratic society with the result that Article 6 must be given a broad construction,[56] a number of limiting principles have taken hold to prevent the Strasbourg authorities being over-prescriptive about the evidentiary procedures that should be adopted in the member states. First of all, from the beginning the Commission established that the Strasbourg authorities do not constitute a further court of appeal from the national courts.[57] This fourth instance doctrine together with the doctrine of the margin of appreciation has meant that the national courts are given considerable discretion concerning the evaluation of evidence. Secondly, as a general principle the member states enjoy considerable freedom in the choice of the appropriate means of ensur-

55 Swart and Young, n 13 above, 84; Nijboer, n 17 above, 311; J. F. Nijboer, 'Vision, Abstraction and Socio-Economic Reality' (1998) 49 *Hastings Law Journal* 387, 394.

56 *Delcourt* v *Belgium* (1979–1980) 1 EHRR 355, *Moreira de Azevedo* v *Portugal* (1992) 13 EHRR 731 at [66].

57 *X* v *FRG* (1957) 1 Yearbook 150, 152.

ing that their judicial systems comply with the requirements of Article 6.[58] The Court does not require states to adopt any particular rules governing the admissibility of evidence, although we shall see that it has embraced certain evidentiary principles that have had to be translated into national systems. Instead it has considered that it is for the competent authorities to determine the relevance of proposed evidence and that rules on the admissibility of evidence are 'primarily a matter for regulation under national law'.[59] The Court's unwillingness to prescribe rules of evidence or concepts such as admissibility was a clear signal that it had no wish to impose a common law system of evidence on member states. Thirdly, the Commission and Court both said at an early stage that their task is to determine whether they can be satisfied that the proceedings taken 'as a whole' were fair.[60] On the one hand, this has enabled the Court to give an expansive interpretation to Article 6, and to hold that the rights accorded to defendants in Article 6(2) and 6(3) are 'specific aspects of the general principle stated in paragraph 1 and are to be regarded as a non-exhaustive list of "minimum rights" which form constituent elements amongst others, of the notion of a fair trial in criminal proceedings'.[61] This expansionist principle has enabled the Court to read other important protective rights into Article 6 such as the privilege against self-incrimination.[62] On the other hand, however, it has given the Court a certain leeway to consider that it is not essential for the special rights to be respected in every case if measures restricting the rights of the defence are 'strictly necessary' and there are adequate compensating measures taken to protect the accused at trial.[63] This has permitted inroads to be made by domestic jurisdictions into the specific rights provided that the trial as a whole may be considered fair.[64] Finally, the Court has given the Convention an evolutionary interpretation according to which the Convention is 'a living instrument which must be interpreted in the light of present day conditions'.[65] On the one hand, this has enabled some of the rights and principles developed under Article 6 to be given an expansionist interpretation in the light of present day conditions; on the other hand, it has also enabled these to be balanced, as we shall see, against other competing concerns that come to dominate the criminal process landscape.[66]

The equality of arms principle

These limiting principles have enabled the Court to be quite flexible about the evidentiary principles and processes that are to be equated with Article 6, permit-

58 *Hadjianastassiou* v *Greece* (1993) 16 EHRR 219 at [33].
59 *Engel* v *Netherlands* (1979–1980) 1 EHRR 647, at [46], *Schenk* v *Switzerland* (1991) 13 EHRR 242, *Delta* v *France* (1993) 16 EHRR 574, at [35].
60 *Nielson* v *Denmark* (1957) 4 Yearbook 518, *Barberà, Messegué and Jabardo* v *Spain* (1989) 11 EHRR 360, *Delta* v *France, ibid.*
61 *Deweer* v *Belgium* (1979–80) 2 EHRR 439, at [56].
62 See, eg., *Funke* v *France* (1993) 16 EHRR 297.
63 See, eg., *Van Mechelen* v *Netherlands* (1998) 25 EHRR 647 at [58].
64 See, eg., *Brown* v *Stott* [2001] 2 All ER 97.
65 *Tyrer* v *United Kingdom* (1979–1980) 2 EHRR 1 at [31].
66 This balancing approach has been evident when the court has come to balance the interests of victims and witnesses against the interests of a defendant in a fair trial: see text at notes 125–133 below.

ting it when necessary to depart from the strait jacket of the specific rights in Articles 6(2) and (3) and to develop its own distinctive principles of fairness. Instead of adopting a fully-fledged adversarial position requiring party control over the presentation of evidence, the Commission and Court from an early stage chose to develop the principle of 'equality of arms', an old principle with roots in both common law and civil law traditions.[67] It is a principle that has been expressed as affording every party to the proceedings 'a reasonable opportunity to present his case in conditions that do not place him at substantial disadvantage *vis-à-vis* his opponent'.[68] Although this principle was enunciated early on in the jurisprudence of the Commission and Court,[69] it has undergone development and refinement over the years. In 1970 for instance, the Court upheld an old Belgian practice whereby the *procureur général* would retire with the Court having expressed a view as to whether the appellant's appeal should be heard.[70] Over 20 years later, however, the Court reached a different conclusion. Once the *procureur général* had expressed an opinion on the merits of the appeal, he became the applicant's opponent and the *procureur général's* participation in the private deliberations of the Court gave him an unfair advantage over the appellant.[71] In emphasising the importance of the appearance of justice, the Court drew attention to the increased sensitivity of the public to the fair administration of justice. This emphasis on the importance of equal participation by the parties has underlined the necessity of distinguishing between those responsible for prosecuting or appearing to be prosecuting and those responsible for judging and, in doing so, has broken with the old continental practices which tended to blur the distinction.

