INQUISITORIAL AND ADVERSARIAL EXPERT EXAMINATIONS IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

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ABSTRACT

The administration of criminal justice may require specific scientific or technical knowledge, for which experts are asked to provide advice to criminal courts. This article addresses the approach by the European Court of Human Rights to the input of expert evidence in domestic criminal proceedings. Two models, an inquisitorial model and an adversarial model of criminal justice, are identified and employed as a framework to analyse the case law. The article further elaborates on the use of these models, the sets of procedural requirements linked to both models, and the interference between them, providing insights capable of improving the gathering and use of technical and scientific information.

Keywords: defence participation; expert examinations; evidence; inquisitorial and adversial model

1. INTRODUCTION

Criminal investigations do not solely relate to human conduct that can easily be assessed by laymen. Quite often, scientific and technical issues must be assessed by courts of law, consisting of laymen vis-à-vis the issue at hand. In order to resolve such a gap of knowledge and expertise, expert advice is called in during criminal proceedings. Such expert evidence can originate in physical analyses, technical sciences and social sciences.[1] Deliberately, this enumeration does not mention legal

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1 W. De Bondt and G. Vermeulen, 'Free movement of scientific expert evidence in criminal matters', in M. Cools, B. De Ruyver *et al.* (eds.), *EU Criminal Justice, Financial and Economic Crime*, Antwerp, Maklu, 2011, (69) 73.

information since this would not pertain to a technical field outside of the courts' knowledge.[2]

The way scientific and technical evidence is gathered, processed and presented, may not be neutral. Discussions can arise as to the methodology of the expert and the accuracy and interpretation of his or her findings. How such discussions are being dealt with varies according to the criminal justice system in which these discussions are raised. Nevertheless, it should be clear that the same human rights standards concerning the right to a fair trial must be met throughout the territory of the Council of Europe. This article analyses how the European Court of Human Rights (ECtHR) applies the fair trial standard to the variety of criminal justice systems in Europe. Which procedural requirements must be guaranteed and how can this be organised in the optimum way? In the second section of this article a framework for better comprehension will be introduced, based on the inquisitorial and the adversarial models of criminal justice. These concepts are subsequently applied to the addition of scientific of technical information in the third section concerning inquisitorial and adversarial expert evidence. This article will set out that both approaches are allowed, but at the same time that each calls for a different set of procedural requirements. The dynamics between both approaches will be explored as well. The fourth section then focusses on the fair trial requirements related to the use of expert evidence, covering the adducing and testing of such evidence, while the concept of inquisitorial forum-separation is proposed in the fifth section.

2. FRAMEWORK: INQUISITORIAL AND ADVERSARIAL MODELS

In order to get to a better understanding of the approach of the ECtHR in criminal law, it is useful to establish a theoretical framework. The framework I will employ in this paper consists of two elements, or two theoretical models of criminal justice systems. I will interpret the case law of the ECtHR with reference to a continuum with the inquisitorial model at one end, and the adversarial model on the other. Certainly, the use of these two models is hardly innovative. Both models are often used, yet seldom are they precisely defined or operationalised. In this paragraph, I will set out what I mean, when making reference to both concepts: the inquisitorial model of criminal justice and the adversarial model.

First of all, it is necessary to point out that both concepts are merely theoretical models, and not national legal systems. This is relevant for two reasons. In the first

2 ECtHR 8 August 2006, *Eskelinen / Finland*, §§33–35; A. Jacobs, 'L'arrêt Cottin c. Belgique ou l'irrestible marche vers l'expertise contradictoire en matière pénale', *RTDH* 2007, Issue 69, (215) 218; T. Decaigny, *Tegenspraak in het vooronderzoek. Een onderzoek naar de meerwaarde van een vroege participatie van de verdachte in de Belgische strafprocedure*, Antwerp, Intersentia, 2013, 531, fn 2497; Also see: ECtHR 25 July 2013, *Khodorkovskiy and Lebedev / Russia*, §722.

place, it emphasises that the analysis provided hereinafter constitutes a theoretical reflection rather than a comparative research. At some points, reference will be made to contemporary national systems, yet those examples should not be confused with the main line of reasoning to be developed. Secondly, employing theoretical models implies some degree of operationalisation. There is no indisputable, ontological meaning of both the inquisitorial and the adversarial model. A scholar availing himself of these concepts defines to some degree the boundaries of these concepts. This being said, no scholar can ignore the existing consensus regarding the essence of these concepts.

Before exploring the main and secondary features of the adversarial and the inquisitorial models, let us consider the context of both models. A (criminal) justice system is not completely abstract, but is always rooted within some political, ideological, philosophical and socio-economic context.[3] At the same time, a caveat must be issued. Too much emphasis on the legal context might involuntarily lead one to take assumptions into consideration that are not inextricably linked to the adversarial or the inquisitorial model. This certainly is the case for the latter, being terminologically infected by its historical connotation.[4] Labelling a criminal justice system "inquisitorial" may provoke images of medieval trials with extracted confessions, torture, religious prosecutions and – more generally – a lack of due process.[5] In order to avoid this connotation, I will introduce a terminological clarification and distinction. A criminal justice system used and – possibly – abused in an authoritarian state can be called an *authoritarian inquisitorial system*, in order to stress the distinction to be made with an inquisitorial criminal justice system in a democratic state. Such a criminal justice procedure could be labelled as a *rule of law based inquisitorial system* or as a *liberal inquisitorial system*.[6] Reference hereinafter to an inquisitorial system will be confined to the latter.

An inquisitorial system of criminal justice thrives well in societies with a strong state structure. Civilians trust the state authorities to take up tasks states are better

3 M. Damaška, *The Faces of Justice and State Authority. A Comparative Approach to the Legal Process*, London, Yale University Press, 1986, 247 p.; B.M. Zupancic, 'The Crown and the Criminal: the Privilege against Self-Incrimination – Towards General Principles of Criminal Procedure', *Nothingham Law Journal* (1996), 32; B. De Smet, *De hervorming van het strafrechtelijk vooronderzoek in België*, Antwerp, Intersentia 1996, 255–257; E. Prakken, 'Legitieme strafvordering', *Delikt and Delinkwent* 2001, vol. 31, Issue 10, 1035; S. Gutwirth and P. De Hert, 'Een theoretische onderbouw voor een legitiem strafproces', *Delikt and Delinkwent* 2001,Vol. 31, Issue 10, 1086; C.H. Brants, 'Strafrechtsvergelijking', *Delikt and Delinkwent* 2008, issue 16, 217.

4 M. Damaška, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study', *University of Pennsylvania Law Review* (1973), http://digitalcommons.law.yale.edu/fss_papers/1591, (506) 557–558.

5 N. Jörg, S. Field and C.H. Brants, 'Are Inquisitorial and Adversarial Systems Converging' in P. Fennell, C. Harding, N. Jörg and B. Swart (eds.), *Criminal Justice in Europe. A Comparative Study*, Oxford, Clarendon Press, 1995, (41) 42.

