Editorial

You Can’t Always Counterbalance What You Want

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Advancing Backwards

From the end of the last century until few years ago, the European Court on Human Rights steadily directed the development of criminal procedure in Europe toward a more harmonised (and due process oriented) supranational system. The States Parties to the Convention amended their domestic systems to align with the ECtHR case-law on several aspects (ne bis in idem, rights of the defendant, right to examine witnesses, trial in absentia, etc.). The EU – following the principles enshrined in the Treaties and in the Charter that acknowledges the primary relevance of the ECHR – heavily referred to the ECtHR findings in drafting its new directives on defence safeguards in criminal proceedings. Lastly, especially after the Lisbon Treaty entered into force, also the ECJ increasingly recalled the ECtHR case-law in its first decisions in the field of criminal justice.¹

However, more recently, the ECtHR seems to be rethinking about its leading role in our Continent, getting back to the old times, in which the Court was far more concerned with ensuring the fairness of single cases than favouring the building up of a fair supranational criminal justice system.

In several cruxes of criminal procedure, in fact, the ECtHR overruled its previous jurisprudence, following specific, non-replicable and closely related-to-the-single-case reasons. This “new-old-fashioned” trend (new, if compared

¹ ECJ, 26 February 2013 (C-617/10), Åkerberg Fransson; 15 October 2015, (C-216/14), Covaci.
to the developments of the last decades; old, if we look further back in time) begun probably in 2011, with the well-known *Al-Khawaja and Tahery v. U.K.* judgment on the defence’s right to examine or have examined witnesses given in the case.\(^2\) There, indeed, the Court reversed its consolidated jurisprudence on the “sole or decisive” test, according to which a conviction, based on a witness statement never challenged by the defence during the proceeding should be considered in violation of the right to a fair trial if the statement constituted the sole or decisive evidence of the defendant’s conviction. In spite of the old interpretation, a new approach inspired to the overall examination of the proceedings was inaugurated. The overruling was followed, few years later, by *Schatschaschwili v. Germany* (2015),\(^3\) where the Court tried to delineate more clearly the new path undertaken.

Another surprising new interpretation was at the basis of the Court judgment in *Ibrahim and others v. U.K.*\(^4\) (2016), with regard to the right of access to counsel and the presumption of innocence (under the aspect related to the right to silence – a consequence of the presumption of innocence in the interpretation of Strasbourg).\(^5\) In that case, the Grand Chamber considered a conviction based, among other evidence, on police interrogation conducted without the attendance of the counsel (and without even a simple consultation between the defendant and the counsel before the interrogation starting) not *per se* in violation of the right to remain silent – as well as of the right to access to counsel. This decision constitutes in good part an overruling of *Salduz*\(^6\) and its descendants;\(^7\) As such, it somehow not only undermines the consolidated ECtHR jurisprudence, but at least in part, could also potentially deprive the EU directives on access to counsel and the presumption of innocence of their content, given their heavy relying on the Strasbourg case-law.\(^8\)


\(^3\) *Schatschaschwili v. Germany*, no. 9154/10, 15 December 2015.


\(^6\) *Salduz v. Turkey* [GC], no. 36391/02, 27 November 2008.

\(^7\) Especially *Dayanan v. Turkey*, no. 7377/03, 13 October 2009. See infra, § 4.