

Penalising Defendant Non-Cooperation in the Criminal
Process and the Implications for English Criminal
Procedure

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Abstract

Requirements for the defendant to actively participate in the criminal process have been increasing in recent years such that the defendant can now be penalised for his non-cooperation. This thesis explores the procedural implications of penalising a defendant's non-cooperation, particularly its effect on the English adversarial system. This thesis uses three key examples: 1) limitations placed on the privilege against self-incrimination, 2) adverse inferences drawn from a defendant's silence, and 3) adverse inferences drawn from defence non-disclosure. The thesis explores how laws regarding the privilege against self-incrimination, the right to silence and pre-trial disclosure came to be reformed such that the defendant can now be penalised for his non-cooperation, and how these laws have been approached by the courts.

A normative theory of criminal procedure is developed in the thesis and is used to challenge the idea of penalising defendant non-cooperation in the criminal process. The theory proposes that the criminal process should operate as a mechanism for calling the state to account for its accusations and request for official condemnation and punishment of the accused. Within this framework, the defendant should be free to choose whether or not to cooperate and participate throughout the process.

The theory rests upon a broad interpretation of the presumption of innocence, the right to a fair trial, and a conception of the relationship between citizen and state. Conversely, the thesis finds that, by placing participatory requirements on the defendant and penalising him for his non-cooperation, a participatory model of procedure has developed. This model relies on the active participation of the defendant in pursuit of efficient fact finding. The participatory model is far removed from England's history of adversarialism and, unfortunately, has less regard for legitimacy, fairness and respect for defence rights.

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1

Introduction

There has been an increasing trend in criminal justice reforms over the past two decades to secure the active participation and cooperation of the defendant as an individual and the defence as a party representing the defendant. These reforms often entail detrimental consequences for those who do not comply with their participatory requirements. This thesis examines the implications of procedural practices which effectively penalise failure to participate in, or cooperate with, the criminal process during the pre-trial and trial stages. It explores the reasoning behind them and their impact on the nature of criminal procedure. Although there are increasing and objectionable expectations on the defence to participate as a party,¹ the main focus is the participatory requirements placed on the defendant as an individual, because it is often the existence of the defence party which allows the defendant to take a passive role in the criminal process. The relevance of the distinction between the participatory role of the defendant as an individual and the defence as a party is discussed in chapter 4.

Three key examples of penalising non-cooperation are presented within the thesis. These are: adverse inferences drawn from defence non-disclosure; adverse inferences drawn from a defendant's silence; and limitations placed on the privilege against self-incrimination. There are several other practices which now effectively penalise the defendant, or the defence party, for their failure to cooperate. These are addressed in different contexts within the thesis and include a loss of sentence reduction for those who do not plead guilty, and sanctions for failure to comply with case management directions under the Criminal Procedure Rules. Reverse burdens of proof are another form of required participation and will be discussed in chapter 4; however, because the defence's failure to discharge a legal burden of proof will result in a conviction, rather than a specific penalty for non-compliance, they are not dealt with in the same way as the three key examples. Instead they are explored in relation to their effect on the presumption of innocence.

¹ These include the case management provisions of the Criminal Procedure Rules discussed in chapter 3.

The idea of penalising non-cooperation is challenged on the basis of a normative conception of criminal procedure within which the criminal process should operate as a mechanism for calling the state to account for its accusations and request for official condemnation and punishment of the accused.² Whilst recognising that concessions are made in practice, this theory applies a relatively absolutist ‘no assistance’ approach to the defendant’s role in the criminal process. As such, the defendant should be free to choose whether or not to cooperate and participate, with the trial offering a forum to test the prosecution’s case. The focus is on the pre-trial and trial stages of the criminal process from charge to verdict, as this is where penalties for non-cooperation usually accrue. Although the majority of criminal cases do not culminate in a trial, the possibility of a trial overshadows the investigative and pre-trial stages. Thus, where the focus is on the trial, it is on the basis that the potential for trial shapes what happens beforehand.

Use of the term ‘penalise’ in this context does not refer specifically to the use of criminal sanctions, but to the risk of a detriment that would not be endured if the accused were to comply or cooperate. With the exception of some cases involving the privilege against self-incrimination which are sanctioned criminally, the examples explored in this work largely rely on the use of adverse inferences to penalise defendants. These inferences can contribute to a finding of guilt, meaning that non-cooperation can have a detrimental effect on the accused and the outcome of the case. Providing for detrimental consequences, whether through adverse inferences or otherwise, often results in unwarranted pressures to cooperate. To penalise the defendant is to treat him as though he had done something wrong. By pressuring him to cooperate and then putting him in a disadvantaged position if he does not comply, this is the message that we get from the practices explored in this thesis. Reference to the defendant’s ‘cooperation’ throughout the pre-trial and trial stages of the criminal process assumes his active participation. The defendant is a participant when he is actively involved as an individual through means such as responding to questioning, providing information and giving evidence at trial.

² Hock Lai Ho presents a similar theory of the adversarial criminal trial as primarily a process of holding the executive to account on its request for conviction and punishment. He proposes an understanding of the trial as a matter of doing justice to the accused. See, HL Ho ‘Liberalism and the Criminal Trial’ (2010) *Singapore Journal of Legal Studies* 87.

1.1 Arguments against penalising non-cooperation

It is important to make clear, at the outset, why it is argued that the idea of penalising non-cooperation is objectionable. The objection stems from fundamental legal norms, namely the presumption of innocence, the right to a fair trial, and a normative conception of the proper relationship between state and citizen in a liberal democracy. These also offer theoretical grounding for the normative theory of criminal procedure based on calling the state to account for its accusations. This theory is developed throughout the thesis and provides a useful tool from which to analyse the concept of penalising non-compliance. The presumption of innocence, the right to a fair trial, and the relationship between state and citizen are key themes which are explored and expanded in the following chapters. Whilst there are important links between them, they are able to offer individual arguments against penalising non-cooperation. It is useful to briefly set out here the way in which they do this.

1.1.1 The presumption of innocence

At a minimum, the presumption of innocence requires the prosecution to bear the burden of proving the defendant's guilt at the criminal trial. In England, this must be done to a standard of beyond reasonable doubt. However, on a broader scale, the presumption operates throughout the criminal process as a direction to treat the accused as if he were innocent. These two approaches to the presumption have been explored by Ho as a common law rule on the one hand, and a human right on the other.³ These, in part, correspond to what Ashworth has labelled the 'narrow' and 'wide' concepts of the presumption of innocence.⁴ The accused's right to have the case against him proved beyond a reasonable doubt, whether viewed from a narrow trial centred approach or from a wider human rights basis, underpins the case against penalising defendants for not cooperating in the criminal process and provides a backbone for the normative theory put forward. The presumption allows citizens to challenge the state and hold it to account before it can exert its powers of condemnation and punishment.

³ HL Ho 'The Presumption of Innocence as a Human Right' in P Roberts and J Hunter *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Hart: Oxford, 2012).

⁴ A Ashworth 'Four Threats to the Presumption of Innocence' (2006) 10 *E and P* 241, 243.

All three of the specific examples of penalising non-cooperation explored in this thesis operate so as to weaken the effect of the presumption of innocence. However, it is important to note that, in practice, there is disagreement as to the proper scope and implications of the presumption.⁵ Where the presumption of innocence is referred to in a general sense within the thesis, it is intended to reflect a wide conception which operates at trial by requiring the prosecution to prove the defendant's guilt, and operates beyond the trial as a direction to officials to treat the suspect as if he were innocent at all stages until guilt is proven. From a normative standpoint, it implies that the accused should not have to play a role in the state's obligation to account for its accusations.

1.1.2 The right to a fair trial

Before an accused person can be convicted of a crime, he is entitled to a fair trial with a range of procedural safeguards.⁶ Article 6 of the European Convention on Human Rights, which guarantees the right to a fair trial, is an important element of this thesis because it sets out the minimum conditions of fairness and has been influential in many decisions regarding penalties for non-cooperation. There is an important link between rights and participation which is evidenced throughout the thesis, as it is often the existence of rights which allows the accused to refuse to participate. Particular examples are the right to silence and the privilege against self-incrimination, both of which have been implied into Article 6.⁷ These rights are discussed in detail in chapters 5 and 6, so it is sufficient to mention here that they provide the accused with specific rights not to assist in the criminal process and help to ensure that the state can account for its accusations. However, as will become clear, the privilege against self-incrimination is not an uncontroversial principle and there is a lack of consensus as to its scope and rationale.⁸ Nevertheless, providing for penalties against those who do not cooperate undermines the rights

⁵ This includes arguments concerning the imposition of legal burdens on the defence and is discussed in chapter 4.

⁶ A Ashworth and L Zedner 'Justice Prevention: Preventive Rationales and the Limits of the Criminal Law' in A Duff and P Green (eds) *Philosophical Foundations of Criminal Law* (Oxford University Press: Oxford, 2011) 292.

⁷ *Murray v UK* (1996) 22 EHRR 29.

⁸ See chapter 5; D Dolinko 'Is There a Rationale for the Privilege Against Self-Incrimination?' (1986) 33 *UCLA Law Review* 1063; M Redmayne 'Rethinking the Privilege Against Self-Incrimination' (2007) 7 *Oxford Journal of Legal Studies* 209.

which guarantee accused persons a fair trial, and which underpin the normative account of the criminal process by ensuring that the state accounts for its accusations.

1.1.3 The relationship between citizen and state

This thesis rests on the supposition that England is a liberal state in which state power is limited and citizens are viewed as rights bearers.⁹ The normative theory of calling the state to account is developed to apply within this context. It is beyond the scope of this work to undertake an exploration of political or liberal philosophies and their controversies. Instead, it relies on standard ideas of liberal values such as autonomy and dignity. Citizens have a 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.¹⁰ The theory of calling the state to account reflects a conception of the proper relationship between the state and its citizens in a liberal democracy. Within this relationship, the accused should not be required or expected to assist the state in proving guilt.

The relationship stems from the fact that, in a democratic society, the state's far-reaching powers of investigation, prosecution, trial and sentencing should be exercised according to certain standards that show respect for the dignity and autonomy of each individual.¹¹ The value attached to freedom and autonomy means that the state should justify its allegations against the defendant before exerting its power to convict and punish him. Autonomy is respected through freedom of choice, exhibited in the freedom to plead guilty or not, in the right to silence, in the privilege against self-incrimination and other participatory and non-participatory rights.¹² It is important that state resources are not used unwarrantedly in the obligation to account for accusations. The state's potentially oppressive powers can be kept in check by placing limitations on what it can legitimately require of the accused. Most fairness norms operate as restraints on the state's power as well as a means of protecting the accused's autonomy and dignity. There is a link between the prosecutorial powers of the state in terms of its resources, and the extent of the defendant's duty to participate in the criminal process: when

⁹ Commentators such as Ashworth and Redmayne also rely on this premise. A Ashworth and M Redmayne *The Criminal Process* 4th edn (Oxford University Press: Oxford, 2010).

¹⁰ I Dennis 'The Human Rights Act and the Law of Evidence Ten Years On' (2011) 33 *Sydney Law Review* 333, 345.

¹¹ Ashworth (n 4) 249.

¹² Ho 'Liberalism and the Criminal Trial' (n 2) 99.

the state uses its powers against its citizens to require participation, irrespective of its burden of proof and their rights of non-participation, it undermines the proper relationship between citizen and state. This conception of the relationship between citizen and state is expanded upon in chapter 5.

1.2 The link between the criminal process and the criminal law

It is important to link the normative theory of the criminal process to the substantive criminal law, as the criminal process is a means of enforcing the criminal law through denunciation and punishment of those who do not comply with it. The criminal law is the strongest form of official censure of an individual for conduct.¹³ A conviction has the effect of labelling the accused as a criminal. It makes a public condemnatory statement about the defendant as blameworthy. It creates a social stigma which, even in the absence of official punishment, may have damaging consequences through, for example, an inability to gain employment. The far-reaching consequences of a criminal conviction offer increased justification for ensuring that the state is held accountable in its enforcement of the criminal law through a process based on calling the state to account for its accusations and requests for condemnation and punishment.

One's perceptions of the goals of the criminal law can impact how one perceives the proper function of the criminal process. The theory of criminal law underpinning the normative account of criminal procedure, based on calling the state to account, purports that the purpose of forbidding certain actions is to protect citizens and the state from harm without undermining the values behind a liberal democracy within which freedom of choice is to be fostered.¹⁴ The criminal law should be enforced, and the criminal process carried out, in a way that respects the rights of the accused, promotes fairness and limits the potentially oppressive power of the state. The scope and rationale of the criminal law is part of the wider context within which this thesis is based. The link between law and process shows the relevance of the normative stance taken. However, whilst the link is further emphasised in the following chapter, substantive criminal law theory is an area that is not elaborated on, due to its remoteness from the central topic.

¹³ Ashworth and Zedner (n 6) 289.

¹⁴ This is not an uncontroversial account of the criminal law. See chapter 2.

1.3 Implications for English criminal procedure

Requiring defendant participation and penalising non-cooperation through the use of adverse inferences and offences of non-compliance interferes with defence rights and notions of fairness, due process and adversarialism which have developed throughout the history of English criminal procedure. Although the English system cannot carry the label 'adversarial' in any strict sense of the term, such as Damaska's core meaning of it,¹⁵ it claims to accord defendants with those rights which ensure fairness and which became established norms as part of adversarialism. When a defendant has rights he has a protection against the power of the state, irrespective of the role he plays in the criminal process. This makes it harder to hold him to account and easier for him to demand that the case against him be proven. Reforms in criminal justice and procedure over the past two decades have shifted English criminal procedure further away from adversarialism. The issue is not so much that England is moving on from having an adversarial system, but that it is also moving on from a strong sense of due process and from legal norms and rights which have become universally recognised ways of limiting the state's potentially oppressive powers against citizens accused of criminal wrongdoing.

Changes in England's procedural style have been the subject of some recent academic commentary. For example, Dennis has noted an emerging 'dialogue' between the prosecution and the defence,¹⁶ whilst Richardson has expressed concern over the shift away from due process concerns in the name of political and economic expediency.¹⁷ Both Hodgson¹⁸ and

¹⁵ A contest which unfolds as an engagement of two adversaries before a relatively passive decision maker whose principal duty is to reach a verdict. M Damaska *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press: New Haven, 1986) 3. The adversarial model is described more fully in chapter 3.

¹⁶ I Dennis *The Law of Evidence* 4th edn (Sweet & Maxwell: London, 2010), 453.

¹⁷ J Richardson 'A "Just" Outcome: Losing Sight of the Purpose of Criminal Procedure' (2011) *Journal of Commonwealth Criminal Law* Inaugural Issue 105.

¹⁸ J Hodgson 'The Future of Adversarial Criminal Justice in 21st Century Britain' (2010) 35 *North Carolina Journal of International Law and Commercial Regulation* 319.