6 T. Decaigny, *Tegenspraak in het vooronderzoek. Een onderzoek naar de meerwaarde van een vroege participatie van de verdachte in de Belgische strafprocedure*, Antwerp, Intersentia, 2013, 22–23, nr. 3; T. Decaigny and P. De Hert, 'You can change the color of your hair, not your hair. Converging is

equipped for. On the other hand, the legal context of the adversarial model is determined by a certain distrust by the individual in state intervention. This liberal approach implies a minimal role for the state in truth-finding and hence a maximal autonomy of the individual.[7] This distinction is very closely linked to the main distinction between the inquisitorial and the adversarial model.

Damaška wrote in 1986 that only the essential meaning of the opposition between the inquisitorial and the adversarial model has a reasonable certainty. '*The adversarial mode of proceedings takes its shape from a contest or a dispute: it unfolds as an engagement of two adversaries before a relatively passive decision maker whose principal duty is to reach a verdict. The non-adversarial [or inquisitorial] mode is structured as an official inquiry. Under the first system, the two adversaries take charge of most procedural action; under the second, officials perform most activities*'.[8] Hence, the key distinctive feature is the structure of the criminal process. The adversarial criminal justice system is horizontal and party-driven; the inquisitorial criminal process is vertical and authority-led.

Adjudication in an adversarial criminal justice system is a dialectical process, based on the confrontation of partisan arguments and claims.[9] Parties monopolise and control the content and the boundaries of the trial[10] while on the other hand the role of the State official is restricted to one of an arbitrator, a passive judge and/or jury. This horizontal structure requires both parties (prosecution and defence) to conduct their own investigation, of which the result is presented in court, where the dialectical process is held in front of an arbitrator.

The inquisitorial criminal procedure on the other hand, is initiated and conducted by non-partisan officials. The parties have no role, or at least no decisive roles in this model of investigation and adjudication. On the contrary, the parties cannot choose, not even by consensus, to renounce the criminal procedure. Such – typically adversarial – renunciations would consist of a plea bargain, or a similar process. Only one preliminary investigation is being conducted by a non-partisan

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what inquisitorial and adversarial systems rarely do' in C. Kelk, R. Koenraadt and D. Siegel (eds.), *Veelzijdige gedachten. Liber amicorum prof. dr. Chrisje Brants*, Den Haag, Boom Lemma, 2013, (235) 237.

7 For more elaborate details and with references: T. Decaigny, *Tegenspraak in het vooronderzoek. Een onderzoek naar de meerwaarde van een vroege participatie van de verdachte in de Belgische strafprocedure*, Antwerp, Intersentia, 2013, 25, nr. 6.

8 M. Damaška, *The Faces of Justice and State Authority. A Comparative Approach to the Legal Process*, London, Yale University Press, 1986, 3.

9 N. Jörg, S. Field and C.H. Brants, 'Are Inquisitorial and Adversarial Systems Converging' in P. Fennell, C. Harding, N. Jörg and B. Swart (eds.), *Criminal Justice in Europe. A Comparative Study*, Oxford, Clarendon Press, 1995, (41) 42.

10 E. Grande, 'Dances of Criminal Justice: Thoughts on Systemic Differences and the Search for the Truth' in J. Jackson, M. Langer and P. Tillers (eds.), *Crime, Procedure and Evidence in a Comparative and International Context. Essays in Honour of Professor Mirjan Damaška*, Oxford, Hart Publishing 2008, 145.

state official. Parties are regarded as lacking the required neutrality to be able to conduct an investigation of which the results would be sufficiently reliable. All the information that has been collected in the course of the preliminary investigation is gathered in a case file, and this file makes up the central source of information for the court hearing.[11]

Apart from the key distinction noted above between the inquisitorial and the adversarial trial, multiple secondary features can be found, yet only the distinctive features that are most relevant for an analysis of expert examinations will be discussed here.[12] One aspect however is not merely a feature, but also a requirement linked to the more inquisitorial or more adversarial nature of the criminal justice system. I will elaborate on this requirement, the question of which procedural safeguards are necessary.

Determining which of the procedural safeguards are paramount in a criminal justice system depends on the place that the criminal justice system has on the continuum as determined by the inquisitorial and the adversarial system on opposite ends. The focus on the contest and confrontation in the adversarial model requires various procedural safeguards that ensure that all parties get a fair chance to present and contest arguments. A system based on the idea of the clash of arguments needs to provide for an arena where this clash can be held in a fair way. In other words, the equality of arms is the most crucial procedural safeguard in an adversarial system.[13] There will be no fair adversarial procedure if parties do not have the chance to effectively take part in all relevant steps of the procedure.

In an inquisitorial criminal justice system, procedural guarantees serve a different conceptual logic. This is not to say that no equality of arms is required, but a conceptual priority has to be given to requirements concerning the 'quality' of the non-partisan state official. State officials play crucial roles, both as investigators and as triers of fact. State officials are introduced into the criminal system because the parties themselves are too much involved, so no neutral investigation is thought to be possible. This logic

11 B. De Smet, *Internationale samenwerking in strafzaken tussen Angelsaksische en continentale landen*, Antwerp, Intersentia 1999, 21–23; B. De Smet, *De hervorming van het strafrechtelijk vooronderzoek in België*, Antwerp, Intersentia 1996, 21–23; J. Hodgson, 'Conceptions of the trial in inquisitorial and adversarial procedure,' in A. Duff, L. Farmer, S. Marshall and V. Tadros (eds.), *The trial on trial. Judgment and calling to account*, Oxford, Hart Publishing 2006, 223–242; T. Decaigny and P. De Hert, 'You can change the color of your hair, not your hair. Converging is what inquisitorial and adversarial systems rarely do' in C. Kelk, R. Koenraadt and D. Siegel (eds.), *Veelzijdige gedachten. Liber amicorum prof. dr. Chrisje Brants*, Den Haag, Boom Lemma, 2013, (235) 238–239.

12 See, more extensively: T. Decaigny, *Tegenspraak in het vooronderzoek. Een onderzoek naar de meerwaarde van een vroege participatie van de verdachte in de Belgische strafprocedure*, Antwerp, Intersentia, 2013, 31–40.

13 A.C. 't Hart, 'Inquisitoir of accusatoir. Een maatstaf voor de positie van de bekennende verdachte', in M. Hildebrandt, P.T.C. van Kampen, J.F. Nijboer and H. Wiersinga (eds.), *Een afzonderlijke procedure voor de bekennende verdachte?*, Arnhem, Gouda Quint 1993, (39) 43; C.H. Brants, 'Strafrechtsvergelijking', *Delikt and Delinkwent* 2008, issue 16, (214) 234.

necessitates that state officials be objective, neutral and impartial. They also need to be competent and independent.[14] A logical consequence as well as an additional safeguard is that all relevant information gathered in the official inquisitorial inquiry is shared with all parties involved. Since parties are in no position to conduct the investigation themselves, full transparency of the state investigation needs to be provided.

In addition to these core features, a liberal inquisitorial model also needs to add, expressly, individual fundamental rights to its catalogue, in order to compensate for the State's display of power in investigative and information-gathering activities (inclusively as a matter of *due process*).[15] Conceptually of secondary importance, this approach preserves the equality of arms needed to be put in place in an inquisitorial system as well, just as much as the integrity, competence, impartiality and independence of the trier of fact are also necessary in the adversarial system.

