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John D. Jackson

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COMMON LAW EVIDENCE AND THE COMMON LAW OF HUMAN RIGHTS: TOWARDS A HARMONIC CONVERGENCE?

John D. Jackson*

ABSTRACT

This Article considers the impact which European Human Rights Law has made upon the common law rules of evidence with reference to the approach the European Court of Human Rights (ECtHR) has adopted towards exclusionary rules of evidence. Particular attention will be given to rules that have been developed by the ECtHR in relation to the right to counsel during police questioning (the so-called “*Salduz*” doctrine) and the right to examine witnesses (the so-called “sole or decisive” evidence rule). The Article argues that the effect of these rules has encouraged common law judges to engage more holistically with the effect of certain kinds of evidence on both the weight of the evidence as a whole and on the fairness of the proceedings as a whole. The result has been to encourage a shift in the nature of both their epistemic and non-epistemic reasoning during the trial. In its most recent decisions, however, the Court appears to have drawn back from its more activist stance of setting standards of fair participation in evidentiary matters. Instead, the Court has become more fixated on the traditional common law concern with reliability. This has somewhat pushed back the potential that the ECtHR has to shift the common law toward reaching a more harmonic convergence between achieving truth and fairness in criminal proceedings.

INTRODUCTION

This Article considers what impact Human Rights Law has made on the common law of evidence, developed in common law jurisdictions as a discrete body of law and practice with a particular focus on exclusionary rules of evidence. Particular emphasis will be given to the jurisprudence of the European Court of Human Rights (ECtHR) which this Article argues has tried to steer an uneasy path between two positions. The first position is one of minimal interference toward the way in which evidence is regulated in member states. This position proceeds on the basis that as an international court, the ECtHR must respect the traditions of member states, and

* School of Law, University of Nottingham. Early versions of this Article were presented at the *William & Mary Bill of Rights Journal* Symposium entitled *Right Protection in International Criminal Law and Beyond*, March 16–17, 2018, and at the Evidential Reasoning World Conference at the University of Girona, June 6–8, 2018. I am grateful to participants at each of these events for their comments.

that those member states should be the driving force in the matter of applying the European Convention on Human Rights. This has resulted in the Court taking a back seat, arbitrating on application of the fair-trial principles in individual cases, and intervening only when the result of a case has led to an unfair outcome. The second position is to take a more supervisory position of “director of operations,” ensuring that the right to a fair trial and the rights of the defense are made sufficiently “practical and effective” within the member states.¹ It will be suggested that in its early days the Court gravitated in favor of the first approach, but in more recent times it has moved toward the second approach. In particular, it has developed certain rules that have had the effect of encouraging common law judges to engage more holistically with the effect of certain kinds of evidence on the weight of the evidence as a whole and on the fairness of the proceedings as a whole. The effect has encouraged a shift in the nature of both their epistemic and non-epistemic reasoning during the trial. In its more recent decisions, however, the Court appears to have drawn back from its activist stance of setting standards of fair participation in evidentiary matters and has become more fixated on the traditional common law concern with reliability. This has arguably pushed back the potential of the ECtHR to shift the common law toward reaching a more harmonic convergence between achieving truth and fairness in criminal proceedings.

Part I of the Article identifies two distinct characteristics of the common law model of Evidence Law: the exclusionary nature and unitary effect of the rules of evidence. Although the aim of many of these rules has been to promote accurate fact finding, this is achieved by judges filtering out certain classes of unreliable evidence on an atomistic, piecemeal basis, without considering the impact of these items of evidence on the case as a whole. The focus on excluding certain types of unreliable evidence in criminal and civil cases alike has meant that little attention was paid to issues of procedural fairness in criminal proceedings. This Part ends by illustrating how common law judges have increasingly had to engage in “forensic reasoning rules” and developing protective rights for accused persons.

Part II then examines the approach that the ECtHR has adopted toward rules of evidence and traces a growing activism in this respect as the Court has developed its own directive standards of procedural fairness based on fair participation. Two particular rules developed by the ECtHR will be considered which exemplify the second more activist approach: the so-called *Salduz* doctrine and the so-called “sole or decisive” rule applied to unexamined statements. The *Salduz* doctrine is a kind of European “*Miranda*” rule whereby access to a lawyer should be provided from the first police interrogation of a suspect. Any use of incriminating statements at trial which have been made during police interrogation without such access will, in

¹ Robert Spano, Terrorism and Article 6 of the European Convention on Human Rights—*Ibrahim and Others v. United Kingdom* (2016) (Mar. 10, 2017), <https://www.nottingham.ac.uk/hrlc/documents/specialevents/judge-spano-lecture-report.pdf> [<http://perma.cc/AW38-6F7C>].

principle, irretrievably prejudice the rights of the defense.² The “sole or decisive” rule provides that defense rights are unduly restricted if the conviction of a defendant is solely, or mainly, based on evidence provided by witnesses whom the accused is unable to examine at any stage of the proceedings.³

This Article then proceeds to examine what effect these rules have had on the common law model of Evidence Law. Part III examines how the “sole or decisive” rule in particular has encouraged common law judges to take a more holistic approach in their assessment of evidence. Part IV considers how the rules require judges to give greater weight to considerations of fairness and to elevate considerations of fair participation in the proceedings above the traditional considerations of truth-finding. Part V, however, argues that in its most recent decisions, the ECtHR appears to have pulled back from its more activist stance of setting standards of fairness in evidentiary matters and has instead become more fixated on the traditional common law concern with reliability. This has somewhat pushed back the potential the ECtHR has to shift the common law toward achieving a more harmonic convergence between achieving truth and fairness in criminal proceedings. This Article concludes, somewhat more positively, by arguing that certain aspects of recent decisions reflect the Court’s determination to ensure that member states give due consideration to the principles of fair participation and the rule of law.

I. THE COMMON LAW MODEL OF EVIDENCE LAW

For many centuries, evidence has been regulated in common law countries by a law of evidence which is often contrasted with a “free” system of proof that operates in civil law countries. The core of this contrast is sometimes wrongly attributed to the fact that common law systems have rules of evidence while civil law systems do not.⁴ In fact, “contemporary Continental procedural systems place a variety of constraints on the . . . use of certain types of evidence similar, in many respects, to evidentiary devices and doctrines familiar to common lawyers.”⁵ The common law system *is*, however, distinctive in two important respects: first, in its exclusionary nature and, secondly, in its unified effect.⁶ J. B. Thayer, one of the giants of Anglo-American common law scholarship, viewed the common law system as “radically

² See *Salduz v. Turkey*, 2008-V Eur. Ct. H.R. 59, 61–62. For an exposition of the relationship between *Miranda*’s rule and the *Salduz* doctrine, see Charles D. Weisselberg, *Exporting and Importing Miranda*, 97 B.U. L. REV. 1235 (2017).

³ See *Al-Khawaja v. United Kingdom (Al-Khawaja II)*, 2011-VI Eur. Ct. H.R. 191, 253–54.

⁴ See JOHN D. JACKSON & SARAH J. SUMMERS, *THE INTERNATIONALISATION OF CRIMINAL EVIDENCE: BEYOND THE COMMON LAW AND CIVIL LAW TRADITIONS* 30 (2012).

⁵ John Jackson & Paul Roberts, *Beyond Common Law Evidence: Reimagining, and Reinvigorating, Evidence Law as Forensic Science*, in *OXFORD HANDBOOK OF CRIMINAL PROCESS* 788 (Darryl K. Brown, Jenia Iontcheva Turner & Bettina Weisser eds., 2019) (forthcoming March 2019).

⁶ *Id.* at 788, 793.

peculiar” because “a great mass of evidential matter, logically important and probative, is shut out from the view of the judicial tribunals by an imperative rule, while the same matter is not thus excluded anywhere else.”⁷ He predicated common law evidence on two strikingly simple, complementary principles: “(1) that nothing is to be received which is not logically probative of some matter requiring . . . prof[of]; and (2) that everything which is thus probative should” be received unless excluded by some rule or principle of law.⁸ The effect is to disaggregate the law of evidence from the logic of proof by excluding from the fact-finding arena certain kinds of evidence, even though such evidence is *ex hypothesi* relevant. As Thayer put it, “[t]he law has no mandamus to the logical faculty.”⁹ This approach is made particularly effective by a binary trial structure with a judge capable of ruling on questions of admissibility and capable of excluding evidence from the jury. The structure of continental proceedings, by contrast, makes it difficult to enforce a system of exclusionary rules in a context where all of the evidence is heard by the fact-finding tribunal.

It would be wrong to conclude from this that the common law system of evidence is not concerned with truth-finding; far from it. In his intellectual history of common law evidence scholarship, William Twining considered that there was a shared assumption that the essential purpose of adjudication is “rectitude of decision.”¹⁰ John Henry Wigmore, Thayer’s pupil and another giant of common law evidence scholarship, divided the rules of evidence into two types: rules of extrinsic policy and rules of auxiliary probative policy.¹¹ The former promoted values extrinsic to the forensic process such as various testimonial privileges that allow witnesses to suppress certain kinds of information to promote values that impose a side-constraint on the core institutional value of promotion of accuracy.¹² The latter, such as the hearsay rule and the rules excluding bad character evidence, are designed to promote rectitude of outcome by excluding evidence on the ground that it is potentially unreliable or might otherwise unduly prejudice or confuse a jury.¹³ These latter types of rules are a distinctive feature of the common law model. While extrinsic exclusionary rules designed to protect other values not necessarily (or primarily) connected to the pursuit of truth are quite common in continental legal systems, “[i]ntrinsic exclusionary rules, which exist primarily to enhance the accuracy of fact finding” are rare.¹⁴ Judges are expected to evaluate the evidence to guarantee the

⁷ JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 1–2 (1898).