McEwan¹⁹ attribute a change in procedural style to the prevalence of efficiency and managerial concerns. Furthermore, Duff *et al.* recognise that principles central to the traditional conception of the trial are being challenged and eroded.²⁰ The approach taken in this thesis is distinctive because it focuses on developments in the defendant's participatory role in the criminal process and the negative consequences of penalising non-cooperation. In doing so, it examines the purpose of the criminal process, its aims and values, and the principles which underpin and constrain it. It also identifies the origins, practice and procedural impact of the specific reforms to the privilege against self-incrimination, the right to silence and disclosure. It, thus, provides an important opportunity to examine the wider effects of often controversial reforms which have been altering the nature of criminal procedure and the role of the defendant. Rather than looking at the emergence of an efficiency model, this thesis finds that England has developed a participatory model of criminal procedure. This model has not been developed by design; rather it is the result of reforms aimed at the perceived benefits of defence cooperation and participation without regard for their wider consequences.

1.4 Thesis Outline

Following this introduction, there are six chapters and a conclusion. Chapters 2 through to 4 construct a theoretical framework which is used to understand and evaluate the criminal process and the concept of penalising those who do not cooperate. Chapters 5 through to 7 go on to apply this framework to the three particular examples of penalising non-cooperation.

Chapter 2 sets out the aims of the English criminal process. It uses the overriding objective of the Criminal Procedure Rules as a structural basis for doing so; also, it draws on Ashworth and Redmayne's rights based account.²¹ Starting with an examination of the aims currently associated with criminal procedure is a useful way of determining which aims must necessarily be emphasised in order to justify penalising defendant non-compliance in the criminal process.

¹⁹ J McEwan 'From Adversarialism to Managerialism: Criminal Justice in Transition' (2011) 31 *Legal Studies* 519.

²⁰ A Duff, L Farmer, S Marshall and V Tadros (eds) *The Trial on Trial Volume 3* (Hart: Oxford, 2007).

²¹ Ashworth and Redmayne (n 9).

Chapter 3 outlines several models of criminal procedure. These are: adversarial; inquisitorial; hybrid; efficiency; and European. Identifying and exploring these models assists in establishing the procedural position England is in and the participatory direction in which it has shifted as a result of the trend of reforms aimed at securing cooperation. As reference is made to these models throughout the thesis, this chapter also serves as important explanatory information and helps to bring together the bigger picture of criminal process aims and procedural style in relation to the issue of penalising non-cooperation.

Chapter 4 explores the issue of defendant participation and argues that, in order to respect the defendant's rights and to uphold some of the fundamental features of the English criminal justice system, participation should be a choice rather than a requirement. It begins by examining Duff *et al.*'s communicative account of the nature of the criminal trial,²² and offers a critique of it. By contrasting this account with the normative theory put forward, in which the criminal process should be a means of calling the state to account, important issues surrounding defendant participation are raised. Drawing on the research of Langbein²³ and Beattie,²⁴ chapter 4 then looks at the historical development of the adversarial system in terms of the role of the defendant and the rise of defence rights which can facilitate a lack of participation. The defendant's position as a participant in the current English criminal process, particularly at trial, is examined. This highlights the trend towards an obligation on the defendant to participate. Finally, the definition and rationale of the presumption of innocence is considered in more detail in relation to the defendant's participatory role.

The first specific example of penalising non-cooperation arises from reliance on the privilege against self-incrimination. Chapter 5 examines the concept of the privilege, its scope and the place it holds in the English criminal process, particularly as a defence right and as a way of limiting the defendant's participation. It notes Redmayne's notion of the privilege as a distancing mechanism,²⁵ and highlights its value in relation to upholding a proper relationship between citizen and state. This chapter critically evaluates how our modern understanding of

²² Duff *et al.* (n 20).

²³ JH Langbein *The Origins of the Adversary Criminal Trial* (Oxford University Press: Oxford, 2003).

²⁴ JM Beattie *Crime and the Courts in England 1660-1800* (Clarendon Press: Oxford, 1986).

²⁵ Redmayne (n 8).

the privilege has been limited. Reliance on the privilege can now, in some circumstances, lead to the direct penalty of criminal prosecution for non-cooperation.

Chapter 6 provides the second example of penalising the defendant for not cooperating in the criminal process. It examines developments to the right to silence in English law. The main point of interest is the Criminal Justice and Public Order Act 1994 and the case law surrounding it, which controversially allow the fact finder to draw adverse inferences of guilt in certain situations. By equating silence with guilt, it has become difficult for the defendant to test the prosecution case without actively participating.

Chapter 7 examines the pre-trial disclosure obligations placed on the defence by the Criminal Procedure and Investigations Act 1996. The provisions for drawing adverse inferences where the defendant fails to comply with these obligations constitutes a penalty for non-compliance with the criminal process. However, the provisions are also controversial because they create, for the first time in the history of English criminal procedure, general pre-trial disclosure obligations for the defence. Although defence disclosure aims to secure convictions as quickly and efficiently as possible, requiring the defence to disclose the details of its case raises important issues of principle. This chapter also considers the link between, and procedural implications of, the case management provisions in the Criminal Procedure Rules and a perceived need to tackle ambush defences. As with chapters 5 and 6, the factors which led to the disclosure reforms, and whether they are justifiable in light of the theoretical framework, are evaluated.

This thesis attempts to state the law as at 1st May 2012.

2

Aims

2.1 Introduction

Examining the aims of the criminal process is a useful way of determining which aims must be emphasised in order to prioritise defendant participation and justify penalising defendants for not cooperating. Whilst the focus of this chapter is on the aims of the pre-trial and trial stages of the process, from charge to verdict, one's theory on other elements of the criminal justice system, such as punishment and sentencing, may influence how one views the aims of the criminal process as a whole. For example, Ashworth and Redmayne's rights based approach to criminal procedure is influenced by their retributive, or deserts-based, rationale for punishment.¹ Within their conception, punishment should be underpinned by the same principles of proportionality and respect for the accused as a rational rights-bearing subject, as the criminal process is.² A normative theory based on calling the state to account for its accusations against the accused also correlates to a retributive theory of punishment; once the state has justified and accounted for its accusations and request for punishment, that punishment can be carried out so as to censure the accused for his wrongdoing.³

One's perceptions of the criminal law can also impact how one perceives the aims of the system, since 'an analysis of criminal procedure's functions is inextricably interwoven with one's vision of the goals of the substantive criminal law.'⁴ The criminal process enforces the criminal law through denunciation and punishment of those who do not comply with it. It is, therefore, important that the criminal process can demand state accountability in its enforcement of the criminal law.⁵ In response to the question, why are certain kinds of action forbidden by law and so made crimes or offences, Hart states: 'To announce to

¹ A Ashworth and M Redmayne *The Criminal Process* 4th edn (Oxford University Press: Oxford, 2010) 21.

² Ibid.

³ Theories and justifications for punishment are part of the wider context of this thesis and are not elaborated on due to space constraints and remoteness from the central topic.

⁴ P Arenella 'Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies' (1983) 72 *Georgetown Law Journal* 185, 197.

⁵ HL Ho 'The Presumption of Innocence as a Human Right' in P Roberts and J Hunter *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Hart: Oxford, 2012) 277.

society that these actions are not to be done and to secure that fewer of them are done. These are the common immediate aims of making any conduct criminal.⁶ A central purpose of criminal law is forbidding certain actions in order to protect citizens and the state from harm and disorder without undermining the values behind a liberal democracy within which freedom of choice is to be fostered. The normative theory of calling the state to account adopts this position. However, a theory which justifies the criminal law as a response to harm does have shortcomings,⁷ and alternative justifications, such as Feinberg's 'offense principle', have been proposed.⁸ Rather than relying on a philosophical theory, the content of the criminal law may be better explained as a matter of historical development. Nevertheless, the goal of protecting the state and its citizens from harm can be pursued legitimately through a criminal process which enforces the criminal law through denunciation and punishment whilst ensuring that, in accordance with the rights and freedom granted to citizens in a liberal democracy, the state can account for its accusations. However, this does not satisfy the question of what the criminal process aims to achieve in terms of case outcome.

Accurate fact finding and conflict resolution are identified in this chapter as the primary aims of the criminal process. However, the process cannot be accepted as legitimate if the aims are not carried out fairly and in accordance with the rights of the accused. This conclusion satisfies both the descriptive question of what the aims of the criminal process are and the normative question of what they should be. This differs from Ho's analysis of the criminal trial. He argues that rather than portraying the trial as a search for truth, it should be more accurately seen as a process of calling upon the executive to account for its request to have a citizen officially condemned and punished.⁹ It is for the police to search for truth, and their

⁶ HLA Hart *Punishment and Responsibility* (Oxford University Press: Oxford, 1968) 6.

⁷ For example, Ashworth and Zedner doubt that prevention is a satisfactory or sufficient justification for many significant features of contemporary criminal law including many inchoate, preparatory and possession offences which have tended to grow in an unprincipled manner, propelled by the apparent irresistibility of preventive purposes. See A Ashworth and L Zedner 'Justice Prevention: Preventive Rationales and the Limits of the Criminal Law' in A Duff and P Green (eds) *Philosophical Foundations of Criminal Law* (Oxford University Press: Oxford, 2011). Furthermore, many criminal offences either exceed the harm principle (such as outraging public decency) or fail to meet it (such as many minor regulatory offences). See C Wells and O Quick *Reconstructing Criminal Law* 4th edn (Cambridge University Press: Cambridge, 2010) 11-13.

⁸ Through his 'offense principle', Feinberg argues that it is necessary to prevent offensiveness as well as harmful conduct. J Feinberg *The Moral Limits of the Criminal Law Volume 2: Offence to Others* (Oxford University Press: Oxford, 1985).

⁹ HL Ho 'Liberalism and the Criminal Trial' (2010) *Singapore Journal of Legal Studies* 87, 90.

search should be over by the time the case reaches court.¹⁰ Ho's account is based on liberal principles and political accountability. This thesis relies on a similar theory of calling upon the executive to account, but applies it to the operation of the criminal process as a whole, rather than limiting it to the function of the court. Unlike Ho's account, this theory does not distinguish between the pre-trial and trial stages, with the executive searching for truth pre-trial, and its case being scrutinised and challenged at trial.¹¹ Instead, it sees accurate fact finding and conflict resolution as the aims, or desired end results, of a process which should itself be an exercise in calling the state to account. The constraints which requirements of fairness, legitimacy and respect for rights place on the pursuance of the process aims help to ensure this.

This chapter examines the aims and values of the criminal process in light of the overriding objective of the Criminal Procedure Rules. Rule 1 sets out the overriding objective as dealing with criminal cases justly. This is followed by a list of seven criteria for meeting this objective:

- (a) acquitting the innocent and convicting the guilty;
- (b) dealing with the prosecution and the defence fairly;
- (c) recognising the rights of a defendant, particularly those under Article 6 of the European Convention on Human Rights;
- (d) respecting the interests of witnesses, victims and jurors and keeping them informed of the progress of the case;
- (e) dealing with the case efficiently and expeditiously;
- (f) ensuring that appropriate information is available to the court when bail and sentence are considered; and
- (g) dealing with the case in ways that take into account—
 - (i) the gravity of the offence alleged,
 - (ii) the complexity of what is in issue,
 - (iii) the severity of the consequences for the defendant and others affected, and
 - (iv) the needs of other cases.

The first four of these are examined in detail and the remaining three are outlined briefly. The aim of conflict resolution, which is also examined, is not expressly provided for in the Rules.

The Criminal Procedure Rules 2005 formalised the aims of criminal litigation in England and Wales for the first time. They have been replaced by the Criminal Procedure Rules 2011. These Rules are setting the tone for developments in procedure and play an important role

¹⁰ Ibid.

¹¹ Ho does recognise that the court plays a useful epistemic role in its ability to counteract police 'tunnel vision'. Ibid 88.

in establishing the duties of the parties and the court by prescribing deadlines and methods of performing tasks, and laying down the powers of the courts to deal with a variety of situations. Furthermore, they have carved out a more active and cooperative role for the defence, increasing the state's ability to require participation and effecting a 'sea change' in the way cases should be constructed.¹² The Criminal Procedure Rules do not apply to the entire criminal process, but many elements, particularly those related to the overriding objective, reflect the aims of the process. The Rules, thus, provide a useful framework and structural tool for this chapter.

2.2 Rule 1.1(2)(a) Acquitting the innocent and convicting the guilty

Determining the facts surrounding a particular offence with a view to ascertaining whether the accused committed the offence is an obvious aim for the pre-trial and trial stages of the criminal process. The fact that the objectives of 'acquitting the innocent and convicting the guilty' are stated in the Rules with apparent equivalence did cause concern for some criminal law practitioners. It was felt that the wording did not sufficiently emphasise the fundamental principle that it is the prosecution which brings the case, and must prove it beyond reasonable doubt.¹³ However, there does not seem to be any question of the rule breaching the prosecution's burden. The wording may simply reflect the general aim of accurate fact finding rather than the principles which govern its pursuit. Richardson takes issue with the inclusion of acquitting the innocent and convicting the guilty in the Rules on the basis that it is inconsistent with an adversarial system of criminal justice to oblige the court to abandon its position of impartial arbiter, and instead to take on an active role in having the case conducted by the parties in such a manner as will produce a true outcome.¹⁴ Such is the role of the judge in an inquisitorial system.¹⁵ However, it is unlikely that this Rule alone has had such an effect on the role of the court, and it remains a reflection of an important process aim.

¹² *R (on the application of DPP) v Chorley Justices and Andrew Forrest* [2006] EWHC 1795 (Admin) [24].

¹³ J Sprack *A Practical Approach to Criminal Procedure* 12th edn (Oxford University Press: Oxford, 2008) 14.

¹⁴ J Richardson 'A "Just" Outcome: Losing Sight of the Purpose of Criminal Procedure' (2011) *Journal of Commonwealth Criminal Law* Inaugural Issue 105, 110-111.

¹⁵ The features of adversarial and inquisitorial systems are outlined in chapter 3.

Although fact finding and truth determination are central aspects of the criminal process, the concepts of 'truth' and 'facts' are not straightforward. Clarifying these terms is, therefore, important. Williams makes a distinction between four types of fact: primary facts, which are principally concerned with whether a witness is to be believed about those facts which he did or perceived, such as what he saw; inferential facts which concern the factual inferences to be drawn from the primary facts; evaluative facts which concern the legal assessment of facts as reasonable, negligent, *et cetera*; and denotative facts which are concerned with the application of words used in legal rules, for instance, whether something amounts to 'grievous bodily harm'.¹⁶ Accurate fact finding as a criminal process aim is predominantly concerned with 'primary facts' and those facts surrounding the criminal act directly. Establishing these facts accurately is the best way of ensuring an accurate outcome for the case. The evaluative, inferential, and denotative facts must often be established as a consequence of the primary facts. They help to clarify and legitimise the laws' ability to determine the truth.