It is not only equality in presenting arguments that is required, but also equality in being able to present evidence as well. Thus in *Bonisch* v *Austria*[72] a court appointed expert provided a report that meat prepared by the applicant contained an excessive concentration of a carcinogenic substance called bezopyrene. The European Court considered that he was more like a witness against the accused than an impartial expert. As a court witness, he could attend throughout the hearings, put questions to the accused and to witnesses with the leave of the court and comment on the evidence. Since he was given much greater control over the proceedings than a defence expert witness would have been given, Bonisch had not been accorded equal treatment.

The principle has gone beyond ensuring that the parties are accorded a formal equality during the presentation of evidence at the trial and appeals process. In order to be able to contest on equal terms, the Commission and Court have recognised that as a result of the disparity in the resources between prosecution and defence, the principle of the equality of arms requires that the facilities which everyone charged with a criminal offence should enjoy under Article 6(3)(b) include the right of the accused to have at his disposal all relevant information that

67 The principle is an expression of the old natural law principle, *audi alteram partem*, which was first formulated by St Augustine: see J. R. Lucas, *On Justice* (Oxford: Clarendon Press, 1980) 84.
68 *Kaufman* v *Belgium* (1986) 50 DR 98, 115, *Foucher* v *France* (1998) 25 EHRR 234 at [34].
69 See, for example, *X* v *FRG*, n 57 above.
70 *Delcourt* v *Belgium*, n 56 above.
71 *Borgers* v *Belgium* (1993) 15 EHRR 92.
72 *Bonisch* v *Austria* (1987) 9 EHRR 191.

has been or could be collected by the competent authorities.[73] The Strasbourg authorities have here recognised the disparity of resources between prosecution and defence. Since the prosecution enjoys considerable facilities derived from its powers of investigation, equality demands that the results of these investigations be shared with the defence.

Despite the significance that the principle of the equality of arms attaches to party information and party presentation, however, there are limitations in regarding it as an adversarial principle. These were illustrated in the civil case of *Feldbrugge* v *Netherlands*[74] where the applicant had been denied an opportunity to appear either in person or through her lawyer in making her claim for health insurance benefits. The Court held that there had been no breach of the principle of the equality of arms because Mrs Feldbrugge's opponents were equally disadvantaged under the procedures of the Appeals Board. It is true, of course, that Article 6(3) specifically guarantees certain defence rights in criminal cases such as the right to call witnesses but even here the equality of arms principle serves to limit adversarialism as the Article provides that parties have the right to obtain the attendance and examination of witnesses on their behalf only 'under the same conditions' as their opponent. It follows that the defence have no right under this principle to call any witness of their choosing. The competent national authorities are therefore able to decide upon the relevance of the proposed evidence of each witness.[75] In addition it would seem that where a system proceeds on the basis of experts being called by the court, parties have no right to call their own expert to challenge this evidence unless there are objectively justified fears concerning the court expert's impartiality.[76]

The right to an adversarial trial

Although there was no inequality of arms in the *Felbrugge* case, the Court went on to hold that there had nevertheless been a breach of Article 6(1) because the failure to hear Mrs Feldbrugge meant she had not been allowed proper participation in the proceedings. Towards the end of the 1980s, the Court began to develop this right to be heard and to speak not just of the principle of equality of arms but also of the principle that 'all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument'.[77] A number of decisions ruled that the right to an adversarial trial means, in a criminal case, that the prosecution and defence must be given the opportunity to have knowledge and comment on the observations filed and the evidence adduced by the other party.[78] It is important to see, however, that in developing this adversarial right the European Court fell short of prescribing the kind of adversarial trial that is associated with common law jurisdictions where procedural control is largely in

73 *Jespers* v *Belgium* (1981) 27 DR 61.
74 (1986) Series A 99.
75 *Engel* v *Netherlands*, n 59 above at [91], *Vidal* v *Belgium* (1992) Series A 235-B.
76 *Brandstetter* v *Austria* (1993) 15 EHRR 378.
77 *Barberà, Messegué and Jabardo*, n 60 above at [78].
78 *Brandstetter* v *Austria*, n 76 above at [67], *Rowe and Davis* v *United Kingdom* (2000) 30 EHRR 1 at [60].

the hands of the parties rather than the judge. Under the label of *une procédure contradictoire* it has long been considered important in continental procedure that the defendant should be present when procedural activities are under way and should be entitled to offer counter- proofs and counter-arguments.[79] The Commission and Court sought to 'translate' the defence rights prescribed in Article 6 into a vision of adversarialism that was as compatible with the continental notion of *une procédure contradictoire* as with the common law adversary trial. Defendants have to be guaranteed rights to legal representation, a right to be informed of all information relevant to the proceedings, a right to be present and to present arguments and evidence at trial. But this does not rule out considerable participation by judges in asking questions or even calling witnesses.