⁸ *Id.* at 530.

⁹ *Id.* at 313–14 n.1.

¹⁰ WILLIAM TWINING, *The Rationalist Tradition of Evidence Scholarship*, in *RETHINKING EVIDENCE* 35, 77 (2d ed. 2006) (referencing a principle of Jeremy Bentham).

¹¹ 1 JOHN HENRY WIGMORE, *A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* 37–38 (1904).

¹² JACKSON & SUMMERS, *supra* note 4, at 37.

¹³ *See id.*

¹⁴ *See id.* at 71.

accuracy of the verdict, unencumbered by rules requiring them to disregard evidence.¹⁵ On the other hand, the common law model, as traditionally conceived, aims to enhance accuracy by excluding whole classes of evidence from the fact-finder—the jury—rather than by rules specifying how particular evidence should be evaluated.¹⁶ Judges, therefore, are discouraged from engaging in an inferential reasoning process with the evidence as a whole. Instead they are required to engage in an “atomistic” approach whereby evidence is assessed piece by piece by reference to two dominant questions—is it relevant? (a question of logic and proof) and, if so, is it admissible? (a question of whether it is excluded by means of an exclusionary rule).¹⁷

We have deconstructed the idea that the logic of proof can be disaggregated from the law of evidence elsewhere.¹⁸ Some of the most prominent rules of evidence, such as the rules on hearsay and bad character evidence, do not in fact depend upon simply labelling a piece of evidence as “hearsay” or “bad character” but actually require an inferential task to be carried out.¹⁹ Whether evidence is hearsay depends upon what inferences are to be drawn from the evidence—whether, in particular, it is to be used for a hearsay purpose, namely to prove the truth of any statement asserted out of court.²⁰ Again, whether bad character evidence is to be excluded depends on whether the bad character evidence is going to be used inferentially as proof of a criminal propensity to commit the offense charged.²¹ While judges are necessarily engaging in inferential reasoning in applying these rules, this becomes much more obviously the case when, as over the course of the last century, they have increasingly come to exercise greater discretion over the admissibility of evidence. This requires them to assess probative force or weight against competing considerations such as the prejudice the evidence may have on the minds of the jury.²²

Commentators have discerned a “powerful trend” toward expanding judicial discretion.²³ One sees this in the most recent legislative attempts in the United Kingdom to regulate hearsay evidence by giving judges an overriding discretion to admit probative hearsay in the interests of justice.²⁴ It is true that some modern legislation, at

¹⁵ *See id.*

¹⁶ *Id.* at 32.

¹⁷ *Id.* at 42–43.

¹⁸ *See generally* Jackson & Roberts, *supra* note 5, at 806–10 (discussing the “logic of inference” and the expansion of evidence to encompass inferential reasoning by including multidisciplinary strands of analysis).

¹⁹ *See id.* at 799.

²⁰ *See id.* at 798–99.

²¹ *See id.* at 799.

²² *See, e.g.*, FED. R. EVID. 403 (permitting judges to exclude “evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence”).

²³ *See, e.g.*, Eleanor Swift, *One Hundred Years of Evidence Law Reform: Thayer’s Triumph*, 88 CALIF. L. REV. 2437, 2441 (2000).

²⁴ *See* Criminal Justice Act 2003, c. 44, §§ 114(1)(d)–(2) (Eng.).

least in the UK context, has narrowed judicial discretion—for example, in the cross-examination of complainants on previous sexual history,²⁵ although this has been interpreted as requiring judges to balance a strict exclusionary approach against the need to ensure that defendants are not prejudiced by the exclusion of the evidence.²⁶ This clear trend away from strict admissibility rules is also driving judges closer to engaging in inferential reasoning when directing juries on how to evaluate potentially suspect kinds of evidence that juries would never previously have been exposed to.²⁷ This is what Roberts and Zuckerman have described as “forensic reasoning rules.”²⁸ In the UK, judicial directions must now be given on how to approach drawing inferences against silence, or probative hearsay, or bad character evidence that has been admitted by virtue of increasingly relaxed admissibility rules or increasing judicial inclusionary discretion.²⁹ One should not overstate the effect of this increasing convergence between inferential reasoning and legal doctrine. Once the evidence is filtered through to the jury, it is still remarkably free to engage in its own common sense reasoning with little appellate supervision of its processes.³⁰

The second distinctive feature of the common law model of evidence is that it is unitary in its effect. The rules of admissibility are applied in an undifferentiated manner to both civil and criminal proceedings.³¹ It is true that different standards of proof apply in civil and criminal cases as it is accepted that the risk of error should not be distributed equally between the parties in a criminal case where the consequences of a wrongful conviction are particularly harmful for the defendant.³² But the common law model has been—traditionally—remarkably resistant to the idea that other evidentiary rules need to be calibrated differently according to the procedural context. The view taken regarding rules designed to promote accuracy is that if certain types of evidence are not reliable, then, they should not be admitted, irrespective of the procedural context and of which party is seeking to adduce them.³³ While this approach may be a sound prescription in civil cases where all litigants are subject to the same procedural standards, it pays little regard to the context of criminal procedure where one party—the state—is in a very different position from the other party, and many features of criminal adjudication are applied asymmetrically in favor of the defense.³⁴

²⁵ See Youth Justice and Criminal Evidence Act 1999, c. 23, § 41 (Eng.).

²⁶ See *R v. A* (No. 2) [2001] UKHL 25, [2002] 1 AC 45 at 105.

²⁷ PAUL ROBERTS & ADRIAN ZUCKERMAN, *CRIMINAL EVIDENCE* 676–84 (2d ed. 2010).

²⁸ *Id.*

²⁹ See *id.*

³⁰ See JOHN D. JACKSON, *Unbecoming Jurors and Unreasoned Verdicts: Realising Integrity in the Jury Room*, in *THE INTEGRITY OF CRIMINAL PROCESS* 281 (Jill Hunter, Paul Roberts, Simon N.M. Young & David Dixon eds., 2016).

³¹ See JACKSON & SUMMERS, *supra* note 4, at 50–51.

³² See *id.* at 51.

³³ See *id.* at 31.

³⁴ For example, in their role as “ministers of justice,” prosecutors in England and Wales

Increasingly, however, this unitary conception of evidence law with its reliance on the exclusion of particular kinds of unreliable evidence, no matter what context they are sought to be admitted in, has been challenged—criminal trial defendants are entitled to certain procedural rights which require that they are protected by special evidentiary safeguards. The result is that some of the traditional common law rules of evidence (for example, the rules on bad character and self-incrimination) have been recast to give special protection to accused persons. Additionally, various evidentiary devices such as compulsory process, legal professional privilege, the exclusion of unlawfully obtained evidence, and the right of silence have been developed and elevated to the status of constitutional guarantees in many common law (as well as civilian) jurisdictions.³⁵

We thus see judges being required to engage more actively in trial fact finding and in ensuring that defendants' procedural, and in some cases, constitutional rights are protected. These developments could be seen in common law jurisdictions before the emergence of the "human rights revolution" that required states to commit themselves to human rights instruments, such as the right to a fair trial, and in the European context, before the ECtHR started to develop its jurisprudence, on fair trial standards.³⁶ But there is little doubt that the global human rights law that has emerged has reinforced this trend. The ECtHR, for example, has emphasized the importance of evidentiary rights in criminal proceedings through its development of rights such as the presumption of innocence, the protection of the accused against abusive coercion, the right to examine witnesses, and the need for "equality of arms" and an "adversarial proceeding" between the investigating or prosecuting authorities and the accused.³⁷ The question then is whether the ECtHR, in its development of these fair trial standards, has had a tangible impact on the development of common law evidence jurisprudence.

II. THE EUROPEAN COURT OF HUMAN RIGHTS: FROM ARBITRATOR TO SUPERVISOR

From the beginning, the ECtHR emphasized that the right to a fair trial, embodied in Article 6 of the European Convention on Human Rights (ECHR), holds a prominent place in a democratic society and must be given a broad construction.³⁸ However,

have long had greater duties to disclose evidence to the defense than the defense has had to disclose evidence to the prosecution. See DAVID CORKER & STEPHEN PARKINSON, *DISCLOSURE IN CRIMINAL PROCEEDINGS* 2 (2009).

³⁵ See Jackson & Roberts, *supra* note 5, at 789.

³⁶ See generally Paul Roberts & Jill Hunter, *Introduction—The Human Rights Revolution in Criminal Evidence and Procedure*, in *CRIMINAL EVIDENCE AND HUMAN RIGHTS* 1 (Paul Roberts & Jill Hunter eds., 2012) (examining the impact of the "human rights revolution" on criminal evidence and procedure law in common law jurisdictions).

³⁷ See JACKSON & SUMMERS, *supra* note 4, at 347.

