

# *The Human Rights Act and the Law of Criminal Evidence: Ten Years On*

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## *Abstract*

This article reviews the impact of the *Human Rights Act 1998* (UK) on the development of the law of criminal evidence in England and Wales. The article argues that the English courts have adopted a pluralist approach to the jurisprudence of the European Court of Human Rights in the course of developing a distinctive conception of fair trial rights under the *European Convention on Human Rights and Fundamental Freedoms*. That conception is founded on a principle of proportionality. The principle can take account of both epistemic and non-epistemic dimensions of fair trial rights, but controversy exists as to when non-epistemic considerations should result in a finding that a restriction on a fair trial right is disproportionate. The article concludes with a sketch of a possible solution consistent with the theory that holds the function of the law of the evidence to be the securing of legitimate verdicts in criminal trials.

## **I Introduction**

This article examines the impact of the United Kingdom's *Human Rights Act 1998* ('HRA') on the law of criminal evidence in England and Wales. A decade has passed since the Act came into force in October 2000. During that time numerous human rights challenges have been mounted to the domestic law of criminal process. Indeed, this area has provided one of the main sites for human rights contests across English law as a whole, and several of the decisions in the area are leading authorities on the implementation of the Act by the courts.<sup>1</sup> This litigation has covered a wide range of issues in the law of criminal procedure and evidence but, in the interests of space, the focus of the article is largely on evidential matters. The human rights

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<sup>1</sup> To name but three: *R v A (No 2)* [2002] 1 AC 45; *Brown v Stott* [2003] 1 AC 681; *Sheldrake v DPP* [2005] 1 AC 264.

jurisprudence in this area is still evolving, but nonetheless this is an appropriate time to take a step back and ask some broad questions about how the courts have responded to the human rights challenges presented to them.

Before outlining the argument, it will be helpful to recall the policy of the HRA and the key provisions of the Act which set out the duties and powers of the courts in adjudicating human rights issues. It is well known that the purpose of the Act was to enable the rights conferred on individual persons by the *European Convention on Human Rights and Fundamental Freedoms* ('ECHR') to be given direct effect in English law.<sup>2</sup> The then New Labour Government presented the policy of the Act as one of 'Bringing Rights Home',<sup>3</sup> meaning that it would no longer be necessary for a person complaining of a violation of their human rights under the ECHR to seek a remedy by way of application to the European Court of Human Rights in Strasbourg. English courts would be able to adjudicate directly on alleged violations and provide appropriate remedies.

To facilitate the implementation of the legislative purpose, the Act created a new set of duties and powers for public authorities, which include, for this purpose, courts and tribunals.<sup>4</sup> Crucially, the Act requires public authorities to act compatibly with the ECHR. It is unlawful for a public authority to act in a way that is incompatible with a Convention right.<sup>5</sup> In addition to courts and tribunals, other public authorities include the police, the Crown Prosecution Service and government departments, but not Parliament.<sup>6</sup>

Section 3(1) imposes an equally important duty relating to the interpretation of legislation:

So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

This section has been described as giving the courts a powerful canon of interpretation,<sup>7</sup> and as an emphatic adjuration by the legislature which applies even if there is no ambiguity in the statutory language.<sup>8</sup> Moreover, this duty is notable for not requiring that the preferred interpretation of the legislation be consistent with its statutory

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<sup>2</sup> The Act applies to all parts of the United Kingdom, but the focus of this article is on the law of England and Wales.

<sup>3</sup> This was the title of the Government White Paper which preceded the Act. See generally, S Fredman, 'Bringing Rights Home' (1998) 114 *Law Quarterly Review* 538.

<sup>4</sup> *Human Rights Act 1998* (UK) (HRA) s 6(3)(a).

<sup>5</sup> HRA, s 6(1).

<sup>6</sup> HRA, s 6(3).

<sup>7</sup> *R v DPP; Ex parte Kebilene* [2000] 2 AC 326, 373 (Lord Cooke).

<sup>8</sup> *R v A (No 2)* [2002] 1 AC 45 (Lord Steyn).

purpose.<sup>9</sup> Consequently, the courts have been willing to use s 3 to depart from the natural meaning of a statutory text in favour of a secondary meaning that is compatible with art 6 of the ECHR, but which may be contrived, and possibly unexpected given the purpose of the legislation.<sup>10</sup>

A further duty arises under s 2 whereby a court or tribunal determining a question which has arisen in connection with a Convention right must take into account what may be conveniently called the ‘Strasbourg jurisprudence’. This is shorthand for any relevant judgment, decision or opinion of any of the institutions established by the Convention, principally, of course, the European Court of Human Rights. It is notable that this obligation is only to take the jurisprudence into account. It is not made *binding* on the English courts, despite the fact that under the Treaty which established the ECHR, the European Court of Human Rights is the final arbiter of the meaning and application of the Convention. It has been said that the duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time<sup>11</sup> and, in the absence of special circumstances, to follow any clear and constant jurisprudence of the European Court of Human Rights.<sup>12</sup> However, as we shall see, that practice has been uneven, and there is an unresolved issue of supremacy where the Supreme Court of the United Kingdom fundamentally disagrees with a decision of the Grand Chamber of the Strasbourg court. This point will be returned to later.

Finally, under s 4 of the HRA, a court has power to make a declaration of incompatibility where it finds a provision of primary legislation to be incompatible with a Convention right, and it is not possible to give the provision a compatible reading by the application of s 3 of the Act. The courts have occasionally made s 4 declarations in the criminal justice context,<sup>13</sup> but are reluctant to do so and will use the s 3 interpretative duty and power whenever possible.<sup>14</sup>

<sup>9</sup> Unlike the interpretative duty under s 32 of the Victorian *Charter of Human Rights and Responsibilities Act 2006*, on which see *R v Momcilovic* (2010) 25 VR 436 and *Momcilovic v The Queen* [2011] HCA 34.

<sup>10</sup> *R v A (No 2)* [2002] 1 AC 45 is the most prominent example, where the House of Lords effectively rewrote part of s 41 of the *Youth Justice and Criminal Evidence Act 1999* (UK) so as to ensure compatibility with art 6(3)(d) of the restrictions on the use of sexual history evidence of a complainant.

<sup>11</sup> See *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 [20] (Lord Bingham).

<sup>12</sup> *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 [26].

<sup>13</sup> One example is *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837, which held that the Home Secretary’s statutory power to fix the minimum period to be served in prison by a person sentenced to mandatory life imprisonment for murder was incompatible with art 6(1).

<sup>14</sup> *R v A (No 2)* [2002] 1 AC 45; *Sheldrake v DPP* [2005] 1 AC 264; see also *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

These are the key elements of the scheme which Parliament set up when charging the courts with the task of ensuring that English law would be compatible with human rights across the board. It was obvious from the outset that the criminal justice system was likely to feature largely on the human rights agenda,<sup>15</sup> and so it has proved. Ten years on, the right of a person under art 6 of the ECHR to a fair hearing in the determination of a criminal charge has formed the basis of many challenges to the domestic law of criminal procedure and evidence. But art 6 is not alone in this respect. Other challenges to this area of the law have invoked other rights under the Convention, notably arts 2 (the right to life), 3 (the right against torture or inhuman or degrading treatment), 5 (the right to liberty and security of person), and 8 (the right to respect for private life). Collectively, these challenges have provided extensive tests of the courts' duties and powers. They have required the courts to identify and refine their approach to human rights issues in a wide variety of procedural and evidential contexts. The issues are complex because they include not only the scope and limits of criminal defendants' rights against the state, but also the resolution of conflicts of the rights of defendants with the rights of others, such as victims and witnesses.

