THE RISE AND FALL OF HUMAN RIGHTS: A SCEPTICAL ACCOUNT OF MULTILEVEL GOVERNANCE

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Abstract

The pursuit of universal human rights in the modern era has a dark side. While universal conceptions of rights can keep abusive governmental practices in check, they can also limit the advancement of rights and result in their diminishment. Where a lower level of government has a strong pre-commitment to rights, obligations imposed at a higher level—such as through a national constitution or an international treaty—can act as a ceiling rather than a floor. Left to their own devices, some states or nations would adopt stronger protections for rights than they do when brought into a system of universal standards. Worse, universality provides cover to local reformers interested in cutting back on pre-existing local rights protections: as attention shifts from strong local traditions to less stringent universal standards, rights diminish. When rights weaken locally, a feedback effect, facilitated in part by judicial dialogue, can in turn reduce the scope of universal requirements. As core sets of rights continue to spread around the world, we should thus expect those rights to take on ever-diminishing form. When it comes to protecting rights, localism has benefits over globalism; diverse conceptions of rights may be preferable to common requirements; and the celebrated practice of cross-jurisdictional dialogue among courts (and other actors) may curtail rights rather than advance them.

Keywords

Human rights, multilevel governance, law reform, European Convention on Human Rights

1 Introduction

We are not alone. In every place on the planet where people have created a government, that government does not exist in isolation. Instead, every government exists as a layer in a multilevel system, with governing institutions above it or below it (or both). Every person governed is governed through power lodged at multiple levels. Multilevel governance is the defining structural feature of modern political life. Villages and cities are parts of counties; counties form

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regions and states; these in turn make up nations; and nations are linked together through multilateral and international treaties and institutions. Isolationism is now impossible. North Korea might be lonely but—as a member of the UN, the IMO, ARF, G-77, WIPO and a series of other supranational entities and as a signatory to dozens of treaties—it is not alone.

Multilevel governance has a single ambition: uniformity. It aims to articulate a set of governing principles and apply—impose—them throughout the entire global system. In particular, multilevel governance seeks universal recognition and protection of an identified roster of individual rights. It aims to ensure that whatever differences may exist among the peoples of the world, whatever divides Londoners from Vera Cruzians, Sowetons, and Manhattanites, all have in common a core set of individual rights. With the notion that there are rights that must apply universally deeply engrained, debate occurs only around defining the particular rights to be made universal and the best mechanisms for ensuring that the ambition is fulfilled.¹ These debates arise because multilevel government comes in different forms. Notably, the degree of integration varies and variation produces challenges for achieving rights universalism. In some cases, rights obligations can be neatly coupled with tight political and economic integration. For example, the member nations of the European Union are all parties to the European Convention on Human Rights² (*ECHR* or *the Convention*), ratification of which is a *de facto* requirement for EU membership.³ In other cases, the quest for uniformity may confront a looser network, raising questions as to how much can be achieved, how quickly, and by what means. For example, most nations in the world are parties to the International Covenant on Civil and Political Rights⁴ but those nations do not otherwise all comprise an integrated political union.

One device for universalising rights that accompanies some but not all multi-level systems is a court sitting at the apex with power to enforce a common set of rights against the lower levels of government. The court hears from aggrieved citizens and issues rulings that ensure that the constituent

¹ See generally J Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, 2013).

² European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221.

³ For differing perspectives on whether ratifying the Convention is a *legal* requirement of EU membership see: V Miller, 'Is adherence to the European Convention on Human Rights a condition of European Union Membership?' (*UK Parliament Publications & Records*, 25 March 2014) <<http://www.parliament.uk/business/publications/research/briefing-papers/SN06577/is-adherence-to-the-european-convention-on-human-rights-a-condition-of-european-union-membership>> [accessed 30 July 2014].

⁴ International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

governments, while free to adopt more generous local protections, do not violate a set of rights that applies across the system as a whole. Thus, in the United States the national constitution sets out rights held throughout the country against all levels of government and enforced ultimately by the Supreme Court. State constitutions, interpreted by state courts, provide separately for state-level rights that may be more generous than federally-protected rights. Likewise, individuals alleging violations of the ECHR may seek relief from the European Court of Human Rights in Strasbourg (*ECtHR*). Signatory states may provide domestically for stronger rights than the Convention imposes but member states may not drop below the floor the Convention sets.

This article offers a sceptical account of multilevel governance and its pursuit of rights universalism. Despite celebrated historical advancements in rights that have accompanied multilevel governance—the post World War II reform of Europe is the obvious example—there is a dark side to this modern system of government and its mechanisms for protecting rights.

Multilevel systems, I suggest, can turn hazardous for individual rights. While universal conceptions of rights can serve to keep abusive governmental practices in check, they can also operate to limit the advancement of rights and, in some instances, result in their diminishment. Structures that historically have facilitated the rise of human rights may in the future lead to their downfall.

Where a lower level of government has a strong pre-commitment to individual rights, rights obligations imposed at a higher-level—such as through a national constitution or an international treaty—can act as a ceiling rather than a floor. That is, a top-level guarantee of rights, designed as the minimum level of protections that must exist, can end up as the maximum level of protection that is viewed throughout the system as necessary or desirable. Localised measures to augment rights beyond those mandated from above risk seeming extravagant or out of place. If, after all, government already meets all of its obligations the multilevel system imposes, why, local actors will ask, is it necessary to go further. Indeed, the stronger the focus on provisions of universal obligations—a focus intensified by monitoring of one's own adherence and that of others—the harder it may become even to imagine other kinds of rights beyond those deemed obligatory.

The problem is that within a multilevel system, however ambitious the highest level of government, it can rarely pursue a maximalist conception of rights. Instead, it must ordinarily settle for a reachable standard so as to ensure that at least some core rights apply everywhere. It is one thing to insist that Nigeria stop torturing people. It would be quite another to tell Nigeria (or for that

matter Finland)⁵ to allow two men to marry. Therein lies the difficulty. While in a multilevel system poor local performers can be pressured to raise their game, the best performers might end up slouching. Left to their own devices, without universal rights imposed from above, the best performing states or nations might well adopt stronger protections for rights. Once brought into a common system, however, ambitions drop. Like standardised educational requirements adopted in a vast and diverse school system (nationwide, statewide), multilevel systems pursuing universal rights risk producing, perversely, a uniform mediocrity.

Even worse, universality can provide cover to local reformers interested in cutting back on pre-existing protections for individual rights. Such reformers can pursue this agenda by shifting attention away from their own traditions to less stringent standards required at the higher level. In an age of universality, an appeal to localised traditions can easily seem provincial. Reformers who speak the language of cosmopolitanism can impose changes that leave localised rights worse off.

The risk of diminishing rights may be particularly great when, as is increasingly the case, a court in a multilevel system has power to enforce universal rights all the way down. When courts interpret the meaning of a right they must do so with a view to the effects on every level of the system and on the system as a whole. In performing this role, there are very strong institutional pressures for a court to act with caution: to read rights modestly, avoid undue disruption, minimise costs of compliance, and avoid public backlash (or worse disobedience). Giving enforcement to a top-level court can thus also water down rights.

Finally, there may be a feedback effect: when rights diminish locally, universal requirements may come to be understood more narrowly or be ratcheted down in response. Downgrading at the top may invite further reductions locally. Lather, rinse, repeat.

This article uses a case study to explore the dark side of multilevel governance and universal rights. The case study involves recent changes in the United Kingdom allowing in criminal trials for use of testimony from anonymous witnesses—with a corresponding reduction in the rights of defendants to confront witnesses against them. The case study shows how the ECHR provided a shield for domestic reformers to cut back on a core right of defendants protected for centuries under the common law. The case study also demonstrates that domestic retrenchment has had a feedback effect upon the ECtHR, which has since interpreted the Con-

⁵ See *Hämäläinen v Finland* [2014] ECHR 787, para 71: '[T]he Convention cannot be interpreted as imposing an obligation on Contracting States to grant same-sex couples access to marriage'.

vention to permit new incursions upon the rights of criminal defendants.

Before taking up the example of anonymous witnesses in the UK and under the European Convention, the article begins, in the next Part, with a brief discussion of multilevel government and rights universality in the United States. My own past work on the US experience gave rise to the analysis offered in this article.⁶ A brief discussion of the US at the outset serves as a useful reminder that the phenomenon the article describes is not limited to the international context, but exists also within national systems; the US experience helps frame the UK/Convention case study; and marking the path that the US has already travelled helps show where the UK and other nations may soon be headed.