By establishing all of these facts, one would hope to unveil the objective truth, namely whether a particular suspect did or did not in fact commit the offence for which he has been charged. However, as William's analysis suggests, the truth as determined through the criminal process is rarely this objective. Legal norms and rules of evidence, including exclusionary rules, must be taken into account. As a result, the fact finder may not be privy to all of the available or relevant information, leading to legal determinations of truth that do not necessarily reflect the objective truth. Ashworth notes that reference to 'truth' and 'facts' carries an aura of objectivity and incontrovertibility that is often exaggerated.¹⁷ Two other terms which he believes warrant consideration are 'selectivity' and 'interpretation'. In all cases that come to court, the prosecution's version of the facts is a selection and may often be open to different interpretations. The defence case is also a construction dependent on selection and interpretation. One must, therefore, recognise that cases are constructed in a particular way. Although we work on the basis that the system is equipped to achieve accurate verdicts, we must accept that this is not always the case. It is the difference between asserting that the defendant *is* guilty, as opposed to having been *proved* guilty.

¹⁶ G Williams 'Law and Fact' [1976] *Crim LR* 472, 472.

¹⁷ A Ashworth 'Crime, Community and Creeping Consequentialism' [1996] *Crim LR* 220, 227

Whilst the aim is ultimately to find the objective truth of the prosecution's charges, so as to hold the state to account for the particular accusations it makes against the accused, the extent to which the objective truth and the legal outcome will align may depend on the procedural model of justice employed. For example, the inquisitorial model is often perceived of as being concerned with truth, whereas the adversarial model is concerned with proof.¹⁸ However, this does not guarantee that one type of system will secure more accurate verdicts than the other. The model of justice used may determine the primacy of accurate fact finding as an aim, but not necessarily its ability to achieve it. Also, there is significant disagreement about which type of system is best suited to finding the truth. Jorg *et al.* suggest that the adversarial system's notion that the truth is best established through two equal parties presenting their best cases is 'at best unproven, and at worst highly implausible.'¹⁹

In his influential article on evidential barriers to convictions, Damaska argues that the adversarial model's commitment to values other than the pursuit of truth has caused it to develop higher evidentiary barriers.²⁰ Furthermore, in 1993, the Royal Commission on Criminal Justice accepted that the adversarial system is not always focused on truth seeking and, for this reason, some of their recommendations were geared towards shifting the English system in an inquisitorial direction.²¹ On the other hand, Sanders and Young believe that there is ample opportunity for an inquisitorial judge to become biased, and the way in which the search for the truth is conducted may shape the 'truth' that is proclaimed in court.²² There does seem to be some degree of consensus that adversarial type systems are less concerned with accurate outcomes than inquisitorial ones. However, which is better at convicting the guilty and acquitting the innocent remains undetermined.

Despite rhetoric suggesting that the English system is unequipped to find truth, recent reforms, including the limits placed on the right to silence and the privilege against self-incrimination, have emphasised the fact finding aim. Furthermore, the importance attached

¹⁸ J Hodgson 'Conceptions of the Trial in Inquisitorial and Adversarial Procedure' in A Duff, L Farmer, S Marshall and V Tadros (eds) *The Trial on Trial Volume 2* (Hart: Oxford, 2006) 224.

¹⁹ N Jorg, S Field and C Brants 'Are Inquisitorial and Adversarial Systems Converging?' in Harding, C, P Fennell, N Jorg and B Swart (eds) *Criminal Justice in Europe: A Comparative Study* (Clarendon Press: Oxford, 1995) 43.

²⁰ M Damaska 'Evidentiary Boundaries to Conviction and Two Models of Criminal Procedure: A Comparative Study' (1973) 121 *University of Pennsylvania Law Review* 506.

²¹ Royal Commission on Criminal Justice *Report* (HMSO: London, 1993) 3.

²² A Sanders, R Young and M Burton *Criminal Justice* 4th edn (Oxford University Press: Oxford, 2010) 15.

to avoiding miscarriages of justice, and the existence of remedies for victims of them, show that the English system does value objective truth, particularly where the defendant has been wronged. There are also exceptions to the double jeopardy rule, allowing those previously acquitted of certain offences to be retried where there is new and compelling evidence.²³ If accurate fact finding were the only consideration of the criminal justice process, it would be difficult to argue against requiring defendant cooperation, since the defendant often has knowledge of the facts. Yet, in reality, the pursuit of accurate fact finding is constrained by evidentiary rules and procedural norms which should prohibit the state from legitimately requiring the defendant to participate. As Ho suggests, the criminal process is much more than a search for truth; it provides an opportunity to hold the state to account for the accusations that it makes and its request for official condemnation and punishment of individual citizens.²⁴ Other aims and values, recognised as part of the overriding objective of the Criminal Procedure Rules, therefore, require consideration.

2.3 Rule 1.1(2)(b) Dealing with the prosecution and defence fairly

This heading is used to explore the concepts of fairness and legitimacy.

2.3.1 Fairness

Principles of fairness have been said to lie at the heart of the criminal process.²⁵ This view is strengthened by Article 6 of the European Convention on Human Rights (ECHR) which specifically provides for the right to a fair trial and has become Europe's defining standard for determining fairness in criminal proceedings. The concepts of fairness and fair trials are broad. However, the rights which constitute fairness under Article 6 are discussed in various contexts throughout this thesis. Although the term 'fair' is ambiguous, the phrase 'dealing with the prosecution and defence fairly' as laid out in the Rules, seems to imply equality between the two parties, and this is in line with the jurisprudence of the European Court of Human Rights on the principle of equality of arms.

²³ Criminal Justice Act 2003, Part 10.

²⁴ Ho 'Liberalism and the Criminal Trial' (n 9) 105.

²⁵ Ashworth and Redmayne (n 1) 25.

Whilst the European Court developed the principle of equality of arms, it has roots in both the common and civil law traditions.²⁶ In accordance with the principle, the prosecution and defence should be on a procedurally equal footing. This includes having access to relevant information before the trial. Fairness at the trial may thus depend upon fair disclosure before the trial.²⁷ In *Edwards v UK*, the European Court held that Article 6 requires that the prosecution disclose to the defence all material evidence in their possession for or against the accused, and that failure to do so can give rise to a defect in the trial proceedings.²⁸ This position was also followed by the Court in *Rowe and Davis v UK*.²⁹ At trial, equality of arms suggests equality in presenting and questioning evidence as stated in Article 6(3). However, despite this principle, the defence and prosecution are often in divergent positions, in terms of resources, throughout the criminal process. The defence lack the independent investigatory and coercive powers of the prosecution, and do not have access to the same type of information or technology, such as access to forensic services or the criminal records of witnesses. They must rely on the prosecution's disclosure. This reinforces the importance of keeping the state's powers in check so that the defence party is not put at a procedural disadvantage.

In *Horncastle*,³⁰ Lord Phillips identified two principal objectives of a fair trial. These are that a defendant who is innocent should be acquitted; and a defendant who is guilty should be convicted.³¹ Achieving fairness may, thus, be tantamount to accurate fact finding. However, this would link fairness only to outcome. Ensuring fairness goes beyond ensuring the discovery of the truth at trial; it also requires that the defendant be treated fairly and that his rights are upheld throughout the criminal process. Lord Phillips went on to recognise this by pointing out that English law has different kinds of rules designed to ensure a fair trial. These rules relate to the procedure itself (including the defendant's Article 6 rights) and to the evidence that can be placed before the tribunal.³² The issue in *Horncastle* related to admissibility rules. More specifically, it referred to whether a conviction based 'solely or to a decisive extent' on the statement of an absent witness, whom the defendant has had no chance of cross-examining, necessarily infringes the defendant's rights under Articles 6(1)

²⁶ J Jackson 'The Effects of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?' (2005) 68 *MLR* 737, 751.

²⁷ *Ibid* 756.

²⁸ *Edwards v UK* (1992) 15 *EHRR* 417 [36].

²⁹ (2000) 30 *EHRR* 1 [60].

³⁰ [2009] *UKSC* 14.

³¹ *Ibid* [18].

³² *Ibid* [19]-[20].

and 6(3)(d). Although the European Court had seemingly cemented this test in *Al-Khawaja and Tahery v UK*,³³ the Supreme Court held that it was not necessary to apply the rule in England, and that sufficient safeguards existed in domestic law to ensure that admitting such evidence would not impede the fairness of the trial. The European Court has since conceded to this view.³⁴

The concept of fairness can help to reinforce an argument against requiring defendant participation, and further assists in forming a basis for the normative conception of criminal procedure. Many of the standards of a fair trial are intrinsic to the function of the criminal process as an exercise of calling the state to account in its enforcement of the criminal law.³⁵ Principles of fairness provide fundamental guarantees against arbitrary state conduct and potential misuse of state authority, an authority which is considerable when the public censure of conviction and state punishment are at stake.³⁶ By imposing penalties against those who do not cooperate, the rights which guarantee an accused person's fairness throughout the criminal process are being interfered with and undermined. This has implications not just for a conception of criminal procedure based on calling the state to account, but also for the existing criminal process, in terms of the value it places on its commitment to fairness and human rights.

Whilst most fairness norms operate as restraints on the state's power and as a means of protecting the accused's autonomy and dignity, it is misleading to speak of fairness as an aim of the criminal process itself. Rather, fairness is a necessary prerequisite to achieving the aims of the criminal process. In relation to the idea of fairness being a central and necessary aspect of criminal procedure, Ho has argued that the law of evidence should be viewed from the perspective of a fact finder seeking to do justice in the search for truth.³⁷ Instead of merely discovering whether the law of evidence has succeeded in achieving factually accurate outcomes, Ho believes that justice in trial deliberation requires that the fact finder, 'must appreciate, from the position of [the defendant], the value of respect and concern...The standard of proof and evidential reasoning used in reaching the verdict must express adequate respect and concern'.³⁸ Practically speaking, this approach, taken from an

³³ (2009) 49 EHRR 1.

³⁴ *Al-Khawaja and Tahery v UK* 2766/05 [2011] ECHR 2127.

³⁵ Ho 'The Presumption of Innocence as a Human Right' (n 5) 269.

³⁶ Ashworth and Zedner (n 7) 293.

³⁷ HL Ho *A Philosophy of Evidence Law* (Oxford University Press: Oxford, 2008).

³⁸ *Ibid* 83.

‘internal perspective’, may differ very little from other fairness and rights based approaches to criminal procedure. It may be enough to state that ensuring fairness, principally by upholding the defendant’s fair trial rights, is (and should remain) an important aspect of criminal procedure and a key means of legitimising the process.

2.3.2 Legitimacy

In any liberal and democratic society, it is essential that the state acts legitimately. Since the state has such vast resources for dealing with criminal matters, it is particularly important that the criminal justice system operates in a legitimate manner and that there is a certain degree of consensus on how it operates and what it aims to achieve. Dennis puts forward a theory of legitimacy, arguing that the production of legitimate verdicts is the key aim of the criminal trial. He states that, ‘If official adjudications are to succeed in gaining acceptance and respect as authoritative decisions, it is essential that they are, and are seen to be, legitimate.’³⁹ Legitimacy in this respect is distinct from the concept of true facts as it includes notions of integrity and acceptability. According to Dennis, a verdict of guilty or not guilty is more than just a factual statement. ‘Guilt’ is a moral concept and a verdict of ‘guilty’ is an expression of moral blame. Additionally, it is an expression of the norms of the criminal law and of the consequences of breach of such norms.⁴⁰ It follows that the verdict should have three qualities: it should be factually accurate; it should be morally authoritative; and it should be founded on respect for the rule of law. Although truth finding becomes the primary means by which a legitimate verdict is secured, it is the legitimacy of that verdict which is the ultimate goal.⁴¹ Dennis argues that whilst the defendant has a unique interest in the factual accuracy of the verdict, he does not have a similar unique interest in its moral authority or expressive value of the rule of law which applies to all citizens of the state.⁴²

Commentators such as Ashworth and Redmayne take a different view point and believe that legitimacy is an elusive concept which cannot be obviously differentiated from the aim of accurate fact finding taken together with respect for defence rights.⁴³ Ho believes that the legitimacy of a particular verdict depends on how the trial was conducted, on the quality of the interaction between state and accused in the process by which the outcome is

³⁹ I Dennis *The Law of Evidence* 4th edn (Sweet & Maxwell: London, 2010) 49.

⁴⁰ Ibid 51-52.

⁴¹ Ibid 54.

⁴² I Dennis ‘The Right to Confront Witnesses: Meanings, Myths and Human Rights’ [2010] *Crim LR* 225, 259.

⁴³ Ashworth and Redmayne (n 1) 26.

reached.⁴⁴ The legitimacy of the verdict means its worthiness to be recognised, its moral weight, normative acceptability, rightful authority or some such notion.⁴⁵ According to Ho, due process is important to this conception because it legitimises the verdict, it also has intrinsic value: 'the liberal trial is not merely a method of determining guilt or a means of bringing criminals to justice; it is also a process of doing justice to accused persons, a political obligation owed by the state to the citizens it seeks to censure and punish.'⁴⁶ When the accused is treated unfairly, the state's right to expect him or her, and the citizenry in general, to accept the resulting conviction is somehow undermined.⁴⁷

Whilst there are differing understandings and uses for the term 'legitimacy', it would seem that the criminal process is legitimised through accurate fact finding, respect for individual rights, and due process and fair procedures. As such, legitimacy is not an aim of the criminal process itself. However, it is an essential aspect of it. The process is legitimate if its aims are pursued fairly and in accordance with the rights of the accused. The concepts of fairness and legitimacy are linked and place constraints on how the criminal process can operate. They may limit the ability to achieve the process aims, and can prevent cooperative obligations being put on the accused. Normatively speaking, a guilty verdict will be legitimate where the state can be said to have accounted for its accusations and request for punishment through a fair procedure which respects the rights of the accused. Where it has failed to do so, the defendant should be acquitted.

2.4 Rule 1.1(2)(c) Recognising the rights of a defendant and the defence, particularly those under Article 6 of the European Convention on Human Rights

Human rights concerns have become increasingly prevalent in the field of criminal procedure and are a significant factor in maintaining fairness and ensuring legitimacy. Ashworth and Redmayne in particular stress the importance of respecting rights; they believe that this should be seen as a concomitant aim of the criminal process rather than a mere side constraint on the pursuit of accurate verdicts.⁴⁸ England has several international rights obligations, including the International Covenant on Civil and Political Rights and the

⁴⁴ Ho 'Liberalism and the Criminal Trial' (n 9) 90.

⁴⁵ Ibid 102.

⁴⁶ Ibid 99.

⁴⁷ Ibid 102.

⁴⁸ Ashworth and Redmayne (n 1) 48.

European Convention on Human Rights which has become an integral aspect of criminal procedure and was given domestic force under the Human Rights Act 1998. Article 6 of the ECHR reads:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - b) to have adequate time and the facilities for the preparation of his defence;
 - c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 6 is intended to protect suspects throughout the criminal process and several rights have been read into it, including the principle of equality of arms,⁴⁹ the right to silence,⁵⁰ and the privilege against self-incrimination.⁵¹ The rights which make up a fair trial are not limited to those expressed and inferred in the Convention; member states are free to afford citizens a broader range of rights. As Dennis puts it, Article 6 'is better treated as a restatement of basic principles of natural justice than as a legislative code of the conditions of a fair trial. As a code it is incomplete and the apparently absolute terms used to describe the rights can be misleading.'⁵² It is recognition of the accused's rights which can allow criminal proceedings to be structured so as to require the prosecution to prove the state's accusations and limit the participatory obligations put on the defendant.