3. INQUISITORIAL AND ADVERSARIAL EXPERT EVIDENCE

3.1. INQUISITORIAL EXPERT EVIDENCE

The ECtHR attaches implicit, yet significant weight to an inquisitorial approach in the gathering of scientific knowledge through the assistance of experts. Two cases originating in the European country with the most strictly regulated forensic expertise, Austria,[16] provide this insight. In the 1985 *Bönisch* case the ECtHR found, as stressed by the Austrian government, that the expert was appointed by a Court and thus was '*formally invested with the function of a neutral and impartial auxiliary of the court*'.[17] Immediately, the ECtHR points out the consequence of this finding: *[b]y*

14 N. Jörg, S. Field and C.H. Brants, 'Are Inquisitorial and Adversarial Systems Converging?' in P. Fennell, C. Harding, N. Jörg and B. Swart (eds.), *Criminal Justice in Europe. A Comparative Study*, Oxford, Clarendon Press, 1995, (41) 43; B. De Smet, *De hervorming van het strafrechtelijk vooronderzoek in België*, Antwerp, Intersentia 1996, 20–21; W.F. van Hattum, *Non bis in idem. De ontwikkeling van een beginsel*, Nijmegen, Wolf 2012, 104.

15 L.L. Weinreb, 'Commentary on professor Herrmann's "The philosophy of criminal justice and the administration of criminal justice",' *Revue Internationale de Droit Pénal* (1982), vol. 53, 864; J. Jackson, 'Autonomy and accuracy in the development of fair trial rights', University College Dublin Law Research Paper No. 09/2009. Available at SSRN: http://ssrn.com/abstract=1407968, 4; T. Decaigny and P. De Hert, 'You can change the color of your hair, not your hair. Converging is what inquisitorial and adversarial systems rarely do' in C. Kelk, R. Koenraadt and D. Siegel (eds.), *Veelzijdige gedachten. Liber amicorum prof. dr. Chrisje Brants*, Den Haag, Boom Lemma, 2013, (235) 242.

16 L.E.M.P. Jakobs and W.J.J.M. Sprangers, 'A European View on Forensic Expertise and Counter-Expertise', in J.F. Nijboer and W.J.J.M. Sprangers (eds.), *Harmonisation in Forensic Expertise. An inquiry into the Desirability of and Opportunities for International Standards*, Amsterdam, Thela Thesis, 2000, (213) 220–221; I will not elaborate on a third Austrian case in this matter (*Brandstetter*, 28 August 1991), because in my opinion it does not provide additional information.

17 ECtHR 6 May 1985, *Bönisch / Austria*, §33.

reason of this, his statements must have carried a greater weight than those of an "expert witness" called (...) by the accused'.[18] Almost three decades later, in the case of *C.B. v. Austria*, the ECtHR found that the official expert whose report gave rise to a complaint in Strasbourg, had been appointed by the court and not by the public prosecutor. As a consequence, the ECtHR rules, '*the court-appointed expert must be considered not as appearing for one of the parties to the proceedings, but as an independent expert supporting the court in questions that the court – and its judges – was not able to answer for itself*'.[19]

These findings indicate that the ECtHR approves the use of a non-partisan expert. Moreover, the ECtHR considers the use of neutral and impartial – thus *inquisitorial* – experts to be more influential than experts appointed by one of the parties.

At the same time, the use of such inquisitorial experts does imply that supporting inquisitorial fair trial requirements must be met. The Austrian cases of *Bönisch* and *C.B.* clearly illustrate this, Article 6 of the ECHR having been violated in the former but not in the latter case. The main reason for the breach of the fair trial rights in the *Bönisch* case is to be found in the core requirements of an inquisitorial expert. Though formally neutral and impartial, this aspect was in doubt in this case. The ECtHR imposes a burden on the inquisitorial expert, comparable to the burden imposed on judges.[20] In this case the burden concerning the neutrality and impartiality was not met because the expert was the Director of the Federal Food Control Institute whose report had actually set the criminal proceedings in motion.[21]

In itself, the finding that an appointed expert does not meet the inquisitorial requirements of neutrality does not imply a violation of fair trial rights, but rather that a different set of procedural requirements comes into play. I will elaborate on this below.

3.2. ADVERSARIAL EXPERT EVIDENCE

Under the previous title, I stated with reference to the ECtHR's case law that an inquisitorial approach to gathering scientific expert evidence is permitted. This does not exclude the possibility of an adversarial approach.

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18 *Ibid.*

19 ECtHR 4 April 2013, *C.B. / Austria*, §42.

20 P. van Kampen, 'Confronting Expert Evidence under the European Convention', in J.F. Nijboer and W.J.J.M. Sprangers (eds.), *Harmonisation in Forensic Expertise. An inquiry into the Desirability of and Opportunities for International Standards*, Amsterdam, Thela Thesis, 2000, (183) 191.

21 ECtHR 6 May 1985, *Bönisch / Austria*, §§8, 10 and 31; On top of this, the Director of the Institute as a formally court-appointed expert, was able to play a crucial role in the trial proceedings. As opposed to van Kampen, I do not consider this element – though relevant – to be decisive in this phase of the reasoning (ECtHR 6 May 1985, *Bönisch / Austria*, §33; P. van Kampen, 'Confronting Expert Evidence under the European Convention', in J.F. Nijboer and W.J.J.M. Sprangers (eds.), *Harmonisation in Forensic Expertise. An inquiry into the Desirability of and Opportunities for International Standards*, Amsterdam, Thela Thesis, 2000, (183) 190–191.

The inquisitorial approach means that an expert is court-appointed and that this expert must meet requirements similar to the requirements imposed on a judge. The adversarial approach on the other hand conceptually entails that the expert does not serve a joint, objective, goal, but instead works according to a partisan logic. Terminologically one might distinguish the inquisitorial 'court-appointed expert' from an adversarial 'partisan expert'. The inquisitorial criminal procedure consists of one, presumed objective, inquiry, whereas the adversarial criminal procedure is rooted in two (or more) party-driven preliminary investigations. Applying this theory to the gathering of expert information, the adversarial context requires each party to be capable of obtaining and producing its own expert opinions.

4. TWO FAIR TRIAL REQUIREMENTS CONCERNING EXPERT EVIDENCE

Two procedural safeguards must be put in place in order to guarantee fair trial rights here. *First*, as a matter of equality of arms, each party must be in a position to gather expert information. *Secondly*, a sufficient possibility must be provided to challenge the validity of the expert opinions produced by another party. These safeguards will be elaborated upon here. The first subsection covers the former right, the next two subsections deal with the latter, from an inquisitorial and an adversarial vantage point.