2 Background: The US Experience

A commonly asserted virtue of multilevel government—federalism—within the United States is that it promotes liberty. Dividing power keeps power in check. In addition, rights are protected at the national and the state (and local) level. The federal Constitution ensures a minimum level of rights around the country but states (and localities) remain free to provide their own citizens with stronger protections. An accepted corollary to this arrangement, one that ensures national uniformity, is that there is a single court—the US Supreme Court—that is authoritative on the scope of federal constitutional rights. State courts, when called upon to decide issues of federal rights, are (like lower federal courts) bound by the Supreme Court's decisions. On the other hand, a state court interpreting the state constitution acts independently of the US Supreme Court. The state court is free to rule that a state constitutional right renders a state law or state government action invalid even though there has occurred no violation of the federal Constitution. The federal Constitution thus sets a floor for rights but not a ceiling. In theory, this multilevel arrangement should promote rights: everyone enjoys a minimum set of protections and there is no limit on the ability of states to increase rights within their own jurisdictions. Some notable increases in protections for rights have emerged from this arrangement, including in the areas of racial equality⁷ and fairness in criminal proceedings.⁸ In this sense, multilevel governance and universality have been good for individual rights. At the same

⁶ See J Mazzone, 'When the Supreme Court is Not Supreme' (2010) 104 *Nw ULR* 979; J Mazzone, 'The Bill of Rights in the Early State Courts' (2007) 92 *Minn LR* 1.

⁷ See e.g. *Brown v Board of Education*, 347 US 483 (1954).

⁸ See e.g. *Gideon v Wainwright*, 372 US 335 (1963).

time, these very structural mechanisms operate to limit the development of rights in the United States. Two points bear emphasis.

First, lodging authority over the meaning of federal constitutional rights in a single court that sits in Washington, DC, has a significant curtailing effect.⁹ In settling constitutional rights for the entire nation, the Supreme Court proceeds with caution. The Court is rarely ahead of political change and within the range of results they find satisfactory, justices across the spectrum tend to opt for narrow rather than broad outcomes.¹⁰ The justices understand that they are setting rules for a diverse nation, that those rules impose costs on state and local government,¹¹ and that it is normally better to postpone deciding more than is necessary to dispose of the case at hand.¹² Thus, to return to the two examples above, while the Court has held that the federal Constitution prohibits the states from segregating schools on the basis of race, states need not ensure that students in poor and predominantly minority school districts receive the same quality of education available in richer and predominantly white school districts,¹³ while in serious criminal cases the state must provide an indigent defendant with a lawyer, there is no guarantee that the lawyer be particularly good.¹⁴

Second, state constitutions, interpreted by state courts, have not proven a robust alternative source of rights. Rather than decide independently what provisions of state constitutions mean, modern state courts have tended to hew to the Supreme Court's (cautious) understandings of analogous provisions in the federal Constitution. While the trend is not entirely in one direction, 'systematic studies demonstrate that most state courts, when presented with the opportunity, have chosen not to depart from federal precedents when interpreting the rights-granting provisions of state constitutions'.¹⁵ Reasons for this phenomenon may include that because state courts spend so much energy adhering closely to

⁹ The Supreme Court did not always play this role. See Mazzone, 'The Bill of Rights in the Early State Courts' above n 6, 19–22 (discussing pre-1914 statutory limits to Supreme Court review of state court decisions on issues of federal constitutional rights).

¹⁰ See generally G Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991).

¹¹ See R Utter, 'Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues when Disposing of Cases on State Constitutional Grounds' (1985) 63 *Tex LR* 1025, 1042 (fn 115): 'Due to the size and diversity of the country, the Court must limit its decisions to constitutional norms capable of achievement nationwide'.

¹² See generally C Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999).

¹³ See *San Antonio Independent School District v Rodriguez*, 411 US 1 (1973).

¹⁴ See *Strickland v Washington*, 466 US 668 (1984); E Chemerinsky, 'Lessons from Gideon' (2013) 122 *Yale LJ* 2676.

¹⁵ M E Solimine, 'Supreme Court Monitoring of State Courts in the Twenty First Century' (2002) 35 *Ind LR* 335, 338.

Supreme Court precedent when resolving federal constitutional issues, they have lost capacity for independent analysis that could be brought to state constitutional questions; litigants tend to press claims in terms of federal rather than state rights; and judges and their staff members are trained in nationally-oriented law schools that devote little attention to issues of state rights. Whatever the explanation, the federal floor has to a large degree capped the development of rights at the state level.

The US experience evidences the risks associated with seeking to impose, in an age of multilevel government, universal rights. It shows that mechanisms that promote the development of rights at one time can later on limit how far rights extend. The next part moves from developments that have occurred already in one domestic setting to developments that are occurring right now within an international context.

3 The Case of Anonymous Witnesses

This part uses the case study of testimony from anonymous witnesses to explore how multilevel systems can reduce rights. The UK Parliament has recently cut back on the long-standing common law right of criminal defendants to confront witnesses against them.¹⁶ Through statutory reform, Parliament has authorized reliance in criminal prosecutions on testimony from anonymous witnesses—witnesses whose identities are concealed when they testify at trial—in ways that the common law did not permit. Domestic reformers have justified this departure from the common law tradition by invoking the compatibility of reform with the requirements of the ECHR, as interpreted by the ECtHR. The Convention, however, sets standards for a diverse set of jurisdictions. In particular, the Convention accommodates the inquisitorial criminal justice systems of the continental countries that have not recognised the same kinds of trial rights—including strong rights of confrontation—developed over centuries of practice under the adversarial system. By making the Convention, rather than the common law, the relevant reference point, UK reformers have successfully pursued domestic changes that at one time would have seemed unimaginable.

¹⁶ The significance of common law rights should not be understated: '[T]he common law has come to recognise and endorse the notion of constitutional, or fundamental, rights': *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158, para 71 (Laws LJ).

Observing the Convention's impact upon traditional rights, some observers have sounded an alarm. Lord Lyell, for example, has said:

Although the incorporation of the Convention into our law has done a great deal of good, it is something of a back stop and, in certain areas [...] it has led to some lowering of standards. It is to be regretted that we simply go for the back stop and not for our traditional rights. [...] [O]ur common law tradition remains of basic, huge importance, in the protection of our liberties.¹⁷

This article takes no position on whether curtailing confrontation or other rights is desirable. The goal is rather to offer an account of a notable phenomenon now occurring.

The Part begins with a review of the origins and purposes of the right of confrontation. It then outlines the scope of the right under the ECHR before taking up the recent statutory reforms in the UK and the implementation of those reforms by domestic courts. The remainder of the discussion explores relevant subsequent decisions of the ECtHR and the UK Supreme Court and the impact the ensuing dialogue between those courts has had upon the scope of the Convention right.

3.1 Confrontation: Origins and Purposes

The right of accused individuals to confront and cross-examine witnesses against them has roots in Roman law. In England, the right accompanied the emergence of the jury trial in the twelfth century and it was protected in treason prosecutions by statute in 1552.¹⁸ Beginning in the early 18th century, a robust common law right of confrontation developed, with one English court in 1720 declaring it 'the most effectual method for discovering the truth'¹⁹ and Blackstone endorsing the truth-seeking function of confrontation in his *Commentaries on the Laws of England*.²⁰ Drawing on this common law tradition, the Sixth Amendment to the US Constitution, adopted in 1791, gave a defendant in a federal criminal trial the

¹⁷ HL Debates, 15 July 2008, 703 *Hansard*, col 1104–05.

¹⁸ An Act for the Punishment of Diverse Treasons 1552, 5 & 6 Edward 6, ch 11, s 9.

¹⁹ *Duke of Dorset v Girdler* (1720) 24 ER 238.

²⁰ W Blackstone, *Commentaries on the Laws of England*, vol 3 (1765–1769) 372–3.

right 'to be confronted with the witnesses against him',²¹ and provisions in early American state constitutions secured a similar right in state court prosecutions.²²

Knowing who the witness is and observing the witness testify have long been central to the right of confrontation. Identifying the witness allows the defence to offer evidence about the witness's character that may undermine the witness's credibility. In addition, it may be more difficult for a witness to lie when required to testify in the presence of the accused.²³ Further, the ability to see and hear the witness testify allows for observation of body language, demeanour, and voice modulation that may help evaluate when a witness is being insincere, is uncomfortable with his or her statements, or shows evidence of being coached. Visibility of witnesses thus aids jurors asked to make factual determinations. More generally, it may enhance the integrity of the trial among public observers.