Although the ECHR is directly enforceable by individuals against the state, Article 6 is not an absolute guarantee of respect for rights. One problem with rights based accounts of the criminal process is that rights often conflict with one another as well as with other social values. Within the ECHR, some rights are qualified in that they may be interfered with in certain circumstances (namely where it is proportionate to the pursuit of a legitimate aim),

⁴⁹ *Edwards v UK* (1992) 15 EHRR 417.

⁵⁰ *Condron v UK* (2001) 31 EHRR 1.

⁵¹ *Murray v UK* (1996) 22 EHRR 29.

⁵² Dennis *The Law of Evidence* (n 39) 45.

whilst others are non-derogable in that they cannot be interfered with unless very strict circumstances apply. Between these qualified and non-derogable rights are rights such as Article 6 which Ashworth and Redmayne refer to as 'strong rights'.⁵³ They suggest that it is wrong to conclude that these rights can be traded off against other values, or that rights based approaches are not distinctive.⁵⁴ Although Ashworth and Redmayne present a theoretically sound argument, in practice the rights conferred by Article 6 have been qualified and restricted by both the European Court and the domestic courts, particularly in cases regarding the right to silence and privilege against self-incrimination. However, the European Court has also held that such restrictions must not destroy the 'very essence' of the right.⁵⁵ Nonetheless, defence rights are being set aside in pursuance of other values and this could lead to greater acceptance of penalising defendants for their lack of cooperation.

2.4.1 Balancing rights

Duff *et al.* pose the question of whether the violation of a defendant's process rights should be balanced against the good of accurate convictions, or whether the very aim of the criminal trial should be seen as having been undermined when a process right is violated.⁵⁶ It is submitted here that when the legitimacy of the process is brought into question by undermining defence rights, the aims of the trial and the process more generally, are also undermined. However, it can be noted that some rights, such as the right to confrontation, promote accurate fact finding as well as ensuring fairness. Dennis has identified two dimensions to the various confrontation rights of the defence.⁵⁷ These are the instrumental value for the outcome of the case, directed to ensuring the factual accuracy of the verdict, and the process value which acknowledges the autonomy and dignity of the accused, irrespective of the likely outcome of the case. This second dimension is described as non-consequentialist and gives effect to the defendant's claim to concern for his interests as a participant in the process of adjudication.⁵⁸ Where the rights being balanced away are of instrumental value, the balancing exercise may be counter-productive in trying to achieve the aim of factual accuracy. When rights are set aside, whether of instrumental or process value, the state can use its powers to coerce individuals into cooperating and, in so doing, undermine their autonomy and freedom of choice. This does not correlate with a political

⁵³ Ashworth and Redmayne (n 1) 38.

⁵⁴ Ibid 37.

⁵⁵ *Heaney and McGuinness v Ireland* (2001) 33 EHRR 12.

⁵⁶ A Duff, L Farmer, S Marshall and V Tadros (eds) *The Trial on Trial Volume 3* (Hart: Oxford, 2007) 7.

⁵⁷ Dennis 'The Right to Confront Witnesses: Meanings, Myths and Human Rights' (n 42) 225.

⁵⁸ Ibid 270.

theory of liberal democracy or with a notion of criminal procedure based on calling the state to account. Yet, the matter of balancing rights against accurate outcomes has become a familiar one, with recent legislation and judicial opinion suggesting that the good of accurate verdicts should take precedence.

The rhetoric of 'balance' is often used by governments, courts and policy makers in criminal justice discussions. Examples can be found in the report of the Royal Commission on Criminal Justice in 1993, judicial opinions concerning Article 6, and the White Paper *Justice For All*. *Justice For All* culminated in the Criminal Justice Act 2003 which substantially altered many important aspects of criminal evidence and procedure in the name of rebalancing the system in favour of the victim.⁵⁹ Similarly, the right to silence was curtailed by the Criminal Justice and Public Order Act 1994 in the pursuit of accurate fact finding.⁶⁰ The increase in political momentum behind this rebalancing threatens traditional conceptions of criminal justice, including those based on adversarialism and testing the prosecution's case.⁶¹ Ashworth and Redmayne view the metaphor of balance as a rhetorical device of which one must be extremely wary. Many of those who adopt the terminology fail to stipulate exactly what is being balanced, what factors and interests are to be included, what weight is being assigned to particular values and interests, and so on.⁶² This makes it all the more worrying that a 'balancing' act has been used to determine breaches of the privilege against self-incrimination. In *Brown v Stott*,⁶³ for example, the Privy Council found that there was 'a clear public interest in enforcement of road traffic legislation' and that limiting the privilege against self-incrimination was not a disproportionate response to this.⁶⁴ This was held despite the fact that the privilege against self-incrimination is an implied Article 6 right and so, according to Ashworth and Redmayne at least, cannot simply be traded off by reference to the public interest.⁶⁵

Sacrificing rights in the pursuit of accurate fact finding presents a dilemma, as the system cannot be accepted as legitimate without accounting for certain factors, including respect

⁵⁹ Examples include reforms regarding character evidence, hearsay and double jeopardy.

⁶⁰ See chapter 6.

⁶¹ Duff et al. (n 56) 1.

⁶² Ashworth and Redmayne (n 1) 42.

⁶³ [2001] 2 All ER 97.

⁶⁴ Ibid 705.

⁶⁵ Ashworth and Redmayne (n 1) 43. The Strasbourg Court has also previously rejected the idea of balancing the privilege against self-incrimination with public interest concerns. See *Heaney and McGuinness v Ireland* (2001) 33 EHRR 12.

for the defendant's procedural rights. As will become clear later, requiring defendants to participate in the criminal process necessitates defence rights being set aside. A system which endeavours to respect defence rights cannot easily be reconciled with one that also penalises defendants for exercising those rights. It is submitted here that, like fairness and legitimacy, respecting the rights of the accused is not a process aim in itself, particularly in terms of case outcome, as the process does not exist to enforce defence rights. Rather, it is a fundamental aspect of criminal procedure and may place necessary constraints on how the process pursues its aims. This is not an uncontroversial view as other commentators do recognise respecting rights as an aim in itself.⁶⁶

2.5 Rule 1.1(2)(d) Respecting the interests of witnesses, victims and jurors and keeping them informed of the progress of the case

The Criminal Procedure Rules explicitly recognise the interests of witnesses, victims and jurors. However, there is a distinction between providing support, information, and compensation on the one hand (i.e. respecting their interests) and affording them procedural rights and influence over key procedural decisions on the other. This heading is used to briefly discuss the role of witnesses, particularly the victim, in terms of procedural rights. Whilst recent years have seen an increasing concern for the interests of victims and other witnesses in the English criminal process, reforms have not gone so far as to grant them a set of procedural 'rights' along the same lines as the defendant. However, the effect of recent case law and legislation makes it difficult to dismiss the notion of procedural rights for victims and witnesses altogether.

An important question is whether victims in particular should have procedural rights and influence, and whether enforcing this should be seen as an aim of the criminal process.⁶⁷ Ashworth and Redmayne argue convincingly that victims should have no such rights as the criminal process is concerned with the relationship between the accused and the state, not

⁶⁶ Ashworth and Redmayne consider respect for rights to be a concomitant aim of the trial process. Ashworth and Redmayne (n 1) 48; Ho believe that many of the standards of a fair trial are not side-constraints; they are, instead, intrinsic to the nature or function of the criminal trial as an exercise of calling the executive branch of government to account on its enforcement of the criminal law. Ho 'The Presumption of Innocence as a Human Right' (n 5) 269.

⁶⁷ This goes beyond the support and information victims may currently be entitled to through measures such as the Victim's Code of Practice and the Prosecutor's Pledge.

the accused and the victim or the victim and the state. Essentially, although victims' should be treated with dignity, they should not be enabled to influence decisions in the criminal process.⁶⁸ This argument leads to the conclusion that, when considering the proper aims of the system, victim 'rights' and interests, in so far as they effect the operation of the process, should not be a factor. They will inevitably play an important role by reporting crimes, providing information and giving evidence, but victims should not determine or influence key decisions. However, some theories of justice do recognise procedural rights for victims. For instance, a model of restorative justice would incorporate a great deal of involvement for the victim who would have a say in both the outcome of the case and the punishment of the offender.⁶⁹ Furthermore, certain jurisdictions which have more inquisitorial characteristics accord a greater role to victims. In Italy, the victim can participate at trial through counsel and can seek civil damages from the defendant.⁷⁰ Likewise, in France, the victim may constitute herself as a party to the case and claim compensation directly from the criminal court.⁷¹

Article 6 makes no mention of victims, but the European Court of Human Rights have recognised that the principle of a fair trial requires that the interests of the defence are balanced against those of the victims and witnesses who are called to give evidence. An example is *Doorson v Netherlands*⁷² in which the Court upheld a decision to allow prosecution witnesses to remain anonymous and be questioned in the absence of the accused. The Court was of the opinion that criminal procedure should be organised so that the Convention rights of victims and witnesses (such as privacy, life and liberty) are not unjustifiably imperilled. A further example is *R (B) v DPP*⁷³ which concerned the decision to discontinue a prosecution for wounding with intent and witness intimidation on the basis that the victim's mental illness meant he could not be placed before the jury as a credible witness. This decision was held to be irrational and in breach of the victims Article 3 rights under the ECHR which holds that no one shall be subjected to torture or to inhuman or

⁶⁸ Ashworth and Redmayne (n 1) 52-55.

⁶⁹ Restorative justice relies on admissions of guilt, making an active role for the victim less objectionable than in a contested trial. However, Ashworth has argued that even in this context defendants should not be deprived of safeguards and rights that should be assured to them in any process which imposes obligations as the consequence of committing an offence. See A Ashworth 'Responsibilities, Rights and Restorative Justice' (2002) 42 *British Journal of Criminology* 578.

⁷⁰ WT Pizzi and M Montagna, 'The Battle to Establish an Adversarial Trial System in Italy' (2004) 25 *Michigan Journal of International Law* 429, 433.

⁷¹ J Hodgson *French Criminal Justice* (Hart Publishing: Oxford, 2005) 31.

⁷² (1996) 22 EHRR 330.

⁷³ [2009] EWHC 106 (Admin).

degrading treatment or punishment. Article 3 carries a positive obligation on the state to provide protection through its legal system against a person suffering such ill treatment at the hands of others, and the court held that this includes bringing to justice those who commit serious acts of violence against others.⁷⁴ This decision demonstrates the greater prevalence being given to victim interests in the running of a case. It seems to imply that the victim can influence the decision to prosecute when not doing so would violate his rights.

Dennis has suggested that if a guilty verdict is to have moral authority (one of the conditions of a legitimate verdict), it is not necessary that the process should have sole regard for the defendant's claim to fair treatment.⁷⁵ In relation to moral authority, a fundamental principle of political morality underpinning the criminal process is that the defendant, as a citizen of the state, should be treated with concern and respect for his liberty and dignity. This principle of fair treatment applies to all citizens of the state.⁷⁶ Thus, while the defendant has a unique interest in the factual accuracy of the verdict, victim and witness interests in its moral authority and expressive value of the rule of law may require their interests to be prioritised, as appeared to have been the case in *Doorson*.

The increasing recognition of the rights and interests of witnesses is also highlighted by *Murtagh*.⁷⁷ The Privy Council had to establish, among other concerns, whether the right to a fair trial requires the prosecution to disclose to the accused all previous convictions and outstanding charges of its witnesses. It was held that the accused's right to a fair trial requires the disclosure only of such previous convictions and outstanding charges as materially weaken the prosecution's case or materially strengthen the case for the defence. Furthermore, it was held to be consistent with the accused's right to a fair trial for the prosecution itself to take the initial decision as to what will satisfy the materiality test. The court held that information about a witness's previous convictions and outstanding charges falls within the scope of private life, which is protected under Article 8 ECHR, even though it relates to proceedings that took place in public. However, the court did acknowledge that a generous approach should be taken as to what might be relevant to the accused, and therefore must be disclosed to him.⁷⁸ As a result of cases such as these, the competing rights

⁷⁴ Ibid [65].

⁷⁵ Dennis 'The Right to Confront Witnesses: Meanings, Myths and Human Rights' (n 42) 260.

⁷⁶ Ibid.

⁷⁷ [2009] UKPC 36.

⁷⁸ Ibid [31].

and interests of defendants, victims and other witnesses, and the conflicts they generate, have become an increasing preoccupation in modern law.⁷⁹

The changing views of victims and other witnesses can impact the rights of defendants. Popular discourse about criminal justice is dominated by perceptions of criminal versus victim. The offender's gain is the victim's loss. Within this a political logic has been established wherein being 'for' victims means being tough on defendants.⁸⁰ While many of the victim-centred reforms, such as better courtroom facilities, support and information, do not affect defendants, reforms such as those concerning the cross-examination of vulnerable witnesses can affect defendants. Restrictions have been put on the defendant's right to examine and cross-examine witnesses who are children or complainants of sexual crimes.⁸¹ The use of special measures such as screens or evidence via video link for vulnerable and intimidated witnesses may also impact the defendant's right to cross-examination.⁸² Special measures are intended to enable vulnerable and intimidated witnesses to give better evidence. In this way they promote factual accuracy, and they also recognise a claim by these participants in the criminal process to be treated with appropriate concern and respect.⁸³ However, they may act to elevate the interests of witnesses above the procedural rights of the defendant. Furthermore, s.100 of the Criminal Justice Act 2003 has restricted the admissibility of a witness's previous bad character whilst s.101 has extended the realm of admissible bad character evidence against the accused.

The balancing metaphor between victim and defendant interests is misleading because it tends to suggest that victims have an interest in increased conviction rates.⁸⁴ Yet victims have no legitimate interest in seeing defendants falsely convicted, the likelihood of which is increased by limiting defence rights. As criminal matters remain an issue between the accused and the state, it is not right to consider the position of the victim (or other witnesses) in relation to the defendant. The traditional separation between the role of the

⁷⁹ Dennis 'The Right to Confront Witnesses: Meanings, Myths and Human Rights' (n 42) 260.

⁸⁰ I Edwards 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision Making' (2004) 44 *British Journal of Criminology* 967, 969-970.

⁸¹ Youth Justice and Criminal Evidence Act 1999, ss.34-44.

⁸² Youth Justice and Criminal Evidence Act 1999, ss.16-33.

⁸³ Dennis 'The Right to Confront Witnesses: Meanings, Myths and Human Rights' (n 42) 270.