³⁸ See *Delcourt v. Belgium*, 11 Eur. Ct. H.R. (ser. A) at paras. 21, 25 (1920).

Third, the European Commission and the ECtHR both stated at an early stage that their task is to determine whether they can be satisfied that the proceedings taken “as a whole” were fair.⁴⁵ On the one hand, this has enabled the ECtHR 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.”⁴⁶ This expansionist principle has enabled the ECtHR to read other important protective rights into Article 6, such as the privilege against self-incrimination.⁴⁷ On the other hand, however, in a number of cases the ECtHR has considered that it is not essential for the specific rights to be respected in every case if the trial, when examined as a whole, has been fair. For example, in *Asch v. Austria*,⁴⁸ the applicant was not given the opportunity to cross-examine the main witness in an apparent breach of the right to examine witnesses under Article 6(3)(d). The Court decided, in spite of this, taken as a whole, the trial could not be characterized as having been unfair.⁴⁹ Sometimes the Court has adopted a stricter proportionality analysis by considering if measures restricting the rights of the defense are “strictly necessary” and there are adequate compensating measures taken to protect the accused at trial.⁵⁰ But the clear signal sent to domestic jurisdictions is that they may make “inroads . . . into the specific rights [in Article 6(3)(d)], provided that the trial as a whole may be considered fair.”⁵¹

While these limiting principles have enabled the Court to adopt a cautionary approach toward the regulation of evidence in national courts, they have not prevented the Court from developing principles that it has considered to be at the heart of a fair trial, such as the privilege against self-incrimination and the principles of equality of arms and adversarial procedure.⁵² Inevitably, this meant that there would

and Tribunals and to a Fair Trial, art. 14, para. 39, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2017). In its ninetieth session the Human Rights Committee replaced general comment 13, from its thirty-first session.

⁴⁵ *Barberà v. Spain*, 146 Eur. Ct. H.R. (ser. A) at 37–38 (1988); *Delta*, App. No. 11444/85, Eur. Ct. H.R. para. 35. For criticism of the “fairness as a whole” doctrine, see STEFAN TRECHSEL, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS 87 (2005).

⁴⁶ *Deweert v. Belgium*, 35 Eur. Ct. H.R. (ser. A) at 30 (1980).

⁴⁷ *See, e.g.*, *Funke v. France*, 256 Eur. Ct. H.R. (ser. A) at 22 (1993).

⁴⁸ *See* 203 Eur. Ct. H.R. (ser. A) at 10–11 (1991). This consideration of the ECtHR is contrary to what would seem to be required in the English text which refers to the specific rights in Article 6(B) as “minimum rights.” Stefan Trechsel, *The Character of the Right to a Fair Trial*, in OBSTACLES TO FAIRNESS IN CRIMINAL PROCEEDINGS: INDIVIDUAL RIGHTS AND INSTITUTIONAL FORMS 23 (John D. Jackson & Sarah J. Summers eds., 2018). *See also* Ryan Goss, *Out of Many, One? Strasbourg’s Ibrahim Decision on Article 6*, 80 MOD. L. REV. 1137, 1146 (2017).

⁴⁹ *Asch*, 203 Eur. Ct. H.R. at 6–8.

⁵⁰ *See* *Van Mechelen v. Netherlands*, 1997-111 Eur. Ct. H.R. 691, 712.

⁵¹ JACKSON & SUMMERS, *supra* note 4, at 83.

⁵² *See id.*

come a point when the development of such principles would conflict with taking a ‘hands off’ approach toward the way national courts regulated evidence. Admittedly, when one looks across both common law and civil law systems, there is a great deal of agreement on how certain types of evidence obtained by coercion should be treated.⁵³ Despite the ECtHR’s “mantra” that it is not its role to determine whether particular types of evidence may be admissible or not, the Court has come to accept that the use in criminal proceedings of evidence obtained by way of torture will automatically violate the right to a fair trial,⁵⁴ as will the use of incriminating statements obtained in defiance of the will of the accused.⁵⁵ Such rules are quite in keeping with the common law approach. The common law has long considered that statements obtained by torture, threats, or inducements will automatically be inadmissible.⁵⁶

Things became more controversial, however, when the ECtHR used the concepts of equality of arms and adversarial procedure to develop a vision of defense rights as not only protecting defendants from abuse and coercion but also enabling defendants to fully participate in the trial process.⁵⁷ Attention has focused on two of the minimum rights specified under Article 6(3): the right to counsel (Article 6(3)(c)), and the right to examine witnesses (Article 6(3)(d)).⁵⁸ In November 2008, the ECtHR issued its famous judgment in *Salduz v. Turkey*, stating that suspects had a right of access to a lawyer when first questioned by the police.⁵⁹ Although there has been much debate about what the nature of such access should mean,⁶⁰ the prescription that *some* access was required when suspects were first questioned by the police had major repercussions across the member states of the Council of Europe.⁶¹ This included common law systems such as Scotland, though less so England and Wales where statutory legislation had already provided for a right of access to a lawyer in

⁵³ See *id.* at 170.

⁵⁴ *Harutyunyan v. Armenia*, 2007-111 Eur. Ct. H.R. 1, 21; *Husayn v. Poland* App. No. 7511/13, para. 554 (Eur. Ct. H.R. July 24, 2014), <http://hudoc.echr.coe.int/eng?i=001-146047> [<https://perma.cc/YBY2-HKFE>]; *Levinta v. Moldova*, App. No. 17332/03, para. 104 (Eur. Ct. H.R. Dec. 16, 2008), <http://hudoc.echr.coe.int/eng?i=001-90304> [<https://perma.cc/JNE9-8RE2>].

⁵⁵ *Saunders v. United Kingdom*, 1996-VI Eur. Ct. H.R. 2044, 2064.

⁵⁶ See *A v. Sec’y of State for the Home Dep’t* [2005] UKHL 71, [2006] 2 AC 221, 228–29; *R v. Warickshall* (1783) 168 Eng. Rep. 234, 235 (demonstrating the common law requirement that confessions must be voluntary dates back to the eighteenth century).

⁵⁷ John D. Jackson, *The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?*, 68 MOD. L. REV. 737, 750–51 (2005).

⁵⁸ See JACKSON & SUMMERS, *supra* note 4, at 347.

⁵⁹ See *Salduz v. Turkey*, 2008-V Eur. Ct. H.R. 59, 78.

⁶⁰ See John D. Jackson, *Responses to Salduz: Procedural Tradition, Change and the Need for Effective Defence*, 79 MOD. L. REV. 987, 988 (2016); Anna Pivaty, *The Right to Custodial Legal Assistance in Europe: In Search for the Rationales*, 26 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 62, 62–64 (2018).

⁶¹ See Dimitrios Giannouloupoulos, *Strasbourg Jurisprudence, Law Reform and Comparative Law: A Tale of the Right to Custodial Legal Assistance in Five Countries*, 16 HUM. RTS. L. REV. 103, 112, 128 (2016).

the police station.⁶² The evidential impact of the judgment had an effect on both of these jurisdictions, however, by in effect imposing what seemed like an almost blanket exclusionary rule on the use made of any incriminating statements when access to a lawyer was denied, no matter how reliable such statements were or how voluntarily they were made. This effectively fettered the discretion that judges had hitherto exercised to decide for themselves whether voluntary or reliable statements unfairly obtained should be excluded.⁶³

The “sole or decisive” rule that was applied to unexamined witness evidence proved even more controversial. As we have seen in cases like *Asch v. Austria*, the Court first adopted a flexible approach toward the right to examine witnesses by looking for compensatory safeguards when defendants were not able to examine witnesses against them.⁶⁴ In later years, it developed a stricter approach toward the right.⁶⁵ In a number of cases, culminating in *Al-Khawaja v. UK*⁶⁶ in 2009, the ECtHR considered that the right to examine witnesses in Article 6(1)(d) was an aspect of the right to a fair trial guaranteed by Article 6 which, in principle, requires that all evidence must be produced in the presence of the accused in a public hearing with a view to adversarial argument.⁶⁷ An almost absolute rule developed to the effect:

[T]hat where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6.⁶⁸

At first sight, it is hard to see why these particular Strasbourg rules should rub up against the common law model of evidence. After all, exclusionary rules are very much its hallmark. The common law has long had a rule excluding the use of involuntary confessions and the *Salduz* rule excluding the use of incriminating statements made in the absence of legal advice might seem little more than an extension of the

⁶² Police and Criminal Evidence Act 1984, c. 60, § 58 (Eng.). The *Salduz* principle was endorsed and applied to Scotland in the UK Supreme Court decision of *Cadder v. HM Advocate*. See [2010] UKSC 43, [2010] 1 WLR 2601, 2623–24.

⁶³ For an analysis of the impact of *Salduz* on the English law of evidence, see IAN DENNIS, *LAW OF EVIDENCE* 248–49 (6th ed. 2017).

⁶⁴ *Asch v. Austria*, 203 Eur. Ct. H.R. (ser. A) at 10–11 (1991).

⁶⁵ See *Al-Khawaja v. United Kingdom (Al-Khawaja I)*, Nos. 26766/05 & 22228/06, para. 27 (Eur. Ct. H.R. Jan. 20, 2009), <http://hudoc.echr.coe.int/eng?i=001-90781> [<https://perma.cc/2UJA-8MZ8>].