Nonetheless, the common law right of confrontation has never been absolute and in exceptional cases, particularly those involving terrorism and other national security issues, it has yielded to competing public interests. For example, in 1990, a Belfast trial court in *R v Murphy and Anor* allowed television journalists to testify anonymously in the murder trial of two British soldiers attacked at an IRA funeral. The journalists had filmed the attack and their testimony served to authenticate the video footage used at trial. The trial court found that, under the extraordinary circumstances of the case, an anonymity order was justified because the witnesses feared for their safety and were instrumental to the determination of the defendant's guilt. At trial, the journalists were not identified by name and their faces were screened so that they were visible only to the judge and the lawyers. The defendants were convicted and on appeal, the trial court's order and the convictions were upheld.²⁴ Thus, while '[t]he right to be confronted by one's accusers is a right [that has been] recognised by the common law for centuries',²⁵ the protection has not been unyielding.

3.2 Confrontation and the ECHR

ECHR Article 6 provides generally for a 'right to a fair trial' in criminal cases.²⁶ Among its specific protections, Article 6 secures the right to 'a fair and public

²¹ Constitution of the United States of America, Amendment VI.

²² See e.g. Constitution of the Commonwealth of Massachusetts 1780, Part I, Art 12.

²³ See *Ohio v Roberts*, 448 US 56, 64 (fn 6) (1980).

²⁴ *R v Murphy and Anor* [1990] NI 306.

²⁵ *R v Davis* [2008] 1 AC 1128, 1150 (Lord Bingham).

²⁶ ECHR Art 6.

hearing,²⁷ a presumption of innocence,²⁸ the assistance of counsel,²⁹ 'adequate time and facilities' to prepare a defence,³⁰ and, significantly for our purposes, the right, in Article 6(d) of the witness to 'to examine or have examined witnesses against him'.³¹ The passive language—'have examined'—preserves the practices of inquisitorial systems in which judges, rather than defence lawyers, do the examining.³² Thus, the Convention does not impose the more specific common law right of adversarial cross-examination. In addition, the ECtHR takes the position that in enforcing the subsidiary protections of Article 6, its task is to determine only whether the trial overall was fair.³³ This approach also gives member states leeway over the circumstances of testimony from prosecution witnesses.

In a series of decisions that began in the 1980s, the ECtHR interpreted Article 6(d) to permit the use in criminal trials of anonymous witnesses (as well as of absent witnesses, a topic discussed in greater detail below).³⁴ In those decisions, the ECtHR sought a balance among the rights of the accused, the interests of member states, and the interests of witnesses themselves.³⁵ Toward this end, the ECtHR held that witness anonymity could be used (1) when 'strictly necessary,' (2) when the testimony from such witnesses did not constitute the 'sole or decisive' basis for a conviction, and (3) when sufficient counter-balancing measures were implemented to protect the defendant's rights.³⁶

Under this rubric, the ECtHR found witness anonymity to be necessary in two circumstances. The first was where a witness feared for his or her safety.

²⁷ ECHR Art 6(1).

²⁸ ECHR Art 6(2).

²⁹ ECHR Art 6(3)(c).

³⁰ ECHR Art 6(3)(b).

³¹ ECHR Art 6(d).

³² In the 1990s many European countries adopted domestic criminal law provisions to implement this right, including Italy, which adopted jot-for-jot the ECHR's language in Article 111 of its Constitution.

³³ *Lucà v Italy* [2001] 36 EHRR 46, para 38: '[t]he Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair'.

³⁴ *Ibid*, para 39; see also *Al-Khawaja and Tahery v United Kingdom* [2009] 49 EHRR 1, para 35 (summarising earlier cases.).

³⁵ See e.g. *Van Mechelen v Netherlands* [1998] 25 EHRR 647; *Doorson v Netherlands* [1996] 22 EHRR 330; *Kostovski v Netherlands* [1989] 12 EHRR 434.

³⁶ *Van Mechelen v Netherlands*, above n 35; *Krasniki v Czech Republic* [2006] 31 EHRR 41; *PS v Germany* [2003] 36 EHRR 61; *Doorson v Netherlands*, above n 35.

Such fear needed to be objectively reasonable but the court did not require proof of actual threats from the defendant (or anyone else).³⁷ Anonymity could also be a necessary measure to protect victims from the trauma of testifying in the presence of their alleged attackers.³⁸

Because the ECtHR has insisted upon counter-balancing measures to safeguard the defendant's rights, anonymity has not typically allowed for a witness to be completely hidden at trial. Instead, the ECtHR has endorsed measures that protect the witness while also promoting a fair proceeding. These include 'using screens, disguising the face or distorting the voice' of the witness,³⁹ and having the witness testify in court while the defendant and defence lawyer listen via an audio link from a different room.⁴⁰

Doorson v Netherlands stands as a landmark decision on the circumstances under which witnesses may be permitted to testify anonymously. The case involved a defendant convicted of drug trafficking. Two witnesses were examined before an investigating judge in the presence of the defendant's lawyer. The judge, who knew the identity of the witnesses, granted the witnesses an anonymity order after they stated they feared reprisal from the defendant. Pursuant to this order, the defendant's lawyer was permitted to cross-examine the witnesses but was barred from asking questions that could reveal their identities. The ECtHR rejected the defendant's argument that this procedure violated his right to a fair trial. The court found that the witnesses' fears justified the anonymity order and that the trial judge had adopted sufficient measures to protect the interests of the defendant. In particular, the Strasbourg court noted that the trial judge drew attention to the fact that both witnesses were drug addicts, thereby providing the defendant an avenue to challenge their testimony. In addition, the Dutch court did not base its finding of guilt solely on the anonymous witnesses' testimony.⁴¹

³⁷ See e.g. *Doorson v Netherlands*, above n 35, para 71.

³⁸ See e.g. *SN v Sweden* [2002] 39 EHRR 13, para 47.

³⁹ *Krasniki v Czech Republic*, above n 36, para 49.

⁴⁰ *Kok v Netherlands* [2000] ECHR 706. Where an anonymous witness is also absent during the proceedings the ECtHR has at times applied a more stringent requirement such that 'the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when [...] [the witness] makes his statement or at a later stage': *Lucà v Italy*, above n 33, para 39.

⁴¹ *Doorson v Netherlands*, above n 35, para 76: '[E]ven when 'counterbalancing' procedures are found to compensate sufficiently the handicaps under which the defence labours, a conviction should not be based either solely or to a decisive extent on anonymous statements'.

3.3 Common Law Reforms

While *Murphy* allowed for anonymous testimony in extraordinary circumstances, in recent years, there has been a more general diminishment of the common law right of confrontation in the UK⁴² and a corresponding rise in testimony from anonymous witnesses. This development has occurred as a result of statutory changes adopted by Parliament and justified in large part by the looser approach to confrontation under the ECHR.

3.3.1 A Note on Absent Witnesses

Developments with respect to anonymous witnesses relate to the issue of absent witnesses and some consideration of that issue is therefore necessary. While an anonymous witness testifies at trial (shielded in some manner), an absent witness is not present during the trial proceeding. Instead, the witness's prior statement is read in court and, although hearsay, is considered testimony. Like anonymity, witness absence implicates the right of confrontation. The Criminal Justice Act 2003 (*CJA*) expanded the power of courts to admit hearsay statements when doing so was 'in the interests of justice'⁴³ as determined by a multi-factor test⁴⁴ designed to ensure the statement is 'cogent and reliable'.⁴⁵ The *CJA* particularly specified circumstances under which a court could admit a statement from an 'unavailable' witness, including when 'through fear the relevant person does not give (or does not continue to give) oral evidence in the proceedings'.⁴⁶ (The *CJA* provided that the term, 'fear' must be 'widely construed' to include 'fear of the death or injury of another person or of financial loss'.)⁴⁷ A statement from an unavailable witness was admissible 'in the interests of justice,' taking into account, among other things, 'the statement's contents' and 'any risk that its admission or exclusion will result in unfairness to any party'.⁴⁸

⁴² Scotland, which administers its own criminal justice system, is not subject to the statutory changes discussed in this section.

⁴³ *CJA* s 114(1)(d).

⁴⁴ *CJA* s 114(2). The factors are: (1) the statement's probative value; (2) the availability of the information from other sources; (3) the importance of the information; (4) the circumstances under which the statement was made; (5) the declarant's credibility; (6) the statement's reliability; (7) the reason for the witness's unavailability; (8) the difficulty in challenging the statement; and (9) the prejudice to the defendant.

⁴⁵ *CJA* s 114, n 396.

⁴⁶ *CJA* s 116(2).

⁴⁷ *CJA* s 116(3).

⁴⁸ *CJA* s 116(4).