The aim of this article is not to attempt a systematic review of the relevant judicial decisions. That would be too large a task and, in any event, it is one the author has to some extent undertaken elsewhere.<sup>16</sup> Nor is it proposed to develop a thematic doctrinal analysis of discrete evidential topics. The purpose is rather to offer some reflections on two general and related questions. The first is about the relationship of the United Kingdom Supreme Court (formerly the House of Lords) to the European Court of Human Rights. Here the focus is on the reception the Strasbourg jurisprudence has received in the highest domestic courts and its value to the English courts in their task of responding to the human rights challenges to the domestic law of criminal evidence. The second is about the nature of the English judicial response to these challenges, which raises the question of how far the English courts have discharged their duties and exercised their powers so as to develop a distinctive approach to human rights in the law of evidence. Is it possible to identify general characteristics in their approach, and to what extent might we account for such characteristics in terms of some theory of criminal process?

In outline, the author's reflections will take the form of a number of claims. The first claim is that the Strasbourg jurisprudence has met with a mixed response from the English courts. This varies

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<sup>15</sup> A T H Smith, 'The Human Rights Act and the Criminal Lawyer: The Constitutional Context' [1999] *Criminal Law Review* 251; A Ashworth, 'Article 6 and the Fairness of Trials' [1999] *Criminal Law Review* 261.

<sup>16</sup> Ian Dennis, *The Law of Evidence* (Sweet & Maxwell, 4<sup>th</sup> ed, 2010).

from clear approval to outright rejection. The reasons for this qualified acceptance are some perceived weaknesses in the style of the European Court's decision-making, and the uneven quality of some of the Court's judgments. Consequently, there has been some tendency for the English courts to treat the Strasbourg jurisprudence as a resource to be drawn upon when useful, in contrast to treating it in all cases as authoritative on the meaning and application of Convention rights. When not thought to be useful it tends to be distinguished or dismissed.

The second claim is that the English courts have taken a nuanced view of human rights in the law of evidence. In relation to the key question of how far fair trial rights under art 6 are in any sense absolute, the English cases demonstrate a selective approach. None of the rights appears to be incapable of qualification or restriction, but some appear to be more negotiable than others. The main standard used for negotiability is that of proportionality in pursuit of a legitimate aim. It seems that proportionality can take account of both epistemic<sup>17</sup> and non-epistemic<sup>18</sup> considerations, but the relationship between these considerations is somewhat opaque. A major challenge for the next decade of the *Human Rights Act*<sup>19</sup> will be to clarify the nature of the proportionality standard and to provide a coherent theoretical account of it. The final section of the paper offers a sketch of one such account, with the caveat that it is only a sketch and that much work remains to be done.

## II The Reception of the Strasbourg Jurisprudence

The English courts have made it clear from an early stage that they will not accept decisions of the European Court of Human Rights on evidential matters uncritically. In accordance with the traditions of common law adjudication, the judgments of the Strasbourg court have frequently been subjected to fine-grained analysis, and where they have been found wanting in terms of clarity, consistency or coherence the English courts have not been slow to say so.

A number of examples can be cited. Let us take first the privilege against self-incrimination. The ECHR does not state this in

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<sup>17</sup> Epistemic considerations go to the truth-finding objective of criminal proceedings, namely to determine the factual accuracy of the prosecution's charges and any defences to them.

<sup>18</sup> Non-epistemic considerations refer to values other than truth-finding, such as efficiency, which may bear on procedural or evidential issues in the proceedings.

<sup>19</sup> That is, assuming it survives in its present form. The Conservative Party, the dominant partner in the current Coalition Government, is pledged to review it: see M Savage and F Gibb, 'Tories Ready for Fight Over Human Rights "Interference" from Europe; Sex Offenders' *The Times* (London) 16 February 2011, 4.

express terms in art 6, in contrast to other human rights instruments such as the *International Covenant on Civil and Political Rights* (ICCPR).<sup>20</sup> But in a series of decisions in the 1990s the Strasbourg court implied the privilege into art 6, along with the related right to silence, describing them as ‘generally recognised international standards lying at the heart of the notion of a fair procedure’.<sup>21</sup> However, the court’s judgments in the leading cases of *Funke v France*<sup>22</sup> and *Saunders v United Kingdom*<sup>23</sup> are problematic in relation to the scope and limits of the privilege, and both have been criticised. In *R v Hertfordshire County Council; Ex parte Green Environmental Industries Ltd*,<sup>24</sup> Lord Hoffmann referred to ‘obscurities’ in the reasoning in *Funke*, in the course of holding that art 6 (and therefore its implied privilege against self-incrimination) did not apply to requests for information in non-adjudicative proceedings. In *Brown v Stott*<sup>25</sup> Lord Steyn described the reasoning in *Saunders* as ‘unsatisfactory and less than clear’ in the course of holding that the privilege was not absolute and could be limited by reference to a principle of proportionality. A further issue is whether the privilege extends to evidence such as documents which exist ‘independently of the accused’s will’, or whether it is limited to the protection of suspects and defendants from improper pressure to make statements which may be incriminating. *Funke* and *Saunders* are inconsistent on this key point;<sup>26</sup> consequently the English courts have preferred the view that they independently regard as jurisprudentially sound.<sup>27</sup>

A second example comes from the law relating to reverse burdens of proof, of which there are a great many in English criminal

<sup>20</sup> The privilege is set out expressly in *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14.

<sup>21</sup> *Funke v France* (1993) 16 EHRR 297 (‘*Funke*’); *Murray v United Kingdom* (1996) 22 EHRR 29; *Saunders v United Kingdom* (1997) 23 EHRR 313 (‘*Saunders*’).

<sup>22</sup> (1993) 16 EHRR 297.

<sup>23</sup> (1997) 23 EHRR 313.

<sup>24</sup> [2000] 2 AC 412, 424.

<sup>25</sup> [2003] 1 AC 681 [28].

<sup>26</sup> *Funke* held that the privilege extends to pre-existing documents such as bank statements; but the *Saunders* principle that the privilege does not extend to evidence having an existence independent of the accused’s will must logically exclude pre-existing documents. See, however, M Redmayne, ‘Rethinking the Privilege Against Self-Incrimination’ (2007) 27 *Oxford Journal of Legal Studies* 209. In *Jalloh v Germany* (2007) 44 EHRR 32, the European Court of Human Rights held that the forcible administration to the defendant of an emetic to retrieve drugs he had swallowed violated the privilege. The Court sought to reconcile *Funke* and *Saunders* on the basis of the degree of compulsion used to obtain evidence in defiance of the will of the suspect, but it is very doubtful whether this is a satisfactory test of the boundaries of the privilege.

<sup>27</sup> *Attorney-General’s Reference (No 7 of 2000)* [2001] 2 Cr App R 19.

law.<sup>28</sup> Legal burdens on the defendant are prima facie incompatible with the presumption of innocence under art 6(2) of the ECHR.<sup>29</sup> In numerous cases the defence has raised the issue of compatibility and argued that the legal burden in question should be read down to an evidential burden, using the interpretative power conferred on the courts by s 3 of the HRA. The Strasbourg jurisprudence on this topic is limited, and says little beyond indicating that the presumption of innocence is not absolute, but that any restrictions on it must be kept 'within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence'.<sup>30</sup> In *R v G*, Lord Hoffmann commented forcefully in relation to this paragraph of the judgment:

No one has yet discovered what this paragraph means ... I think that judges and academic writers have picked over the carcass of this unfortunate case so many times in attempts to find some intelligible meat on its bones that the time has come to call a halt. The Strasbourg court, uninhibited by a doctrine of precedent or the need to find a ratio decidendi, seems to have ignored it.<sup>31</sup>

In consequence of this perceived lack of help from Strasbourg the English courts have developed an extensive body of domestic jurisprudence dealing with the compatibility issue. The consistency and coherence of this case law is debatable, to say the least,<sup>32</sup> but it is nonetheless striking how the domestic courts have fashioned a distinctive approach based on a standard of proportionality, about which more later.