4.1. ADDUCING EXPERT EVIDENCE

In an adversarial preliminary investigation, the prosecution unilaterally obtains expert reports. The defence cannot participate in any way in such an expert examination. Hence the role of the defence is limited to challenging the expert conclusions afterwards and the equality of arms requirement implies that the defence must have an opportunity to conduct an active defence.[22] Applied to the adversarial gathering of expert information, this requirement implies, as a matter of principle, that the defence can obtain an alternative expert examination.[23] Such alternative expert examination may be performed by an alternative expert appointed by the court at the request of the defence,[24] or by an expert appointed directly by the defence. The latter possibility is only a valid one, if the domestic proceedings subsequently allow the expert findings to be regarded as equally valuable evidence. In the case of

22 ECtHR 25 July 2013, *Khodorkovskiy and Lebedev / Russia*, §728.

23 ECtHR 5 April 2007, *Stoimenov / FYR Macedonia*, §41–42; in this paper, only the procedural position of expert evidence is examined. Another relevant aspect concerns the use of quality standards concerning experts, for which a list or register is often used (see B.F. Keulen, H.K. Elzinga, N.J.M. Kwakman and J.A. Nijboer, *Het deskundigenregister in strafzaken. De beoogde werking, mogelijke neveneffecten en risico's*, Groningen, WODC, 2012, 383).

24 *Ibid.*

Khodorkovskiy and Lebedev, the domestic Russian courts made a clear distinction between the 'experts', called in by the prosecution and providing incriminating elements on one hand, and the 'specialists' involved at the request of the defence on the other. Such a distinction, and the different procedural rules attached to both roles brought the ECtHR to the conclusion that an imbalance of power was created between the defence and the prosecution, amounting to a violation of Articles 6.1 and 6.3.d ECHR.[25]

The right to obtain an alternative expert examination, however, is not an absolute right. When assessing the relative weight that needs to be attached to this right, this right needs to be *'counterbalanced by the interests of proper administration of justice'*.[26] This way, the ECtHR refers to the overall fairness of a criminal case, taking into consideration *'the proceedings as a whole'*. This holistic approach is applied to a large extent within the Court's fair trial case law, especially regarding the admissibility of evidence.[27] This non-absolute right creates a margin of appreciation and allows for a number of factors to be taken into consideration such as (a) whether or not the expert information is crucial to the decision the court has to make,[28] (b) whether serious doubts arise concerning the reliability of the available expert information,[29] (c) what interests, especially what possible penalties, are at stake,[30] and (d) whether the execution of a new expert examination is in fact feasible and possible. Notwithstanding the relative approach the ECtHR uses, a violation of the equality of arms has been found in a considerable number of cases. For instance in the *Stoimenov* case, the expert input could not be regarded as objective, and arguments were raised that put the expert report on the content of narcotics in doubt. The refusal to adequately address the repeated requests for an alternative expert examination resulted in the ECtHR concluding that Article 6 ECHR had been violated.[31] In *Khodorkovskiy and Lebedev* a similar breach was found, because the defence was unable to obtain a fresh expert examination on specific economic and fiscal items. The experts (specialists)

25 ECtHR 25 July 2013, *Khodorkovskiy and Lebedev / Russia*, §§734–735.

26 ECtHR 11 December 2008, *Mirilashvili / Russia*, §§189–190.

27 S. Trechsel, *Human Rights in Criminal Proceedings*, Oxford, University Press, 2005, 86–88.

28 A. Jacobs, 'L'arrêt Cottin c. Belgique ou l'irrésistible marche vers l'expertise contradictoire en matière pénale', (215) 218; S.E. Jebens, 'Illegally Obtained Evidence in Criminal Cases. An Analysis on the Basis of Three Grand Chamber Judgments' in D. Spielmann, M. Tsirli en P. Voyatis (eds.), *La Convention européenne des droits de l'homme, un instrument vivant: mélanges en l'honneur de Christos L. Rozakis. The European Convention on Human Rights, a living instrument: essays in honour of Christos L. Rozakis*, Brussel, Bruylant, 2011, (219) 229; ECtHR 18 March 1997, *Mantovanelli / France*, §33–34; ECtHR 2 June 2005, *Cottin / Belgium*, §30; ECtHR (GC) 15 December 2011, *Al-Khawaja and Tahery / UK*.

29 ECtHR 5 April 2007, *Stoimenov / FYR Macedonia*, §42; *mutatis mutandis* ECtHR (GC) 10 March 2009, Bykov / Russia, §90.

30 ECtHR (GC) 27 November 2008, *Salduz / Turkey*, §54 (*... These principles are particularly called for in the case of serious charges, for it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies*).

31 ECtHR 5 April 2007, Stoimenov / FYR Macedonia, §39–43.

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26 ECtHR 11 December 2008, *Mirilashvili / Russia*, §§189–190.

27 S. Trechsel, *Human Rights in Criminal Proceedings*, Oxford, University Press, 2005, 86–88.

28 A. Jacobs, 'L'arrêt Cottin c. Belgique ou l'irrésistible marche vers l'expertise contradictoire en matière pénale', (215) 218; S.E. Jebens, 'Illegally Obtained Evidence in Criminal Cases. An Analysis on the Basis of Three Grand Chamber Judgments' in D. Spielmann, M. Tsirli en P. Voyatis (eds.), *La Convention européenne des droits de l'homme, un instrument vivant: mélanges en l'honneur de Christos L. Rozakis. The European Convention on Human Rights, a living instrument: essays in honour of Christos L. Rozakis*, Brussel, Bruylant, 2011, (219) 229; ECtHR 18 March 1997, *Mantovanelli / France*, §33–34; ECtHR 2 June 2005, *Cottin / Belgium*, §30; ECtHR (GC) 15 December 2011, *Al-Khawaja and Tahery / UK*.

29 ECtHR 5 April 2007, *Stoimenov / FYR Macedonia*, §42; *mutatis mutandis* ECtHR (GC) 10 March 2009, Bykov / Russia, §90.

30 ECtHR (GC) 27 November 2008, *Salduz / Turkey*, §54 (... *These principles are particularly called for in the case of serious charges, for it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies*).

31 ECtHR 5 April 2007, Stoimenov / FYR Macedonia, §39–43.

The inquisitorial approach means that an expert is court-appointed and that this expert must meet requirements similar to the requirements imposed on a judge. The adversarial approach on the other hand conceptually entails that the expert does not serve a joint, objective, goal, but instead works according to a partisan logic. Terminologically one might distinguish the inquisitorial 'court-appointed expert' from an adversarial 'partisan expert'. The inquisitorial criminal procedure consists of one, presumed objective, inquiry, whereas the adversarial criminal procedure is rooted in two (or more) party-driven preliminary investigations. Applying this theory to the gathering of expert information, the adversarial context requires each party to be capable of obtaining and producing its own expert opinions.

4. TWO FAIR TRIAL REQUIREMENTS CONCERNING EXPERT EVIDENCE

Two procedural safeguards must be put in place in order to guarantee fair trial rights here. *First*, as a matter of equality of arms, each party must be in a position to gather expert information. *Secondly*, a sufficient possibility must be provided to challenge the validity of the expert opinions produced by another party. These safeguards will be elaborated upon here. The first subsection covers the former right, the next two subsections deal with the latter, from an inquisitorial and an adversarial vantage point.