3.3.2 The *Davis* Decision

Within five years after enactment of the CJA, Parliament adopted a wide-ranging statutory scheme authorising courts to allow witnesses to testify anonymously. The trigger was a ruling by the House of Lords in *R v Davis* that the use of anonymous witnesses whose testimony was critical to the conviction rendered a trial unfair.⁴⁹ Within a month of the *Davis* decision, Parliament approved the Criminal Evidence (Witness Anonymity) Act 2008 (WAA) to overturn the ruling.

The WAA produced a sharp break from common law rules governing anonymous witnesses. To see why, some further discussion of *Davis* is helpful. In *Davis*, a jury convicted a defendant of murder following a trial in which the prosecution's case was based principally on three witnesses who testified anonymously.⁵⁰ The witnesses feared for their own safety should their identities be revealed. The trial judge ruled that those fears were genuine and granted protective measures.⁵¹ The witnesses thus testified under pseudonyms, withholding identifying information from the defendant, his attorney, the public and the press;⁵² the defendant's attorney was also prohibited from asking questions that could identify the witnesses.⁵³ In court, the witnesses sat behind a screen so that they were hidden from the defendant, the public, and the press, but visible to the judge, jury, and the attorneys for both sides.⁵⁴ The judge and jury heard the witnesses' actual voices but the defendant and his attorney heard a mechanically distorted audio version of the testimony.⁵⁵

The defendant's lawyer contended that the broad anonymity order prevented his client from receiving a fair trial and therefore was inconsistent with the common law and his Convention rights. The defence case had involved a claim that the defendant's former girlfriend was extracting revenge by falsely implicating him in the murders. As a result of the anonymity order, however, the defence could not establish whether one of the witnesses was in fact the former girlfriend or pursue questions that could reveal a nefarious motive for testifying. Hence the shunned girlfriend theory had no traction.

The Appellate Committee of the House of Lords unanimously overturned the conviction, finding that the anonymity measures violated the 'long established

⁴⁹ *R v Davis*, above n 25.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*, para 3.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

[...] common law [...] right of an accused to confront his accuser'⁵⁶ and violated also the Convention as interpreted by the ECtHR.⁵⁷ In reaching its decision, the House of Lords took a robust view of the common law right of confrontation and criticised trial court practices that undermined that right. The House explained that in a small number of 'remarkably recent' cases the common law had developed to allow 'a limited qualification on the right to know the identity of prosecution witnesses' where there existed 'rare and exceptional circumstances' involving 'a clear case of necessity' for a curtailment of the right. Although in each instance courts were exercising their 'inherent jurisdiction' to control proceedings before them, collectively, these decisions had actually produced an outcome that was inconsistent with the common law. Lord Bingham thus stated: '[b]y a series of small steps, largely unobjectionable on their own facts, the courts have arrived at a position which is irreconcilable with long-standing principle'. In essence, the House recognised that while some use of anonymous testimony was compatible with the common law and also with the Convention, the exception had, problematically, become the rule. Lord Brown explained that the decision in *Murphy* was 'close to the limits to which the courts should go in permitting any invasion of the core common law principle that the accused has a fundamental right to know the identity of his accusers'. Any use of anonymity beyond the circumstances in *Murphy* required parliamentary legislation to displace the common law protections.⁵⁸ With *Murphy* setting the cap, the anonymity measures in the *Davis* trial were plainly impermissible and deprived the defendant of a fair proceeding.

Reaction to the *Davis* decision was swift and intense. Immediately after the decision, Secretary of State for Justice and Lord Chancellor Jack Straw complained that besides the conviction in *Davis* itself, the House of Lords' ruling jeopardized a series of other criminal cases. Straw said: '[i]n addition to those cases in the prosecution pipeline, there is great concern [...] that a number of serious criminals convicted by a jury, whose trials satisfied Article 6 and common law requirements, and whose appeals have failed, would seek to make use of the technicality of their lordships' judgment to have their convictions quashed'.⁵⁹ Straw thus announced a plan for emergency legislation to respond to *Davis* and head off its broader effects.

⁵⁶ Ibid, para 49.

⁵⁷ Ibid, paras 25, 96.

⁵⁸ Ibid, para 98 (Lord Mance): '[A]ny further relaxation of the basic common law rule [...] is one for Parliament to endorse and delimit and not for the courts to create'.

⁵⁹ HC Debates, 26 June 2008, 478 *Hansard*, col 516.

3.3.3 The Common Law Displaced

The resulting statute was the WAA. The statute replaced the courts' common law power to withhold witnesses' identities in criminal proceedings with a standardised and permissive statutory anonymity scheme.⁶⁰ Upon request from either party, courts were empowered to grant a 'witness anonymity order' and deploy any of a variety of protective measures the court considered 'appropriate'.⁶¹ Such measures included withholding the name of the witness and other identifying details; allowing the witness to use a pseudonym; prohibiting questions that would identify the witness; use of a screen to hide the witness from the defence and the public; and the use of technology to distort the witness's voice.⁶² (The WAA did not permit hiding the witness from the judge or members of the jury or shielding the witness's natural voice from those individuals.)⁶³ Before issuing an anonymity order, the court was required to find that: (a) 'the measures are necessary [...] to protect the safety of the witness or another person or to prevent any serious damage to property, or [...] to prevent real harm to the public interest'; (b) the use of the protective measures would be 'consistent with the defendant receiving a fair trial'; and (c) 'it is important that the witness should testify' and 'the witness would not testify if the order were not made'.⁶⁴ The WAA also required that the court consider six factors when evaluating whether the above conditions are present.⁶⁵ Introduced as emergency legislation, the WAA was a temporary measure in specific response to the *Davis* decision and would

⁶⁰ WAA s 1(2), stating that the Bill 'abolished' 'the common law rules relating to the power of a court to make an order for securing that the identity of a witness in criminal proceedings is withheld'.

⁶¹ WAA s 2(1).

⁶² WAA s 2(2).

⁶³ WAA s 2(4).

⁶⁴ WAA s 4. The Act further specifies that in determining necessity under (A), 'the court must have regard (in particular) to any reasonable fear on the part of the witness [...] that the witness or another person would suffer death or injury, or [...] that there would be serious damage to property' as a result of identifying the witness. *Ibid.*

⁶⁵ These factors are (WAA s 5):

(a) the general right of a defendant in criminal proceedings to know the identity of a witness in the proceedings; (b) the extent to which the credibility of the witness [...] would be [...] relevant [...] [in assessing the weight of his or her evidence]; (c) whether the evidence given by the witness might be the sole or decisive evidence implicating the defendant; (d) whether the witness's evidence could be properly tested [...] without his or her identity being disclosed; (e) whether there is any reason to believe that the witness [...] has a tendency [...] or motive to be dishonest [...]; and (f) whether it would be reasonably practicable to protect the witness's identity by any [other] means'.

have expired in 2009. However, the Coroners and Justice Act 2009 incorporated the anonymity provisions of the WAA and those provisions therefore remain in effect.⁶⁶

3.3.4 Debating Reform

The debates that led to the enactment of a statutory mechanism for witness anonymity demonstrate the powerful influence of the ECHR in Parliament's decision to depart from long-standing common law protections. In introducing the WAA on 26 June 2008, Jack Straw framed the bill in terms of Convention standards⁶⁷ and spun *Davis* as an invitation to Parliament to adopt anonymity measures that would satisfy Convention requirements.⁶⁸ In urging Parliament to act quickly, Straw argued that *Davis* created the risk of other criminal defendants going free on a 'technicality' that the Convention did not endorse.⁶⁹ Under this approach, the common law—what Blackstone called 'the settled and invariable principles of justice'⁷⁰—was of little relevance.

⁶⁶ Coroners and Justice Act 2009, Part 3, Ch 2, ss 86–89.

⁶⁷ HC Debates, 26 June 2008, 478 *Hansard*, col 519.

⁶⁸ *Ibid*, col 515. It is worth quoting at length Straw's discussion because it demonstrates a singular focus on Convention—rather than common law—standards as supplying the proper framework:

Lord Mance, who extensively reviewed the Strasbourg jurisprudence, said that he did not believe that the Strasbourg Court would 'accept that the use of anonymous evidence in the present case satisfied the requirements of article 6'. However, Lord Mance went on to say that the 'admissibility of evidence is primarily a matter for national law', and that the Strasbourg Court has repeatedly stated that the use of anonymous evidence is 'not under all circumstances incompatible with the Convention'. And importantly, Lord Mance said it is not certain that 'there is an absolute requirement that anonymous testimony should not be the sole or decisive evidence'. In other words, there should be caution about treating the Convention, or apparently general statements by the Strasbourg Court, as containing absolutely inflexible rules. All of their lordships accepted fully what Lord Bingham said was the 'reality of the problem' of witness intimidation, 'vividly described' in the Court of Appeal judgment. Lord Bingham went on to say that, 'this is not a new problem, but it is a serious one. It may very well call for urgent attention by Parliament'. Lord Rodger said: 'Parliament is the proper body both to decide whether such a change is now required, and, if so, to devise an appropriate system which still ensures a fair trial'. Lord Mance echoed these views. He [...] said that 'it may well be appropriate that there should be a careful statutory modification of basic common law principles. It is clear from the Strasbourg jurisprudence [...] that there is scope within the [...] Convention for such modification'.