The Strasbourg authorities have not self-consciously tried to squeeze the Article 6 defence rights into a continental mould and imposed this across the contracting states. The one right that would seem to stretch the notion of *une procédure contradictoire* is the right to examine witnesses, expressly safeguarded in Article 6(3)(d). In a series of decisions beginning in 1986,[80] the European Court began to interpret Article 6(3)(d) to mean that convictions should not be substantially based upon the statements of witnesses whom the defence were unable to cross-examine. There would seem to be little doubt that these decisions, although not always consistent with one another,[81] were a major factor in some of the changes that began to take effect in a number of continental jurisdictions which were more firmly associated with the old inquisitorial tradition.[82] As a result of the *Kostovski* decision against the Netherlands, for example, in which the Court ruled that there was a breach of Article 6 where the conviction was based to a decisive extent on the statements of two anonymous witnesses who gave evidence in the absence of the accused, the Dutch Supreme Court was forced to retreat from earlier case law that had permitted the use of anonymous hearsay evidence.[83] In France the Court of Cassation held that Article 6(3)(d) requires the trial court to grant the defendant's request to summon and question a witness unless the witness is clearly unavailable, or his testimony would be irrelevant, or the accused has had an adequate opportunity to confront and question the witness in prior proceedings, or there is a serious risk of witness intimidation or retaliation.[84] The adversarial defence rights in Article 6 had a strong influence upon the Delmas-Marty Commission

79 Damaška, n 15 above, 561.

80 See eg *Unterpertinger* v *Austria* (1991) 13 EHRR 175, *Kostovski* v *Netherlands* (1990) 12 EHRR 434, *Windisch* v *Austria* (1991) 13 EHRR 281, *Delta* v *France* (1993) 16 EHRR 574.

81 Although the court has generally considered that cross-examination must be permitted where the evidence plays a substantial, or a decisive, or main part in the conviction, on occasions it has varied this standard, narrowing it at times to apply where the evidence is the only item of evidence (see eg *Asch* v *Austria* (1991) 15 EHRR 597 and *Artner* v *Austria* (1992) 242 Series A 3) and widening it in other cases to apply where the evidence has 'played a part' in the conviction (see eg *Ludi* v *Switzerland* (1993) 15 EHRR 173). See D. J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths, 1995) 212.

82 Nijboer has singled out Spain, France, Belgium and the Netherlands in this category: n 17 above, 311. See also M. Chiavario, 'The Rights of the Defendant and the Victim' in Delmas-Marty and Spencer, n 5 above, 548.

83 See P. T. C. van Kampen, *Expert Evidence Compared* (Leiden: E M Meijers Instittue, 1998) 105–06.

84 J. Pradel, 'France' in C. van den Wyngaert (ed), *Criminal Procedure Systems in the European Community* (London: Butterworths, 1993) 120.

which proposed that a list of basic principles should be placed at the head of a new code of criminal procedure and in reforms in 2000 the principle that criminal procedure should be fair and 'contradictoire' was given pride of place in the list of guiding principles.[85] In Italy the new code of criminal procedure in 1988 gave expression to these principles and Article 111 of the Italian Constitution was amended to provide that every trial should be based on giving the parties the right to offer counterproofs and counterarguments against unfavourable evidence (including *contradittorio tra le partii*) on an equal standing in front of an impartial judge.[86]

Although the European Court seems to have played a significant role in prompting these changes, it again fell short of prescribing the need for anything like a fully- fledged common law adversarial trial.[87] First of all, as we have seen, the Court has steered well clear of imposing any common law concepts on member states such as the notion of admissibility or hearsay. It has put much more emphasis on the *use* that is made of evidence than on the question of its admissibility as evidence. Thus in the first major decision on Article 6(3)(d) the Court stressed that in itself the reading out of statements cannot be regarded as inconsistent with Article 6 but the *use* made of the statements as evidence must nevertheless comply with the rights of the defence.[88]

Secondly, it would seem that it is not necessary for the right to examine witnesses to be exercised at the trial. In the *Kostovski* case the Court made it clear that the right to confrontation does not mean that in order to be used as evidence statements of witnesses should always be made at a public hearing:[89]

> to use as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs (3)(d) and (1) of Article 6, provided that the right of the defence has been respected.
>
> As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge a witness against him, either at the time the witness was making his statement *or at some later stage in the proceedings.*

This again is an illustration of accommodation towards a civil law approach which has been much more receptive towards the idea of reviewing evidence before the trial.[90] So long as opportunities exist for challenging witnesses before trial, the absence of an opportunity to examine these witnesses at trial is not fatal to compliance with Article 6 standards. This could pose difficulties for common law processes where there is no properly organised pre-trial phase of procedure

85 See V. Dervieux, 'The French System' in Delmas-Marty and Spencer, n 5 above, 218, 220–22.
86 A. Perrodet, 'The Italian System' in Delmas-Marty and Spencer, *ibid*, 348, 368–69.
87 J. R. Spencer, 'Introduction' in Delmas-Marty and Spencer, *ibid*, 45.
88 *Unterpertinger* v *Austria*, n 80 above at [31] (emphasis added).
89 n 80 above at [41] (emphasis added).
90 Note, however, that the German immediacy principle attempts to put a fetter on the use of derivative sources at trial by restricting the use of hearsay evidence when better sources of information are easily accessible. For an explanation of this principle, see M. R. Damaška, 'Of Hearsay and its Analogues' (1992) 76 *Minnesota Law Review* 425.

taking place under judicial control at which witnesses may be examined.[91] Where vital witnesses become unavailable at trial and there has been no pre-trial opportunity for cross-examination, the European jurisprudence suggests that prosecution cases may fail in the absence of other evidence against the accused.