4.1. ADDUCING EXPERT EVIDENCE

In an adversarial preliminary investigation, the prosecution unilaterally obtains expert reports. The defence cannot participate in any way in such an expert examination. Hence the role of the defence is limited to challenging the expert conclusions afterwards and the equality of arms requirement implies that the defence must have an opportunity to conduct an active defence.[22] Applied to the adversarial gathering of expert information, this requirement implies, as a matter of principle, that the defence can obtain an alternative expert examination.[23] Such alternative expert examination may be performed by an alternative expert appointed by the court at the request of the defence,[24] or by an expert appointed directly by the defence. The latter possibility is only a valid one, if the domestic proceedings subsequently allow the expert findings to be regarded as equally valuable evidence. In the case of

22 ECtHR 25 July 2013, *Khodorkovskiy and Lebedev / Russia*, §728.

23 ECtHR 5 April 2007, *Stoimenov / FYR Macedonia*, §41–42; in this paper, only the procedural position of expert evidence is examined. Another relevant aspect concerns the use of quality standards concerning experts, for which a list or register is often used (see B.F. Keulen, H.K. Elzinga, N.J.M. Kwakman and J.A. Nijboer, *Het deskundigenregister in strafzaken. De beoogde werking, mogelijke neveneffecten en risico's*, Groningen, WODC, 2012, 383).

24 *Ibid.*

Khodorkovskiy and Lebedev, the domestic Russian courts made a clear distinction between the 'experts', called in by the prosecution and providing incriminating elements on one hand, and the 'specialists' involved at the request of the defence on the other. Such a distinction, and the different procedural rules attached to both roles brought the ECtHR to the conclusion that an imbalance of power was created between the defence and the prosecution, amounting to a violation of Articles 6.1 and 6.3.d ECHR.[25]

The right to obtain an alternative expert examination, however, is not an absolute right. When assessing the relative weight that needs to be attached to this right, this right needs to be '*counterbalanced by the interests of proper administration of justice*'.[26] This way, the ECtHR refers to the overall fairness of a criminal case, taking into consideration '*the proceedings as a whole*'. This holistic approach is applied to a large extent within the Court's fair trial case law, especially regarding the admissibility of evidence.[27] This non-absolute right creates a margin of appreciation and allows for a number of factors to be taken into consideration such as (a) whether or not the expert information is crucial to the decision the court has to make,[28] (b) whether serious doubts arise concerning the reliability of the available expert information,[29] (c) what interests, especially what possible penalties, are at stake,[30] and (d) whether the execution of a new expert examination is in fact feasible and possible. Notwithstanding the relative approach the ECtHR uses, a violation of the equality of arms has been found in a considerable number of cases. For instance in the *Stoimenov* case, the expert input could not be regarded as objective, and arguments were raised that put the expert report on the content of narcotics in doubt. The refusal to adequately address the repeated requests for an alternative expert examination resulted in the ECtHR concluding that Article 6 ECHR had been violated.[31] In *Khodorkovskiy and Lebedev* a similar breach was found, because the defence was unable to obtain a fresh expert examination on specific economic and fiscal items. The experts (specialists)

25 ECtHR 25 July 2013, *Khodorkovskiy and Lebedev / Russia*, §§734–735.

26 ECtHR 11 December 2008, *Mirilashvili / Russia*, §§189–190.

27 S. Trechsel, *Human Rights in Criminal Proceedings*, Oxford, University Press, 2005, 86–88.

28 A. Jacobs, 'L'arrêt Cottin c. Belgique ou l'irrésistible marche vers l'expertise contradictoire en matière pénale', (215) 218; S.E. Jebens, 'Illegally Obtained Evidence in Criminal Cases. An Analysis on the Basis of Three Grand Chamber Judgments' in D. Spielmann, M. Tsirli en P. Voyatis (eds.), *La Convention européenne des droits de l'homme, un instrument vivant: mélanges en l'honneur de Christos L. Rozakis. The European Convention on Human Rights, a living instrument: essays in honour of Christos L. Rozakis*, Brussel, Bruylant, 2011, (219) 229; ECtHR 18 March 1997, *Mantovanelli / France*, §33–34; ECtHR 2 June 2005, *Cottin / Belgium*, §30; ECtHR (GC) 15 December 2011, *Al-Khawaja and Tahery / UK*.

29 ECtHR 5 April 2007, *Stoimenov / FYR Macedonia*, §42; *mutatis mutandis* ECtHR (GC) 10 March 2009, Bykov / Russia, §90.

30 ECtHR (GC) 27 November 2008, *Salduz / Turkey*, §54 (... *These principles are particularly called for in the case of serious charges, for it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies*).

31 ECtHR 5 April 2007, Stoimenov / FYR Macedonia, §39–43.

that could be appointed by the defence did not have adequate access to the case file and were not able to have their reports adduced.[32]

The above-reasoning is based on a distinction between an inquisitorial approach and an adversarial approach in dealing with scientific expert input in criminal trials. One could wonder if this distinction is not merely an artificial one. Does the requirement of equality of arms not have the same function and the same weight in all cases? It does not, and I will demonstrate this claim with the example of the case of *C.B.* and its comparison with the *Bönisch* case.

In the former case, expert evidence related to neurological and psychiatric information in a case of sexual abuse of minors and juveniles. The relevant complaint in Strasbourg was that C.B. was not permitted to bring in a private expert opinion to the proceedings, neither in written reports, nor by having this expert testify in court. The ECtHR however found no violation of Article 6 ECHR. This conclusion was based not as much on the counterbalancing exercise in this case, but *primarily* the ECtHR stressed that the expert in this case was an expert appointed by the court, not by a party. As a consequence, the Court adds that this expert must not be considered as appearing for one of the parties, but as an independent expert supporting the domestic court in questions they are unable to answer themselves.[33] Apparently, the impartial position of the official was not put in doubt. *Secondly*, the ECtHR notes that the participation of the defence in the expert examination by the court-appointed expert was organised. In this case, certain comments and questions were raised by the defence – assisted by their private expert – concerning the methodology employed by the official expert. These comments were taken into consideration and addressed by the official expert in his final report. *Thirdly*, the official expert was questioned at length during an oral hearing of the domestic court, with a full opportunity for the defence to challenge this expert and his findings. *Subsequently*, the domestic courts explained extensively why they considered the official expert's report to be comprehensive and conclusive, also taking into consideration the arguments raised by the defence.[34] In such circumstances, the principle of equality of arms does not require domestic courts to admit private expert information either in writing or orally.[35]

As opposed to the procedural situation in the *C.B.* case, the official expert in the *Bönisch* case failed to maintain an inquisitorial position. The impartiality and neutrality of the expert was put in doubt in the first place because he was the Director of the Institute that drew up a report that had initiated the prosecution.[36] Those

32 ECtHR 25 July 2013, *Khodorkovskiy and Lebedev / Russia*, §§724–735.

33 ECtHR 4 April 2013, *C.B. / Austria*, §42.

34 ECtHR 4 April 2013, *C.B. / Austria*, §43.

35 ECtHR 4 April 2013, *C.B. / Austria*, §§43–44 and 47.

36 *Supra*, nr. 6.