⁶⁹ *Ibid*, col 516. In considering the legislation, Parliament took account of a report of the Crown Prosecution Service on the scale of the use of anonymous witnesses. According to that report, there were 580 pending cases involving anonymity orders (of which 290 cases involved undercover officers purchasing narcotics). See *ibid*, col 1304.

⁷⁰ Blackstone, above n 20, vol 3, 396.

Virtually the entire subsequent consideration of the bill occurred in Convention rather than in common law terms. The House of Lords Select Committee on the Constitution acknowledged that the proposed legislation represented a departure from the common law rules but emphasized that Article 6 of the Convention permitted the change.⁷¹ Likewise, the Joint Committee on Human Rights in its report on the proposed legislation agreed that it was compatible with Convention requirements.⁷²

In the House of Commons and in the House of Lords members across the political spectrum repeatedly referred to the bill's compatibility with the European Convention—which, rather than the common law tradition, served as the relevant reference point. Andrew Dismore (Labour) thus stated: 'Strasbourg has not had difficulties with anonymous witness evidence. The real issue is the parameters and the scheme in which the evidence is used'.⁷³ Invoking the balancing approach of the ECtHR to justify anonymity orders, David Howarth (Liberal Democrat) urged that '[t]he human right to a fair trial is absolute, but whether that right has been violated in a particular case is a matter of degree'.⁷⁴ Lord Hunt took the position that 'the scheme set out in the Bill will enable a trial judge to navigate the difficult legal considerations at stake and reach a view, on the circumstances of the particular case, that it would, or would not, be compliant with Article 6 considerations to grant a witness anonymity in that instance'.⁷⁵ Lord Grabiner likewise explained that:

[i]t is important to understand that the Law Lords were not saying that legislation in this area would be incompatible with our obliga-

⁷¹ House of Lords Select Committee on the Constitution, *Report: Criminal Evidence (Witness Anonymity) Bill* (2008) para 15. According to the report:

The new statutory rules on witness anonymity introduced by the Bill are broader than the existing common law rules. Whereas the common law powers on witness anonymity appear to be limited to protecting personal safety, the Bill will enable anonymity orders to be made where this is necessary to protect serious damage to property and 'real harm to the public interest'. This broadening of the rules [...] may lead to greater use of witness anonymity. Article 6 of the ECHR will however continue to provide the minimum guarantees of a fair trial. In this context it is important to note that the Appellate Committee in *Davis* held that the protective measures imposed in that particular case breached the right to a fair trial as well as the common law limits on anonymity. *Ibid.*

⁷² House of Lords Joint Committee on Human Rights, *Legislative Scrutiny: Criminal Evidence (Witness Anonymity) Bill* (2008) para 1.9.

⁷³ HC Debates, 8 July 2008, 478 *Hansard*, col 1317.

⁷⁴ *Ibid.*, col 1320.

⁷⁵ HC Debates, 10 July 2008, 703 *Hansard*, cols 868–69.

tions under Article 6 of the Convention. On the contrary, they took the view that legislation was the appropriate way forward so long as the devised structure produced a fair trial for the accused.⁷⁶

Some MPs took the view that by replacing the *ad hoc* approach that had developed under the common law with a standardised set of rules, the proposed legislation in fact enhanced the common law right of confrontation. According to Lord Elystan-Morgan: '[O]ne is seeking to repair an infection in so far as the common law is concerned [...]. [T]hat infection was brought about by creeping erosion, step by step, without anyone anticipating that one was doing anything fundamentally wrong.'⁷⁷ Maria Eagle (Labour) claimed:

What is being abolished is not the ancient common-law right to confront one's accusers, but the system that had grown up in the court for creating anonymity orders. That is being replaced by the statute before us. [...] [It] is about dealing with the rules for anonymity orders, for which a Judicial Committee of the House of Lords said that there was no common-law power.⁷⁸

Even opponents of the proposed legislation found it hard to resist the Convention's siren call. Cautioning that in practice anonymity orders might become too broad, they argued that conformity with ECHR Article 6 required rejecting the bill.⁷⁹ Such arguments had little traction given that the case law of the ECtHR plainly allowed for greater use of anonymous witnesses than did the common law; making the Convention the relevant landmark virtually doomed opposition efforts.

A minority sought to return the debate to common law principles and to highlight the erosion of common law protections for defendants. For example, Douglas Hogg (Conservative) emphasised the 'fundamental principle' that the

⁷⁶ Ibid, col 877.

⁷⁷ Ibid, col 878.

⁷⁸ HC Debates, 16 July 2008, 479 *Hansard*, cols 371–72.

⁷⁹ See e.g. HC Debates, 8 July 2008, 478 *Hansard*, cols 1295–6 (David Heathcoat-Amory) (Con) ('We are not dealing with a matter of trivia, but with a constitutional matter. [...] Are we certain that a statutory right to anonymity will not gradually be expanded over time, for the convenience rather than the safety of witnesses, and become fairly routine?'); *ibid*, col 1343 (Douglas Hogg) (Con) (asking 'whether protective measures [...] can ever be fair'); *ibid*, col 1362 (Edward Garnier) (Con) ('Article 6 of the Convention reminds us of our solemn duty to ensure fairness in our trials.[...] The witness cannot produce the ace of personal apprehension to trump the right of the citizen to a fair trial').

‘defendant [...] know the identity of the witness against him’ because otherwise ‘when credibility is at issue it is extraordinarily difficult to challenge the Crown’s case.’⁸⁰ Lord Goodlad sought to highlight the dramatic change the legislation represented. Observing that ‘[t]he common law [...] has for many centuries recognised the right for a defendant in a criminal trial to be confronted by his named and identified accusers,’ he deemed the proposed anonymity statute ‘broader than the existing common law rules.’⁸¹ However, with the Convention offering the virtue of cosmopolitanism as well as an approach that would prevent the guilty from going free, appeals to the common law seemed outdated and unwise. Consider in this regard Baroness Mallalieu’s dramatic statement in opposition to the proposed legislation:

I have been a practising criminal barrister for 38 years [...] and I believe that the best way of getting at the truth in a criminal trial is to allow the accused to confront his accusers directly and in public and to cross-examine and challenge them knowing who they are and where they come from. [...] We have been down this route before, albeit some time ago. We have given anonymous and secret evidence a whirl in the past. We did it with the Court of Star Chamber and in trials for treason. While those procedures were initially very popular, they came to be regarded as cruel, unfair and oppressive, because they resulted in wrong convictions.⁸²

From one perspective, the above plea is simply a balanced reminder of the history of and significance to the common law prohibition on anonymous witnesses. In the summer of 2008, however, to reform the common law was to embrace the ECHR and its safeguards. To resist reform, by invoking the Star Chamber, or for that matter 38 years of practice, was to fail to recognize the healthy step forward the proposed legislation promised.

3.4 Implementation: Anonymity Ascendant

Although justified at enactment in terms of ECHR Article 6, the WAA quickly lost its Convention tether. The Human Rights Act 1998 (*HRA*) requires courts to ‘take into account’ the decisions of the ECtHR⁸³ and directs that parliamentary

⁸⁰ Ibid, col 1324.

⁸¹ HL Debates, 10 July 2008, 703 *Hansard*, cols 871–72.

⁸² Ibid, col 883.

⁸³ HRA s 2.

legislation 'be read and given effect in a way which is compatible with the Convention rights'.⁸⁴ Yet in applying the provisions of the WAA, domestic courts quickly allowed more liberal use of anonymous testimony than that which the ECtHR itself had found to be consistent with Convention rights.