⁸⁴ Ashworth and Redmayne (n 1) 44.

prosecutor and the position of the victim must be maintained if the system is to remain fair to the defendant.⁸⁵

The judicial and legislative decisions referred to above are not easy to reconcile with a claim that victims and other witnesses do not hold rights in the criminal process. As it stands, the pre-existing rights of victims and other witnesses have the potential to affect defence rights and interests. Furthermore, legislation is being enacted which restricts the defendant's ability to exercise his rights in favour of the interests of victims and witnesses. However, neither the European Court, nor the domestic courts or legislators, have gone so far as to accord victims or other witnesses with specific procedural or trial rights. A distinction can therefore be drawn between respecting the rights that victims and witnesses hold as citizens, and the establishment of procedural rights specifically allocated to them. Whilst it is important that support and information is available for victims and other witnesses, and that their pre-existing rights are respected (at least in as far as they do not interfere with the defendant's fair trial rights), this is clearly not an aim of the criminal process itself. For now at least, the relevant measures, case law and statutes make it clear that victims should not expect to dictate prosecution decisions nor have their wishes adhered to during the criminal process.⁸⁶

2.6 Rules 1.1(2)(e), (f) and (g)

The remainder of the requirements for satisfying the overriding objective of the Criminal Procedure Rules are:

- (e) dealing with cases efficiently and expeditiously;
- (f) ensuring that appropriate information is available to the court when bail and sentence are considered;
- (g) dealing with the case in ways that take into account – (i) the gravity of the offence alleged; (ii) the complexity of what is in issue; (iii) the severity of the consequences for the defendant and others affected; and (iv) the needs of other cases.

The first two of these requirements are concerned with efficiency and management. In terms of outcome at least, these are not aims in themselves; there must be something which needs to be managed and achieved efficiently. They better reflect how the system sets out

⁸⁵ M Hall 'The Relationship Between Victim and Prosecutors: Defending Victims Rights?' [2010] *Crim LR* 31, 38.

⁸⁶ *Ibid* 40.

to pursue its aims and are considered in more detail as a model of criminal procedure in the next chapter. The impact of efficiency and managerialist concerns are also referred to in various contexts throughout the thesis as they have become a major pre-occupation within criminal procedure, and influence the imposition of penalties for non-cooperation as well as the participatory role of the defence. Rule 1.1(2)(g) is an important provision for the parties and the court. It sets out specific elements of a case which should be taken into account, but it is not an aim of the criminal process and therefore is not addressed here.

2.7 Conflict resolution

Two key aspects of conflict resolution in terms of the outcome of the criminal process are finality and closure. As an aim, conflict resolution is linked to accurate fact finding in that the conflict can be resolved through a determination of the true facts. However, conflict resolution is also an aim in itself; a case can be brought to a conclusion, and thus closure and finality achieved, without necessarily discovering the objective truth. In many jurisdictions, including England, if a resolution is reached during the pre-trial stage, either by entry of a guilty plea or by the discovery of exculpatory evidence, there will be no need for a trial. An innocent defendant may be tempted to plead guilty where, for example, the evidence against him appears overwhelming and he feels he would benefit from a sentence reduction gained by pleading guilty at an early stage. Guilty pleas can therefore be accepted from innocent defendants as determinative of the legal outcome in the case, effectively supplanting the role of the court in accurately determining the facts.

Jackson argues that in the absence of a definitive manner for establishing the truth and in the face of the uncertainty that attaches to making judgements about past events, the strength of the criminal trial has been that it establishes a basis for resolving disputes about evidence and justifying the outcome to the community.⁸⁷ Safeguards such as public hearings, together with rules of evidence and fairness requirements, have helped to do this by providing defendants with a legitimate means for disputing the accusations made against them. The need for final decisions to be reached in conditions of uncertainty about disputed claims can impose a number of constraints on procedures for legal truth finding, such as

⁸⁷ J Jackson 'Managing Uncertainty and Finality: The Function of the Criminal Trial in Legal Inquiry' in A Duff, L Farmer, S Marshall and V Tadros (eds) *The Trial on Trial Volume 1* (Hart: Oxford, 2004) 142.

standards of proof setting out when facts will be considered proved.⁸⁸ This may act to protect the defendant's rights and ensure that the state is held to account. Thus, where closure and finality are the main concerns, factors such as fairness and respect for rights can be given priority to ensure a legitimate outcome. However, in practice, the aim of conflict resolution is pursued together with the aim of accurate fact finding; accurate fact finding being the key means of resolving the conflict. There is therefore a compromise between objective truth finding on the one hand, and finality and closure on the other.

Although several factors influence the means by which a conflict can be resolved, it seems that some procedural styles are more adept than others to achieve this aim. Conflict resolution is usually associated with the adversarial model of justice. It is easier to visualise criminal proceedings arranged around a dispute between the prosecution and defence as a mechanism for resolving conflicts than it is an official inquiry driven by court officials and aimed at the truth. As the system moves away from adversarialism, the aim of conflict resolution in the absence of accurate fact finding becomes less pronounced. Damaska has put forth a theory of conflict solving as the legitimate function of Anglo-American governments.⁸⁹ He states that the procedural aim of the 'adversarial' model (being structured as a dispute between two sides) is to settle the conflict stemming from the allegation of commission of a crime. The prosecution's role is to obtain a conviction; the defendant's role is to block this effort.⁹⁰ For the most part, resolving the conflict is akin to establishing the primary facts. However, as in the pursuit of accurate fact finding, evaluative, inferential and denotative facts will often be relevant. For example, having concluded that the defendant caused another's death, the issue may become whether he can be held responsible given his state of mind at the time. The conflict will then centre on the facts surrounding the act rather than the act itself.

Damaska takes the aim of conflict resolution further in his two procedural models based on the functions of government. In a reactive state, which is conceived as a 'conflict-solving' mode of governing, the state's task is limited to providing a supporting framework within which its citizens pursue their chosen goals. This type of government is said to do two things: it protects order and provides a forum for dispute resolution. However, to protect order in

⁸⁸ Ibid 127.

⁸⁹ M Damaska *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press: New Haven, 1986).

⁹⁰ Damaska 'Evidentiary Boundaries to Conviction and Two Models of Criminal Procedure: A Comparative Study' (n 20) 563.

this type of state is to settle disputes. Therefore, dispute resolution becomes the function of government; 'in the lens of extreme reactive ideology, to administer justice is always to engage in dispute resolution'.⁹¹ Conversely, where government is conceived as a manager, the administration of justice appears devoted to the fulfilment of state programmes and the implementation of state policies. Within this 'policy implementing' model is an activist state in which social problems and social policies are dissolved into state problems and state policies.⁹² The activist state does not rely on disputes between individuals. However, a dispute is often a good indication to officials that government intervention is needed. In this sense, at least in the cases that arise in the form of a dispute, activist legal process is also devoted to dispute resolution.⁹³ Damaska sees these two models as being directed at separate ends. However, Markovits argues that the policy implementing/conflict solving dichotomy does not outline two clearly distinguishable opposites. The moment the law is involved, the element of conflict, which gives rise to the need for law in the first place, is so omnipresent that it no longer serves as a device for distinguishing some legal processes that resolve conflicts from others that supposedly do not.⁹⁴ Ultimately, the purpose of the system will be conflict solving.

Conflict resolution can become an integral feature of any system of criminal justice, even if it is not designed as such. The resolution may or may not be achieved through establishing the objective truth, but it can bring finality and closure. How this aim is achieved and the limits placed on it will depend on the importance attached to other procedural elements. So far as this aim is concerned, requiring defendants to participate may speed up the process of finality by uncovering facts which will then lead to a conclusion. However, it seems entirely possible that a conflict can be resolved without the active participation of the defendant, either through the participation of his legal representatives or by simply putting the prosecution to proof. The trend in reforms intended to secure the active participation of the defendant and the defence place greater emphasis on the aim of accurate fact finding than conflict resolution by any other means. Furthermore, because conflict resolution is a more obvious goal of adversarialism, the further English criminal procedure shifts away from adversarialism, the less apparent the conflict resolution aim becomes. Nonetheless, due to

⁹¹ Damaska *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (n 89) 78.

⁹² *Ibid* 81.

⁹³ *Ibid* 85.

⁹⁴ J Markovits 'Playing the Opposites Game: On Mirjan Damaska's *The Faces of Justice and State Authority*' (1989) 41 *Stanford Law Review* 1313, 1337.

the nature of law and legal systems, it seems that conflict resolution will always be an element of the criminal process.

2.8 Conclusion

The main aims of the criminal process are to determine the facts surrounding the commission of a criminal offence and to resolve the conflict arising from it through finality and closure. To ensure that the criminal law can protect citizens from harm without undue or excessive use of state power, the way in which these aims are pursued is fundamental to the successful operation of the criminal process. A process that sets out to uncover truth and resolve disputes in a fair and legitimate manner is consistent with a normative theory of criminal procedure under which the state must account for its accusations against the accused and its request for his blame and punishment. The state must show the accuracy of its accusations and in so doing, the conflict between the state and the accused can be resolved. These aims must be pursued in accordance with the rights of the defendant. The need for fairness, legitimacy and respect for rights should act as a constraint on how the process achieves its aims and limit the participatory requirements which can be legitimately attributed to the accused. However, in practice, the emphasis is shifting away from issues of fairness and defence rights. This has led to a participatory style of criminal procedure which involves penalising defendants for not cooperating in the criminal process. The aims and values identified in this chapter will assist in evaluating the purpose and implications of penalising defendant non-cooperation. By penalising defendants, the system is not necessarily shifting or changing its aims since the defendant's cooperation is more likely to further them, but may be giving less regard to the important factors which can act as constraints on achieving them.

3

Models

3.1 Introduction

The previous chapter identified the aims of the criminal process as accurate fact finding and conflict resolution subject to constraints of legitimacy, fairness and respect for rights. Once the aims and values of the criminal process are accepted, the process itself must be structured in a way best equipped to fulfil them. Knowing where a system lies on the procedural spectrum can also help to clarify the aims of that system and the primacy attached to them. Legal systems are often defined by their belonging to a particular procedural model, which are themselves defined by a description of their central features. These procedural models may be based on either the historical developments of certain legal systems or as fictitious entities, difficult to find in reality, but under certain conditions useful for analysing systems and making them intelligible.¹ Some aspects of certain procedural models are easily identifiable within existing legal systems, whilst others are outdated, theoretical or ideal types. Since most individual jurisdictions cannot easily be placed within a specific category, the value of identifying particular procedural models in relation to existing systems is not always clear. Whilst it is becoming increasingly common for writers to emphasise the dangers and oversimplifications which come with categorising systems into certain procedural types, they continue to do so. Summers points out that even with the recognition that the models are vague and inconsequential, commentators seem unable to resist the temptation of relying on them in order to sustain later arguments and comments.² It seems that we need some way to identify common and differing features when making comparisons between legal systems. Setting out distinct procedural models allows us to do this.

This chapter analyses some of the most commonly referenced models of criminal procedure. The adversarial and inquisitorial models are framed as ideal types rather than operating systems and are drawn from common themes running through the relevant literature. The

¹ M Damaska *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press: New Haven, 1986) 5.

² S Summers *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights* (Hart: Oxford, 2007) 5.

hybrid, managerial and European models are based on existing practices, trends and possible emerging themes within England and Europe. Identifying these models assists in placing England on the procedural spectrum in light of the participatory style which has emerged with the imposition of penalties for defence non-cooperation. It also allows us to place the normative ideal of the criminal process, in which the state must account for its accusations and request for punishment, within the procedural spectrum. Furthermore, this chapter provides important explanatory information which is useful for examining procedural developments in later chapters, and it helps to bring together the bigger picture of aims, values and procedural style in relation to the issue of defendant participation.

3.2 Adversarial and inquisitorial models

The adversarial-inquisitorial divide is one of the most common ways of distinguishing between different Western legal systems. It is often used to represent the division between Anglo-American procedures on the one hand, and continental European procedures on the other. This distinction is derived from the historical developments and contrasting features of the two legal traditions. Although it has become impossible to identify a purely adversarial or inquisitorial model within existing legal systems, much of the literature on comparative criminal procedure continues to rely on the distinction. For example, Harding *et al.* describe the Anglo-American and continental systems as being adversarial and inquisitorial,³ and Sprack claims that ‘the criminal justice system in this country is essentially adversarial’.⁴ This represents an oversimplified and inaccurate view of modern Western legal systems. However, the distinction remains a useful starting point for assessing England’s procedural style.

There is sometimes a tendency to use the term ‘accusatorial’ when referring to Anglo-American or continental procedure. As the term has been used to describe both the adversarial and inquisitorial models, it is helpful to know what it means. Jackson explains that:

³ C Harding, P Fennell, N Jorg and B Swart (eds) *Criminal Justice in Europe: A Comparative Study* (Clarendon Press: Oxford, 1995).

⁴ J Sprack *A Practical Approach to Criminal Procedure* 12th edn (Oxford University Press: Oxford, 2008) 314.

Within the Anglo-American tradition, there has been a tendency to use the term 'accusatorial' in an ideological manner to refer to a series of idealised features of common law proceedings, including the presumption of innocence, and the use of oral testimony. Within the continental tradition, on the other hand, the term has at times been used to describe the reformed continental procedures of the nineteenth century whereby the separate functions of prosecuting and ascertaining facts were severed, with the former entrusted to the prosecutor and the latter to the investigating judge.⁵

Jackson's definition does not exhaust the possible uses of the term 'accusatorial', but it makes clear that where it appears in comparative literature it is important to know the context in which it is used. To avoid confusion this term will be avoided. What follows is a descriptive account of the adversarial and inquisitorial models drawn from the features most commonly associated with them. It is intended to be an idealistic and uncontroversial account and is not based on the existing workings of Anglo-American or continental jurisdictions.

3.2.1 The adversarial model

This account of the adversarial model draws on those features most often used to define it.⁶ The adversarial trial, which is the centrepiece of the adversarial model, takes the form of a contest between two equal sides before an impartial judge. Whilst the judge ordinarily settles issues of law, lay people are often used to determine the facts. The prosecution and defence are two separate parties in control of the case; they define the issues, gather evidence, call witnesses at trial and examine and cross-examine them. Lawyers are an essential element of the adversarial system, and the emergence of defence lawyers has

⁵ J Jackson 'The Effects of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?' (2005) 68 *MLR* 737, 741.

⁶ S Landsman *The Adversary System: A Description and Defence* (American Institute for Public Policy Research: Washington, 1984); Damaska *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (n 1); E Sward 'Values, Ideology, and the Evolution of the Adversary System' (1989) 64 *Indiana Law Journal* 301; R Kagan *Adversarial Legalism* (Harvard University Press: Cambridge, 2001); H Crombag 'Adversarial or Inquisitorial: Do we Have a Choice?' in P Van Kopen and S Penrod (eds) *Adversarial Versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems* (Kluwer Academic/ Plenum Publishers: New York, 2003); JH Langbein *The Origins of the Adversary Criminal Trial* (Oxford University Press: Oxford, 2003); P Van Kopen and S Penrod *Adversarial Versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems* (Kluwer Academic/ Plenum Publishers: New York, 2003); J McEwan 'Ritual, Fairness and Truth: The Adversarial and Inquisitorial Models of Criminal Justice' in A Duff, L Farmer, S Marshall and V Tadros (eds) *The Trial on Trial Volume 1* (Hart: Oxford, 2004); J Hodgson 'Conceptions of the Trial in Inquisitorial and Adversarial Procedure' in A Duff, L Farmer, S Marshall and V Tadros (eds) *The Trial on Trial Volume 2* (Hart: Oxford, 2006); A Duff, L Farmer, S Marshall and V Tadros (eds) *The Trial on Trial Volume 3* (Hart: Oxford, 2007).

been directly linked to the emergence of adversarialism.⁷ Within this model there is a generally negative image of the state and mistrust in officials.⁸ This is reflected in the judge's passive role and the preference for procedural rules and laws of evidence, including rules relating to the admissibility of evidence. Many of the typically adversarial characteristics can be traced back to the development of the English criminal trial throughout the eighteenth century.⁹ However, beyond these features, there is little consensus as to what characterises an 'adversarial' system.