Thirdly, not all witnesses need to be examined on the defence's request in order to meet the fair trial standards of Article 6. In some cases the Court would seem to have taken into account the difficulty in producing witnesses at the trial where they have gone missing or where the witnesses exercise their right not to testify.[92] In these instances the Court will look for any compensating safeguards which might include the fact that the witness has already been questioned by a judge or that the defence have had an opportunity to view the demeanour of the witness or an opportunity to cast doubt on the witness's credibility.[93] Whatever the compensating safeguards, however, the Court has tended to insist that the right to examination should be available where the testimony concerned constitutes the 'main',[94] 'decisive',[95] 'only'[96] or 'sole'[97] basis for the conviction.

This again implies that the European Court has construed the right as much to accommodate continental systems of justice as common law systems. Indeed it may be argued that it is common law judges rather than their civil law counterparts who are likely to have to change their perspective in the light of these standards. Judges in the common law tradition are used to ruling on the admissibility of evidence in a piecemeal, 'atomistic' manner, although once the prosecution case is completed, they have had a role in screening out weak cases before factual disputes are sent to the jury for decision. By contrast the European Court has considered that a much more 'holistic' approach needs to be taken towards the evidence by considering how decisive or substantial the unexamined witness evidence is to the case as a whole.[98] This requires that judges are in a position to make some assessment of the strength of the other evidence against the accused and it has been argued this is likely to bring about a considerable change of perspective and practice in the English criminal process.[99] It would seem to mark a shift away from the traditional focus on deciding on the admissibility of evidence on a piece by piece basis towards considering whether there is a sufficient basis under Article 6 for sending a case to the jury. Such judgments of sufficiency would require a much more probing assessment of the evidence as whole than the traditional approach taken at the end of the prosecution case, which has been to consider whether *on one possible view* of the facts there is evidence on which a jury could

91 J. R. Spencer, 'French and English Criminal Procedure: A Brief Comparison' in Markesinis, n 1 above, 33.

92 See, for example, *Asch* v *Austria* and *Artner* v *Austra*, n 81 above: see B. Emmerson and A. Ashworth, *Human Rights and Criminal Justice* (London: Sweet & Maxwell, 2000) para 5–115.

93 *Van Mechelen* v *Netherlands*, n 63 above at [62].

94 *Unterpertinger*, n 80 above at [33].

95 *Kostovski*, n 80 above at [44].

96 *Asch* v *Austira*, n 81 above at [30], *Artner* v *Austria*, n 81 above at [24].

97 *Saidi* v *France* (1994) 17 EHRR 251 at [44].

98 For the contrast between 'atomistic' and 'holistic' approaches to evidence, see M. Damaška, 'Atomistic and Holistic Evaluation of Evidence' in R. Clark (ed), *Comparative and Private International Law: Essays in Honour of John Merryman* (Berlin: Duncken and Humblot, 1990).

99 A. Ashworth, 'Article 6 and the Fairness of Trials' [1999] CrimLR 261, 272.

conclude that the defendant is guilty.[100] This in turn points towards a more active fact-finding role for the common law judge. The trial judge is there not just to referee a contest in the traditional common law mould, making atomistic rulings of evidence, but to take a more proactive and dominant role in the proceedings in deciding whether fairness requires that particular witnesses need to be examined.[101]

The upshot of all this is that the adversarial principle of defence examination of witnesses has been accommodated by the European Court to meet continental processes without too much disturbance. Although the right to examine witnesses would seem to have stretched the continental notion of *une procédure contradictoire* beyond its traditional boundaries, this right has not required any full scale transition towards a party-controlled trial. Indeed so great has been the accommodation that it may be argued that traditional common law approaches, so long associated with the adversarial right of cross-examination,[102] have been as much disturbed by the European Court's jurisprudence as civil law traditions. There are other respects as well in which it may be said that the 'adversarial' requirements that have been interpreted by the European Court as necessary in the light of Article 6 standards of fairness have stretched common law adversary traditions beyond their comfort zone.

We have seen that one of the conditions for meeting the principle of equality of arms is the right of the defence to have access to relevant information before the trial. This effectively predicates fairness at the trial upon fair disclosure before trial and once again elevates the significance of pre-trial procedures. In continental eyes the principle of disclosure of evidence through a shared dossier which is constructed by judicial or prosecutorial officials charged with gathering evidence, in favour as well as against the accused, is an essential condition to be met before the defence can have any chance of exercising 'adversarial rights' because there is no tradition of the defence having the resources to find evidence for itself.[103] But the notion of sharing information is not so easy to assimilate into the common law tradition with its emphasis on each side gathering and presenting 'its own' evidence. Although the Court has claimed that the requirement of fairness under Article 6 that the prosecution authorities disclose to the defence all material evidence for or against the accused is one which is recognised under English law,[104] this is not a principle that has been deeply embedded in the English tradition. It is true that the notion of inspecting the depositions on which the accused was to be committed for trial dates back to the nineteenth century,[105] but it has taken much longer for the principle of 'unused' prosecution material to be disclosed.[106] Even today the notion that evidence is used by one side or the other rather than shared is retained in the notion of two sides holding on to 'their' evidence unless required to