⁶⁶ *Id.* paras. 1, 3.

⁶⁷ *Id.* paras. 42–43.

⁶⁸ *Luca v. Italy*, 2001-11 Eur. Ct. H.R. 167, 178. See also *Solakov v. the Former Yugoslav Republic of Macedonia*, 2001-X Eur. Ct. H.R. 291, 308; *Al-Khawaja I*, Eur. Ct. H.R., para. 36.

privilege against self-incrimination long recognized in English law.⁶⁹ Similarly, rules such as the hearsay rule have long been designed to encourage witnesses to give oral evidence at trial by effectively excluding out-of-court witness statements adduced to prove the truth of the facts asserted.⁷⁰ In fact, the Strasbourg rules, particularly the sole or decisive rule as applied to unexamined statements, have provided a challenge both to the common law method of excluding evidence and to the increasingly flexible approach that English courts have toward exclusionary rules such as the hearsay rule. We will examine the methodological challenge first before considering the content of the new Strasbourg rules.

III. THE METHODOLOGICAL CHALLENGE

We have seen that the common law model of evidence requires judges to rule on the admissibility of evidence in a piecemeal, “atomistic” manner as the evidence is adduced, rather than make sweeping assessments about the impact of the evidence on the case as a whole.⁷¹ By contrast, the ECtHR has considered that a much more “holistic” approach is called for by considering how decisive or substantial any “suspect” evidence is in relation to the case as a whole.⁷² This requires judges to make some assessment of the strength of the other evidence against the accused, decisions that judges are not used to doing in criminal trials involving juries. It is true that at the end of the prosecution’s case judges have been traditionally asked to rule on whether there is a case to answer, requiring them to consider whether on one possible view of the facts there is evidence on which a jury could conclude the defendant is guilty.⁷³ But the new rules would seem to call for a much more searching analysis of the strength of the evidence as a whole. In its own terms, the sole or decisive rule governing the use made of unexamined statements requires a judgment to be made as to whether such evidence is the sole or decisive evidence in the case as a whole.⁷⁴ The *Salduz* principle, as enunciated by the ECtHR, did not seem to call for such a judgment to be made.⁷⁵ The court suggested that if incriminating statements were made after there had been a denial of access to a lawyer, then the rights of the accused were irretrievably prejudiced.⁷⁶ However, as we shall see, in its later application of the rule the ECtHR would seem to have changed tack. In considering whether the lack of access affects the fairness of the proceedings as a whole, the court has put particular emphasis on the quality and significance of the incriminating statements in the context of the evidence as a whole.⁷⁷

⁶⁹ See ADRIAN KEANE, *THE MODERN LAW OF EVIDENCE* 446 (3d ed. 1994).

⁷⁰ See *id.* at 194–95.

⁷¹ See JACKSON & SUMMERS, *supra* note 4, at 90.

⁷² See *id.* at 368.

⁷³ See, e.g., *R v. Galbraith* [1981] 1 WLR 1039 at 1042.

⁷⁴ See, e.g., *Asch v. Austria*, 203 Eur. Ct. H.R. (ser. A) at 10–11 (1991).

⁷⁵ See *Salduz v. Turkey*, 2008-V Eur. Ct. H.R. 59.

⁷⁶ See *id.* at 78.

⁷⁷ See *Ibrahim v. United Kingdom (Ibrahim I)*, App. Nos. 50541/08, 50573/08, 40351/09,

The UK judges were quick to voice their concerns about the “sole or decisive” rule. Soon after the ECtHR applied the “sole or decisive” rule to the UK in *Al-Khawaja v. UK*, the UK Supreme Court delivered a seven-judge ruling in *R v. Horncastle*,⁷⁸ raising concerns about the practicability of the test under the common law system.⁷⁹ In the jury system, the judge will not know whether a piece of evidence is decisive or not in the jury’s eyes, so it was suggested that the judge would have to rule inadmissible any witness statement capable of proving decisive.⁸⁰ If “decisive” means capable of making a difference between a finding of guilt and innocence, then this seemed to point to all hearsay evidence being excluded.

When the fourth section decision in *Al-Khawaja* was referred to the Grand Chamber, the ECtHR clarified that the word “decisive” should not be broadly construed to mean that almost all evidence would qualify as “decisive,” but should be narrowly understood as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case.⁸¹ But the broader methodological challenge that the sole or decisive rule poses to the common law model is that it re-engages the law of evidence in the logical analysis of evidence. The judge is no longer required to apply a technical rule (hearsay) and its exceptions in a binary fashion, determining whether the evidence is accordingly admissible or inadmissible. Instead, he is required to make a wholesale, rounded assessment of the importance of the evidence to the case as a whole. The jury, under judicial direction, must then likewise make its own assessment of the evidence in this manner. This is a shift towards the “forensic reasoning rules” that Roberts and Zuckerman have referred to, as opposed to the conventional exclusionary rules of evidence at common law.⁸² In contrast to the common law’s atomistic admissibility determinations (deferring holistic evaluation of evidence to the jury), the ECtHR is requiring judges to engage in holistic evaluation before the evidence gets to the jury.

Interestingly, however, the Grand Chamber defended the charge that the rule could not be practically applied in the common law system on the ground that the common law courts had *themselves* resorted to the very same sole or decisive rule when they had considered whether anonymous witness evidence should be admissible in criminal trials.⁸³ Rather than formulating a binary approach toward anonymous witness evidence whereby it was either admissible or not, the House of Lords in *R v. Davis*⁸⁴ had fashioned a rule (drawing, it would seem, from the language of

para. 191 (Eur. Ct. H.R. Dec. 16, 2014), <http://hudoc.echr.coe.int/eng?i=001-148676> [<https://perma.cc/SZJ4-AC37>].

⁷⁸ *R v. Horncastle* [2009] UKSC 14, [2010] 2 AC 373.

⁷⁹ *Id.* at 458–59.

⁸⁰ *See id.* at 453–54.

⁸¹ *Al-Khawaja v. United Kingdom (Al-Khawaja II)*, 2011-VI Eur. Ct. H.R. 191, 252–53.

⁸² *See* ROBERTS & ZUCKERMAN, *supra* note 27, at 676–84.

⁸³ *Al-Khawaja II*, 2011-VI Eur. Ct. H.R., at 250–51.

⁸⁴ [2008] UKHL 36, [2008] 1 AC 1128.

the ECtHR) that a conviction which was based solely, or to a decisive extent, on statements or testimony of anonymous witnesses could not be regarded as “fair,” adding that “[t]his [was] the view traditionally taken by the common law of England.”⁸⁵ This case prompted the UK government to reverse the binding effect of such a bright line rule by replacing it with legislation that allowed judges to make witness anonymity orders.⁸⁶ Interestingly, the effect of the rule was not wholly extinguished, as one of the factors which judges were to regard in deciding to make an anonymity order was “whether evidence given by the witness might be the sole or decisive evidence implicating the defendant.”⁸⁷ The ECtHR also drew attention to another context in which a “sole or decisive” rule had been incorporated into English law relating to the drawing of adverse inferences from an accused’s silence. In *Murray v. United Kingdom*,⁸⁸ the Court had approved the drawing of inferences from accused persons in certain circumstances when the evidence against the accused called for an explanation. However, it hedged this with various safeguards, one of which was that it would be incompatible with the right of silence to base a conviction “solely or mainly” on the accused’s failure to give evidence or on a refusal to answer questions put to him.⁸⁹ The Court did not add, but seemed to rightly imply, that such a rule had been successfully integrated into English law without much protest.⁹⁰ Moreover, in the latest legislative attempt to codify hearsay law in the Criminal Justice Act 2003, the UK Parliament began to shift the moorings of hearsay law away from a purely exclusionary or inclusionary approach by empowering the trial judge, at the end of the prosecution’s case, to direct an acquittal where he or she is satisfied that:

[T]he case against the defendant is based wholly or partly on a statement not made in oral evidence in the proceedings, and the evidence provided by the statement is so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be unsafe⁹¹

Rather than pointing to the impracticality of applying the sole or decisive rule in the common law context, these shifts away from a purely exclusionary approach toward adopting a more holistic approach of “suspect” evidence indicate that such a rule could be successfully integrated into English law. This has produced a far

⁸⁵ *Id.* at 1147.

⁸⁶ Coroners and Justice Act 2009, c. 25, §§ 86–87 (Eng.).

⁸⁷ *Id.* § 89(2)(C).

⁸⁸ 1996-1 Eur. Ct. H.R. 30, 31.

⁸⁹ *Id.* at 49.

⁹⁰ The “solely or mainly” phraseology has been incorporated into judicial directions to the jury. *See R v. Petkar* [2003] EWCA (Crim) 2668 [58].

⁹¹ Criminal Justice Act 2003, c. 44, § 125(1)(Eng.).

more harmonic convergence than was suggested as possible in the *Horncastle* decision between the common law as it has been developing in more recent years and the human rights approach.⁹² The challenge that the “sole or decisive” rule posed to the more flexible approach regarding the admissibility of hearsay developed in the Criminal Justice Act 2003 was more serious.