There are several justifications put forward in support of adversarialism. These include the preservation of autonomy and dignity.¹⁰ The adversarial model is highly individualistic and, in theory at least, allows the parties to control their case, but it does not necessarily preserve individual dignity. Aggressive public cross-examination could lead a defendant to feel far from dignified. Adversarialism has also been defended as a means of accurate fact finding; the competitive nature and individuality of adversarialism provides an effective forum to ascertain the truth. However, the adversarial system is not structured in such a way that accurate fact finding is the obvious or sole aim. As such, the truth finding capacity of the adversarial system is viewed as both a justification for and criticism of it.¹¹ Langbein notes two striking defects in the adversarial system: the wealth effect and the combat effect.¹² The combat effect refers to the truth impairing incentives of this model; the job of each adversary is to win and this might entail tactics that distort or suppress the truth. The structure of the trial as a combat or contest better reflects the aim of conflict resolution. The wealth effect refers to the advantage that adversary procedure bestows upon people who can afford to hire skilled counsel. Because most persons accused of serious crime are not wealthy, the wealth effect is considered to be a profound structural flaw in adversary criminal procedure.¹³ However, the availability of state funded legal representation in many modern systems undermines this criticism when applied in practice. Nevertheless, the defendant's wealth can affect certain aspects of the case, such as the ability to conduct investigations or commission expert witnesses.

⁷ Langbein (n 6); JM Beattie 'Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries' (1991) 9 *Law and History Review* 221, 221.

⁸ A Sanders, R Young and M Burton *Criminal Justice* 4th edn (Oxford University Press: Oxford, 2010) 16.

⁹ Aspects of this development are discussed in detail in chapter 4.

¹⁰ Sward (n 6) 318.

¹¹ *Ibid* 317.

¹² Langbein (n 6) 1.

¹³ *Ibid* 2.

The adversarial trial is often perceived as providing an opportunity for defence counsel to test the prosecution case.¹⁴ The system is structured to take account of numerous variables, many of which are related to ensuring reliability, fairness and equality between parties. It, thus, takes account of the difficulty of ensuring fairness between participants when one is the state itself.¹⁵ As such, it can provide a legitimate framework within which to address matters of criminal wrongdoing. The notion of the trial as a forum for testing the prosecution's case also forms a core element of the normative theory of the criminal process, as one in which the state must account for the accusations it makes against the defendant. Within this, it is not easy to justify requirements being placed on the accused to assist or participate in the criminal process. It is therefore hard to reconcile an adversarial system with one that is willing to penalise defendant non-cooperation.

3.2.2 The inquisitorial model

Like the adversarial model, the inquisitorial model has several key features.¹⁶ Instead of party control, the emphasis lies on official, or bureaucratic, control of the case.¹⁷ There is much less emphasis on the individual parties, as everyone is seemingly concerned with ascertaining the truth. To achieve this, the judge is proactive, taking the lead in questioning the defendant and any witnesses while the prosecution and defence take a subsidiary role. Within this model the distinction between the judge and prosecutor as separate entities is blurred; the prosecution is often thought of as forming part of the judiciary.¹⁸ However, many features of the inquisitorial model derive from elements of continental European legal traditions. Summers traces the European procedural tradition back to the nineteenth century when the 'accusatorial trinity' was accepted by most European countries, thus framing the trial as a two sided enterprise with an impartial judge.¹⁹ It is therefore hard to

¹⁴ Ibid 6.

¹⁵ J McEwan 'From Adversarialism to Managerialism: Criminal Justice in Transition' (2011) 31 *Legal Studies* 519, 526.

¹⁶ This section is also drawn from the relevant literature: Damaska *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (n 1); JF Nijboer 'Common Law Tradition in Evidence Scholarship Observed from a Continental Perspective' (1993) 41 *American Journal of Comparative Law* 299; Harding et al. (n 3); N Jorg, S Field and C Brants 'Are Inquisitorial and Adversarial Systems Converging?' in Harding, C, P Fennell, N Jorg and B Swart (eds) *Criminal Justice in Europe: A Comparative Study* (Clarendon Press: Oxford, 1995); Crombag (n 6); Van Kopen and Penrod (n 6); McEwan 'Ritual, Fairness and Truth: The Adversarial and Inquisitorial Models of Criminal Justice' (n 6); Hodgson 'Conceptions of the Trial in Inquisitorial and Adversarial Procedure' (n 6).

¹⁷ Damaska in particular stresses the bureaucratic nature of the inquisitorial model. See Damaska *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (n 1).

¹⁸ Hodgson 'Conceptions of the Trial in Inquisitorial and Adversarial Procedure' (n 6) 225.

¹⁹ Summers (n 2) 29.

define the exact nature of the relationship between the prosecution and the judiciary in a purely inquisitorial model.

In an inquisitorial system, a member of the judiciary typically investigates the case before a trial judge determines the facts. It may even be the case that, in a pure inquisitorial system, a single judge is responsible for investigation, prosecution and trial of the accused.²⁰ The broad role of the judiciary as investigator and fact finder practically eliminates the need for lay participation and there is a preference for written evidence at trial. The judge is familiar with the case prior to the trial through a dossier of evidence gathered during the investigation, and is trusted to accord proper weight to the evidence. Consequently, there is little need for complicated rules of admissibility. Unlike the adversarial model, the trial is not the focal point of the inquisitorial criminal process. Because of the emphasis on pre-trial determinations, the trial serves more as a confirmation of what has already been judicially established.²¹

The legitimacy of the inquisitorial model requires a great deal of faith in the integrity of the state and its capacity to pursue truth unprompted by partisan pressures or individual self interest. Public interest, not self interest, is key.²² This is in stark contrast to the adversarial model which is very much centred on the proposition that the state's power needs to be curtailed in order to protect its citizens. There is a presupposition that the inquisitorial system is legitimate because it aims at a version of the truth that will be as nearly objective as possible.²³ Unlike the adversarial model which welcomes admissions of guilt as conclusive, within the inquisitorial model it remains the responsibility of the court to satisfy itself that the offence has been fully investigated and that the case against the accused has been established.²⁴ This does not necessarily mean that the inquisitorial model is unconcerned with other aims, but that it is designed to encourage optimum truth finding. The conflict is resolved once the facts have been accurately determined. Inquisitorial jurisdictions may therefore emphasise the importance of truth finding at the expense of procedural rights. Within a system structured in this way, it is less objectionable to require accused persons to participate in the process. By adopting inquisitorial features, the system moves further away

²⁰ J Hodgson 'The Future of Adversarial Criminal Justice in 21st Century Britain' (2010) 35 *North Carolina Journal of International Law and Commercial Regulation* 319, 321.

²¹ Hodgson 'Conceptions of the Trial in Inquisitorial and Adversarial Procedure' (n 6) 225.

²² Jorg et al. (n 16) 47.

²³ Ibid 43.

²⁴ Hodgson 'Conceptions of the Trial in Inquisitorial and Adversarial Procedure' (n 6) 224.

from a conception of criminal procedure based on calling the state to account, and it may become easier to justify the imposition of penalties for non-compliance.

3.2.3 Assessment

Although it may not be accurate to describe Anglo-American and continental systems as strictly adversarial or inquisitorial, Mirjan Damaska believes that distinct evidentiary styles do exist between the two legal traditions. He assembled his 'hierarchical' and 'coordinate' models based on the major features that distinguish the two styles, explaining how such divergence can be understood by differences in the structure and nature of state authority.²⁵ The hierarchical and coordinate models represent the structure of government and the character of procedural authority. They correlate with the policy implementing and conflict solving characters of government outlined in chapter 2. The hierarchical model is characterised by a hierarchical ordering of centralised authority with bureaucratic control of litigation, 'professional' decision-making, precisely defined standards for decision and comprehensive systems of appeal and review.²⁶ The underlying assumption is that the state is the benevolent and most powerful promoter and guarantor of public interest.²⁷ Clearly, this model shares certain attributes with the inquisitorial model. The Coordinate model, on the other hand, is characterised by party control of litigation, a substantial lay element in decision-making, and a limited system of appeal and review. Judges preserve their independence and identity, and there are high degrees of complexity in the law accompanied by low degrees of order in structure. Like the adversarial model, the trial is the centrepiece of the legal process as a whole. Damaska links the hierarchical model to the policy implementing administration of justice and the coordinate model to the conflict solving administration of justice; the former reflects continental systems and the latter Anglo-American ones.

Damaska's models appear to have much in common with adversarialism and inquisitorialism whilst providing an alternative way of organising and classifying individual systems. Yet, they both remain unrealistic constructs. Jorg *et al.* have gone as far as to describe the adversarial and inquisitorial models as 'ridiculous' when applied to modern criminal justice.²⁸ However,

²⁵ M Damaska 'Structures of Authority and Comparative Criminal Procedure' (1975) 84 *Yale Law Journal* 480; Damaska *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (n 1).

²⁶ Damaska 'Structures of Authority and Comparative Criminal Procedure' (n 25) 485.

²⁷ Jorg *et al.* (n 16) 44.

²⁸ *Ibid* 42.

as Nijboer suggests, concluding that the ‘adversarial’ and ‘inquisitorial’ models are inadequate for the purpose of grouping existing systems together does not imply that it is *always* inadequate to point out that *some* aspects of existing systems can be described or analysed in terms of being either inquisitorial or adversarial.²⁹ To a large extent, the differences between the models reflect the different fundamental assumptions underlying them, and these are also common to the hierarchical and coordinate models. In the inquisitorial model, the state is seen as the most powerful protector of public interests, so that it can be trusted to police itself, whereas the adversarial model holds a negative image of the state and a minimalist view of its functions.³⁰ An adversarial system is less adept at requiring the defendant’s cooperation and penalising his failure to comply.

3.3 Hybrid systems

As well as the inquisitorial and adversarial divide, Anglo-American jurisdictions are often referred to as ‘common law’, whilst continental jurisdictions are referred to as ‘civil law’. This distinction is a reflection of the different sources of law used within the individual legal systems which make up these groupings, with the term ‘common law’ describing judge made law, and ‘civil law’ describing coded law. These labels avoid some of the misconceptions and generalisations inherent in grouping systems, some as adversarial and others as inquisitorial. Nonetheless, they maintain the categorisation of several conceptually different legal systems under one procedural umbrella. Nijboer notes that, although it is very attractive to look to continental European legal systems as one group with basic common features, the political history of each country has produced national autonomy and, therefore, international divergence.³¹ He points to the differing use of lay people in serious criminal cases which range from the Belgian jury to the mixed panel of judicial and lay decision makers in Germany to the absence of lay participation in the Netherlands.³² In reality, elements of adversarialism and inquisitorialism can be found in all Western legal systems, with some jurisdictions leaning more closely to one model than the other, and some jurisdictions not easily identifiable as correlating more closely to either.

²⁹ Nijboer (n 16) 308.

³⁰ C Bradley ‘The Convergence of the Continental and the Common Law Model of Criminal Procedure’ (1996) 7 *Criminal Law Forum* 471, 479.

³¹ Nijboer (n 16) 300.

³² *Ibid.*

Both continental and Anglo-American jurisdictions are more appropriately referred to as hybrids or mixed systems. The term 'hybrid' is a generic term covering any system which applies the characteristics of at least two procedural models. Whilst some hybrid systems may find it easy to justify requiring defendant participation and penalising non-cooperation, others may not. What follows is a brief outline of two continental European jurisdictions which might be categorised as 'inquisitorial' but are, in fact, hybrids. They demonstrate the variance within continental systems and highlight the inadequacy of grouping individual states together under the umbrella of a very specific, outdated or theoretical model.

3.3.1 France

France is often considered one of the more inquisitorial systems within continental Europe. In England, both prosecution and defence share the same professional status. In France, on the other hand, judges and prosecutors are part of the professional career trained judiciary, the *magistrature*. Historically, the functions of investigation, prosecution and trial were dominated by a single individual. Although these functions have been separated out gradually, they remain bound together structurally and ideologically through the professional training and status of the *magistrat*.³³ The judiciary is therefore a broadly defined concept, encompassing the trial judge, the investigating judge and the prosecutor. However, in reality, the investigative process is now dominated by the police, rather than by *magistrats*, and supervised from a distance by the prosecutor.³⁴ Less than five per cent of cases consisting of the most serious and complex are investigated by judges, or *juge d'instruction*, who are personally responsible for conducting the case enquiry.³⁵

Within the French system, the pre-trial investigation is the principal source of fact finding, and there is a heavy reliance placed upon written evidence at trial. These aspects contribute towards a structural exclusion of the accused and his ability to shape the case.³⁶ At trial, the defendant is expected to contribute to the truth finding process and is questioned directly by the judge. Unlike English trials, where the defendant does not testify until the close of the prosecution case, the French defendant is addressed by the court at the outset. He is asked to comment on the accusations before any witnesses have been heard. The defendant has the right to remain silent, but, psychologically, this becomes almost impossible to maintain.

³³ J Hodgson *French Criminal Justice* (Hart Publishing: Oxford, 2005) 68.

³⁴ *Ibid* 67.

³⁵ *Ibid* 5.

³⁶ Hodgson 'Conceptions of the Trial in Inquisitorial and Adversarial Procedure' (n 6) 232.

The trial remains a procedure dominated by the *magistrats* trying the case, rather than lawyers representing those prosecuting and defending.³⁷ The defence lawyer is considered to have little effect upon the case outcome.³⁸

During the pre-trial investigation, a suspect may be held in *garde à vue* (police detention and interrogation) when there is reasonable suspicion that he has committed or attempted to commit an offence, and the police consider detention necessary to investigate. Hodgson found that for the police and most prosecutors, the principal function of the *garde à vue* is to obtain a confession. She also found that prosecutors are generally tolerant of police pressure exerted on suspects to make them tell 'the truth'.³⁹ The suspect can consult a lawyer for just thirty minutes at the start of the *garde à vue*. The lawyer is not permitted to be present during interrogation and usually has no access to the case dossier. The introduction of active defence lawyers is seen as an adversarial element which will create unfairness and undermine the ideology of judicial supervision conducted by a public interest oriented *magistrat*.⁴⁰ The subsidiary role of the defence lawyer creates a large gap between French procedure and adversarialism. It also puts the French system at odds with the European Court of Human Rights who have held that access to a lawyer should be provided from the start of detention in order to allow the effective exercise of the rights of the defence.⁴¹ In July 2010 the French constitutional court declared the legal framework of the *garde à vue* as contrary to the French Constitution and considered that the suspect was not allowed the effective assistance of a lawyer.⁴² It is now for the French government to remedy this,⁴³ creating scope for the adoption of more 'adversarial' elements.