100 *R* v *Galbraith* [1981] 1 WLR 1039.
101 J. Jackson, 'The Impact of Human Rights on Judicial Decision Making' in Doran and Jackson, n 6 above, 109, 118.
102 J. H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford: Oxford University Press, 2003).
103 *Jespers* v *Belgium*, n 73 above, 87–88.
104 *Edwards* v *United Kingdom* (1993) 15 EHRR 417 at [36].
105 P. Devlin, *The Criminal Prosecution in England* (London: Oxford University Press, 1960) 6.
106 See *R* v *Ward* (1993) 1 WLR 619.

do so by rules of disclosure. Meanwhile English procedure has fallen foul of the European Court on issues of disclosure in a number of cases.[107] Disclosure is now governed by a statutory regime which determines what material needs to be disclosed by each side in a two stage process of disclosure.[108] But it has been pointed out that it falls short of European jurisprudence both in failing to require the prosecution to disclose all material evidence and in failing to provide the defence with recourse to judicial review at the first stage of prosecution disclosure.[109] Besides, the disclosure obligations only come into play at the stage when a case has been investigated. There is no obligation on the prosecution to disclose information while investigations are ongoing.[110]

TOWARDS CONVERGENCE OR REALIGNMENT?

It has been seen that traditional common law and civil law approaches to evidence have been challenged by some of the rulings of the Strasbourg authorities. The principle of equality of arms has required civil law countries to make a sharper differentiation between those exercising judicial functions and those exercising 'party' functions. The principle of an adversarial trial has also required such systems to give greater weight to defence rights to examine witnesses. Although some commentators have argued that this move towards adversarialism is promoting some sort of convergence between the two legal traditions, it is accepted that the European Court's idea of adversarial proceedings does not necessarily correspond in every respect with the notion as it is understood in common law countries. The Court itself did not set out with any presumption that the common law concept of a fair trial is superior to the civil law concept, or the latter superior to the former.[111] We have seen that the common law tradition has been equally discomforted by the 'adversarial' principle of open disclosure of material evidence. The Court has steered clear of imposing any abstract model of proof on contracting parties.[112] Instead, as we have seen, it has tried to 'translate' the principles in Article 6 in such a manner as to make them amenable to accommodation within both common law and civil law traditions.

It is tempting to see in this some sort of gradual convergence of party and court dominated procedures towards a mixed model of proof, more party-orientated than traditional continental criminal procedure but falling short of the party control exercised in the common law adversarial trial. But we would argue that rather than attempt to piece together the various strands of both traditions, borrowing from each tradition where possible to reach a compromise between the two, the

107 See, for example, *Rowe and Davis* v *United Kingdom*, n 80 above; *Atlan* v *United Kingdom* (2001) 19 June, *Edwards and Lewis* v *United Kingdom* (2003) Applic nos 39647/98 and 40461/98.

108 See Criminal Procedure and Investigations Act 1996.

109 S. D. Sharpe, 'Article 6 and the Disclosure of Evidence in Criminal Cases' [1999] *Criminal Law Review* 273. New changes to the regime enacted in the Criminal Justice Act 2003 will remedy some of these defects. See M. Redmayne, 'Criminal Justice Act 203: Disclosure and its Discontents' [2004] CrimLR 441, 444–445.

110 See Spencer, 'Evidence' in Delmas-Marty and Spencer, n 5 above, 594, 632.

111 Swart and Young, n 15 above, 86.

112 Chiavario, n 82 above, 542.

Court has developed its own distinctive brand of jurisprudence through the principles of the equality of arms and the right to an adversarial trial which is transforming rather than merely mixing together the two traditions. As explained, the notion of adversarialism is far removed from that which is evident in common law countries. Delmas-Marty has argued that the great lesson of the European jurisprudence is that *no* model of criminal procedure – accusatory, inquisitorial or mixed – has escaped censure by the Strasbourg tribunals.[113] Instead the Commission and Court have over the years developed a vision of participation in the decision-making of the justice system which is rooted both in common law principles of natural justice and due process and in what is known on the continent as *la theorie de la procédure contradictoire.* At the heart of this vision is what Delmas-Marty has called the 'contradictory debate' – the rejection, as she has put it, 'of revealed, uncontested truth replaced by facts which are contested and only then established as truths'.[114] Her own Commission in France went some way towards attempting to realise this ideal in practice when it recommended that defence lawyers be given enhanced rights of access to their clients in custody, access to the official dossier, a right of attendance at judicial hearings and the power to request investigative acts of the *juge d'instruction.*[115]

But if this vision is rooted in both common law and civil law traditions of criminal justice, the Court's jurisprudence has shown that it has not always been evident in the practice and procedure of national systems. In drawing attention to shortcomings in the procedures of national systems, the Court has had to develop its vision in a piecemeal fashion, case by case, proceeding on the basis, as the Court has done throughout its jurisprudence, that the Convention is a living instrument that requires adaptation as circumstances change. Nevertheless, it is possible to identify four broad strands in the development of its vision of defence participation in the criminal processes of proof that require to be accommodated within national systems. First, defendants cannot be required to participate in the proof process. Although Article 6 makes no mention of the privilege against self-incrimination, the Court made it clear in 1993 that the right of anyone charged with a criminal offence to remain silent and not contribute to incriminating himself flowed directly from Article 6 of the Convention.[116] At first glance it may seem that the principle of participation sits uneasily with a principle that permits defendants to refuse to participate. But if participation is viewed broadly as the right of the individual to choose to participate in the fact – finding process, then this must be compatible with a right to choose not to do so.[117] This does not mean, however, that in situations which clearly call for an explanation from the accused, accused

113 M. Delmas-Marty, 'Toward a European Model of the Criminal Trial' in M. Delmas-Marty (ed), *The Criminal Process and Human Rights: Towards a European Consciousness* (Dordrecht: Martinus Nijhoff, 1995) 191, 196. See also Fennell et al, n 13 above, 384.