'appearances suggested that the Director was more like a witness against the accused'.[37] This finding does not automatically bring the ECtHR to conclude that Article 6 ECHR would be violated, but merely leads to the necessity, based on the principle of equality of arms, to permit the defence to obtain an alternative expert examination.[38] Transposed to the theoretical inquisitorial-adversarial framework, this lack of impartiality and neutrality signifies an abandonment of the inquisitorial starting point and a shift towards the adversarial approach of expert examination. Whenever the presumed inquisitorial position of the official expert can no longer be upheld, a more adversarial set of guarantees must be put in place. In terms of procedural safeguards, this shift on the inquisitorial-adversarial continuum implies that the principle of equality of arms increases in priority. As VAN KAMPEN puts it, if the expert's presumed impartiality and neutrality are refuted, the requirement of fairness demands a *tour de force* on the part of national courts to remedy the defect.[39] This defect is remedied by acknowledging that the inquisitorial scheme cannot be applied, making it necessary to make use of the more adversarial logic. In such cases the expert no longer acts as a court-appointed expert, but as a partisan one which may necessitate the possibility for the defence to obtain an alternative expert examination.

4.2. INQUISITORIAL TESTING EXPERT EVIDENCE

In the case of *C.B.*, no alternative expert examination needed to be organised. This conclusion cannot exclusively be linked to the neutral position of the official expert as a strong argument was also made concerning the participation of the defence in the official expert examination.[40] In a broader perspective, this again raises the postponed question about how the expert opinion produced by another party may be challenged.[41] Under this heading, I will first discuss this issue from an inquisitorial point of view,[42] then analyse it in a more general and adversarial approach.[43]

For a start, an 'expert opinion produced by another party' is impossible when applying the inquisitorial model. The neutral, official expert examination is, by definition, non-partisan. This, however, does not preclude the necessity for the defence

37 ECtHR 6 May 1985, *Bönisch / Austria*, §32.

38 ECtHR 6 May 1985, *Bönisch / Austria*, §§32–34; P. van Kampen, 'Confronting Expert Evidence under the European Convention', in J.F. Nijboer and W.J.J.M. Sprangers (eds.), *Harmonisation in Forensic Expertise. An inquiry into the Desirability of and Opportunities for International Standards*, Amsterdam, Thela Thesis, 2000, (183) 191–192.

39 P. van Kampen, 'Confronting Expert Evidence under the European Convention', in J.F. Nijboer and W.J.J.M. Sprangers (eds.), *Harmonisation in Forensic Expertise. An inquiry into the Desirability of and Opportunities for International Standards*, Amsterdam, Thela Thesis, 2000, (183) 200.

40 ECtHR 4 April 2013, *C.B. / Austria*, §43.

41 *Supra*, nr. 8.

42 Paras 11–14.

43 Paras 15–17.

to challenge such expert findings. Quite the opposite, one could argue, since more weight is likely to be attached to an inquisitorial expert's findings.[44] Nevertheless, the non-partisan construction of the proceedings logically necessitates a specific way of challenging.

The specific, vertical construction of the inquisitorial procedure ordinarily implies that only one investigation is conducted, and only one expert examination (concerning a specific element) is executed. Whereas under the adversarial logic a party leads its own investigation and expert examination, an inquisitorial system should allow parties to participate in a unique inquiry. Specifically for an expert examination, parties could theoretically participate in three stages of the proceedings: *primo* when the expert examination is ordered, *secundo* through the execution of the expert examination and *tertio* when the findings of the examination are interpreted and a report is being drafted, but prior to the completion of the final report. A party may participate personally, but it would logically follow that an early participation would call for a private expert. Terminologically, this inquisitorial partisan expert should be separated from the adversarial partisan expert. Both partisan experts have different functions and tasks too: the inquisitorial partisan expert participates in the court-appointed expert examination on behalf of a party while the adversarial partisan expert produces an expert report at the request of a party.

The ECtHR's case law clearly indicates that a mere possibility to comment on the final report of an official expert does not always suffice as a way of defence. This issue arose in the *Mantovanelli* and the *Cottin* cases. The former case concerns proceedings brought against a hospital for alleged medical malpractice, causing the applicants' daughter's death. The domestic proceedings were conducted before an administrative court, but the broad terms applied by the ECtHR indicate that this case is also relevant in criminal matters.[45] The ECtHR confirmed this, by applying the same grounds in the criminal case of *Cottin*.[46] In *Mantovanelli* the applicants had no possibility to participate in the expert examination, even though the expert examination consisted only of interviews with the medical staff and an analysis of documents.[47]

As the expert examination concerned the very essence of what the domestic court had to decide upon, namely whether the repeated use of halothane on Miss Jocelyne Mantovanelli amounted to gross medical negligence, the ECtHR requires a high standard of fair trial rights for the expert examination. Unlike the domestic (French) approach, the ECtHR even points out that the very question the expert was instructed

44 *Supra*, nr. 6; ECtHR 6 May 1985, *Bönisch / Austria*, §33; ECtHR 4 April 2013, *C.B. / Austria*, §42.

45 ECtHR 18 March 1997, *Mantovanelli / France*; P. Martens, 'L'influence de la jurisprudence de la Cour d'arbitrage. L'expertise en matière pénale' in Belgisch-Luxemburgse Unie voor het Strafrecht (ed.), *Perspectieven uit de recente rechtspraak in strafzaken*, Gent, Mys and Breesch, 2000, (101) 105; A. Fettweis, 'Le point sur le caractère contradictoire de l'expertise pénale', *RDP* 2004, afl. 1, (129) 130.

46 ECtHR 2 June 2005, *Cottin / Belgium*.

47 ECtHR 18 March 1997, *Mantovanelli / France*, §36.

to answer and the one the court had to determine were 'identical'.[48] Clearly, the ECtHR deals with this matter in a much more functional and pragmatic way, as opposed to the domestic French formalistic approach, by which an expert examination can at most offer an advice to the court which is taken into consideration, while it is for the courts exclusively to judge the case.[49] Does the ECtHR raise a high threshold because the expert examination is decisive for the main issue to be addressed by the court? Apparently not, as the same criteria were used in the criminal *Cottin* case, though the expert examination did not influence the issue of guilt or innocence, but merely the extent of the physical injuries sustained by the victim. This issue is of importance for possible aggravating circumstances and damages to be awarded, both items clearly being of lesser importance than the technical questions raised in the *Mantovanelli* case.[50]

A related factor in the ECtHR's assessment is that the expert examination pertains to a technical field outside of the (domestic) judges' knowledge.[51] Like the previous criterion, this one hardly restricts the scope, since an expert examination by definition only assists in solving a question or problem raised in the proceedings that a judge is incapable of solving by him- or herself.[52] This issue nevertheless is of importance, because it is due to the inability of the domestic judge to assess the validity of an argument and the soundness of an expert report that the judge is likely to be profoundly influenced by the expert report.[53] Because of this, the right to effectively take part in a criminal trial may require the possibility to participate *within* the expert examination process.

A possibility to participate *within* the expert examination process means that a defendant (or another party) can authorise an inquisitorial partisan expert to comment on the official expert examination in advance of the issue being transferred back to the court. This way, the clash of arguments and ideas is organised between technical experts, allowing the discussion to focus on the (most) relevant factors. This becomes most clear when compared to the situation of indirect participation in the expert examination, i.e. participation *after* the expert opinion has already been drawn up. *By hypothesis* a discussion is then conducted based upon a unilateral expert report,

48 ECtHR 18 March 1997, *Mantovanelli / France*, §36.

49 ECtHR 18 March 1997, *Mantovanelli / France*, §32.

50 ECtHR 2 June 2005, *Cottin / Belgium*, §31; T. Decaigny, *Tegenspraak in het vooronderzoek. Een onderzoek naar de meerwaarde van een vroege participatie van de verdachte in de Belgische strafprocedure*, Antwerp, Intersentia, 2013, 530–532, nr. 437.