In the very year the WAA was adopted, the Court of Appeal in *R v Mayers* adopted a very broad view of the circumstances under which anonymity orders were appropriate. The court recognised that consistent with decisions of the ECtHR, anonymous testimony could not be the 'sole or decisive' source of evidence against the accused. Yet the *Mayers* court read that limitation more broadly than did the ECtHR, to apply in just one instance: where only *one* witness testifies anonymously. 'By definition', the court explained, 'where two or more anonymous witnesses give important incriminating evidence against the defendant, the evidence of one would not provide either the sole evidence or indeed the decisive evidence against him'.⁸⁵ Thus, so long as the prosecution has multiple witnesses, anonymous or not, there is never a risk of running afoul of the sole or decisive bar. The court in *Mayers* also construed broadly the necessity provision of the WAA. First, the court held, the defendant need not represent the source of risk to the witness: 'the threat may come from any source'.⁸⁶ Second, the court rejected the argument that if the witness could be relocated and thus protected from harm an anonymity order was unnecessary. Given that 'interference with the life of any such witness would be tumultuous, and would effectively penalise him for doing his duty as a citizen,' the court explained that '[w]itness relocation can only be a practicable alternative in the rarest of circumstances'.⁸⁷

Applying these standards in the consolidated cases before it, the *Mayers* court upheld a murder conviction in which the trial court issued anonymity orders with respect to five eyewitnesses. Four witnesses identified the defendant as the shooter: the trial judge withheld the identities of these witnesses from the defence and allowed them to testify using pseudonyms, screened from the dock and public gallery, and with electronic voice distortion. The fifth witness in the case was protected by a pseudonym and also screened from the dock and public gallery.⁸⁸ In upholding the anonymity orders the appellate court noted that the trial judge and the defence had access to various information about the

⁸⁴ HRA s 3.

⁸⁵ *R v Mayers* [2008] EWCA Crim 2989, para 25.

⁸⁶ *Ibid*, para 28.

⁸⁷ *Ibid*, paras 9, 71.

⁸⁸ *Ibid*, para 66.

witnesses (including transcripts of police interviews with them and reports of police investigations of their associations with the victim and the defendant)⁸⁹ and the defendant's lawyer remained able to cross-examine each witness at trial and expose discrepancies among their accounts.⁹⁰ Most significantly, because there were multiple witnesses, '[n]one of the eye witnesses provided either the sole or the decisive evidence against the [defendant]'.⁹¹ By contrast, in a second murder case before it, the *Mayers* court vacated the conviction. An eyewitness who had come forward close to trial—without an opportunity for anyone to investigate fully her background⁹²—testified with her identity hidden from the defence and her voice distorted. Without this witness's testimony, 'a conviction would have been highly improbable' and thus the trial was unfair.⁹³

The *Mayers* court also announced special rules for undercover police officers. Invoking the public interest in shielding the identity of undercover police and brushing aside any countervailing interest on the part of the defendant,⁹⁴ the court held that a trial judge was 'entitled to follow the unequivocal assertion by an undercover police officer that without an anonymity order he would not be prepared to testify'.⁹⁵ Neither the WAA nor the case law of the ECtHR endorses such absolute deference to any particular classes of witnesses.⁹⁶ Nonetheless, the *Mayers* court upheld an anonymity order that permitted police officers to testify using pseudonyms and from behind screens so that they were visible only to the judge, the jury, and counsel.⁹⁷

3.5 Convention Limits

All cases decided by the ECtHR involving the use of anonymous or absent witnesses originated from civil law countries until the 2009 decisions in *Al-Khawaja*

⁸⁹ Ibid, para 63.

⁹⁰ Ibid, para 73.

⁹¹ Ibid, para 75.

⁹² Ibid, para 50.

⁹³ Ibid, para 52.

⁹⁴ Ibid, para 31: 'Knowledge of their true identities can rarely be of any importance to the defendant, who can advance whatever criticisms of the evidence, or indeed the conduct of the officers, while they continue to be known by their false identities'.

⁹⁵ Ibid, para 30.

⁹⁶ See *Ellis, Simms and Martin v United Kingdom* [2012] ECHR 813, para 76: '[A]ppropriate inquiries must be conducted by the trial court to determine whether there are objective grounds for the fear in question'.

⁹⁷ *R v Mayers*, above n 85, para 79.

and *Tahery v United Kingdom*.⁹⁸ These two consolidated cases involved the statements of absent witnesses admitted into evidence in criminal trials pursuant to the Criminal Justice Act 2003 (CJA). In the course of reviewing the convictions, the ECtHR discussed also the use of anonymous witnesses in a way that soon led to additional developments concerning criminal trials and anonymity.

In *Al-Khawaja*, a male physician was convicted of indecently assaulting female patients while they were under hypnosis. One of the alleged victims committed suicide before the trial but she had given a statement to the police and had told also friends about the attack. Over the defence's objection, the trial judge admitted into evidence the victim's police statement. The judge determined that the statement was crucial to the prosecution because there was no other evidence of the alleged attack on that victim. In addition, the judge found, the defendant's interests were protected because he could offer contrary evidence about what had happened and because he could explore inconsistencies between the statement the victim gave the police and what she had told her friends. The judge also instructed the jury to keep in mind that the victim's statement had not been subject to cross-examination. The Court of Appeal affirmed the conviction, rejecting the defendant's claim that his trial was unfair under ECHR Article 6(3)(d).⁹⁹

In *Tahery*, the defendant was convicted of wounding with intent in connection with a stabbing incident. A witness of Iranian origin identified only as "T" told the police he saw the defendant, also of Iranian origin, stab the victim. The prosecution sought to have T's statement read into evidence pursuant to the CJA on the ground T feared reprisal from the local Iranian community if he testified. The trial judge admitted the statement, finding that T's fears were genuine, his statement was of great importance to the case, and the defendant's interests could be protected through rebuttal evidence and by cross-examination of other government witnesses. The judge also advised the jury to take into account that T's statement was not subject to cross-examination and reminded the jurors they lacked an opportunity to observe T's demeanour. Rejecting the defendant's argument that the use of T's statement rendered the trial unfair, the Court of Appeal affirmed the conviction.¹⁰⁰

Although the admission of these statements was consistent with the requirements of the CJA, the ECtHR ruled that the defendants did not receive fair trials

⁹⁸ *Al-Khawaja and Tahery v United Kingdom*, above n 34.

⁹⁹ *Ibid*, paras 8–12.

¹⁰⁰ *Ibid*, paras 18–21.

under ECHR Article 6 because their convictions were based solely or decisively on testimony from witnesses they could not adequately challenge. In the court's view, the sole or decisive rule was absolute and it could not be overcome by a balancing approach of the kind the domestic court employed.¹⁰¹ In response to this ruling, the UK requested review by the Grand Chamber.

3.6 Standing Ground: The UK Supreme Court

While the UK's application to the Grand Chamber in *Al-Khawaja and Tahery* was pending, the Supreme Court (which in 2009 assumed the judicial function of the House of Lords) decided *R v Horncastle*.¹⁰² In the course of that decision, the Supreme Court rebuffed the chamber's decision in *Al-Khawaja and Tahery*—thereby setting in motion a remarkable interchange between the domestic judiciary and the ECtHR that led ultimately to a ratcheting down of Convention protections for criminal defendants.

3.6.1 *Horncastle* and Absent Witnesses

Horncastle involved four convicted defendants at whose trials statements by non-testifying victims were submitted to the jury. Two of the defendants were convicted of intentionally causing grievous bodily harm to a victim who died (of unrelated causes) before trial began. A prior statement the victim had given to the police about the incident was read to the jury in accordance with CJA sections 116(1) and (2)(a). The Court of Appeal found the statement was 'to a decisive degree' the basis for the convictions but that admission of the statement was nonetheless proper. The two other defendants in *Horncastle* were convicted of kidnapping a young woman. She left town the day before trial because she was too frightened to testify and in her absence a statement she had made to the police was read to the jury pursuant to CJA sections 116(1) and (2)(e). The Court of Appeal found that in light of other evidence at trial, the victim's police statement was not in fact decisive but the defendants disputed this conclusion before the Supreme Court.¹⁰³

The issue presented to the Supreme Court in *Horncastle* was whether a conviction based 'solely or to a decisive extent' on the statement of an absent

¹⁰¹Ibid, para 37, expressing 'doubt[] whether any counterbalancing factors would [...] justify the introduction [...] of an untested statement which was the sole or decisive basis for the [defendant's] conviction'.

¹⁰²*R v Horncastle*; *R v Marquis*; *R v Carter* [2010] 2 AC 373.

¹⁰³Ibid, 379–80.

witness whom the defendant was not able to examine infringes ECHR Article 6. The four defendants argued that the chamber's decision in *Al-Khawaja and Tahery* had set a clear precedent and required the UK Supreme Court to rule that admitting the victim statements rendered their trials unfair. However, the Supreme Court unanimously ruled in favour of the government and rejected the applicability of a sole or decisive bar.

3.6.2 UK Exceptionalism

In reaching this result, Lord Phillips explained that while under HRA section 2 the Court was obligated to 'take into account' decisions of the ECtHR, it was not required to follow decisions that did not adequately account for domestic law. He wrote:

The requirement to 'take into account' the Strasbourg jurisprudence will normally result in this Court applying 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.¹⁰⁴

In other words, a requirement to take into account Strasbourg decisions was not a mandate to follow in all instances those decisions.