114 *ibid*, 197.

115 For recent studies on how far these participatory principles are challenging and reforming pre-trial practice in France, see J. Hodgson, 'Constructing the Pre-trial Role of the Defence in French Criminal Procedure: An Adversarial Outsider in an Inquisitorial Process' (2002) 6 *International Journal of Evidence & Proof* 1; S. Field and A. West, 'Dialogue and the Inquisitorial Tradition: French Defence Lawyers in the Pre-trial Criminal Process' (2003) 14 *Criminal Law Forum* 261.

116 *Funke* v *France*, n 62 above.

117 Chiavario, n 82 above, 570.

persons should not be strongly encouraged to answer questions provided appropriate safeguards are put in place.[118] This analysis implies a second principle: that any participation must be on an informed basis. This would seem to require the assistance of counsel at pre-trial stages when the accused is being questioned, full disclosure of relevant information to the defence and the right to comment on the evidence.[119] Thirdly, the defence must be given an opportunity to challenge this evidence including, as we have seen, the right to examine decisive witnesses at some stage during the proceedings. Finally, the national courts must indicate with sufficient clarity the grounds on which they base their decisions. This requires some form of reasoned judgment which can be challenged by the defence.[120]

The Court has given states considerable leeway in translating these principles into national law in an attempt to accommodate established procedures within the two prevailing traditions. It may seem, for example, that jury trial offends against the principle of a reasoned judgment, but the Court has accepted that one way of compensating for the lack of a reasoned judgement is by a carefully framed direction from the judge.[121] It is also true that each principle in isolation may not measure up to the degree of participation permitted in one or other of the established traditions. For example, the right to examine witnesses in the adversarial tradition has not been confined only to decisive witnesses. By contrast, however, the second principle requiring informed defence participation before trial goes much further than traditional adversarial or inquisitorial procedure. Collectively, it may be said that the principles extend the boundaries of participation beyond those that have been traditionally permitted within each of the traditions and the established procedures have had to be realigned upon a more participatory footing.

It is no longer possible for proof processes to be dominated entirely by judicial inquiry but neither is it possible for them to be dominated entirely by a trial contest between partisan parties refereed by a passive judge. Instead defence participation has come to enable defendants to play an active role in the proof process throughout the course of the proceedings, with access to legal advice when suspects are being questioned and material evidence disclosed to the defence well before trial. This seems to call for more than just a realignment of procedures. It requires a change in legal culture on the part of public authorities. In the common law tradition judges have long had a responsibility to guarantee a fair trial but what is now required is a much more protective stance towards defendants on the part of those acting on behalf of public authorities – including police officers and prosecutors, as well as judges – throughout the criminal process. It requires those responsible for examining defendants in the preparatory phase of procedure to ensure that rights to legal access are safeguarded. In the course of criminal investigations it requires police and prosecutors to search for evidence, *à charge et*

118 *Murray* v *United Kingdom* (1996) 22 EHRR 29.

119 The precise parameters of the right of access to counsel before trial, like the right of silence, remain uncertain. Cf *Murray* v *United Kingdom, ibid, Brennan* v *United Kingdom* (2002) 34 EHRR 507; *Öcalan* v *Turkey* (2003) Application no 46221/99.

120 *Hadjianastassiou* v *Greece* (1993) 16 EHRR 219 at [33].

121 *Saric* v *Denmark* (1999) Applic no 31913/96.

à décharge, and then to share this information with the defence.[122] Then in the course of the trial itself prosecutors must consider whether to rely on evidence that has been tainted by coercion or illegality and judges must adopt a vigilant approach to ensure that convictions are not based substantially on unexamined or otherwise suspect evidence. Although all this requires a considerable change of culture on the part of public authorities, particularly where prosecutors and judges are unused to monitoring investigative activities,[123] it would also seem to entail a change of culture on the part of defence lawyers who have been accustomed within the common law tradition to focus their proof-gathering activities on the trial. Now they are obliged to represent their clients at earlier vital stages of the proof process and, with greater rights to disclosure, they are being encouraged to participate in this process at a much earlier stage.[124]

The culture change necessary to align procedures towards a participatory model of proof is not one that merely requires active protection of defence rights. Although the Court has been incrementally widening the scope of defence participation throughout its jurisprudence, in doing so it has also had to take cognisance of other Convention rights. One issue that has come to exercise the Court in recent years has been how to protect the interests of particularly vulnerable witnesses and victims in the course of criminal proceedings. In the landmark decision of *Doorson* v *Netherlands*[125] in 1996 the Court accepted that although Article 6(3)(d) guarantees the right of a defendant to examine or have examined witnesses against him, steps may be taken to limit this guarantee in the interests of witnesses where, for example, their life, liberty or security of person may be threatened or their interests affected within the ambit of Article 8. The Court concluded that contracting states should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled, issuing the following important statement:

> Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.[126]

This statement appears to require the interests of victims and witnesses to be built into the principles of fair trial. The Court is not suggesting that the principles of fair trial be balanced against other Convention rights. The principle of a fair trial remains absolute. However, the principles of fairness enshrined in Article 6 need

122 This has not traditionally been a requirement on the police conducting criminal investigations in the UK. However, the Code of Practice under the Criminal Procedure and Investigations Act 1996, s 23 (1) provides that the police are now expected 'to pursue all reasonable lines of inquiry, whether these point towards or away from the suspect' (para 3(4)).