Inquisitorial type systems generally have less regard for defence rights, as they may interfere with the truth seeking purpose of the criminal process. Prior to reforms enacted in 2000, the French system lacked many basic procedural safeguards, such as informing the suspect of the charges for which he is detained; allowing prompt access to legal advice; providing a translator; and the right to appeal from the trial court. The 2000 reforms rectified these shortcomings and, amongst other developments, included an obligation on the police to

³⁷ Hodgson *French Criminal Justice* (n 33) 107.

³⁸ *Ibid* 128.

³⁹ *Ibid* 171.

⁴⁰ *Ibid* 132.

⁴¹ *Salduz v Turkey* (2008) 49 EHRR 421.

⁴² Decision No. 2010-14/22 QPC of 30 July 2010. See J Hodgson 'The French *Garde à Vue* Declared Unconstitutional' (2010) *Criminal Law & Justice Weekly* 174.

⁴³ *Ibid*.

inform the suspect of his right to silence. This provision was later repealed. There was scepticism about invoking procedures that might be regarded as moving towards an adversarial system.⁴⁴ By creating provisions, such as access to a defence lawyer throughout police detention and interrogation, it is believed that the suspect will gain an unfair advantage that will promote his interests above that of an effective investigation.

The central notion of French procedure remains inquisitorial; there is no battle between the prosecution and the accused, rather there is a neutral investigator, who examines all aspects of the case and acts in the public interest to ascertain the truth. However, it has incorporated a number of adversarial features: a jury sits in more serious cases; there are provisions for accepting guilty pleas as determinate; in the majority of cases, the police carry out the pre-trial investigation; and, in serious cases, defence lawyers have access to the dossier. Furthermore, the recent decision of the constitutional court may see a greater role for defence lawyers.

There is a tension within French criminal procedure between maintaining what are essentially inquisitorial ideologies and ensuring due process and respect for the rights of the defence. It is therefore more appropriately referred to as a hybrid or mixed model. Nevertheless, the obvious reluctance to accept procedural developments which challenge the traditional notions of French criminal procedure is likely to keep it on the inquisitorial side of the spectrum, and make it easier to require defendant participation. The normative idea of calling the state to account may not be consistent with strict inquisitorial ideology, particularly the primacy of truth finding above due process concerns. However, the theory could be usefully applied in France as it is underlined by values which are important in any liberal democracy, including rights which the European Convention on Human Rights (ECHR) seeks to protect.

3.3.2 Italy

Italy's procedural style is less clearly identifiable than that of France. It is unique in that it once had strong inquisitorial roots, but owing to recent reforms, it is assuming a more adversarial character. Prior to the 1988 Code of Criminal Procedure, there were many typically inquisitorial elements: judges carried out investigations; the defence played a minor

⁴⁴ J Hodgson 'Human Rights and French Criminal Justice: Opening the Door to Pre-Trial Defence Rights' in S Halliday and P Schmidt, *Human Rights Brought Home: Socio-legal Perspectives on Human Rights in the National Context* (Hart: Oxford, 2004) 195.

role in the investigation; trial judges decided which witnesses should be called, and undertook initial questioning of each witness; counsel could not cross-examine witnesses at trial; admissibility rules did not take precedence over the search for truth; and the trial often did little more than serve as a repetition of the investigative phase. Although investigation and trial were conducted by separate judges, the trial had been likened to a formal exercise used to legitimise the investigation and decision to charge the defendant.⁴⁵

The 1988 Code marked an obvious departure from the inquisitorial tradition.⁴⁶ It set out a clear distinction between the pre-trial and trial stages of the criminal process. The individual parties now conduct their own investigations; also the role of the investigative judge has been effectively abolished.⁴⁷ The Italian judiciary, like the French, includes prosecutors, judges who supervise the investigatory stage and trial judges. Under the new code, the prosecutor conducts investigations to determine whether to file a formal charge against the defendant. Since public prosecutors constitute part of the judiciary, pre-trial investigations may still be conceived of as judicially supervised. At trial, the reforms shifted the emphasis from written evidence to oral evidence and, rather than the court relying on pre-trial statements, the parties have become responsible for calling, examining and cross-examining witnesses. The Code limits the influence of the written dossier by demanding the production of evidence anew, and trial judges are denied access to most of the material gathered during the investigation. The intention is to limit the judge's prior knowledge of the case, thereby guaranteeing that only the evidence produced during the trial will influence his decision.⁴⁸ The structure of the Italian criminal process and the trial in particular has, therefore, shifted away from an official inquest towards a competition reflecting a more adversarial style.

Since the Italian criminal process is notoriously slow, with trials often commencing years after the alleged crime, it was felt necessary to introduce expedited procedures. These include the 'abbreviated trial' whereby the parties agree to a judgment on the investigative file, and the 'proceeding by penal decree' whereby the accused is charged on the prosecutor's request, based on the records of the investigative dossier. He may then receive a sentence reduction of up to a half for having been deprived of any chance of being heard

⁴⁵ M Panzavolta 'Reforms and Counter Reforms in the Italian Struggle for an Accusatorial Criminal Law System' (2005) 30 *North Carolina Journal of International Law and Commercial Regulation* 577, 581.

⁴⁶ *Ibid* 578.

⁴⁷ *Ibid* 585.

⁴⁸ *Ibid* 587.

or introducing evidence.⁴⁹ There is also now a mechanism for plea bargaining. However, plea bargaining in Italy does not operate as it might in a typically adversarial system. The prosecutor and defence may agree on a sentence to be imposed and ask the judge to impose that sentence. However, the judge is expected to scrutinise the agreement to a much greater degree than in Anglo-American jurisdictions.⁵⁰ Furthermore, a plea bargain may only take place where a sentence would ordinarily be seven and a half years or less, there is no provision for 'charge bargaining', and, where the prosecutor does not agree to the reduced sentence, the defendant may apply to the judge directly.⁵¹

Despite the significant changes brought about by the Code, some of Italy's 'inquisitorial' features remain. These include compulsory prosecution, victim participation and judicial fact finding (with the exception of the *court of assise* which handles the most serious crimes and is comprised of judges and laymen).⁵² There remains also scope for trial judges to introduce new evidence and question witnesses directly, and they must justify their decisions in writing.⁵³ In addition, some of the expedited procedures, such as the proceeding by penal decree, reflect a more inquisitorial nature. The reforms were not intended to be an exact model of adversarialism. Rather, they were intended to adopt an adversarial system to the extent that power over the control of the criminal trial was to be shifted from the trial judges to the prosecutors and defence lawyers.⁵⁴ The focus of the reforms was, therefore, at the trial stage of the criminal process.

Although the goal of the 1988 Code was to create a trial system that was fair and open, whilst increasing efficiency in a system renowned for its slow pace,⁵⁵ laws require a certain amount of acceptance from the governed. This was not forthcoming in Italy. There seemed to be a conflict in priorities between the courts and parliament. The former was determined to preserve the inquisitorial ideology of truth finding, and the latter was concerned with the adversarial ideals of due process and proof. As in France, a tension could be identified between maintaining an inquisitorial foundation and ensuring fairness and legitimacy through adversarial means. Prosecutors and judges submitted a large number of provisions

⁴⁹ Ibid 596.

⁵⁰ WT Pizzi and M Montagna, 'The Battle to Establish an Adversarial Trial System in Italy' (2004) 25 *Michigan Journal of International Law* 429, 444.

⁵¹ Ibid 438.

⁵² Panzavolta (n 45) 593.

⁵³ Ibid 592.

⁵⁴ Pizzi and Montagna (n 50) 431.

⁵⁵ Ibid 437.

to the Italian Constitutional Court for review, particularly those which supported a sharp distinction between the pre-trial and trial stages and which sought to give the trial judge a more passive role.⁵⁶ The Constitutional Court agreed with the complaints and declared several important aspects of the Code unconstitutional.

By mid-1992, the new adversarial inspired model had been definitively weakened.⁵⁷ Parliament felt that the adversarial elements were worthwhile and, in 1999, the Italian Constitution was amended to reflect this. The 'due process reform'⁵⁸ strengthened defence rights at trial. They are similar in nature to the rights contained in Article 6 ECHR. These rights grant the defendant the right to offer contradictory evidence, the right to an impartial judge, the right to a trial of a reasonable length, the right to confront and cross-examine witnesses, and the right to due process of law.⁵⁹ They also emphasise the preference for live oral evidence. These provisions put less pressure on the defendant to participate directly, and are more consistent with the normative theory of calling the state to account than many other jurisdictions which attract the 'inquisitorial' label. However, the battle over the future direction of Italian criminal procedure continues, as the heavy case load and backlog necessitates more shifts in procedural style.⁶⁰ Italy wants to protect adversarial values and diminish the importance of the dossier on the issue of guilt, whilst retaining features of its inquisitorial heritage.⁶¹ It, therefore, provides a unique example of the differences among those jurisdictions grouped together as 'inquisitorial', whilst highlighting the difficulties of implanting a procedural model into a particular set of pre-existing historical and cultural norms.

3.3.3 Assessment

This account of hybrid systems is brief, but it demonstrates the varying degrees of 'inquisitorialism' within a group of jurisdictions often described as such. Even the Netherlands, which might be described as corresponding most closely to the inquisitorial model,⁶² is more appropriately labelled as a hybrid. The Dutch judiciary are responsible for investigation and adjudication; there is no system of plea bargaining; decision-making is the responsibility of professional judges; and most cases are decided on the basis of a written

⁵⁶ Panzavolta (n 45) 597.

⁵⁷ Ibid 600.

⁵⁸ Pizzi and Montagna (n 50) 460.

⁵⁹ Ibid 461.

⁶⁰ Panzavolta (n 45) 620-623.

⁶¹ Pizzi and Montagna (n 50) 465.

⁶² Van Kopen and Penrod (n 6) 4.

dossier without hearing witnesses at trial. However, the Dutch courts do adhere to some exclusionary and evidentiary rules, such as a rule requiring corroborative evidence in certain circumstances and, unlike many other 'inquisitorial' type jurisdictions, Dutch prosecutors have a broad discretion in deciding whether to pursue a case. In practice, although many continental, or 'inquisitorial', jurisdictions are assumed to have a judge or prosecutor leading the criminal investigation, the police often have significant investigative powers, particularly for less serious cases. This is true of France, Italy and the Netherlands.⁶³ In this respect, practice is similar to that in common law, or 'adversarial', jurisdictions in which investigation and interrogation are understood as a police function.⁶⁴ Conversely, in England, prosecutors are increasingly advising police on the course of investigations and taking the decision to commence criminal proceedings,⁶⁵ thus assuming an inquisitorial role.

Variance can also be found within Anglo-American jurisdictions which are frequently categorised as 'adversarial' or 'common law'. Pizzi is hesitant to describe the US as adversarial, stating that, at times, it appears to be highly inquisitorial.⁶⁶ American judges have it within their discretion to take on a more active role, for example, by calling and questioning witnesses, suggesting defences, commenting on the evidence and issuing warrants. These elements make it difficult to sustain a claim that American judges are passive. Goldstein claims that, due to its proactive nature, American criminal procedure has developed strong inquisitorial elements which are rarely noted because, 'Americans tend to equate inquisitorial systems with coercive interrogation, unbridled search, and unduly efficient crime control'.⁶⁷ Nor can England correctly be described as purely adversarial. There remain strong adversarial characteristics within the English criminal process. These include a clear distinction between the prosecution and the judiciary; party control of the case;⁶⁸ a relatively inactive judiciary; and the use of lay fact finders. However, the increasing weight put on accurate fact finding above issues of fairness and respect for rights has influenced it

⁶³ E Cape, J Hodgson and T Spronken *Suspects in Europe: Procedural Rights at the Investigative Stage of the Criminal Process* (2007) Antwerp-Oxford: Intersentia; Maastricht Faculty of Law Working Paper Series, 24.

⁶⁴ *Ibid* 13.

⁶⁵ *Ibid* 17.

⁶⁶ WT Pizzi 'The American Adversary System' (1998) 100 *University of West Virginia Law Review* 847, 850.

⁶⁷ A Goldstein 'Reflections on Two Models: Inquisitorial Themes in American Procedure' (1974) 26 *Stanford Law Review* 1009, 1018.

⁶⁸ However, McEwan has found that recent emphasis on efficiency and managerialist concerns have diluted this aspect of the English adversarial system. McEwan 'From Adversarialism to Managerialism: Criminal Justice in Transition' (n 15).

to adopt what appear to be inquisitorial aspects. There is now more emphasis on defence and defendant participation.

Beyond the remits of criminal procedure, there are some clear inquisitorial elements of the English legal system. An example is Coroner's inquiries which aim to establish how, when and where a death occurred.⁶⁹ These are factual inquiries and determinations should not be framed in such a way as to appear to determine any questions of criminal liability.⁷⁰ Certain administrative investigations also take on a more inquisitorial role, and can require information to be provided under compulsion. For example, the Serious Fraud Office has compulsory powers to require people to answer questions and provide information with the threat of criminal sanction for non-compliance. However, information obtained in this way cannot subsequently be used against a person in criminal proceedings.⁷¹

The normative theory of the criminal process as one in which the state should account for its accusations against the accused is developed in this thesis to apply within the context of England's 'adversarial' or 'common law' type of criminal procedure. However, because it is founded on the relationship between citizen and state in a liberal democracy, as well as the presumption of innocence and right to a fair trial, it may be transferable to all liberal democracies which claim to give effect to defence rights. It is thus applicable to other hybrid systems, including France which currently prioritises inquisitorial ideology, and Italy which is now in a better position to accept it. The process of hybridisation and the changing nature of criminal procedure is an important aspect of this thesis. Later chapters demonstrate how requiring defendant participation and penalising non-cooperation has shifted the English system towards a participatory style.

3.4 Efficiency and managerialism

Efficiency and managerial concerns have had a significant impact on English criminal procedure. Efficiency in this context refers to time and cost of the criminal process; reaching outcomes by achieving process aims as time and cost effectively as possible. Many relatively

⁶⁹ Coroners and Justice Act 2009, s.5.

⁷⁰ Coroners and Justice Act 2009, s.10(2).