51 ECtHR 18 March 1997, *Mantovanelli / France*, §36.

52 ECtHR 4 April 2013, *C.B. / Austria*, §39; T. Decaigny, *Tegenspraak in het vooronderzoek. Een onderzoek naar de meerwaarde van een vroege participatie van de verdachte in de Belgische strafprocedure*, Antwerp, Intersentia, 2013, 531–532, nr. 437.

53 ECtHR 18 March 1997, *Mantovanelli / France*, §36; ECtHR 2 June 2005, *Cottin / Belgium*, §31; T. Decaigny, *Tegenspraak in het vooronderzoek. Een onderzoek naar de meerwaarde van een vroege participatie van de verdachte in de Belgische strafprocedure*, Antwerp, Intersentia, 2013, 531, nr. 437.

in which case the participants in the discussion and the deciding body are not experts, but lawyers. By definition such discussions and decisions cannot lead to new technical insights or a valid assessment of the expert report, since the parties involved in the discussion lack the necessary technical knowledge. Logically, the ECtHR considers that such a procedural approach does not afford parties a real opportunity to comment effectively on a major piece of evidence, violating Article 6 ECHR.[54]

This does not mean, however, that a defendant should be able to participate in any inquisitorial expert examination through a private expert. *In the first place*, three moments were mentioned before, at which a participation could be organised, (1) when ordering the expert examination, (2) when the expert examination is carried out and (3) during the drawing up of the report, prior to the final report. One can easily understand that participation might be very sensitive at the second instance. For example when a gynaecological examination is being performed, it would be undesirable to have someone else present, other than the person who is being examined and the expert-gynaecologist. The ECtHR's case law provides for this possibility, by which a 'practical difficulty' renders the participation of parties either impossible or undesirable.[55] This may be the case for the examination itself, on the other hand no such technical difficulty could call for an exclusion at the third moment, namely when the expert report is being drafted, prior to the formulation of the final text.[56]

In the second place the very essence of a criminal procedure may oppose the early participation of a defendant, in two ways. Often the first aim of the preliminary investigation is to identify a suspect. In such a case participation prior to the completion of the expert report is logically impossible. In a second way, there may be good a reason to prevent early participation even if a suspect has already been identified. This would be the case when the preliminary investigation is being dealt with in a secretive way. Many forms of investigation are completely futile unless deployed in a covert period of investigation, such as surveillance measures and undercover operations. Although a secret stage of preliminary investigation should be the exception, the possibility of a covert period of preliminary investigation cannot exclude any gathering of technical or forensic information, which means that such an expert examination must be executed without the participation of the defence. As the nature of preliminary investigations may prevent early defence participation, other means of defendant participation and challenging need to be found. The more

54 ECtHR 18 March 1997, *Mantovanelli / France*, §36; ECtHR 2 June 2005, *Cottin / Belgium*, §31; P. van Kampen, 'Confronting Expert Evidence under the European Convention', in J.F. Nijboer and W.J.J.M. Sprangers (eds.), *Harmonisation in Forensic Expertise. An inquiry into the Desirability of and Opportunities for International Standards*, Amsterdam, Thela Thesis, 2000, (183) 196–198.

55 ECtHR 18 March 1997, *Mantovanelli / France*, §36.

56 T. Decaigny, *Tegenspraak in het vooronderzoek. Een onderzoek naar de meerwaarde van een vroege participatie van de verdachte in de Belgische strafprocedure*, Antwerp, Intersentia, 2013, 533–536, nr. 439 en 440.

adversarial possibilities to be dealt with hereinafter must be taken into consideration to that end.

4.3. ADVERSARIAL TESTING OF EXPERT EVIDENCE

In an adversarial structured investigation, there is no common, court-appointed expert, leading an expert examination in which a party could participate. As has already been pointed out, parties seek their own evidence and arguments, in parallel trial preparations. I already elaborated on the possibility to adduce alternative or partisan expert reports.[57] The adversarial model also requires parties to have the possibility to challenge the evidence adduced by the adversary. This typically takes place in open court.

Though rooted in an adversarial logic and history,[58] the requirement to be able to challenge evidence also needs to be fulfilled in an inquisitorial system. Concerning expert evidence, this is clear from the *C.B.* case, in which great store was placed in the possibility to challenge an inquisitorial court-appointed expert.[59] The ECtHR also emphasises that experts may not be eye-witnesses, but they are nevertheless witnesses within the meaning of Article 6.3.d ECHR.[60] This implies that the defence must be able to study and challenge both the expert report and the persons who prepared it, through questioning.[61] The consequences of the applicability of this right to confrontation are clearly established in the ECtHR's case law.[62] In short, the defence must have the possibility to confront the source of any inculpatory piece of evidence. Only for good reasons are any restrictions on the right to confrontation allowed. Such restrictions should be accompanied by counterbalancing factors and the inculpatory evidence related to the restriction cannot, as a rule, serve as the sole or decisive evidence for a conviction. This rule was made more flexible in 2011 and since then, sole or decisive evidence would call for the most searching scrutiny of counterbalancing factors, especially related to the assessment of the reliability of that evidence.[63]

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57 *Supra*, para 8.

58 S. Trechsel, *Human Rights in Criminal Proceedings*, Oxford, University Press, 2005, 292; S. Maffei, *The European Right to Confrontation in Criminal Proceedings. Absent, Anonymous and Vulnerable Witnesses*, Groningen, Europa Law Publishing, 2006, 13–18.

59 ECtHR 4 April 2013, *C.B. / Austria*, §43.

60 This emphasis in *Khodorkovskiy and Lebedev* is a rather recent one. For the previous approach, see: S. Trechsel, *Human Rights in Criminal Proceedings*, Oxford, University Press, 2005, 303–304.

61 ECtHR 11 December 2008, *Mirilashvili / Russia*, §§158–160; ECtHR 25 July 2013, *Khodorkovskiy and Lebedev / Russia*, §711.

62 S. Maffei, *The European Right to Confrontation in Criminal Proceedings. Absent, Anonymous and Vulnerable Witnesses*, Groningen, Europa Law Publishing, 2006, 43–95; ECtHR (GC) 15 December 2011, *Al-Khawaja and Tahery / U.K.*; O. Michiels, "Le principe de la preuve unique ou déterminante (ECtHR (GC) 15 December 2011, *Al-Khawaja and Tahery / U.K.*)", *RTDH* 2012, afl. 91, 693–711.

63 ECtHR (GC) 15 December 2011, *Al-Khawaja and Tahery / U.K.*; ECtHR (decision) 10 April 2012, Ellis, *Simms and Martin / U.K.*, §§76–78.