123 In the UK prosecutors have been said to occupy a quasi-judicial role but this has fallen far short of becoming actively involved in monitoring criminal investigations: see S. Field, P. Alldridge and N. Jörg, 'Prosecutors, Examining Judges and Control of Police Investigations' in Fennell et al, n 13 above, 227; Brants and Field, n 13 above, 77; Jackson, n 41 above.

124 For the different role that defence lawyers play in the Netherlands and England and Wales, see Field, Alldridge and Jörg, *ibid*, 246–247.

125 (1997) 23 EHRR 330.

126 *ibid* at [70].

to take account of the interests of victims and witnesses as well as defendants. To date, whilst account must be taken of other Convention rights such as the right to life, liberty, security of the person and privacy, the Court has not directly considered that victims are entitled to any direct rights of participation in the criminal process.[127] Nonetheless, the effect of some of the decisions since *Doorson* has been to protect the ability of vulnerable witnesses to participate in the process of giving evidence without undue coercion on the part of the defence.

In *Doorson* itself the identity of two witnesses was withheld from the defence in a drugs case where there was concern about threats of violence being used against them. A number of counterbalancing safeguards had been established. Witnesses had been questioned in the presence of counsel by an investigating judge, and the defence were allowed to put certain questions to the witnesses. Consistent with its previous jurisprudence, however, the Court held that even when counterbalancing procedures were found to compensate the handicaps under which the defence had laboured, a conviction should not be based either wholly or to a decisive extent on anonymous witnesses.

Some more recent cases involving allegations of sexual abuse, however, would appear to have severely tested the principle that convictions should not be based on 'decisive' testimony, whether anonymous or not, that has not been examined by the defence.[128] Certain decisions have reiterated the principle that where a conviction is based solely or to a decisive degree on depositions made by a person whom the accused has had no opportunity to examine or have examined, the rights of the defence are restricted to an extent that is incompatible with the right to a fair trial.[129] But other decisions would appear to be weakening the principle. One approach involves apparently diluting the meaning of 'decisive evidence', accepting that the complainant's evidence is not decisive where there is some supporting evidence against the accused.[130] A more direct inroad into the principle was made, however, in *SN* v *Sweden*[131] when a conviction was based on the 'decisive' but unexamined evidence of a child. The child had been videotaped in the absence of the defence and although, on his request, the defendant's counsel was given an opportunity to attend a second interview with the child, in the event the defendant was not represented at this interview because counsel was unavailable. Instead, counsel agreed to the interview going ahead in his absence, and certain questions drafted by him were put to the child by the police. The Court considered that the criminal proceedings were fair and laid much store by the fact that counsel had been given an opportunity to attend an interview with the child before trial and that he was able to have questions put to the child. The Court appeared to be suggesting that defence rights are satisfied by counsel being

127 On the rights of victims within the European Convention on Human Rights, see J. Doak, 'The Victim and the Criminal Process: An Analysis of Recent Trends in Regional and International Tribunals' (2003) 23 *Legal Studies* 1; F. Leverick, 'What has the ECHR done for Victims? A United Kingdom Perspective' (2004) *International Review of Victimology* 177.

128 For recent commentary, see Summers, n 15 above.

129 See, eg., *AM* v *Italy* (1999), 14 December, *PS* v *Germany* (2003) 36 EHRR 61.

130 See, eg., *Verdam* v *Netherlands* (1999) Application no 35353/97, *NFB* v *Germany* (2001) Application no 37225/97.

131 (2004) 39 EHRR 13.

allowed to put questions indirectly to the witness. The two minority judges appeared to agree that the interests of minors may require that the principle of cross-examination can be 'left aside', but insisted that this should be possible only in cases where there is neutral corroborating evidence.[132] The authorities had not done everything that could have been done in this case to offset the risk of unfairness. One possible step that would in the dissentients' view have served as a counterbalancing procedure which would have compensated sufficiently the handicaps under which the defence laboured would have been to call for forensic psychology experts who could have helped in the assessment of the victim's behaviour and testimony.

The emphasis given to the needs of particularly vulnerable witnesses in the light of modern day concerns surrounding effective sexual abuse prosecutions is an example of Article 6 being interpreted as a living instrument. The Court would appear to have accepted that in these cases direct examination by counsel may not be appropriate. Its decisions have been criticised on the ground that the Court has succumbed to a zero sum calculation according to which safeguarding the interests of witnesses must mean diminishing the rights of the defence.[133] But the principle of the need for compensating safeguards, such as the involvement of independent experts in the assessment of witness evidence, has meant that the Court has not lightly sacrificed the rights of the defence. All this puts a heavy onus on public authorities to arbitrate fairly between the interests of witnesses and the interests of the defence. A culture of safeguarding witness and defence participation would seem to be required but this need not translate itself into common procedures across the European systems. On the contrary, the flexibility which the Court has given states to organise their procedures to meet the standards of fairness in Article 6 means that states are encouraged to think imaginatively of the various ways in which the rights of defendants and witnesses may be respected in their indigenous systems. This may require some significant modification to traditional approaches. The attendance of defence lawyers at pre-trial witness interviews in order that the demeanour of the witness may be observed and questions may be put indirectly, the pre-trial questioning of the witness by a judge and the involvement of court-appointed or independent forensic psychology experts are all procedures that are alien to the common law tradition. Yet it may be that these and other measures will have to be contemplated if the authorities wish to find ways of protecting particularly vulnerable witnesses from direct cross-examination.