The third example is the strongest, in the sense that it shows the English courts rejecting outright what appears to be a key principle of Strasbourg jurisprudence and inviting the European Court of Human Rights to think again. This principle relates to the use by the prosecution of hearsay evidence in the form of pre-trial witness statements by witnesses who are unavailable to testify at trial.<sup>33</sup> The

<sup>28</sup> A Ashworth and M Blake, 'The Presumption of Innocence in English Criminal Law' [1996] *Criminal Law Review* 306.

<sup>29</sup> *R v Johnstone* [2003] 2 Cr App R 33 [47]; *Sheldrake v DPP* [2005] 1 AC 264 [41]; *R v Makuwa* [2006] 2 Cr App R 11 [28].

<sup>30</sup> *Salabiaku v France* (1988) 13 EHRR 379 [28]. See also *Janosevic v Sweden* (2004) 38 EHRR 473 and, for a general account of the Strasbourg case law, see B Emmerson, A Ashworth and A Macdonald, *Human Rights and Criminal Justice* (Sweet & Maxwell, 2<sup>nd</sup> ed, 2007) 348–52. For further discussion, see A Stumer, *The Presumption of Innocence* (Hart Publishing, 2010) ch 4.

<sup>31</sup> [2009] 1 AC 92 [5]–[6].

<sup>32</sup> For a critical review, see I Dennis, 'Reverse Onuses and the Presumption of Innocence: In Search of Principle' [2005] *Criminal Law Review* 901. See also A Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10 *International Journal of Evidence and Proof* 241.

<sup>33</sup> The same principle has been said by the European Court of Human Rights to apply also to the use of oral evidence from anonymous witnesses, and is equally controversial in that context. The power to make witness anonymity orders in

Strasbourg court has stated in a series of decisions that while the right of the defence under art 6(3)(d) to examine witnesses is not absolute, any restrictions on the right must be counterbalanced by other measures, and that in any event basing a conviction solely or decisively on depositions from a witness whom the defendant has had no opportunity to examine at any stage restricts the rights of the defence to an extent incompatible with art 6.<sup>34</sup> However, in *R v Horncastle*<sup>35</sup> the United Kingdom Supreme Court firmly rejected the ‘sole or decisive evidence’ limitation on the use of hearsay evidence. The principle was suggested to be overbroad, impracticable for use in jury trial, and unnecessary to ensure a fair trial given the existence of a ‘crafted code’ in the *Criminal Justice Act 2003* (UK) for the admission of hearsay evidence which contains numerous safeguards for the defence.

Lord Phillips, giving the unanimous judgment of the Supreme Court, spelt out the Court’s attitude to the Strasbourg jurisprudence:

The requirement to ‘take into account’ the Strasbourg jurisprudence will normally result in this Court applying the principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court. This is such a case.<sup>36</sup>

This amounts to a robust assertion of the Supreme Court’s independence from the Strasbourg court and a claim to a position of near, if not complete, equality with that court in the interpretation and application of the ECHR. The United Kingdom Supreme Court is not alone in Europe in adopting such a stance. Krisch has shown that the German Constitutional Court has taken a similar line, and that the

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English law is contained in the *Coroners and Justice Act 2009* (UK) pt 3 ch 2. For discussion of the issues arising, see J Doak and R Huxley-Binns, ‘Anonymous Witnesses in England and Wales: Charting a Course from Strasbourg’ (2009) 73 *Journal of Criminal Law* 508; I Dennis, ‘Witness Anonymity in the Criminal Process’ in J Chalmers, F Leverick and L Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh University Press, 2010) ch14; D Ormerod, A Choo and R Easter, ‘*Coroners and Justice Act 2009*: The Witness Anonymity and Investigation Anonymity Provisions’ [2010] *Criminal Law Review* 368.

<sup>34</sup> *Unterpertinger v Austria* (1991) 13 EHRR 175; *Saidi v France* (1994) 17 EHRR 251; *PS v Germany* (2003) 36 EHRR 61; *Luca v Italy* (2003) 36 EHRR 807; *Al-Khawaja and Tahery v United Kingdom* (2009) 49 EHRR 1.

<sup>35</sup> [2010] 2 AC 373.

<sup>36</sup> *R v Horncastle* [2010] 2 AC 373 [11].



Spanish and French courts both retain flexibility in the weight they accord to Strasbourg judgments.<sup>37</sup> At the same time it should be said that the United Kingdom Supreme Court's statement in *R v Horncastle* stands in some contrast to the views expressed in the House of Lords a few months earlier in *Secretary of State for the Home Department v AF (No 3)*.<sup>38</sup> The latter case concerned the extent of the obligation on the Home Secretary to disclose to an applicant for judicial review the grounds of reasonable suspicion sufficient to justify the making of a control order against the applicant. The House of Lords held that the applicant's appeal against a refusal of judicial review should succeed in view of the judgment of the European Court of Human Rights in the earlier case of *A v United Kingdom*,<sup>39</sup> which concerned a similar issue in relation to the certification and detention without trial of a suspected international terrorist. Lord Hoffmann said:

I agree that the judgement of the European Court of Human Rights in *A v United Kingdom* requires these appeals to be allowed. I do so with very considerable regret because I think that the decision was wrong ... Nevertheless I think that your Lordships have no choice but to submit ... [T]he UK is bound by the Convention, as a matter of international law, to accept the decisions of the European Court of Human Rights on its interpretation.<sup>40</sup>

Lord Rodger was even more succinct: '[W]e have no choice ... Strasbourg has spoken, the case is closed'.<sup>41</sup>

One explanation for the very different approaches revealed in these cases may be that the judgment in *A v United Kingdom* was a decision of the Grand Chamber of the European Court of Human Rights, which sits with an enlarged Bench to hear cases of particular sensitivity or difficulty. The judgments of the Grand Chamber have an authority somewhat greater than those of the Sections of the Court and usually represent the Court's last word on the subject. In *R v Horncastle* the Supreme Court was addressing a principle applied by the Fourth Section of the Strasbourg court in *Al-Khawaja and Tahery v United Kingdom*. The Supreme Court clearly envisaged that the Grand Chamber would be considering the latter case on a reference request by the United Kingdom Government, which did indeed happen. The case was argued before the Grand Chamber in May 2010; at the time of writing the judgment is still awaited. There is no doubt that it will be one of the most important that the European Court of Human Rights has ever delivered. It will be crucial in defining the relationship

<sup>37</sup> N Krisch, 'The Open Architecture of European Human Rights Law' (2008) 71 *Modern Law Review* 183.

<sup>38</sup> [2010] QB 370.

<sup>39</sup> (2009) 49 EHRR 29.

<sup>40</sup> *Secretary of State for the Home Department v AF (No 3)* [2010] QB 370 [70].

<sup>41</sup> [2010] QB 370 [98].

between the Strasbourg court and the Supreme Court of the United Kingdom,<sup>42</sup> and may have implications for the Supreme Courts of other Member states who are parties to the Convention. It will of course also have major significance for the law of evidence. If the court upholds the ‘sole or decisive’ limitation on the use of hearsay and anonymous prosecution evidence the consequences for English criminal justice will be profound.