Having unhooked the Court from Strasbourg, Lord Phillips next rejected any sole or decisive bar on testimony from absent witnesses. He explained that '[l]ong before [...] the Convention came into force the common law had, by the hearsay rule, addressed that aspect of a fair trial that Article 6(3)(d) was designed to ensure'. In addition, he wrote that recently 'Parliament has [...] enacted exceptions to the hearsay rule that are required in the interests of justice' and '[t]he regime enacted by Parliament contains safeguards that render the sole or decisive rule unnecessary'.¹⁰⁵ In other words, there was no need to adhere to the ECtHR's own

¹⁰⁴Ibid, 381.

¹⁰⁵Ibid, 382.

approach to absent witnesses because domestic safeguards—in the common law and in statutory law—adequately protect the defendant’s interests.

Again distinguishing the UK regime, Lord Phillips cautioned that that sole or decisive rule was ‘introduced into the Strasbourg jurisprudence without discussion of the principle underlying it or full consideration of whether there was justification for imposing the rule as an overriding principle applicable equally to the continental and common law jurisdictions’.¹⁰⁶ In his view, the rule was unnecessary in the UK because the CJA ‘contains a crafted code intended to ensure that evidence is admitted only when it is fair that it should be’.¹⁰⁷

More generally, Lord Phillips explained, long-standing common law rules continue to ensure fairness: the trial judge acts as an evidentiary gatekeeper; ‘[h]earsay evidence is only admissible in strictly defined circumstances’; the judge warns the jury of the risks of relying on out-of-court statements; and the judge has power to reject a conviction based on unreliable hearsay evidence.¹⁰⁸ Because the sole or decisive rule would create ‘severe practical difficulties if applied to English criminal procedure’,¹⁰⁹ including the difficulty of determining whether evidence was actually decisive, the rule could be rejected.¹¹⁰ In sum, the Supreme Court declined to follow a rule of the ECtHR that ignored the basic features of the UK system.

Turning, then, to *Al-Khawaja and Tahery*, Lord Phillips took the position that while ‘the statements [by the absent witnesses] admitted in evidence were central to the prosecution case’ in each instance, those statements were ‘supported by other evidence’ and the interests of the defendants were in fact sufficiently protected.¹¹¹ The ECtHR had therefore erred in ruling that the defendants had not received fair trials—and the erroneous ruling did not entitle the four *Horncastle* defendants to relief.

3.6.3 *Horncastle* and Anonymous Witnesses

Significantly, the Supreme Court did not limit itself in *Horncastle* to the issue of absent witnesses that was before it. Having announced it would not apply the ECtHR’s rule for absent witness testimony, the Supreme Court went on to

¹⁰⁶Ibid.

¹⁰⁷Ibid, 387.

¹⁰⁸Ibid, 388.

¹⁰⁹Ibid, 382.

¹¹⁰Ibid, 403.

¹¹¹Ibid, 406–8.

reject any sole or decisive rule with respect to anonymous witnesses. The Court explained that the procedural safeguards in the WAA and related statutes along with background common law practices rendered such a rule unnecessary in the UK system.¹¹²

3.7 The European Court's New Approach: Absent Witnesses

After the Supreme Court's decision in *Horncastle*, the Grand Chamber heard anew and issued its own decision in *Al-Khawaja and Tahery*. Departing from the lower chamber's approach, the Grand Chamber transformed the sole or decisive rule for absent witnesses into a flexible standard. Whereas the lower chamber had ruled that sole or decisive testimony from an absent witness automatically violated ECHR Article 6, the Grand Chamber ruled that such testimony required instead 'searching scrutiny' to ensure fairness to the defendant. The Grand Chamber explained:

It would not be correct, when reviewing questions of fairness, to apply [the sole or decisive] rule in an inflexible manner. Nor would it be correct for the Court to ignore entirely the specificities of the particular legal system concerned. [...] To do so would transform the rule into a blunt and indiscriminate instrument. [...] The Court therefore concludes that, where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6 para 1. At the same time, where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny. [...] The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case.¹¹³

The Grand Chamber couched its ruling as consistent with prior case law focused on the general requirement of fairness in criminal proceedings¹¹⁴ but in

¹¹² Ibid, 392, 394, 403.

¹¹³ *Al-Khawaja and Tahery v United Kingdom* [2011] 54 EHRR 23, paras 146–7.

¹¹⁴ Ibid, paras 118–19.

rejecting the lower chamber's analysis there is little doubt that in the specific the Grand Chamber was adopting a new and quite different approach. The Supreme Court's criticism, in *Horncastle*, of the lower chamber's earlier ruling played an obvious role in the turnabout. Although the Grand Chamber lobbied potshots at some of Lord Phillips's criticisms¹¹⁵ and bristled at times at the notion of English exceptionalism,¹¹⁶ the ultimate outcome was deference to the Supreme Court's judgment that in the UK legal system the sole or decisive rule was unnecessary.

With respect to *Al-Khawaja's* case, the Grand Chamber found, as had the lower chamber, that testimony from the absent witness was indeed the decisive evidence supporting the conviction. However, the Grand Chamber also ruled that the interests of justice weighed in favour of admitting the statement at issue; the statement was reliable because it was recorded by the police in proper form before the witness's death; the absent witness provided an account to two friends, who testified at trial, and those accounts were sufficiently similar to the account given to the police, and there was no evidence of collusion; and that there were sufficient countermeasures, including the judge's instructions to the jury, to safeguard the defendant's interests. Therefore, the Grand Chamber held, there was no violation of ECHR Article 6.¹¹⁷

In *Tahery's* case, the Grand Chamber applied its new standard but agreed that the proceeding violated the Convention. The Grand Chamber reasoned that T's testimony 'was, if not the sole, at least the decisive evidence' against the defendant. The Grand Chamber noted that '[e]ven if [...] [the defendant] gave evidence denying the charge, [...] [he] was [...] unable to test the truthfulness of T's evidence by means of cross-examination' and T was 'the sole witness who was apparently willing or able to say what he had seen'. Although the trial judge had warned the jury about unduly relying on untested evidence, the Grand Chamber deemed this warning an insufficient 'counterbalance where an untested statement of the only prosecution eyewitness was the only direct evidence' in the case. After '[e]xamining the fairness of the proceedings as a whole', the Grand Chamber found 'there were not sufficient counterbalancing factors to compensate for the difficulties to the defence which resulted from the admission of T's statement'.¹¹⁸

¹¹⁵ Ibid, para 137: 'in the case of *R v Davis* [...] the House of Lords appeared to foresee no apparent difficulty in the application of the sole or decisive rule in the context of anonymous witnesses'.

¹¹⁶ See e.g. *ibid*, para 130: 'while it is important for the Court to have regard to substantial differences in legal systems and procedures [...] ultimately it must apply the same standard of review under Article 6 paras 1 and 3(d), irrespective of the legal system from which a case emanates'.

¹¹⁷ Ibid, paras 154–58.

¹¹⁸ Ibid, para 159–65.

The Grand Chamber confined its ruling to the use of absent witnesses, noting that the cases did not present issues of anonymity.¹¹⁹ That said, the Grand Chamber referenced the UK Supreme Court's discussion of anonymity in *Horncastle*, and observed, 'the two situations are not different in principle' in that 'each results in a potential disadvantage for the defendant' and implicates the defendant's right to 'an effective opportunity to challenge the evidence against him'.¹²⁰ The seed was thus planted for a new approach to anonymous testimony as well.

3.8 The European Court's New Approach: Anonymous Witnesses

As described above, decisions of the ECtHR pre-dating *Al-Khawaja and Tahery* permitted anonymity measures under certain circumstances. Importantly, the ECtHR had ruled that a conviction could not be based solely or decisively on an anonymous witness's statement even if the defence had an opportunity to examine the witness. In addition, the court required that even if the witness's statements were not decisive that there be counterbalances to the anonymity measures in order to protect the interests of the defendant.¹²¹ After the Grand Chamber's decision in *Al-Khawaja and Tahery*, therefore, the Convention rules about anonymous witnesses appeared more stringent than those involving absent witnesses.

Yet the Grand Chamber's passing reference to anonymity in *Al-Khawaja and Tahery* soon bore fruit. In *Ellis, Simms and Martin v United Kingdom*¹²² the ECtHR extended the principle of *Al-Khawaja and Tahery* to apply also to anonymous witnesses. The case involved a prosecution of three defendants in connection with gang-related murders and attempted murders. The trial judge permitted an eyewitness, who feared for his safety, to testify anonymously in the trial. Pursuant to the judge's order, neither the defendants nor the public were able to see the witness and heard only his distorted voice. The judge, the jury, and the defence lawyers could all see and hear the witness. The judge also cautioned the jury about the risks associated with relying upon anonymous testimony.¹²³ The defendants

¹¹⁹ Ibid, para 127.