IV. THE FAIR PARTICIPATION CHALLENGE

The more substantive challenge that the new Strasbourg rules posed to the common law approach was how they appeared to elevate considerations of fair participation in the proceedings above the traditional considerations of truth-finding that had long provided a motivating factor for rules governing confessions and hearsay. The common law, as we have seen, had always accepted that involuntary confessions were inadmissible. The new *Salduz* doctrine now prescribed that *any* use of incriminating statements for a conviction when made during police interrogation without access to a lawyer would, in principle, prejudice the rights of the defense, even when, presumably, it is believed that the statements are reliable and voluntary.⁹³ Furthermore, the Court suggested that this would be the case even where, as the Court conceded, there could be compelling reasons for not granting access to a lawyer.⁹⁴ This suggested that the right of access to a lawyer is grounded in more than simply the privilege against self-incrimination, long embedded as a principle within the common law.⁹⁵ In justification of its rule, the ECtHR stated that access to a lawyer would help ensure the right of an accused not to incriminate himself.⁹⁶ Such a right presupposed that the prosecution in a criminal case must seek to prove their case without resorting to evidence obtained through methods of coercion or oppression. But the Court also seemed to extend its justification for access to a lawyer on the broader, more participative principle of equality of arms between the investigating or prosecuting authorities and the accused.⁹⁷ In later judgments, the ECtHR expressly linked the *Salduz* doctrine to the need to secure “the fundamental aspects of . . . [the] defence” such as the “discussion of the case, organisation of the defence, collection of evidence favorable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention.”⁹⁸

This participative strand to the fair trial standards is also very evident in the “sole or decisive” rule relating to unexamined statements which, in *Al-Khawaja*, was

⁹² See *R v. Horncastle* [2009] UKSC 14, [2010] 2 AC 373 at 458–59.

⁹³ See *Salduz v. Turkey*, 2008-V Eur. Ct. H.R. 59, 77–78.

⁹⁴ See *id.* at 78.

⁹⁵ See KEANE, *supra* note 69, at 446.

⁹⁶ *Salduz*, 2008-V Eur. Ct. H.R. at 77–78.

⁹⁷ See *id.* at 77.

⁹⁸ *Dayanan v. Turkey*, App. No. 7377/03, para. 32 (Eur. Ct. H.R. Oct. 13, 2009), <http://hudoc.echr.coe.int/eng?i=001-95015> [<https://perma.cc/SE4J-6578>].

applied even where there was a good reason for the non-attendance of the witness.⁹⁹ The common law has long recognized the importance of the defendant being able to confront his accusers and cross-examine them.¹⁰⁰ Indeed, the “sole or decisive” rule relating to anonymous statements articulated by the House of Lords in *Davis* gave particular expression to the content of these principles.¹⁰¹ However, there has also been a strong reliability strain built into the common law, reinforced by the statutory provisions relating to hearsay in the Criminal Justice Act 2003, which has allowed the admittance of hearsay when it is reliable or is the best evidence available.¹⁰² Before *Al-Khawaja*’s case was determined in Strasbourg, the English Court of Appeal had stressed that where a witness who is the sole witness of a crime has made a statement to the police, and that witness has since died (as happened in *Al-Khawaja*), there may be a strong public interest in the admission of the statement as evidence so that the prosecution may proceed.¹⁰³ This did not mean that such a statement would automatically be admissible. There was a provision under the legislation for the judge to exclude the statement if he considered it had insufficient value.¹⁰⁴ Additionally, as we have seen, there is a provision to direct an acquittal where reliance on such a statement would make a conviction unsafe.¹⁰⁵ When the case came to Strasbourg, however, the Court in its fourth section decision ruled that the use of such a statement constituted a violation of Article 6(1) and Article 6(3)(d) of the Convention.¹⁰⁶ The Court could envisage no counterbalancing factors that would justify the introduction into evidence of an untested statement which was the sole or decisive basis for the conviction of an applicant, other than in an exceptional case where the witness had been kept from giving evidence through fear induced by the defendant.¹⁰⁷

For the justices of the UK Supreme Court in *Horncastle*, this went too far.¹⁰⁸ According to Lord Phillips, who gave the unanimous judgment of the Court, *Al-Khawaja* was the first case where the sole or decisive test “had been applied so as to produce a finding of a violation of Article 6(1)(3)(d) . . . where there had been justification for not calling a witness and where the evidence was demonstrably reliable.”¹⁰⁹ This was also the first instance where the rule was applied in a case from England and Wales and no consideration had been given as to whether it was necessary or appropriate to apply the rule taking into account the safeguards contained in the

⁹⁹ See *Al-Khawaja v. United Kingdom (Al-Khawaja II)*, 2011-VI Eur. Ct. H.R. 191, 255.

¹⁰⁰ See KEANE, *supra* note 69, at 194–95.

¹⁰¹ See *R v. Davis* [2008] UKHL 36, [2008] 1 AC 1128 at 1157.

¹⁰² See Criminal Justice Act 2003, c. 44, § 114(2) (Eng.).

¹⁰³ *R v. Al Khawaja* [2005] EWCA (Crim) 2697, para. 26, [2006] 1 WLR 1078 at 1085.

¹⁰⁴ Criminal Justice Act 2003, c. 44, § 126(1) (Eng.).

¹⁰⁵ *Id.* § 125(1).

¹⁰⁶ See *Al-Khawaja v. United Kingdom (Al-Khawaja I)*, App. Nos. 26766105 & 22228106, paras. 42–43, 47–48 (Eur. Ct. H.R. Jan. 20, 2009).

¹⁰⁷ *Id.* paras. 44–46.

¹⁰⁸ See generally *R v. Horncastle* [2009] UKSC 14, [2010] 2 AC 373.

¹⁰⁹ *Id.* at 455.

Criminal Justice Act.¹¹⁰ His lordship considered that the justification for the sole or decisive test appeared to be that the risk of an unsafe conviction based solely or decisively on anonymous or hearsay evidence was so great that such a conviction could never be permitted.¹¹¹ But by building in safeguards, the Criminal Justice Act had shown that there were less draconian ways of protecting against that risk.¹¹² His lordship's preoccupation was very much about ensuring the reliability of the evidence.¹¹³ Earlier, his lordship indicated that there are two principal objectives of a fair criminal trial—that a defendant who is innocent should be acquitted, and that a defendant who is guilty should be convicted.¹¹⁴ He stated that the first objective carries more weight than the second, but the emphasis placed on these objectives highlights that a clear priority should be given to epistemic concerns in criminal trials.¹¹⁵ On this view, the right to cross-examination is not sacrosanct; instead, everything turns on the presumptive reliability of the statements made by witnesses.

What this view fails to encapsulate, however, is that a fair verdict is more than simply a reliable verdict.¹¹⁶ The sole or decisive rule as applied to unexamined statements may be justified on a participatory, rather than on a purely epistemic basis, which holds that witnesses put forward by either party must be capable of being effectively tested by the other. The more a case rests upon witness statements in respect of whom there is an absence of supporting evidence, the more it can be said that fairness requires that there should be an opportunity to examine these witnesses. The point is not that the witness needs to be examined to determine whether his or her evidence is reliable. The question is rather whether, as a matter of fairness, the defense ought to be given an opportunity to put a version of events directly to an important witness which is different from that advanced by the prosecution. If the prosecution has been able to question a witness and rely on a statement which is clearly incriminatory, why should the defense not be able to probe the witness who made it? Institutional equality between the parties, in order that the tribunal of fact can reach an impartial evaluation of the evidence, would seem to demand this.

Unfortunately, however, the strong claims that the Strasbourg rules in *Salduz* and *Al-Khawaja* seemed to make for meaningful defense participation in both the investigatory and trial processes have since been rolled back by the ECtHR. Rather, the ECtHR favors what would seem to be the classic common law concern for the reliability of the verdict, with fairness relegated as a mere side-constraint to ensuring that defendants are fairly treated in the criminal justice process and not coerced into making

¹¹⁰ *See id.*

¹¹¹ *Id.* at 453.

¹¹² *See* Criminal Justice Act 2003, c. 44, §§ 125(1), 126(1) (Eng.).

¹¹³ *See Horncastle*, [2010] 2 AC 373 at 453.

¹¹⁴ *Id.* at 433.

¹¹⁵ *Id.*

¹¹⁶ *See* Laura Hoyano, *What is Balanced on the Scales of Justice? In Search of the Essence of the Right to a Fair Trial*, (2014) CRIM. L. REV. 4, 4 (asserting that without the “substance of a fair trial, the administration of justice” fails).

involuntary statements.¹¹⁷ It did not take long for this rolling back to begin. When the UK government asked for the fourth section decision in *Al-Khawaja* to be referred to the Grand Chamber, the latter issued a decision which turned the “sole or decisive” rule into more of a flexible standard. This restored a strong reliability rationale into the Court’s decision-making and reaffirmed the dominance of the common law approach.¹¹⁸

V. STRASBOURG ROLLS BACK ITS OWN RULES

Much of the language in the Grand Chamber’s decision in *Al-Khawaja* expresses a strong determination to uphold the sole or decisive rule.¹¹⁹ The UK based its challenge to the rule on the Supreme Court judgment in *Horncastle*.¹²⁰ It argued that the rule seemed to have been particularly directed at civil law jurisdictions which had not accommodated the right to examination as comprehensively as common law jurisdictions.¹²¹ Common law countries had, by contrast, long developed a hearsay rule which addressed that aspect of fair trials that Article 6(3)(d) of the ECtHR was designed to ensure.¹²² The Grand Chamber accepted that much of the impact of Article 6(3)(d) was on continental procedures which previously allowed the accused to be convicted on the basis of evidence from witnesses whom he or she had not had an opportunity to challenge.¹²³ However, the cases of *Al-Khawaja*, where the accused had been convicted on hearsay evidence, would not have arisen if the strict common law rule against hearsay had been applied and the Criminal Justice Act had not provided for exceptions which allowed the admission of witness statements.¹²⁴ While it was important for the Court to have regard for substantial differences in legal systems and procedures, it had to apply the same standard of review under Article 6(1) and (3)(d) irrespective of the legal system from which a case emanates.¹²⁵ As we have seen, the Court similarly rejected the argument that the rule could not be applied within the common law system.¹²⁶

When it came to consider the substance of the rule, however, we see the Court coming to a gradual acceptance of the “reliability” approach that was adopted in *Horncastle*, which has arguably fatally undermined the right to examine witnesses.¹²⁷ The Court rejected the UK government’s submission that the rule was predicated on the false assumption that all hearsay evidence crucial to a case is either unreliable

¹¹⁷ See *infra* Part V.