An alternative explanation for the different approaches in the two English cases is that while the courts remain completely unpersuaded as to the merits of the ‘sole or decisive evidence’ principle, they were generally content to accept the Strasbourg court’s conclusion on the disclosure issue. Several of the speeches of the House of Lords in *Secretary of State for the Home Department v AF (No 3)* expressly supported the decision in *A v United Kingdom* that the Home Secretary should make sufficient disclosure of the case against the person in question to enable him to give effective instructions to his lawyers or special advocates<sup>43</sup> regarding the defence to the allegations.<sup>44</sup> Many would regard this as a core principle of natural justice, and Lord Scott expressed the view that the same result would be reached at common law.<sup>45</sup>

If sympathy for or antipathy to the merits of the Strasbourg views is the explanation for the different approaches, it follows that it is conceivable that the Supreme Court of the United Kingdom might refuse to follow an upholding by the Grand Chamber of the ‘sole or decisive evidence’ principle.<sup>46</sup> Constitutionally the propriety of such a course might be thought dubious, given the status in international law of the European Court of Human Rights as the ultimate authority on the interpretation of the text of the Convention. However, as noted above, the duty on English courts under the HRA is only to ‘take account of’ the Strasbourg jurisprudence; the decisions of the Strasbourg court are not stipulated to have binding force. There is scope therefore for an argument that Parliament intended the English courts to adopt what Krisch has called a ‘pluralist’ approach to the Convention, meaning an approach based on dialogue and co-ordination between the national and European courts rather than a hierarchical model in which the rulings of

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<sup>42</sup> This is not say that the Strasbourg court itself will attempt to define its relationship to the Supreme Court, but the latter will clearly have to return to the issue in due course.

<sup>43</sup> Special security-cleared advocates may be appointed by the Attorney-General to represent the interests of the accused in cases where considerations of national security are held to justify non-disclosure of material to the accused and the lawyers normally representing the accused.

<sup>44</sup> See *Secretary of State for the Home Department v AF (No 3)* [2010] QB 370 [83]–[84] (Lord Hope), [96] (Lord Scott), [103], [106] (Baroness Hale).

<sup>45</sup> [2010] QB 370 [96].

<sup>46</sup> More likely perhaps would be an attempt to restrict its operation as narrowly as possible.

the European court have to be accepted however good or bad they may be.<sup>47</sup>

In defence of pluralism, the English courts might point to a number of reasons why Strasbourg jurisprudence is not always worthy of uncritical acceptance. The style of some of the judgments does not carry for common lawyers the persuasive authority which they have come to expect from their highest courts. Sometimes the judgments, particularly of Sections of the Court rather than the Grand Chamber, consist of little more than a narrative history of the case, a summary of the arguments for the parties, a brief recall of principle from earlier Strasbourg cases, and an application of the principle to the facts.<sup>48</sup> This oracular style of judgment tends to lack the detailed analysis of precedent, of academic and professional critiques, and of underlying principle that the common law tradition would expect from its highest courts such as the House of Lords or the High Court of Australia.

Second, the lack of this type of analysis can lead to flagrant inconsistency of decision. The conflict in the leading Strasbourg cases on the scope of the privilege against self-incrimination, namely whether it extends to documents having an existence independent of the will of the accused, has already been mentioned.

Third, lack of analytical rigour can lead to incoherence of principle. For example, the European Court of Human Rights held in one case that the use of evidence obtained by unfair entrapment of a defendant to supply drugs deprived him of his right under art 6 to a fair trial 'from the outset'.<sup>49</sup> However, the Court also held just two years later that the use of a covert recording, which had been made in violation of art 8 of the ECHR, did not necessarily make a trial unfair.<sup>50</sup> The recording contained highly incriminating statements by the defendant relating to his participation in the illegal importation of drugs. There are of course differences between these methods of obtaining evidence, but it seems appropriate to compare the two situations given that both involved impropriety by state investigative agencies, and in both the evidence obtained was decisive of the defendant's guilt of a serious drug offence. It is unclear as a matter of principle how the trial can be unfair in one case but not in the other.

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<sup>47</sup> The argument might be reinforced by the formal point that under the HRA the duty of the English courts is to act compatibly with 'Convention rights', as interpreted by the English courts themselves. As noted above, this duty has enabled the domestic courts to interpret the scope of certain rights under the Convention in more detail and, arguably, to provide greater protection than the Strasbourg jurisprudence. The crucial question then is whether the duty is subject to an implied limitation that 'Convention rights' may not be interpreted in a way that provides less protection than the Strasbourg jurisprudence.

<sup>48</sup> A good example is *JB v Switzerland* [2001] ECHR 324 (3 May 2001).

<sup>49</sup> *Teixeira de Castro v Portugal* (1999) 28 EHRR 101.

<sup>50</sup> *Khan v United Kingdom* (2001) 31 EHRR 1016.

Fourth, as the Supreme Court pointed out in *R v Horncastle*, the Strasbourg court may sometimes lack a proper understanding of the English procedural context. The leading judgment of Lord Phillips argued that the Strasbourg case law developed the ‘sole or decisive evidence’ limitation on the use of hearsay and anonymous evidence:

without full consideration of the safeguards against an unfair trial that exist under the common law procedure. Nor, I suspect, can the Strasbourg court have given detailed consideration to the English law of admissibility of evidence, and the changes made to that law, after consideration by the Law Commission, intended to ensure that English law complies with the requirements of art 6(1) and (3)(d).<sup>51</sup>

Lord Phillips’ argument can be reinforced by the point that judges from the common law adversarial tradition are in a very small minority on the Strasbourg Bench. There are currently 47 Member states of the Council of Europe, each of which nominates a judge to sit on the European Court of Human Rights. Of the 47 judges who comprise the Strasbourg Bench, only two, the United Kingdom and Irish judges, are squarely from the common law tradition.<sup>52</sup> Of course, this is not to suggest that all the other 45 judges form a homogeneous bloc; there are numerous differences in forms of criminal process amongst the many continental jurisdictions represented on the court. Nor is it suggested that all the continental judges are in a state of total ignorance of common law procedure. But the fact remains that in many of the Strasbourg cases the court is likely to have a significant cognitive deficit in relation to common law procedure, and this may be particularly true of the complex rules which govern the admissibility and use of evidence in criminal proceedings in common law jurisdictions.

For the final point in this section of the paper we return to Lord Phillips’ comment in *R v Horncastle* about the relationship of the Supreme Court and the European Court of Human Rights being founded on dialogue. The examples discussed so far show the English courts being influenced in varying degrees by the Strasbourg decisions. But it should not be thought that the traffic is, as it were, all one way. In at least one notable art 6 case the European Court of Human Rights accepted in substance an English approach to a fair trial right. The case was *O’Halloran and Francis v United Kingdom*,<sup>53</sup> which concerned a compulsory requirement for the owner of a motor vehicle caught on camera speeding to disclose to the police the identity of the driver at the

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<sup>51</sup> *R v Horncastle* [2010] 2 AC 373 [107].

<sup>52</sup> Two more, the judges from Cyprus and Malta, might be expected to have some familiarity with common law approaches to criminal process.

<sup>53</sup> (2008) 46 EHRR 21.

time.<sup>54</sup> In holding that the requirement was compatible with the implied right under art 6 against self-incrimination, the Strasbourg court cited and adopted the justifying arguments for the requirement which had been set out by Lord Bingham in the earlier Privy Council case of *Brown v Stott*.<sup>55</sup> This was significant, since Lord Bingham had expressly described his approach as one founded on the principle that limits on art 6 rights could be justified if they were proportionate measures for the achievement of a legitimate aim. The European judgment does not refer in terms to proportionality; however, its listing of the various factors relevant to whether the ‘essence’ of the privilege against self-incrimination had been destroyed, and its discussion of the relative weight of those factors, seems to involve a calculation of proportionality in all but name. Lord Bingham’s approach is discussed in more detail in the next section of the paper; for the moment we may note that this case, read with those mentioned earlier in this section, supports the idea that the Strasbourg court and the domestic courts may influence each other in a relationship that is more pluralistic than strictly hierarchical.

