

CONTENTS

Introduction.....	1
Chapter 1. A Background for Article 6	9
1. Introduction.....	9
2. Divine Law and the <i>audi alteram partem</i> Principle.....	11
3. Developments at National Level.....	12
3.1. Classical Antiquity.....	13
3.1.1. Athens.....	13
3.1.2. Rome.....	16
3.2. Medieval Trial by Oath, Ordeal and Combat.....	19
3.3. Ecclesiastical Inquisitorial Procedure.....	21
3.4. Heresy Inquisitions.....	22
3.5. French Criminal Ordinance 1670.....	25
3.6. English Jury Trials.....	29
3.7. French Napoleonic Code of Criminal Procedure 1808.....	38
4. Developments at Constitutional Level.....	42
4.1. Magna Carta.....	43
4.2. American and French Constitutional Instruments Born of Revolution.....	46
5. Developments at International Level.....	52
5.1. Nuremberg Trials.....	53
5.2. UDHR and ICCPR.....	58
5.3. ECHR.....	60
6. Conclusion.....	69
Chapter 2. Equality of Arms	75
1. Introduction.....	75
2. The Value of Procedural Equality.....	75
2.1. Correct Trial Outcome.....	76
2.2. Respect for Human Dignity.....	76
2.3. Primacy of Value: Correct Trial Outcome v Respect for Human Dignity.....	80
2.4. Good Governance.....	82

3.	A Contemporary Legal Basis for Procedural Equality	83
3.1.	Basis in Article 6	83
3.2.	Basis in International Law	85
4.	The Fundamental Elements of Equality of Arms Defined	91
4.1.	Opponents.	91
4.1.1.	Accused and the Prosecution	91
4.1.2.	<i>Avocat Général</i> or Similar Officer	92
4.2.	Arms.	94
4.3.	Equality	95
4.3.1.	Procedural Equality	95
4.3.2.	Equality Distinguished.	96
4.3.3.	Degree of Equality.	99
4.3.4.	Equality and Article 6(3) ECHR.	101
4.4.	Disadvantage	103
4.4.1.	Disadvantage Defined.	103
4.4.2.	Actual Prejudice	103
4.4.3.	Inevitable Prejudice.	107
4.4.4.	Unequivocal Inequality	108
4.4.5.	Substantial Disadvantage.	109
4.4.6.	Shared Deprivation of a Procedural Right: No Disadvantage	110
4.4.7.	The Disadvantaged Prosecutor	111
5.	Conclusion	113

Chapter 3. Equality of Arms and the Right to Challenge and Call

Witness Evidence	117
1. Introduction.	117
2. The Nexus between Equality of Arms and Article 6(3)(d)	119
2.1. Legal Nexus.	119
2.2. Conceptual Nexus	120
3. Witness Defined	123
3.1. Witness	123
3.2. Status of Experts.	124
4. Examiner Defined.	127
5. A Benchmark Model for the Conduct of Examinations.	129
6. Derogations from the Benchmark Model.	130
6.1. Absent Witnesses.	131
6.1.1. Introduction.	131
6.1.2. Case-Law.	131
6.2. Anonymous Witnesses	138
6.2.1. Introduction.	138
6.2.2. Case-Law.	140

6.2.3. Alternative Approach	149
6.3. Vulnerable Witnesses: Child Victims in Sexual Offence	
Prosecutions	152
6.3.1. Introduction	152
6.3.2. Case-Law	154
6.3.3. Acceptable Level of Derogation from Benchmark	
Model	157
7. The Right to Call Witnesses	158
8. Conclusion	161
Chapter 4. Equality of Arms and the Right to Adequate Time	
and Facilities	165
1. Introduction	165
2. The Nexus between Equality of Arms and Article 6(3)(b)	166
2.1. Legal Nexus	166
2.2. Conceptual Nexus	167
3. Adequate Time	168
3.1. Assessing Adequate Time	169
4. Adequate Facilities	173
4.1. Examples of Facilities	174
4.2. Disclosure	176
4.2.1. Character of Disclosure	176
4.2.1.1. Content of Disclosure	176
4.2.1.2. Timing of Disclosure	178
4.2.1.3. Recipient of Disclosure	178
4.2.2. Disclosure and Equality of Arms	179
4.2.2.1. Non-Disclosure of Material Evidence	180
4.2.2.2. Non-Disclosure of Material Observations	188
5. Conclusion	191
Chapter 5. Equality of Arms and the Right to Legal Assistance	195
1. Introduction	195
2. The Nexus between Equality of Arms and Article 6(3)(c)	197
2.1. Legal Nexus	197
2.2. Conceptual Nexus	198
3. Legal Assistance by Privately Retained Counsel	201
4. Legally Aided Assistance	206
4.1. Eligibility for Legal Aid	207
4.1.1. Financial Criterion	208
4.1.2. Interests of Justice Criterion	210
4.1.2.1. Key Assessment Factors	211

4.2. Choice and Consultation in the Appointment of Counsel	217
5. Imposed Legal Assistance	220
6. Pre-Trial Access to and Private Communication with Counsel	221
6.1. Access to Counsel at Interrogation	222
6.2. Visitation by and Private Communication with Counsel	225
7. Effective Legal Assistance	230
8. Conclusion	235
Concluding Overview	239
<i>Bibliography</i>	243
<i>List of Cases</i>	259
<i>List of Legislative Instruments</i>	275