¹¹⁸ *Al-Khawaja v. United Kingdom (Al-Khawaja II)*, 2011-VI Eur. Ct. H.R. 191, 253.

¹¹⁹ See *id.* at 248–51.

¹²⁰ *Id.* at 237.

¹²¹ *Id.* at 236.

¹²² See KEANE, *supra* note 69, at 194–95.

¹²³ *Al-Khawaja II*, 2011-VI Eur. Ct. H.R. at 248.

¹²⁴ See Criminal Justice Act 2003, c. 44, § 114 (Eng.).

¹²⁵ *Al-Khawaja II*, 2011-VI Eur. Ct. H.R. at 252–53.

¹²⁶ See *id.* at 248.

¹²⁷ See generally *id.*

or incapable of proper assessment.¹²⁸ Instead, the Court said it is predicated on the principle that the greater the importance of the evidence, the greater the potential unfairness to the defendant in allowing a witness to remain anonymous or absent from the trial.¹²⁹ So far, so good. But it then conceded that the rule is based largely on a reliability rationale; where there was such potential unfairness, there was a greater need for “safeguards to ensure that the evidence is demonstrably reliable or that its reliability can properly be tested and assessed.”¹³⁰ It then went on to undercut the significance of the right to examine witnesses under Article 6(3)(d) by stating that it has always “traditionally” interpreted Article 6(3) in the context of an overall examination of the fairness of the proceedings.¹³¹ Directing itself specifically to the sole or decisive rule, it stated that it should not be applied in an inflexible manner.¹³² Seemingly reining back from its earlier statement about the need to apply objective standards across all the member states, it considered that it would not be correct to ignore entirely the specificities of the particular legal system concerned, particularly its rules of evidence¹³³:

To do so would transform the rule into a blunt and indiscriminate instrument that runs counter to the traditional way in which the Court approaches the issue of the overall fairness of the proceedings, namely to weigh in the balance the competing interests of the defence, the victim, and witnesses, and the public interest in the effective administration of justice.¹³⁴

Far from introducing a more flexible element into the rule, however, it seemed then to take the bite out of the rule altogether—“where a conviction is based solely or decisively on the evidence of absent witnesses,” this was now only one important factor to be balanced in the scales.¹³⁵ The question in each case was whether there were “sufficient counterbalancing factors in place,” including strong procedural safeguards, to “permit a fair and proper assessment of the reliability of that evidence to take place” so that a conviction based on such evidence would only be permitted where it was sufficiently reliable given its importance to the case.¹³⁶

When the Court came to apply these principles, it ironically seemed to come close to appropriating for itself a fourth instance role, something it has always said it would not do, by looking not only for strong procedural safeguards but also by making an

¹²⁸ *Id.* at 240.

¹²⁹ *Id.* at 250.

¹³⁰ *Id.*

¹³¹ *Id.* at 264 (Sajó, J. & Karakaş, J., joint partly dissenting and partly concurring).

¹³² *Id.* at 261 (Bratza, J., concurring).

¹³³ *Id.*

¹³⁴ *Id.* at 252–53.

¹³⁵ *Id.* at 253.

¹³⁶ *Id.*

overall assessment of the reliability of the evidence.¹³⁷ The Court first looked at the safeguards in the English legislation that enabled judges to prevent juries from considering sole or decisive witness statements, even though convictions may be based on such statements, and considered that they were in principle strong safeguards to ensure fairness.¹³⁸ It then looked at the facts of the particular cases before it and considered whether there was corroborative evidence to establish the reliability of the hearsay.¹³⁹ The Court ruled that in the *Al-Khawaja* case, involving the statement of a deceased witness, there was, but that in the *Tahery* case, involving the statement of a witness in fear, there was not.¹⁴⁰ The counterbalancing factors that were considered, in other words, were not only whether there were procedural safeguards assisting the defense to overcome the inability to examine the witnesses, but also evidential considerations such as the strength of any corroborating evidence. In subsequent cases the ECtHR has taken a similar approach, determining whether the proceedings were fair overall according to whether there was or was not “strong corroborative evidence,” or in some cases determining whether the witness evidence was sole or decisive evidence in the first place.¹⁴¹

The most recent Grand Chamber decision in *Schatschaschwili v. Germany*¹⁴² on the non-attendance of important witnesses seems to accentuate this trend toward examining the reliability of the evidence and diminishing the importance of defense participation in terms of being able to examine witnesses. In this case, the ECtHR considered that the lack of a good reason for the non-attendance of a witness did not in itself violate the accused’s right to a fair trial.¹⁴³ In *Al-Khawaja*, the Court had said that the requirement that there be a good reason for admitting the evidence of an absent witness was a preliminary question to be examined before any consideration of whether that evidence was sole or decisive.¹⁴⁴ In a number of decisions before *Al-Khawaja*, the Court had found that even where the evidence of an absent witness had not been sole or decisive, there was a violation of Article 6(1) and 3(d) when no good reasons had been shown for failing to have the witness examined.¹⁴⁵ In *Schatschaschwili*, however, the Grand Chamber found that even though there were good reasons why two decisive witnesses could not attend, the absence of a good reason

¹³⁷ *Id.*

¹³⁸ *Id.* at 237–38.

¹³⁹ *Id.* at 238–39.

¹⁴⁰ *Id.*

¹⁴¹ See John Jackson & Sarah Summers, *Confrontation with Strasbourg: UK and Swiss Approaches to Criminal Evidence*, (2013) CRIM. L. REV. 114, 124.

¹⁴² 2015-VIII Eur. Ct. H.R. 419, 454.

¹⁴³ *Id.* at 456.

¹⁴⁴ *Id.* at 451.

¹⁴⁵ See, e.g., *Pello v. Estonia*, App. No. 11423/03 (Eur. Ct. H.R. Apr. 12, 2007), <http://hudoc.echr.coe.int/eng?i=001-80123> [<https://perma.cc/SUR6-6EDX>]; *Mild v. Finland*, App. Nos. 39481/91 and 40227/98 (Eur. Ct. H.R. July 26, 2005), <http://hudoc.echr.coe.int/eng?i=001-69906> [<https://perma.cc/4ZY3-GWY4>]; *Bonev v. Bulgaria*, App. No. 60018/00 (Eur. Ct. H.R. June 8, 2006), <http://hudoc.echr.coe.int/eng?i=001-75698> [<https://perma.cc/Q4C4-V4F3>]; *Lüdi v. Switzerland*, 238 Eur. Ct. H.R. (ser. A) (1992).

for the non-attendance of a witness was not itself conclusive of the unfairness of a trial.¹⁴⁶ Following the approach adopted in *Al-Khawaja*, the Grand Chamber stated:

[i]t would amount to the creation of a new indiscriminate rule if a trial were considered to be unfair for lack of a good reason for a witness's non-attendance alone, even if the untested evidence was neither sole nor decisive and was possibly even irrelevant for the outcome of the case.¹⁴⁷

Although the Court noted that the lack of a good reason for a prosecution witness's absence was a "very" important factor to be considered when assessing the overall fairness of the proceedings,¹⁴⁸ the extent to which the Court is prepared to tolerate the non-attendance of an important (if not decisive) witness for no good reason, thereby depriving the defense of an opportunity to cross-examine the witness, can be illustrated in *Seton v. UK*.¹⁴⁹ In this case, the English Court of Appeal upheld a judge's decision to admit, under the Criminal Justice Act, the hearsay evidence of a phone call by a serving prisoner in which he denied responsibility for a murder which the defendant alleged that he had committed.¹⁵⁰ The prisoner had refused to give a statement to the police or to testify.¹⁵¹ In its decision, the fourth section of the ECtHR considered that there was no good reason for the non-attendance of the witness (he could have been compelled to attend), but nevertheless found there had been no violation of Article 6 as there was other "substantial, even decisive, incriminating evidence" against the defendant.¹⁵² The case serves as a classic illustration of how the apparent reliability of the rest of the evidence was deemed to make the proceedings as a whole fair, thereby aligning reliability of the evidence very closely with fairness.