### III The English Approach to the Right to a Fair Trial in Light of Article 6

The right to a fair trial in art 6 of the ECHR is a strong right, in the sense that the terms of the Convention do not permit the kinds of qualifications that can be made to the rights in arts 8–11.<sup>56</sup> However, it is clear that the specific express and implied rights in art 6, which constitute guarantees of particular features of fair trial, can be subject to exceptions and qualifications. Article 6(1) itself allows expressly for limitations to be imposed on the right to a *public* hearing, and the Strasbourg and domestic jurisprudence reveals that limitations may be imposed on the other particular rights in art 6. Accordingly, it is possible to say that all the individual art 6 rights are negotiable to some extent. This article now considers the methodology for determining the validity of exceptions and qualifications, and asks how far it is possible to determine the limits of negotiability.

The Strasbourg jurisprudence has not developed a uniform methodology for resolving these issues. Although a concept which appears to be one of proportionality has been said to be inherent in the

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<sup>54</sup> *Road Traffic Act 1988* (UK) s 172. It is an offence to refuse to disclose the required information.

<sup>55</sup> [2003] 1 AC 681.

<sup>56</sup> Although it is not absolute insofar as a Member state can formally derogate from it under art 15 in time of war or any other public emergency threatening the life of the nation. The UK has never sought to make such a derogation from art 6.

whole of the Convention,<sup>57</sup> the European Court of Human Rights has not deployed the concept with any consistency in the context of art 6. It has been referred to in connection with limiting the right of access to the court,<sup>58</sup> and the use of reverse burdens of proof contrary to the presumption of innocence in art 6(2).<sup>59</sup> But it has not been referred to in connection with restrictions on the privilege against self-incrimination, or the right to examine witnesses under art 6(3)(d). In these contexts the court has preferred to talk of other limiting principles, such as not infringing the ‘essence’ of the privilege, or not permitting hearsay or anonymous evidence to be the ‘sole or decisive’ evidence for conviction.<sup>60</sup> It is unclear how far these principles are part of the methodology of proportionality, or whether they mark external limits to any notion of a ‘fair balance’ between community interests and defence rights.

By contrast, the English courts have been more consistent in using proportionality to evaluate restrictions on art 6 rights, although the practice has not been uniform.<sup>61</sup> Examples of proportionality reasoning in the evidential context relate to restrictions on the privilege against self-incrimination,<sup>62</sup> the presumption of innocence,<sup>63</sup> the right to examine complainants on their previous sexual behaviour,<sup>64</sup> and legal professional privilege.<sup>65</sup> In these cases the courts have generally taken their lead from Lord Bingham’s seminal judgment in *Brown v Stott*, referred to above.

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<sup>57</sup> *Sporrong and Lonnroth v Sweden* (1983) 5 EHRR 35 [69]; *Soering v United Kingdom* (1989) 11 EHRR 439 [89]. Both cases refer to the ‘search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights’. It is this concept of the ‘fair balance’ which Lord Bingham referred to in *Brown v Stott* as the standard of proportionality.

<sup>58</sup> *Ashingdane v United Kingdom* (1985) 7 EHRR 528.

<sup>59</sup> *Janosevic v Sweden* (2002) 38 EHRR 22.

<sup>60</sup> A similar limitation has been said to apply in relation to the implied right to silence – that is, adverse inferences from a defendant’s failure to mention facts when interviewed by the police, which the defendant relies on in defence at trial, must not be the sole or main evidence for conviction: see *Condron v United Kingdom* (2001) 31 EHRR 1. This is a Strasbourg decision which the English courts have accepted without demur, possibly because many judges were not enamoured of the reform to the common law right to silence effected by s 34 of the *Criminal Justice and Public Order Act 1994* (UK): see, eg, *R v Bowden* [1999] 1 WLR 823; and I Dennis, ‘Silence in the Police Station: The Marginalisation of Section 34’ [2002] *Criminal Law Review* 25.

<sup>61</sup> The language of proportionality has not been used in the context of hearsay and anonymous evidence, which engage art 6(3)(d), although it is arguable that it could and should be used: see I Dennis, ‘The Right to Confront Witnesses: Meanings, Myths and Human Rights’ [2010] *Criminal Law Review* 255.

<sup>62</sup> *Brown v Stott* [2003] 1 AC 681; *R v S and A* [2009] 1 All ER 716; *R v K* [2010] 2 WLR 905.

<sup>63</sup> *R v Lambert* [2002] 2 AC 545; *Sheldrake v DPP* [2005] 1 AC 264.

<sup>64</sup> *R v A (No 2)* [2002] 1 AC 45.

<sup>65</sup> *In Re McE* [2009] 2 Cr App R 1.

According to this judgment the criteria for a valid qualification or restriction of an art 6 right are to be found in the concepts of legitimate aim and proportionality. To be valid a restriction must first be imposed in pursuance of a legitimate aim, which may be an important goal of public policy, such as the reduction of death and injury caused by the misuse of motor vehicles,<sup>66</sup> or the protection of complainants of sexual offences from intrusive and distressing questioning.<sup>67</sup> Given that the courts will invariably be considering the validity of restrictions imposed by statutory provisions passed by a democratically elected Parliament, they are unlikely in most cases to question the legislature's conceptions of the aims of public policy. Judicial deference in this respect would seem to be constitutionally appropriate,<sup>68</sup> and it will be an exceptional case where an English court will be able to hold that a statutory restriction of a fair trial right is incompatible with art 6 because it does not serve a legitimate aim.

Second, the restriction must be proportionate to the aim. This means that it must represent a fair balance between the importance of the community interest in the legitimate aim to be achieved and the importance of the interest in the protection of the defendant's fundamental rights.<sup>69</sup> A considerable number of factors may be taken into account in calculating the 'fair balance', and these will vary according to the nature of the fair trial right in question. The factors relevant to deciding the proportionality of a reverse onus, for example, will not necessarily be the same as those relevant to an evaluation of a restriction on the privilege against self-incrimination. There are, however, some principles of general application. First, the restriction or qualification must bear a rational connection to the legitimate aim.<sup>70</sup> As the Canadian Supreme Court put it in *R v Oakes*,<sup>71</sup> the measure adopted must be carefully designed to achieve the objective in question; it must not be arbitrary, unfair or based on irrational considerations. Second, it must not go beyond what is necessary to achieve the aim.<sup>72</sup> In the language of Strasbourg, the measure in question must be 'strictly necessary'.<sup>73</sup> Third, both the European Court of Human Rights and the English courts will also look carefully at safeguards against unfair infringements of the right in question. The European Court has insisted,

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<sup>66</sup> *Brown v Stott* [2003] 1 AC 681.

<sup>67</sup> *R v A (No 2)* [2002] 1 AC 45.

<sup>68</sup> See in particular the remarks of Lord Hope in *R v DPP; Ex parte Kebilene* [2000] 2 AC 326, 381; and Lord Bingham in *Sheldrake v DPP* [2005] 1 AC 264 [23].

<sup>69</sup> *Brown v Stott* [2003] 1 AC 681.

<sup>70</sup> *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80.

<sup>71</sup> [1986] 1 SCR 103.