Another area where imaginative solutions are called for would seem to be in cases where sensitive information needs to be kept away from the defence. The Court again would seem to have accepted that this is another area where strict defence participation rights may need to be qualified. In *Rowe and Davis* v *UK*[134] the Court considered that there were competing interests such as national security or the need to protect witnesses at risk of reprisals or to keep secret methods of

132 *ibid* (dissenting opinion of Judges Türmen and Maruste).
133 R. K. Kirst, 'Hearsay and the Right of Confrontation in the European Court of Human Rights' (2003) 21 *Quinnipiac Law Review* 777, 806–07.
134 n 78 above.

police investigation of crime which must be weighed against the rights of the accused. Once again, however, the Court applied the rule that any departures from the defence right to disclosure must be 'strictly necessary' and must be adequately compensated by other procedures.[135] In two other decisions handed down on the same day as *Rowe and Davis*,[136] the Court appeared to accept that it would be sufficient to submit the sensitive material to a judge at an *ex parte* hearing in order that the judge could rule on the issue of disclosure. In these cases, however, the information withheld played no part of the prosecution case and in two more recent cases the Court held that where the undisclosed evidence may have been taken into account by the judge on an issue of fact requiring his determination – such as, in these cases, allegations of entrapment – the procedures employed to determine issues of disclosure did not comply with the requirements to provide adversarial proceedings and equality of arms.[137] This would seem to increase the pressure on the UK to appoint special counsel in public interest immunity hearings, a procedure that jars with the principle that communications between counsel and client should be frank and open. The pressure to deal effectively and fairly with terrorist cases is prompting other practices alien to UK tradition to be considered, including the use of non-jury trials – already established in Northern Ireland – and even the appointment of an investigating judge to be responsible for gathering and evaluating evidence before trial.[138]

All this suggests that, as the European Court refines and develops its vision of participatory proof in the light of modern day conditions and takes criminal procedure beyond the traditional boundaries of adversarial/inquisitorial discourse, the European states are given considerable freedom of manoeuvre in realigning their procedures in a manner that respects the rights of the defence. This means that while countries may naturally try to hold on to procedural traditions indigenous to their system as best they can, they are encouraged to develop distinctive processes which diverge from the traditional norm for particular kinds of case. It follows that there may be considerable divergence in the manner in which the participatory principles developed by the Court are translated from one system to another and even from one category of case to another within the same system.

CONCLUSION

The debate on whether European systems of criminal proof are converging or diverging has continued to be dominated by 'adversarial' and 'inquisitorial' models of proof, with some suggesting that European models are converging towards an 'adversarial' model. The article began by attempting to identify what are the core 'adversarial' and 'inquisitorial' features of criminal proof and concluded that although it is not easy to find agreement on what these should be, the adversarial

135 *ibid* at [61].
136 See *Fitt* v *United Kingdom* (2000) EHRR 1; *Jasper* v *United Kingdom* (2000) EHRR 441.
137 *Edwards and Lewis* v *United Kingdom*, n 107 above.
138 See eg Privy Counsellor Review Committee, *Anti-Terrorism, Crime and Security Act 2001 Review: Report* (2004); House of Lords and House of Commons Joint Committee on Human Rights, *Review of Counter-Terrorism Powers* (2004), Eighteenth Report of the Session 2003–2004.

model would encompass one or more of the following characteristics: a high degree of party control over the fact-finding process, a concentrated and climactic trial, a heavy reliance on oral testimony, a bifurcated tribunal involving judge and jury and exclusionary rules of evidence. Through an analysis of the jurisprudence of the European Commission and Court the article went on to show that the Strasbourg institutions have been steadily developing a model of proof which requires none of these traditionally adversarial features to be adopted. Although the Court has referred to 'adversarial' rights, the model of proof that has been developed is better characterised as 'participatory' than as 'adversarial' or 'inquisitorial'. Contracting parties to the Convention are having to realign their processes and procedures, and indeed the attitudes of the professional actors concerned must adapt, to meet the standards of fairness that this model entails.

The Court is unable through its practice to impose any detailed evidentiary rules upon contracting parties, since it has always proceeded upon the basis that contracting parties should be given as much freedom as possible to organise their systems in order to meet the Convention standards of fairness. It is therefore unlikely that human rights law will lead to any clear convergence of evidentiary practices. On the contrary, it has been argued that we may witness further fragmentation of existing processes as particular countries adapt their procedures to meet the demands of fairness laid down by the Court. This is not to say that other external pressures of the kind mentioned at the beginning of this article, such as the need for transnational cooperation in the fight against crime and terrorism will not induce greater convergence, difficult as this may be to accomplish. So long as the present machinery of human rights protection continues in Europe, however, states will have to comply with the standards of fairness laid down by the Court. If the Court continues to evolve its jurisprudence towards the kind of participatory model described in this article, this will mean that any convergence that is achieved will have to meet the participatory standards of proof required by this model.