The reiteration of the traditional approach of looking at the overall fairness of the proceedings has also come into play in the Court's more recent interpretation of the *Salduz* rule. In *Ibrahim v. United Kingdom*,¹⁵³ the ECtHR introduced a two-tier

¹⁴⁶ *Schatschaschwili*, 2015-VIII Eur. Ct. H.R. at 461. The two decisive witnesses had been robbed in their apartment and fled to Latvia. *Id.* The trial court had taken all reasonable steps to try and secure their attendance.

¹⁴⁷ *Id.* at 453.

¹⁴⁸ *Id.* at 466.

¹⁴⁹ *Seton v. United Kingdom*, App. No. 55287/10, para. 62 (Eur. Ct. H.R. Mar. 31, 2016), <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22seton%20v.%20united%20kingdom%22%2C%22itemid%22:%5B%22001-161738%22%5D%7D> [https://perma.cc/L8YZ-ACY7].

¹⁵⁰ *Seton v. R* [2010] EWCA (Crim) 450.

¹⁵¹ *Id.*

¹⁵² *Seton v. United Kingdom*, App. No. 55287/10, para. 69 (Eur. Ct. H.R. Mar. 31, 2016).

¹⁵³ *Ibrahim v. United Kingdom (Ibrahim II)*, App. Nos. 5054/08, 50571/08, 505731/08, 40351/09 (Eur. Ct. H.R. Sept. 13, 2016) (Grand Chamber), <http://hudoc.echr.coe.int/eng?i=001-166680> [https://perma.cc/QX7Y-378L].

test considering whether restricting the *Salduz* right of access to a lawyer violated a fair trial.¹⁵⁴ The first question was “whether there were compelling reasons for the restriction of access” and the second question was whether the restriction had an impact on “the overall fairness of the proceedings.”¹⁵⁵ The rigor of the *Salduz* doctrine rule seemed to be diluted here in two respects.¹⁵⁶ First of all, in *Salduz*, the Court had accepted that there could be compelling reasons for the restriction of access but considered that where there were not, Article 6 required that “as a rule” access be provided.¹⁵⁷ The question left unanswered was what meaning to give to “as a rule.”¹⁵⁸ Was it to be interpreted to mean that where there were not compelling reasons for the restriction, there would be an automatic breach of Article 6 as the Court intended? Or did it mean only that where there were no compelling reasons, there would be merely a presumption of unfairness and that the Court could proceed in the traditional manner to consider whether the proceedings as a whole were fair? In *Ibrahim*, the Court was satisfied that there were compelling reasons for restricting access to three of the applicants given the urgent need to question them about the whereabouts of bombs which it was feared they had planted in the London underground.¹⁵⁹ But then, paralleling its stance in *Schatschaschwili* where the Court said that the absence of good reasons for the non-attendance of a witness would not necessarily violate a fair trial,¹⁶⁰ the Court took the view that the absence of compelling reasons similarly does not necessarily violate a fair trial.¹⁶¹ Instead, in such a case, there was a presumption of unfairness for the government to rebut.¹⁶²

A good illustration of how this can dilute the rigor of the *Salduz* rule can be seen in a later Grand Chamber case on the interpretation of the *Salduz* rule, *Simeonovi v. Bulgaria*.¹⁶³ The Court found—by twelve votes to five—that despite the absence of compelling reasons for restricting the applicant’s access to legal assistance while he had been in custody, the government had rebutted unfairness by showing that he had not been prejudiced by this restriction.¹⁶⁴ The applicant’s right to legal assistance

¹⁵⁴ *Id.* para. 5.

¹⁵⁵ *Id.*

¹⁵⁶ For an extensive commentary, see DIMITRIOS GIANNOULOPOULOS, IMPROPERLY OBTAINED EVIDENCE IN ANGLO-AMERICAN AND CONTINENTAL LAW 180–97 (2018). See also Ergul Celiksoy, Ibrahim and Others v. UK: *Watering Down the Salduz Principles?*, 9(2) NEW J. EUR. CRIM. L. 229, 241 (2018).

¹⁵⁷ *Id.* at 231–32.

¹⁵⁸ *Id.*

¹⁵⁹ *Ibrahim II*, Eur. Ct. H.R., para. 276.

¹⁶⁰ *Schatschaschwili v. Germany*, 2015-VIII Eur. Ct. H.R. 419, 421.

¹⁶¹ *Ibrahim II*, Eur. Ct. H.R., para. 262.

¹⁶² *Id.* para. 273.

¹⁶³ *Simeonovi v. Bulgaria*, App. No. 21980/04 (Eur. Ct. H.R. May 12, 2017), <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22SIMEONOVI%20v.%20BULGARIA%22%5D%22%22%7D> [https://perma.cc/34JK-E9CU].

¹⁶⁴ *Id.* para. 144.

had been restricted for the first three days of his police custody.¹⁶⁵ He had then made a voluntary confession two weeks later in the presence of a lawyer.¹⁶⁶ The Court said that no causal link was ever posited between the absence of a lawyer for the first three days of custody and the confession that was used, amongst other evidence, to convict him.¹⁶⁷ The Court found that although there had not been compelling reasons for restricting his right of access to a lawyer, the fairness of the proceedings, taken as a whole, had not been irretrievably prejudiced by the absence of legal assistance while he had been in police custody.¹⁶⁸ According to the latest Grand Chamber decision on the interpretation of the *Salduz* rule, it is necessary to adopt a two-tiered approach and consider “fairness as a whole,” even where there is a mandatory restriction on suspects in police custody communicating with a lawyer for which there could be no compelling reason.¹⁶⁹

The second respect in which the *Salduz* rule seemed to be diluted in *Ibrahim* relates to what is meant by the fairness of the proceedings. In *Salduz*, as we have seen, fairness seemed to be equated with not unduly prejudicing the rights of the accused under Article 6 even when there were compelling reasons for restricting the right of access.¹⁷⁰ Such rights were considered to be irretrievably prejudiced when incriminating statements were made in the absence of a lawyer.¹⁷¹ In *Ibrahim*, a somewhat different approach was taken to fairness.¹⁷² The decision was made in the context of a case where the applicants had been convicted of conspiracy to murder for detonating bombs which failed to explode on three underground trains and a bus in central London—two weeks after four suicide bombs exploded on three underground trains and a bus, killing fifty-two people and injuring hundreds more.¹⁷³ The Court considered that there could “be no question of watering down fair trial rights for the sole reason that the individuals in question [were] suspected of involvement in terrorism.”¹⁷⁴ But then, in the very next sentence it appeared to contradict itself: “when determining whether the proceedings as a whole have been fair[,] the weight of the public interest in the investigation and punishment of the particular offence in issue may be taken into consideration,” provided “the very essence of an applicant’s defense rights” is not extinguished.¹⁷⁵ This balancing of the individual defense

¹⁶⁵ *Id.* paras. 14, 18.

¹⁶⁶ *Id.* para. 21.

¹⁶⁷ *Id.* para. 140.

¹⁶⁸ *Id.* paras. 142, 144.

¹⁶⁹ *See* *Beuze v. Belgium*, App. No. 71409/10 (Eur. Ct. H.R. Sept. 9, 2018), [https://perma.cc/RJ7B-8R5K](https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22BEUZE%20v.%20BELGIUM%22%5D%22itemid%22:%5B%22001-187802%22%5D%7D).

¹⁷⁰ *Salduz v. Turkey*, 2008-V Eur. Ct. H.R. 59, 78.

¹⁷¹ *Id.* at 80.

¹⁷² *Ibrahim II*, Eur. Ct. H.R., para. 294.

¹⁷³ *Id.* paras. 14–15.

¹⁷⁴ *Id.* para. 252.

¹⁷⁵ *Id.* *See* Goss, *supra* note 48, at 1148–49 (arguing that the ECtHR attempts to have it

rights against the public interest seemed then to lead the Court, as it had done previously in *Al-Khawaja*, toward putting a high premium on the weight or reliability of the evidence against the defendant when considering the fairness of the proceedings as a whole.¹⁷⁶ In setting out a number of relevant factors to be considered, the Court put considerable emphasis on the quality and significance of the evidence in the context of the evidence as a whole.¹⁷⁷ The Court appeared to be suggesting that, “[t]he more important the evidence in the context of the prosecution case, the more vulnerable the suspect and the greater the risk of unreliability, the greater the impact will be on the fairness of the proceedings.”¹⁷⁸ On the facts of the case, the Court considered that the three applicants who had lied to the police when questioned in the absence of a lawyer had had these lies admitted as evidence against them as merely one element of a substantial prosecution case and in their cases, it was satisfied that the proceedings as a whole were fair.¹⁷⁹ By contrast, the admissions which the fourth applicant had made had formed an integral and significant part of the evidence on which his conviction was based, and the Court considered that in his case the proceedings were unfair.¹⁸⁰

In both respects in which it can be argued that the *Salduz* rule was diluted in *Ibrahim*, it is troubling that, like the watering down of the “sole or decisive” rule as applied to unexamined statements, the ECtHR has shifted the emphasis away from defense rights and put greater reliance on balancing these against the public interest in ensuring that the guilty are punished. It is true that in *Ibrahim* the Court emphasized that public interest concerns cannot extinguish “the very essence” of an applicant’s rights.¹⁸¹ But if these rights can be overridden in the interests of an overall fairness test that puts a heavy weight on the reliability of the evidence as a whole, it is hard to see how their essence is not taken away.¹⁸² As the dissent makes clear, “there is no logically compelling ground to claim that only an ‘overall fairness’ evaluation (based on the outcome of the trial) can result in a finding of a violation of Article 6.”¹⁸³ When one looks at the history of the Court’s case law, there was nothing unique in the *Salduz* approach of considering a specific factor to be so decisive to the fairness of the proceedings as to enable the fairness of the whole trial to be assessed.¹⁸⁴ In

both ways: Article 6 rights cannot be watered down when a particularly serious offense has been committed but the rights can be “balanced away” when terrorism is concerned).