<sup>72</sup> *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80; *Thomas v Baptiste* [2000] 2 AC 1; *Brown v Stott* [2003] 1 AC 681, 704.

<sup>73</sup> *Van Mechelen v Netherlands* (1997) 25 EHRR 647.

for example, that restrictions on a defendant's right to examine witnesses must be accompanied by measures to 'counterbalance' any handicaps to the defence resulting from the inability to cross-examine a witness.<sup>74</sup>

This example leads to crucial questions: whether proportionality calculations relate exclusively to epistemic considerations, or whether they also take account of non-epistemic considerations and, if so, what is the relationship between epistemic and non-epistemic considerations. The following supposition is taken as a starting point. While references to 'counterbalancing' measures might suggest that the courts conceptualise the question in terms of whether the restriction has a significant effect on a defendant's ability to present a full and effective defence to the charge, so that he or she will be acquitted if innocent, according to this supposition the right to examine witnesses would represent an instrumental right for ensuring the factual accuracy of the criminal verdict. The question of proportionality would then be concerned with the adequacy of alternative safeguards for ensuring the reliability of the evidence of a witness who cannot be cross-examined fully or even at all.

However, the deployment by the European Court of Human Rights of the 'sole or decisive' evidence principle, referred to above, to limit the use of hearsay or anonymous evidence, would seem to indicate that for Strasbourg counterbalancing epistemic disadvantage is not the only concern. The principle appears to limit the extent to which compensatory measures for the handicaps to the defence may go. It has been argued elsewhere that the introduction of this principle suggests that the European court conceives of the cross-examination of witnesses as having a non-consequentialist process value, in addition to its instrumental value for determining the reliability of witness evidence.<sup>75</sup> This process value appears to be founded on the importance of providing the defendant with an *opportunity* to test evidence that may be decisive; it is a non-epistemic consideration in the sense that the opportunity should be provided irrespective of whether the evidence in question carries its own guarantees of reliability, or whether the counterbalancing measures are sufficient to permit the reliability of the evidence to be assessed safely. To put the point another way, the principle suggests that art 6 does not permit a defendant to be convicted wholly or largely on witness evidence that he or she has had no opportunity to test by questioning.

If this analysis is correct, two key conclusions follow. The first is that art 6 rights may have both epistemic and non-epistemic dimensions. Restrictions on art 6 rights may therefore have to address

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<sup>74</sup> Ibid.

<sup>75</sup> See above n 61.



both dimensions. The final section of the article returns to this point. The second conclusion is that non-epistemic considerations are at least partly concerned with the fair treatment of the defendant as a citizen of the state.<sup>76</sup> The right to fair treatment is founded on the defendant's political and moral claim to respect for his liberty and dignity as a citizen of a democratic polity.<sup>77</sup> All citizens may make this claim, which explains why the claims of defendants to fair treatment in the criminal process sometimes conflict with those of witnesses.<sup>78</sup> It can be further argued that a defendant's right to fair treatment generates a number of entitlements that have an intrinsic value. This value is independent of any contribution these rights may make to achieving accurate fact-finding in criminal adjudication. At the same time it is important to note that other non-epistemic considerations exist which are not exclusively defendant-focused. They may include matters which promote what have been called elsewhere<sup>79</sup> the moral authority and/or the expressive value of the criminal verdict, as opposed to its factual accuracy. If criminal verdicts are to be legitimate, they have not only to be factually accurate ('true' in that sense), but also carry moral authority and express the value of the rule of law.

An example of a case where both epistemic and non-epistemic considerations are in play and point to the same conclusion is the control order case of *Secretary of State for the Home Department v AF (No 3)*.<sup>80</sup> This is not a criminal case in point of form, since control orders are civil orders which are intended to be preventative and not punitive. But, as Zedner has argued,<sup>81</sup> control orders impose measures on individuals which may be at least as onerous as some criminal punishments, and that is a reason for treating decisions on their validity as analogous to decisions about criminal liability. As noted above, the issue in this case concerned the non-disclosure to the defendant of closed material containing the essence of the case against him that the government alleged justified the Home Secretary's reasonable suspicion that he was engaged in terrorism. One argument for the government was that disclosure should not be ordered where it would

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<sup>76</sup> I use the term 'citizen' broadly to denote any person subject to the state's criminal jurisdiction and to whom the state has obligations under human rights legislation. For the purposes of the argument in this article nothing turns on whether the person has citizenship status.

<sup>77</sup> R M Dworkin, *Law's Empire* (Harvard University Press, 1986) chs 6 and 7; A Duff, L Farmer, S Marshall and V Tadros (eds), *The Trial on Trial* vol 3 (Hart Publishing, 2007).

<sup>78</sup> An obvious example is the conflict between the right of a complainant of a sexual offence to respect for her private life (art 8 of the ECHR), which would tend to rule out cross-examination on her previous sexual behaviour, and the right of the defendant to examine a witness against him.

<sup>79</sup> See Dennis, above n 16, ch 2.

<sup>80</sup> [2010] QB 370.

<sup>81</sup> L Zedner, 'Preventive Justice or Pre-Punishment? The Case of Control Orders' [2007] *Current Legal Problems* 174.

make no difference because the case in the closed material was ‘overwhelming’. Lord Hope summarily rejected this argument for three reasons.<sup>82</sup> First, he said, you can never know what difference disclosure might make to the outcome. The defendant might have an innocent explanation for something apparently damning on its face. This is clearly an epistemic consideration, since it goes to the factual existence of grounds for suspicion. Second, persons whose rights are to be affected by control orders are entitled to be heard in their defence, and in order that they may enjoy that right they must first be notified of the allegations against them. This right clearly has an epistemic dimension (a defendant will have difficulty making a factually accurate defence to unknown charges), but it seems to embody also a non-epistemic claim to fair treatment; the entitlement to be heard is a right to participate in a decision about one’s fate and therefore a fundamental process value in itself. It is accordingly a factor going to the moral authority of the decision, arising out of the state’s ethical obligations to its citizens. Third, Lord Hope stated that the rule of law would not tolerate the ‘nightmare’ of accusation on undisclosed grounds.<sup>83</sup> This consideration is concerned less with defendants’ rights and more with the need for adjudicative decisions to respect the rule of law as a matter of public policy.

In this case epistemic and non-epistemic factors all supported the decision that disclosure of the allegations was necessary to enable the defendant to give effective instructions to his lawyers in relation to the allegations. In other cases either type of factor on their own may be sufficient. If, for example, an order for anonymity of a prosecution witness would prevent the defendant being able to cross-examine to the effect that he or she was being framed, the epistemic concern not to convict a possibly innocent person will be enough to invalidate the order as disproportionate in the circumstances.

Consider then a case involving real evidence — say the location of explosives bearing the defendant’s fingerprints — obtained by torture of the defendant. The defendant’s right under art 3 has been violated. Would his or her right under art 6 to a fair trial on explosives charges be violated by the admission of the evidence? It would be difficult to defend the exclusion of the real evidence for epistemic reasons. This is highly reliable evidence which is highly probative of a serious offence. If the evidence is to be excluded as the ‘fruit of the poisoned tree’ an appeal will therefore have to be made to non-epistemic arguments. These will be concerned with the state’s moral authority to convict and punish a citizen on the basis of its grossly

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<sup>82</sup> [2010] QB 370 [83]–[84].