Although the right to this confrontation is generally applicable, an adversarial context heightens its importance. Article 6.3.d ECHR in fact contains two procedural rights, a general right to call witnesses and a more specific right to confront adversarial witnesses,[64] described by MAFFEI as the attendance clause respectively the confrontation clause.[65] Only the application of the former right requires the party concerned to demonstrate the importance of the witness statement, the latter right can be called in, based solely on the procedural position of the piece of evidence. If the prosecution relies on information provided by the witness, or when the court delivers a guilty verdict (partially) on the basis of a statement of that witness, a possibility to confront that witness must be provided.[66] Only if a good reason entails the absence of a witness and the sole or decisive rule has been complied with,[67] or when the testimony of that witness is manifestly irrelevant or redundant,[68] does this right to confrontation not have to be guaranteed.

In an adversarial criminal trial, experts – much like witnesses – will be proposed or called in by a party. Based on the party-driven structure of the adversarial process, the confrontation clause automatically comes into play and this right will be fully applicable for the adverse party.

In a continental or inquisitorial process on the other hand, witnesses and experts are not – in principle – classified as those 'belonging' to the prosecution or the defence.[69] Instead, all information and evidence is supposed to be gathered in a neutral way. Nevertheless, the confrontation clause will in two ways come into play. *In the first place,* the theoretical structure of the criminal procedure does not preclude an expert from providing inculpatory elements. A perfectly neutral and impartial court-appointed expert may produce a report containing disadvantageous elements for the defence. *In the second place,* the actual position an expert takes up in a procedure can divert from the neutral and impartial starting point, as was evident in the *Bönisch* case. The first situation remains inquisitorial and the second situation signifies a shift towards a more adversarial position. Yet both situations necessitate an opportunity to confront the expert.

The classical way to assert the right to confrontation might be the right to 'cross-examine' adverse witnesses. Based on the Convention text, the ECtHR has nevertheless developed a different, but stable definition of what this right in the European context means: '*In principle, all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument (...). This does not mean, however, that in order to be used as evidence statements of witnesses should always be made at a*

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

65 S. Maffei, *The European Right to Confrontation in Criminal Proceedings. Absent, Anonymous and Vulnerable Witnesses*, Groningen, Europa Law Publishing, 2006, 72.

66 ECtHR 25 July 2013, *Khodorkovskiy and Lebedev / Russia*, §712.

67 *Supra*, para 15.

68 ECtHR 25 July 2013, *Khodorkovskiy and Lebedev / Russia*, §712.

69 S. Trechsel, *Human Rights in Criminal Proceedings*, Oxford, University Press, 2005, 300–301.

public hearing in court: 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 (art. 6-3-d, art. 6-1) provided the rights of the defence have been respected. (...) As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings (...)'.[70]

Based on the Convention text, there is no right to cross-examine, since Article 6.3.d itself provides two equal possibilities to *examine* or *have examined* witnesses.[71] The ECtHR's case law further clarifies that the confrontation is not necessarily confined to the trial phase of a case, but the confrontation can also take place in the pre-trial phase. This certainly is relevant in the inquisitorial approach of expert examinations, because this allows a combination of the early participation of the defence (as described above) with the exercise of the confrontation right. At least conceptually, an early possibility to make use of the confrontation right could allow courts in the trial phase to reject a defence claim for the right to challenge a court-appointed expert.

When an adversarial expert examination is at hand, whether because the structure of the criminal trial itself is adversarial, or because the court-appointed expert *acts* as a partisan expert, and in this way holds a position *'closer to that of a prosecution witness'*, the exercise of the confrontation right must be fully guaranteed at the trial phase.[72] Furthermore, no additional conditions may be imposed on the exercise of the right to confrontation. In this way, the defence does not need to explain why the right to confrontation was called in.[73]

5. INQUISITORIAL FORUM SEPARATION

The confrontational approach in adversarial cases has the advantage of a full debate in open court. Nevertheless, two disadvantages are intrinsically linked to this system. *Primo* an alternative expert examination is not possible in all cases. The material to be examined may no longer be available or suitable for a second (or third) examination or the person concerned may not be willing to cooperate anymore. *Secondly*, the clash of ideas based on partisan expert reports is a polarised debate, conducted and settled by lawyers, possibly assisted by laymen. The technical field of the expert examination pertains, by definition, to knowledge outside of the judges' knowledge.[74] This way it is very difficult for these professional and lay judges to assess the quality and reliability of the arguments and evidence that is being adduced.

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70 ECtHR 20 November 1989, *Kostovski / the Netherlands*, §41; also: ECtHR 27 September 1990, *Windisch / Austria*, §26; ECtHR 26 April 1991, Asch / Austria, §27; ECtHR (GC) 15 December 2011, Al-Khawaja and *Tahery / U.K.*, §118.

71 *Supra*, footnote 64.

72 ECtHR 25 July 2013, *Khodorkovskiy and Lebedev / Russia*, §712.

73 ECtHR 25 July 2013, *Khodorkovskiy and Lebedev / Russia*, §§713–714.

74 *Supra*, para 13.

In contrast, the inquisitorial possibility of defence participation within the expert examination offers the opportunity of a more constructive discussion, led by the court-appointed expert and joined by the partisan experts.[75] In a pragmatic approach, one could say that such fact-finding confined to a technical field is separated from the classical judicial fact-finding. Though formally all fact-finding occurs at the trial stage, important aspects of criminal investigation may take place in the pre-trial phase. Pragmatically conducting part of the fact-finding *in* the expert examination, prior to the final expert report and the debate upon that report, allows a consideration of the expert examination as a *forum-separation*. Subsequently, fair trial rights can be guaranteed to the largest extent by allowing the defence to intervene at the moment of the *de facto* fact-finding, i.e., during the expert examination.

The ECtHR does not explicitly hold this point of view. Nevertheless, the ECtHR at the same time states very clearly that in some circumstances, the mere possibility of making submissions to a court after expert reports have been drawn up is only an indirect possibility and constitutes no real opportunity to comment effectively on a main piece of evidence, hence Article 6 ECtHR is violated.[76]

6. CONCLUSION

This article consists of an analysis of the ECtHR's case law concerning the input of expert information. Using the theoretical framework of the continuum determined by the inquisitorial and the adversarial system at opposite ends, two main features of the use of expert information were pointed out. On the one hand, attention must be paid to how a party can participate in providing expert information, while on the other hand a genuine possibility to test the inculpatory information must be provided for the accused.

Applying the inquisitorial model, good reasons exist to exercise both options at an early stage. The reasons why this is the case have been elaborated upon above, and an alternative and pragmatic way of such inquisitorial fact-finding has been labelled forum-separation in the fifth section. An accused's fair trial rights are protected in a different way in the more adversarial organised criminal trials, with a focus on the equality of arms requirement, typically asserted in open court at the trial stage. This approach is not exclusively called for in the *ab initio* adversarial criminal trial, but can also come into play when the more specific inquisitorial method of participation and challenging cannot be exercised.

75 *Ibid.*

76 ECtHR 18 March 1997, *Mantovanelli / France*, §36; ECtHR 2 June 2005, *Cottin / Belgium*, §32; P. van Kampen, 'Confronting Expert Evidence under the European Convention', in J.F. Nijboer and W.J.J.M. Sprangers (eds.), *Harmonisation in Forensic Expertise. An inquiry into the Desirability of and Opportunities for International Standards*, Amsterdam, Thela Thesis, 2000, (183) 198.