¹⁷⁶ *Ibrahim II*, Eur. Ct. H.R., para. 252.

¹⁷⁷ *Id.* para. 274.

¹⁷⁸ Andrew Roberts, *Fair Trial: Ibrahim v. United Kingdom*, (2017) CRIM. L. REV. 877, 878.

¹⁷⁹ *Ibrahim v. United Kingdom (Ibrahim I)*, App. Nos. 50541/08, 50573/08, and 40351/09, para. 213 (Eur. Ct. H.R. Dec. 16, 2014).

¹⁸⁰ *Ibrahim II*, Eur. Ct. H.R., para. 309.

¹⁸¹ *Ibrahim I*, Eur. Ct. H.R., at 55–56 (Kalaydjieva, J., dissenting).

¹⁸² See also Goss, *supra* note 48.

¹⁸³ *Ibrahim II*, Eur. Ct. H.R., para. 14 (Sajó, J. & Laffranque, J., joint partly dissenting, partly concurring).

¹⁸⁴ *Salduz v. Turkey*, 2008-V Eur. Ct. H.R. 59, 83 (holding that Article 6 § 3(c) and Article 6 § 1 of the convention were violated because of the lack of legal assistance and the dismissal of the case).

other words, violations of certain bright line rules are so prejudicial per se to the overall fairness of the proceedings that there is no need to make any further assessment. Instead, the ECtHR would seem to have adopted the common law approach of giving weight to the reliability of evidence and the outcome of the trial over defense rights, without realizing that a harmonic convergence between truth-finding and fairness requires that these two considerations are not put in opposition. In the interests of the overall integrity of the proceedings, truth-finding is only achieved through fairness.

CONCLUSION—THE COMMON LAW VINDICATED OR REIMAGINED?

In earlier Parts of this Article, we have reviewed how in recent jurisprudence of the ECtHR, through the development of strong principles like the *Salduz* rule and the “sole or decisive” rule, common law judges have been encouraged to shift away from atomistic approaches toward more holistic approaches to factual reasoning, and to shift away from the common law emphasis on truth-finding, where fairness is considered to be a mere side-constraint on the overall search for rectitude. It is true that there were already signs of these shifts occurring, as judges have come to grapple more with “forensic reasoning rules” and with the importance of procedural rights.¹⁸⁵ But the emphasis of the ECtHR on defense participation as a vital element of a fair trial, at both investigatory and trial processes, has been a distinctive contribution that has encouraged a shift away from purely protective rights towards more participatory rights.¹⁸⁶ More recently, however, the ECtHR has taken some of the bite out of its participatory rules by equating fairness of the proceedings as a whole with whether there has been a fair (reliable) outcome.¹⁸⁷ This might seem to be a vindication of the traditional common law approach and has led to a more harmonic convergence between common law evidence and human rights law. But in another sense it has set back the potential for a harmonic convergence between truth and fairness, where each goal is achieved through procedures that allow for meaningful participation between the parties.

It would be wrong to end on too negative a note. The ECtHR continues to play a useful role in giving an independent voice to important principles which have the potential to influence the development of the common law of evidence and push it in the direction of a more harmonic convergence of principles. This can be illustrated by looking at two more positive features of the recent Grand Chamber decisions in *Schatschaschwili* and *Ibrahim*.¹⁸⁸ Although we have seen that the *Schatschaschwili* decision gave priority to the “fairness as a whole” principle when there has been no good reason for the non-attendance of witnesses, it went on to give a majority decision that has potentially wide-ranging significance for common law evidence.¹⁸⁹

¹⁸⁵ Jackson & Roberts, *supra* note 5, at 800.

¹⁸⁶ *Id.* at 814.

¹⁸⁷ See *supra* notes 181–84 and accompanying text.

¹⁸⁸ See generally *Schatschaschwili v. Germany*, 2015-VIII Eur. Ct. H.R. 419; *Ibrahim II*, Eur. Ct. H.R.

¹⁸⁹ *Schatschaschwili*, 2015-VIII Eur. Ct. H.R. at 466.

The Court concluded that on the facts of the case the evidence of the two witnesses was decisive in the determination of the applicant's conviction.¹⁹⁰ The trial court had scrutinized the reliability of their statements in a careful manner but hardly any procedural measures had been taken to compensate for the defense's lack of opportunity to directly cross-examine the witnesses.¹⁹¹ In particular, the Court pointed to the failure to provide for any defense examination of the witnesses at the investigation stage when the investigating judge had heard the witnesses.¹⁹² Overall, the ECtHR concluded that given the importance of the statements, the counterbalancing measures had been insufficient to permit a fair and proper assessment of the reliability of the untested evidence.¹⁹³

This reassertion of the importance of procedural measures to compensate for the absence of examination at trial is a welcome expression of the continuing importance of providing some measure of defense participation other than giving the defendant an opportunity simply to give his own version of the facts. *Salduz* heralded an important change in terms of the participation of defense counsel at the investigative stage of police questioning of suspects. Now, it would seem that *Schatschaschwili* is exhorting member states to build in mechanisms for the participation of the defense at the investigatory stage of questioning witnesses as well.¹⁹⁴ It has repercussions, however, for the common law model of evidence which has traditionally focused on the principle of defense participation at trial. Although it would seem that common law systems have adjusted to the *Salduz* principle, the notion that counsel should have a role in questioning witnesses who are likely to be absent at trial is a new challenge.

The other example of the ECtHR's role in encouraging states to comply with principle is seen in the *Ibrahim* decision.¹⁹⁵ We have seen that the Court considered that there were compelling reasons to restrict access to legal advice to three of the four applicants based on the urgency of the situation.¹⁹⁶ This was another respect in which the Court's judgment referred to the need to balance rights against the public interest.¹⁹⁷ When it came to the fourth applicant, it found there were not compelling reasons to restrict access here, because the police had acted completely outside the framework of domestic law.¹⁹⁸ In particular, they failed to caution him at the point when it became clear he was no longer only a witness, but was about to incriminate himself; this was a deliberate flouting of the code of practice governing the detention

¹⁹⁰ *Id.* at 467.

¹⁹¹ *Id.*

¹⁹² *Id.* at 466.

¹⁹³ *Id.* at 467.

¹⁹⁴ *Id.* at 466.

¹⁹⁵ See *Ibrahim v. United Kingdom (Ibrahim II)*, App. Nos. 5054/08, 50571/08, 505731/08, 40351/09, paras. 294, 311 (Eur. Ct. H.R. Sept. 13, 2016) (Grand Chamber).

¹⁹⁶ *Id.* paras. 278–79.

¹⁹⁷ *Id.* para. 276.

¹⁹⁸ *Id.* para. 300.

and questioning of suspects.¹⁹⁹ A significant minority of judges considered that it is hard to understand why, if the urgent factual circumstances were enough to constitute compelling reasons to restrict access to the first three applicants, these were not enough to constitute compelling reasons in respect of the fourth applicant.²⁰⁰ The minority thought that breaches of the code of practice should have been considered at the second stage of the test when examining the fairness of the proceedings as a whole, particularly as the Court mentioned that one factor to account for was whether the framework governing pretrial proceedings and the admission of evidence had been complied with.²⁰¹ The minority considered that because the trial judge had discretion to exclude the evidence when there had been breaches of the code, this meant there had been sufficient compliance with the rule of law.²⁰² But this overlooks the need for a human rights court to be seen affirming the rule of law. Here, there was no mere technical breach of the code; there was a deliberate flouting of the whole basis underlying the questioning of suspects which the trial judge failed to consider when exercising his discretion to admit the statement.

The common law has long subscribed to principles such as a right to a fair trial and the rule of law. As we have seen, however, the common law model of evidence tended to give priority to the weight or probative value of the evidence in any particular case, although it has upheld protective principles such as the need to protect defendants against abuse and compelled incrimination. The ECtHR's wider agenda of introducing participatory principles into the forensic process has challenged this approach. Although the Court has rolled back somewhat from imposing these principles on member states by making it clear that it will always look at the fairness of the proceedings as a whole, recent decisions show that this does not mean that the Court will always give overwhelming weight to the fairness or reliability of the outcome of a case. Instead, the Court will wish to ensure that counterbalancing procedures have been taken to try and accommodate participatory principles and that ultimately there has been respect for the rule of law in the procedures that have been followed.

¹⁹⁹ *Id.* para. 299.

²⁰⁰ *Id.* paras. 11–12 (Hajuyev, J., Yudkivska, J., Lemmens, J., Mahoney, J., Silvis, J., & O'Leary, J., partly dissenting).

²⁰¹ *Id.* para. 21.

²⁰² *Id.* paras. 25–26.