<sup>83</sup> *Secretary of State for the Home Department v AF* (No 3) [2010] QB 370 [83].

unfair treatment, and also with its gross violation of its legal duty not to use torture.<sup>84</sup>

This example shows that in some cases, where epistemic and non-epistemic considerations pull in different directions, the latter may prevail. Giving effect to the values involved in not admitting evidence obtained by torture takes priority over determining the truth of prosecution allegations. In other cases, where a defendant may not be at a significant epistemic disadvantage from the admission of the evidence, it may be highly controversial whether non-epistemic considerations should prevail over the aim of truth-finding. This is a crucial issue which may well be responsible for the current disagreement between the English and Strasbourg courts over hearsay evidence. The decision of the European Court of Human Rights in *Al-Khawaja and Tahery v United Kingdom*<sup>85</sup> appears to give the non-epistemic dimension of cross-examination as a process value priority over its instrumental value for fact-finding. If this is a correct interpretation of the decision then the necessary implication of *R v Horncastle*<sup>86</sup> is that the United Kingdom Supreme Court would reject this priority as unjustifiable. The Court would no doubt point in support of its position to the importance of community interests in correct enforcement of the criminal law, interests which include those of victims of the crimes alleged and potential victims of future crimes which might be committed by the defendant.

#### IV Theorising Proportionality

It has been suggested that the proportionality requirement for a valid restriction of an art 6 right may need to address both epistemic and non-epistemic considerations relating to the admissibility and use of

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<sup>84</sup> In *Gafgen v Germany* (2011) 52 EHRR 1 [167], the ECHR stated that evidence obtained in consequence of torture in violation of art 3 of the ECHR should never be admitted. It would be very surprising if an English court did not follow this ruling, particularly in view of the attitude of the House of Lords to use of intelligence allegedly obtained by torture of a third party: see *A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221. A confession obtained by torture of the accused is inadmissible by virtue of s 76(2) of the *Police and Criminal Evidence Act 1984* (UK), and although s 76(4)(a) of the Act states that the admissibility in evidence of facts discovered as a result of a confession is not affected by the inadmissibility of the confession, s 78 of the same Act provides an overriding discretion to exclude prosecution evidence where its admission would so adversely affect the fairness of the proceedings that it ought not to be admitted. Section 78 has been recognised as having a vital role in ensuring the fairness of the trial for ECHR purposes: see *Khan v United Kingdom* (2000) 8 BHRC 310; *R v P* [2002] 1 AC 146. Accordingly one would expect the exclusion under s 78 of the real evidence in the author's hypothetical; a court might take a different view where the inadmissibility of the confession resulted from impropriety falling short of torture.

<sup>85</sup> (2009) 49 EHRR 1.

<sup>86</sup> [2010] 2 AC 373.

evidence. In regard to epistemic considerations, it seems clear that any restrictions, as well as being necessary for the achievement of a legitimate aim, must not be such as to render the right ineffective as a truth-finding instrument. This requirement is implicit in the Strasbourg insistence that any handicaps to the defence from restricting art 6 rights must be adequately counterbalanced by measures taken by the authorities. The English courts appear to have accepted this requirement and are prepared to hold that if the counterbalancing measures are not adequate the restriction will result in a violation of art 6. Thus, in *Secretary of State for the Home Department v AF (No 3)*<sup>87</sup> the House of Lords held that disclosure of closed material to special advocates was insufficient to comply with the applicant's right under art 6 to know the gist of the allegations against him. Similarly, a witness anonymity order is likely to be struck down if its effect is to disable the defendant from cross-examining the witness to show that he or she has a motive for falsely incriminating the defendant.<sup>88</sup>

It is in this sense that the epistemic dimensions of the right to a fair hearing have a minimum non-negotiable content. If the restriction creates a real risk that the outcome of the hearing will be different — thus giving rise to the possibility of a miscarriage of justice, which cannot be compensated for by other measures to ensure accuracy of outcome — the right will be violated. This position gives effect to what elsewhere has been called the defendant's unique interest in the outcome of criminal proceedings.<sup>89</sup> Since the defendant is the party in the proceedings who is at risk of blame and punishment if convicted, he or she has an interest in the factual accuracy of the verdict over and above the interest of anyone else. And since factual accuracy is the principal component of a legitimate verdict, it follows that measures which diminish the likelihood of achieving factual accuracy are themselves illegitimate if not properly compensated.

Non-epistemic dimensions of art 6 rights are more problematic. As suggested above, these are implicated by the current conflict between the United Kingdom Supreme Court and the European Court of Human Rights in relation to hearsay and anonymous evidence. On one reading of *Al-Khawaja and Tahery v United Kingdom*<sup>90</sup> the Strasbourg court seems to be saying that even if the epistemic dimension of the right to examine witnesses is not infringed by the admission of hearsay or anonymous evidence, because of the

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<sup>87</sup> [2010] QB 370.

<sup>88</sup> As in *R v Davis* [2008] 1 AC 1128. It is thought that the decision in such a case would not be different under the witness anonymity provisions of the *Coroners and Justice Act 2009* (UK).

<sup>89</sup> Dennis, above n 61.

<sup>90</sup> (2009) 49 EHRR 1.

availability of adequate counterbalancing measures, the non-epistemic dimension founded on the right to fair treatment can prevent the evidence in question from playing any more than a supporting role. If this reading is correct<sup>91</sup> the ruling can be criticised as arbitrary and untheorised,<sup>92</sup> to say nothing of its impracticability for jury trial.<sup>93</sup> Moreover, by implication it raises the possibility of giving an uncritical priority to non-epistemic defence interests in fair treatment at the expense of the claims to fair treatment of other participants in the criminal process. Such defence interests might, for example, be held always to override the claims of vulnerable witnesses to the protection of witness anonymity orders whenever their evidence might be ‘sole or decisive’.

This raises a crucial question. In what circumstances *should* non-epistemic considerations result in a finding that a restriction on an art 6 right is disproportionate, when epistemic considerations would not? When, in other words, should non-epistemic considerations be overriding? One answer is that defence interests, whether epistemic or non-epistemic, should always take priority, but it is suggested that this is not now a plausible view. It is unconvincing in relation to the hearsay example, for the reasons just given, and is problematic where vulnerable witnesses are concerned.

Consider also restrictions on the cross-examination on their sexual history of complainants of sexual offences,<sup>94</sup> a controversial subject in many jurisdictions. These restrictions in ‘rape shield’ statutes are generally defended on the basis that such cross-examination is intrusive, has socially undesirable side effects (discouragement of women to report rape and to testify about it) and is of little or no epistemic value.<sup>95</sup> Exceptions are then made for cases where cross-examination on sexual history might have significant epistemic value — for example where the issue is one of the identity of a rapist. Might a defendant argue that the general restrictions are unjustified, not on epistemic grounds, but because their right to confront an accuser,

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<sup>91</sup> The reading derives some support from the saving made to the ‘sole or decisive evidence’ principle for ‘special circumstances’, a term which the court used in relation to cases where the unavailability of the witness is deliberately procured by the defendant: see (2009) 49 EHRR 1 [37], referring to the English case of *R v Sellick* [2005] 1 WLR 3257. The underlying ethical principle that a person should not be able to take advantage of her or his wrongdoing is surely a non-epistemic consideration in this context, and as such forms a coherent exception to a non-epistemic principle of priority for cross-examination.

<sup>92</sup> Dennis, above n 61.

<sup>93</sup> As the Supreme Court pointed out at length in *R v Horncastle* [2010] 2 AC 373.

<sup>94</sup> For England and Wales, see the *Youth Justice and Criminal Evidence Act 1999* (UK) s 41. Legislation of this type restricts the right of a defendant to examine witnesses against him and the right to present evidence in his defence.