¹²⁰ Ibid.

¹²¹ See e.g. *Doorson v Netherlands*, above n 35.

¹²² *Ellis, Simms and Martin v United Kingdom*, above n 96.

¹²³ Ibid, paras 29, 31.

were found guilty and sentenced to life imprisonment.¹²⁴ The Court of Appeal, which had rejected a mid-trial appeal of the judge's anonymity order,¹²⁵ dismissed the defendants' appeal.¹²⁶

The defendants argued to the ECtHR that allowing the anonymous testimony violated their Convention right 'to examine or have examined witnesses against' them. In its decision, the ECtHR rejected the argument and dismissed the defendants' complaint. In so doing, the court adopted the same approach to anonymous witnesses that the Grand Chamber in *Al-Khawaja and Tahery* had applied to absent witnesses. After setting out the new approach to determining whether use of testimony by absent witnesses was compatible with Convention rights,¹²⁷ the court invoked the Grand Chamber's recognition in *Al-Khawaja and Tahery* that the problems of absent and anonymous witnesses were 'not different in principle'.¹²⁸ The court then deemed Convention precedents in cases involving absent witnesses 'consistently [...] similar'¹²⁹ to those involving anonymous witnesses because in each instance the court 'insisted upon good reasons for granting anonymity [...] and [...] made reference to the general need for counterbalancing factors [...] and to the "sole and decisive" test'.¹³⁰ The only real issue, then, was exactly how that test should apply with respect to anonymous witnesses. The outcome suggested itself: the guidance given by the Grand Chamber in *Al-Khawaja and Tahery* was 'equally applicable'¹³¹ to anonymous witnesses. Thus, the court explained the new approach:

[I]n assessing the fairness of a trial involving anonymous witnesses [...] this Court must examine, first, whether there are good reasons to keep secret the identity of the witness [...]. [A] subjective fear [expressed by the witness] is not sufficient, and appropriate inquiries must be conducted by the trial court to determine whether there are objective grounds for the fear in question [...]. Second, the Court must consider whether the evidence of the anonymous witness was the sole or decisive basis of the conviction. [...] As the Court noted in *Al-Khawaja and Tahery*, an appellate court in the United Kingdom

¹²⁴ Ibid, para 52.

¹²⁵ Ibid, para 37.

¹²⁶ Ibid, para 54.

¹²⁷ Ibid, para 73.

¹²⁸ Ibid, para 74.

¹²⁹ Ibid, para 75.

¹³⁰ Ibid.

¹³¹ Ibid.

is well placed to consider whether untested evidence could be considered to be the sole or decisive evidence against the defendant and whether the proceedings as a whole were fair [...]. Third, where a conviction is based solely or decisively on the evidence of anonymous witnesses, the Court must subject the proceedings to the most searching scrutiny. It must be satisfied that there are sufficient counterbalancing factors, including the existence of strong procedural safeguards, to permit a fair and proper assessment of the reliability of that evidence to take place.¹³²

In sum, a single approach now applied to the use of anonymous witnesses and to absent witnesses alike.

Applying this approach in the matter before it, the court first observed that the case involved the very kind of prosecution in which anonymity served an important public interest: 'Allowing witnesses to give evidence anonymously is an important tool in enabling prosecutions to be brought in respect of gang-related murders.'¹³³ Next, in light of other evidence the prosecution introduced at trial, including telephone records and firearms residue, the anonymous testimony was not the sole evidence that formed the basis for the conviction—but it may have been decisive. Thus, the court went on to examine whether there were adequate counterbalancing factors. In this regard, the court noted that the judge, the jury, and the defence lawyers could all see and hear the witness give evidence and assess his demeanour. In addition, the trial judge properly instructed the jury as to the restrictions the defence faced with respect to the witness.¹³⁴ Further, the court noted, the defence had received significant information about the anonymous witness's background (including that he had a gang affiliation himself) that facilitated cross-examination. In light of these factors, there was no violation of the defendant's Convention right.¹³⁵

The ECtHR's decision stands for the proposition that even if anonymous testimony is the sole or decisive evidence against a defendant, there is not necessarily a violation of Article 6 so long as there are sufficient counterbalancing factors to ensure the overall trial is fair. Like the shift in its approach to absent

¹³² Ibid, paras 76–78.

¹³³ Ibid, para 80.

¹³⁴ Ibid, para 84.

¹³⁵ Ibid, paras 86, 89.

witnesses, the decision represents a broader acceptance of anonymous testimony than prior case law had permitted.¹³⁶

In sum, the UK's broad embrace of testimony by anonymous witnesses quickly had a feedback effect at the Convention level. It prompted the ECtHR to accept as compatible with Article 6 anonymous testimony in ways that prior case law had disallowed. Just as lower Convention standards enabled UK reformers to curtail the right of confrontation, the UK reform facilitated a diminished Convention right. Put differently, judicial dialogue, routinely celebrated for its rights-enhancing effects, in this instance helped ratchet down the right of confrontation under both domestic and European law.¹³⁷

3.9 Summary

A brief recap is in order. In 2003, Parliament provided in the CJA a statutory basis for courts to admit testimony of witnesses who were absent from the courtroom because they were afraid to testify. In 2008, in response to the ruling in *Davis*, Parliament created with the WAA a statutory framework for courts to allow witnesses (out of fear or for other reasons) to testify anonymously. Billed as a temporary emergency measure, the framework was made permanent with the 2009 Coroners and Justice Act. Courts immediately took a broad view of their statutory powers in cases such as *Mayers*. In 2009, in *Al-Khawaja and Tahery*, the European Court of Human Rights found a violation of Convention rights by a conviction based solely or decisively on testimony from an absent witness under the CJA. Yet later that same year, in *Horncastle*, the Supreme Court refused to follow the ECtHR's sole or decisive bar with respect to testimony by absent witnesses. The Supreme Court announced also that it would not follow a sole or decisive rule with respect to anonymous witnesses either. In 2011, the Grand Chamber, hearing anew *Al-Khawaja and Tahery*, abandoned the sole or decisive rule with respect to absent witnesses and suggested that such a rule was also not needed with respect to anonymous witnesses. In 2012, in *Ellis, Simms and Martin v United Kingdom*, the European Court extended the more relaxed approach with respect to absent witnesses to apply also to anonymous witnesses.

¹³⁶Subsequent judgments of the ECtHR have followed the same approach: see e.g. *Pesukic v Switzerland* [2012] ECHR 2031.

¹³⁷See concurring opinion of Judge Bratza in *Al-Khawaja and Tahery v United Kingdom*, above n 113, para 2: '[t]he present cases afford, to my mind, a good example of the judicial dialogue between national courts and the European Court on the application of the Convention'.

The foregoing events demonstrate that within a decade a remarkable change occurred in protections for defendants to examine witnesses testifying against them. The mechanism of change, one that left defendants worse off, was the structure of government ostensibly designed to secure individual rights. In multilevel systems, constraints at the top set a common floor for protecting rights. Local actors may not go below this floor but they are empowered (and generally expected) to exceed it in ways that are appropriate to their own conditions. Yet the protection in the European Convention of a right to examine witnesses enabled UK lawmakers to reduce safeguards that for centuries existed under the common law. Looser standards at the top provided cover for a localised reduction in rights. Further, the domestic reduction had a feedback upon the Convention as understood by the ECtHR.

4 Conclusion

The pursuit of universal human rights through the structures of multilevel government entails a significant risk of diminished protections for individuals from government abuses. Watered-down rights imposed from above can lead to the displacement of local traditions and a downgrading of rights at the local level. In turn, diminished localised rights can float back up to the top, further stunting the prospects of robust universal protections. In the short term, universality may help secure rights. In the long-term, however, universality itself can provide the means by which rights are cut back. As core sets of rights continue to spread around the world, we should expect those rights to take on ever-diminishing form.

This article points, then, to some under-appreciated benefits of localism over globalism. It suggests that encouraging diversity of rights may be preferable to insisting upon commonalities. It shows that courts—which played a key role in the case study examined—can reduce as well as expand liberties. It demonstrates also that dialogue among courts may generate agreement to curtail rather than enhance protections. These lessons might well sound old fashioned but they are generated from a study of diminishing rights in the very place where—eight hundred years ago next spring—human rights first gained protection with Magna Carta. That is reason enough to pay these lessons heed.