<sup>95</sup> See generally, J Temkin, *Rape and the Legal Process* (Oxford University Press, 2<sup>nd</sup> ed, 2002).

especially of a highly stigmatic offence such as rape, has a non-epistemic dimension? A claim might be made that the defendant should be entitled to cross-examine a complainant to bring out her moral character. The point of doing so might be to invite a jury to compare the respective characters of the complainant and the defendant in order to highlight the potential unfairness of condemning the defendant on the word of a morally bad person.<sup>96</sup> It is not suggested that such a claim would or should succeed, and it is not possible to investigate the question further in this article. The point is simply that an uncritical acceptance of non-epistemic defence interests could raise the possibility of such claims, which would generate acute conflict with public policy objectives as well as with the rights of others.

A second possibility is a broad unstructured ‘balancing’ of non-epistemic considerations. This is arguably the approach the English courts have adopted in deciding on the compatibility of reverse onuses with the presumption of innocence in art 6(2) of the ECHR. The presumption has of course a vital epistemic dimension in requiring the prosecution to prove the truth of its allegation that the defendant committed the offence charged. Allocation of the burden of proof to the prosecution provides a safeguard against conviction of the innocent. But the presumption also has a non-epistemic dimension. It gives effect to a person’s moral and political claim to fair treatment by the state; the claim is the simple one that, as a matter of principle, a liberal polity should treat all its citizens as law-abiding until it proves otherwise. The importance of the claim is that it can be maintained in respect of all offences, even those where it would be easy for a defendant to prove innocence and the risk of a wrongful conviction would be slight.<sup>97</sup> Modern statutes frequently make exceptions to the presumption of innocence on the basis of a combination of epistemic reasons (such as the ease of proof of innocence for the defence) and non-epistemic reasons (such as the efficiency of a scheme of regulation). The approach of the courts to the compatibility of these reverse onuses with the presumption of innocence has been to take account of a wide range of such factors, both epistemic and non-epistemic, which it then attempts to ‘balance’. The result of this approach is a mass of incoherent case law, in which the decisions come to resemble a forensic lottery, and the underlying principles, if any, remain unclear.<sup>98</sup> It is surely preferable to attempt a third solution, using an articulated and nuanced test which can be plausibly defended in theoretical terms.

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<sup>96</sup> Arguably the common law permitted the defendant to do this: P Roberts and A Zuckerman, *Criminal Evidence* (Oxford University Press, 2<sup>nd</sup> ed, 2010) 444.

<sup>97</sup> An example would be the possession of a licence to do an act that would be an offence if done without a licence.

<sup>98</sup> See further the articles by Dennis and Ashworth, cited above n 32. See also A Stumer, *The Presumption of Innocence* (Hart Publishing, 2010) ch 5.

It is suggested that a sketch of such a solution might look something like this. We might think that a restriction is disproportionate where:

- (a) it permits action by courts and state agents (in good faith) which substantially damages a defendant's interest in fair treatment by the state; and
- (b) such damage exceeds the benefit conferred by the restriction on other citizens participating in the process, who also have claims to fair treatment; and/or
- (c) such damage exceeds the benefit conferred by the restriction on other community interests, including the interest in the enforcement of the criminal law.

The solution presupposes that the restriction is authorised by law, and that it is imposed in pursuance of a legitimate aim. If either of these conditions is not fulfilled, the restriction will fail for that reason. If state agents act in bad faith in restricting art 6 rights — for example by deliberately eavesdropping on confidential discussions between the defendant and a legal adviser — rule of law considerations arise. There will then be a strong case for a prosecution to be stayed as an abuse of process,<sup>99</sup> or for evidence obtained following the action to be excluded in the exercise of judicial discretion.<sup>100</sup>

Outside these situations, it is suggested that there will not be many cases where non-epistemic considerations will result in a finding that a restriction on an art 6 right is disproportionate. This is because any restriction must also comply with the general requirements discussed earlier; these are that it must have a rational connection with the achievement of a legitimate aim, it must not go further than is necessary to achieve the aim, and it must have adequate safeguards to counteract any epistemic disadvantage that might ensue to the defendant. Cases where courts find restrictions to be disproportionate are most likely to be those where one or more of the general requirements is not satisfied. It may be that restrictions in the form of reverse onuses can provide the main examples of disproportionality for non-epistemic reasons. The English courts have found a number of these to be incompatible with the presumption of innocence in art 6(2) and have read down the legal burden imposed by the relevant

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<sup>99</sup> As in *R v Grant* [2006] QB 60. But see now *Warren v Attorney-General for Jersey* [2011] UKPC 10 (28 March 2011), doubting the correctness of the decision to stay the prosecution on the facts of *Grant*, where the defendant was charged with a very serious crime (conspiracy to murder) and the breach of privilege did not cause any prejudice to him.

<sup>100</sup> *Police and Criminal Evidence Act 1984* (UK) s 78.

legislation to an evidential one.<sup>101</sup> The principle suggested above would account for such cases on the basis that a reverse onus substantially infringes the presumption of innocence, which we may well think is a fundamental aspect of the right to fair treatment. Since the allocation of the burden of proof concerns the institutional relationship between state and defendant, the question of benefit to other citizens will not generally arise. Thus the infringement will have to be justified by reference to community benefit. This benefit will generally be the facilitation of prosecutions for the offence in question, where proof of the elements of the offence might be difficult or costly, or spurious defences difficult to rebut.<sup>102</sup> But even if a reverse onus could satisfy the general conditions noted above,<sup>103</sup> it might still be defeated by an argument that it requires a person who is not on the face of it morally blameworthy to prove her or his innocence.<sup>104</sup>

Finally, it may be noted that the suggested principle is consistent with the theory of legitimacy. The theory argues that the factual accuracy of a decision (truth-finding) is the principal constituent of a legitimate verdict. Epistemic dimensions of the fair trial rights in art 6 play a major role in supporting the truth-finding aim. This is why a restriction on those rights which impairs their epistemic function and which cannot be compensated for will render a guilty verdict illegitimate. Its factual accuracy is compromised by the epistemic disadvantage suffered by the defendant. A factually accurate verdict will generally carry the necessary moral authority and expressive value that a guilty verdict should have, provided that it has been reached in accordance with the state's ethical and legal obligations. However, a factually accurate verdict will lack legitimacy where its moral authority and/or expressive value is significantly damaged by the way in which it was obtained. It is in this regard that non-epistemic dimensions of rights may have an important function. Their function may be a defeasing one; they may defeat restrictions on rights which are epistemically acceptable, but which will create unnecessary or unacceptable damage to the moral authority and/or expressive value of a guilty verdict. But a defeasing decision on non-epistemic grounds should never be taken lightly. It comes at what may be a considerable cost to the enforcement of the criminal law, since by hypothesis a guilty

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<sup>101</sup> See Dennis, above n 16, 468–91.

<sup>102</sup> Stumer, above n 97, 135.

<sup>103</sup> The condition that a legal burden should be *necessary* in preference to an evidential burden may well provide a good reason for a finding of disproportionality in the majority of cases where a court is minded not to uphold a reverse onus.

<sup>104</sup> See, eg, the approach taken by Lord Bingham in *Sheldrake v DPP* [2005] 1 AC 264 to the compatibility of the reverse onus in s 11(2) of the *Terrorism Act 2000* (UK), which provides a defence to the offence under s 11(1) of being a member of a proscribed organisation that the organisation was not proscribed when the defendant became a member and that he had not taken part in any of its activities while it was proscribed.



verdict would be factually accurate. Such decisions should be exceptional.

The English courts have not theorised their use of the proportionality standard in these terms, but the argument of this article is that the theory accounts coherently for that standard and offers reasons why the Strasbourg jurisprudence may have gone wrong insofar as it has adopted an untheorised approach to the non-epistemic dimensions of the art 6 right to a fair hearing.