⁷¹ *Saunders v UK* (1997) 23 EHRR 313; Youth Justice and Criminal Evidence Act 1999 s.59 and Sch.3. See chapter 5 for discussion on the privilege against self-incrimination and the concept of use immunity.

recent reforms to the law have been aimed at creating an efficient criminal justice process. In 1993, the Royal Commission on Criminal Justice arrived at their important proposals through practical considerations intended to make the system better capable of serving the interests of both justice and efficiency.⁷² More recently, there have been demands for judicial case management as a means of controlling the increasing cost and length of proceedings.⁷³ Managerialism is thus one way of creating an efficient model of criminal procedure. The Criminal Procedure Rules have helped to spearhead a shift towards a managerial view of criminal procedure. Judges are now required to intervene proactively in the management of criminal cases, before and during trial, to encourage agreement where possible and to ensure that trials begin promptly, are as narrowly focussed as possible, and do not last longer than necessary.⁷⁴ Judges were themselves primary movers in this, even before the Rules formalised their case management role.⁷⁵ Duff *et al.* note that judges are now expected to combine impartiality with an understanding of their managerial role within a criminal justice system increasingly oriented towards securing convictions.⁷⁶

The Criminal Procedure Rules expressly state that meeting the overriding objective of justice requires 'dealing with cases efficiently and expeditiously'.⁷⁷ Part 3 of the Rules deals specifically with case management. Rule 3.2 places a duty on the court to further the overriding objective by actively managing the case, whilst Rule 3.3 requires the parties to actively assist the court in fulfilling this duty. Rule 3.2 assigns the court an activist role far removed from the passive adversarial role that English judges have become associated with. This is furthered by Rule 3.5 which grants power to the court to take any steps to actively manage the case unless that step would be inconsistent with legislation. Furthermore, Rule 3.10 allows the court to place participatory requirements on the parties in its role as case manager. These requirements include identifying whether the parties intend to raise any points of law that could affect the conduct of the trial or appeal, and identifying information about witnesses and the order of their evidence. Granting judges with a more active managerial role is something usually associated with inquisitorialism. However, in this case,

⁷² Royal Commission on Criminal Justice *Report* (HMSO: London, 1993) 3.

⁷³ Lord Justice Auld *Review of the Criminal Courts of England and Wales* (The Stationery Office: London, 2001).

⁷⁴ McEwan 'From Adversarialism to Managerialism: Criminal Justice in Transition' (n 15) 527.

⁷⁵ *R v Chaaban* [2003] EWCA Crim 1012; McEwan 'From Adversarialism to Managerialism: Criminal Justice in Transition' (n 15) 527.

⁷⁶ Duff *et al.* (n 6) 53.

⁷⁷ Rule 1.1(2)(e).

it has stemmed from the desire to create a more efficient system rather than a focus on truth finding.

As originally drafted, the Criminal Procedure Rules said little about sanctions for non-compliance with case management directions. However, Rule 3.5(6) now allows the court to: fix, postpone, bring forward, extend, cancel or adjourn a hearing; exercise its powers to make a costs order; and impose such other sanctions as may be appropriate. Sanctioning non-compliance with pre-trial orders, or failure to serve appropriate notices within time, provides an example of the increasing emphasis on defence cooperation as well as the state's willingness to impose penalties where this is not forthcoming. As such, the desire for efficiency may be a driver behind the shifts in procedural style which allow penalties to be imposed for non-cooperation, particularly those related to pre-trial defence disclosure.⁷⁸ In the recent case of *SVS Solicitors*,⁷⁹ a wasted costs order was upheld against a solicitors firm who had opposed a prosecution application to adduce hearsay evidence without setting out their grounds for doing so, in contravention of Rule 34.3(2)(d). This led to the unnecessary expense of a prosecution witness being flown in from Australia. The court held that, if their client would not allow them to comply with the Rules, the solicitors should have withdrawn from the case. They owed a duty to the court and were not entitled to break the Rules in order to act on their client's instructions. This case has raised important questions about where the balance lies between the duties of defence lawyers to their clients and their duties to the courts. It seems now that defence lawyers are expected to act in the interests of the administration of justice rather than the interests of their clients. This is inconsistent with an adversarial role.

Although it has been argued that non-compliance with the Rules rarely leads to any meaningful sanction in practice,⁸⁰ they have been used to exclude relevant evidence. In *Musone*,⁸¹ the trial judge was held to have been entitled to exclude evidence of an alleged confession where the defendant attempted to ambush his co-defendant. There had been a breach of Rule 35(5) as the defendant had not given notice of intention to introduce the evidence. However, Rule 35 contains no express provision dealing with a sanction for non-compliance, and the Court acknowledged that the circumstances in which a breach of the

⁷⁸ See chapter 7.

⁷⁹ [2012] EWCA Crim 319.

⁸⁰ RL Denyer 'Non-Compliance with Case Management Orders and Directions' [2008] *Crim LR* 784.

⁸¹ [2007] EWCA Crim 1237.

Rules would entitle a court to exclude evidence of substantive probative value would be rare.⁸² The Court were of the view that the power to make rules requiring a co-defendant to serve notice of evidence of another defendant's bad character, under s.111 of the Criminal Justice Act 2003 (CJA), confers power on a court to exclude such evidence in circumstances where there has been a breach of a prescribed requirement (in this case giving notice under Rule 35). They also felt that, in order to further the overriding objective of the Rules, the courts must have power to prevent a deliberate manipulation of the rules by refusing to admit evidence which it is sought to adduce in deliberate breach of those rules.⁸³

This decision was largely framed in terms of ensuring fairness to the co-defendant and prosecution. However, it does demonstrate a willingness to sanction defence non-cooperation where efficiency and managerialism are at stake. The need for efficiency can also impact the admissibility of other types of evidence. For example, under s.126 of the CJA 2003, a judge can refuse to admit a hearsay statement on grounds which include undue waste of time, weighed against the value of the evidence. In the recent Review of Disclosure in Criminal Proceedings, undertaken for the Judiciary of England and Wales, it has been anticipated that, subject to the interests of justice, late disclosure of material by any party may be capable of resulting in the exclusion of such material from trial.⁸⁴

Langer has proposed a theory of managerial judging as a procedural model in itself within which the court, with the parties' assistance, uses procedure to expedite the criminal process.⁸⁵ Unlike the adversarial model, the managerial court gets information about the case very early in the process, in order to exert pressure on the parties to reach factual and legal agreements and accelerate the case. It dislikes party control over the process, with power transferred to the court. It also differs from the inquisitorial model, in that the court does not actively investigate the truth; it is active to make sure that the parties do not delay proceedings.⁸⁶ The aims of this model include conflict resolution and truth determination, but the goal of processing cases swiftly is particularly important.⁸⁷ Within this model, the parties are still responsible for pre-trial investigation and, so, retain control of their case,

⁸² Ibid [60].

⁸³ Ibid.

⁸⁴ Lord Justice Gross *Review of Disclosure in Criminal Proceedings* (Judiciary of England and Wales: London, 2011) 75.

⁸⁵ M Langer 'The Rise of Managerial Judging in International Criminal Law' (2005) 53 *American Journal of Comparative Law* 835, 836.

⁸⁶ Ibid.

⁸⁷ Ibid 878.

while the court is in charge of expediting the case. Elements of this model can be observed in English criminal procedure, as a result of provisions such as those in the Criminal Procedure Rules, as well as the judicial approach to their case management role.⁸⁸ However, it is important to note that transfer of power to the court, represented by a move towards a case management model, can preserve due process only for as long as judges remain informed and objective.⁸⁹

There is concern that a managerial model of procedure does not accord due respect to rights and fairness. Although the essential principles of due process are not exclusive to adversarial proceedings, replacement of an adversarial system with a managerial one that lacks the protection for fair trial rights does threaten fundamental due process values.⁹⁰ McEwan argues that the emergence of a managerialist system of criminal justice in England has not been accompanied by profound consideration of the values that underpinned traditional structures in England and Wales. Rather, it has evolved through independent and ad hoc measures that fundamentally change the criminal process in the absence of any normative underpinning.⁹¹ This affects the commitment of adversarialism to the fundamental importance of protecting the parties by allowing them, rather than the state, to direct proceedings. Managerialism per se is indifferent to fair trial rights. Conversely, Richardson suggests that the 'case management' label has been used to dress up the movement away from the adversarial model in England towards a more inquisitorial form of trial, that the authors of the Criminal Procedure Rules lost sight of the proper purpose of such rules, and that, in consequence, a culture has emerged according to which it is acceptable to subordinate procedure to substance.⁹²

Aside from the creation of management duties, efficiency concerns have led to other practices which disadvantage those who fail to cooperate. For example, s.144 of the CJA 2003 gives legislative authority for a reduction in sentence for guilty pleas. This reduction, or 'discount', can range from one third to one tenth, and can influence the decision between a custodial and non-custodial sentence. As such, it places enormous pressure on the accused to cooperate. The Sentencing Guidelines Council felt this to be appropriate because:

⁸⁸ See the comments made by the President of the Queen's Bench Division in *R (on the application of Drinkwater) v Solihull Magistrates' Court* [2012] EWHC 765 (Admin).

⁸⁹ McEwan 'From Adversarialism to Managerialism: Criminal Justice in Transition' (n 15) 534.

⁹⁰ Ibid 524.

⁹¹ Ibid.

⁹² J Richardson 'A "Just" Outcome: Losing Sight of the Purpose of Criminal Procedure' (2011) *Journal of Commonwealth Criminal Law* Inaugural Issue 105, 106.

A guilty plea avoids the need for a trial (thus enabling other cases to be disposed of more expeditiously), shortens the gap between charge and sentence, saves considerable cost, and, in the case of an early plea, saves victims and witnesses from the concern about having to give evidence. The reduction principle derives from the need for the effective administration of justice and not as an aspect of mitigation.⁹³

Sentence discounts are thus framed as an incentive to plead guilty in order to save the system time and money. However, the effect is to significantly disadvantage those who do not cooperate; an inevitable consequence of the discount for pleading guilty is that a plea of not guilty has its price for defendants.⁹⁴ In this regard, the lack of sentence reduction constitutes a sort of indirect penalty for non-compliance. The 'incentive' to cooperate is also contentious because it affects principles which the criminal justice system ought to protect. Ashworth argues that, as a consequence of the presumption of innocence, it is the accused's right to have the case against him proved beyond a reasonable doubt.⁹⁵ It is not then proper to insist that a person who exercises this right should be treated more severely, and it is a weak response to maintain that pleading not guilty is not an aggravating factor.⁹⁶ Likewise, Bridges argues that the guidelines on sentence reductions have led to, if not an abandonment of the principle of the presumption of innocence, then, at least, to its further subordination to other political and administrative priorities.⁹⁷

Sentence discounts may also have a discriminatory effect contrary to Article 14 of the ECHR.⁹⁸ Since black defendants tend to plead not guilty more often than white defendants, and tend to receive longer sentences, partly due to having forfeited their discount,⁹⁹ sentence reductions operates as a form of indirect racial discrimination. The general principle of a sentence reduction has a disproportionate impact on members of ethnic minorities simply because they more frequently exercise their right to be presumed innocent.¹⁰⁰ At the very least, the formalisation and systematisation of the sentence discount has introduced a more explicit and, arguably, stronger constraint on the voluntary

⁹³ Sentencing Guidelines Council *Reduction in Sentence for a Guilty Plea* (Sentencing Guidelines Secretariat: London, 2007) para 2.2.

⁹⁴ A Ashworth *Sentencing and Criminal Justice* 5th edn (Cambridge University Press: Cambridge, 2010) 179.

⁹⁵ *Ibid.*

⁹⁶ *Ibid* 178.

⁹⁷ L Bridges 'The Ethics of Representation on Guilty Pleas' (2006) 9 *Legal Ethics* 80, 85.

⁹⁸ Ashworth (n 94) 179.

⁹⁹ R Hood *Race and Sentencing* (Oxford University Press: Oxford, 1992) 125.

¹⁰⁰ Ashworth (n 94) 179.

nature of the guilty plea.¹⁰¹ Blake and Ashworth have stated that it 'militates against the "free choice" of the defendant.'¹⁰² This sits uneasily with the concept of the criminal process based on calling the state to account; the pursuit of efficiency has taken precedence over the accused's ability to test the case against him, and interferes with his autonomy and freedom of choice.

A model based on efficiency and managerialism has much in common with the inquisitorial model which prefers professionalisation of the legal process. The similarities between managerialism and inquisitorial procedure can lead to confusion regarding the hybridisation of English criminal procedure. Although it appears to be taking on an 'inquisitorial' nature, this may simply be the result of reforms aimed at creating efficiency in the system. Both are equipped to accept a requirement for the defendant to cooperate in order to achieve their respective aims of accurate fact finding and conflict resolution. However, the dual focus on efficiency and accurate fact finding in English criminal procedure pushes it towards a participatory style of criminal procedure. Later chapters will show how the drive to secure accurate fact finding as efficiently as possible has resulted in requirements of defence participation backed by penalties for non-cooperation. Within a system based on calling the state to account, there is a place for efficiency so long as it does not interfere with fairness, legitimacy and respect for rights. Unfortunately, the reforms which encourage efficiency and managerialism in England have often been at the expense of these important concerns.

3.5 European model

It has already been noted that categorising European legal systems into groups, such as adversarial and inquisitorial, fails to recognise the diverse nature of individual jurisdictions. However, the differences between the individual systems appear to be diminishing. This section explores two possible explanations for this. On the one hand, European systems may be adopting so many of each other's characteristics that they are converging into a single procedural model. On the other hand, a unique European model might be emerging as a result of the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights. Both possibilities have implications for English criminal procedure.

¹⁰¹ Bridges (n 97) 85.

¹⁰² M Blake and A Ashworth 'Ethics and the Criminal Defence Lawyer' (2004) 7 *Legal Ethics* 168, 182.

3.5.1 Convergence

It is important to note, at the outset, that the convergence debate is often based on the proposition that European countries can be categorised according to whether they are inquisitorial or adversarial, or as civil or common law. These groups are considered to be merging. However, as discussed above, each legal system is unique and a product of its own distinctive history and culture. The convergence debate should therefore be approached with a recognition of procedural differences within certain jurisdictional groupings, and with a rejection of the possibility of 'pure' or 'ideal' procedural models existing in reality.

The perception of convergence may originate from the desire of individual states to adopt procedural laws and rules from other legal traditions. However, since each system depends on its own historically evolved institutions, there are risks in taking this approach. The criminal justice system is not self-contained; it is affected by external elements such as politics, media and technology. Attempts to import foreign practices often lead to their being translated in different ways. This can result in fragmentation and divergence rather than convergence. It leads to a paradox in which evidentiary processes are said to be converging, yet may also be diverging through attempts at convergence.¹⁰³ An example is Italy, where attempts to implant adversarial elements into a traditionally 'inquisitorial' system has resulted in a unique hybrid. Damaska notes that even textually identical rules acquire a different meaning and produce different consequences in the changed institutional setting. He writes: 'The music of the law changes, so to speak, when the musical instruments and the players are no longer the same.'¹⁰⁴ Legrand sees serious problems with an approach that focuses on posited law in order to draw conclusions regarding the convergence of legal systems.¹⁰⁵ He argues that neither rules nor concepts reveal as much about a legal system as appears to be assumed, and submits that the comparativist should be focusing on the mentality of a given system rather than its rules. In doing so, one will find that European systems are not converging. He further argues that convergence is impossible on account of the fact that the relationship between a law and a society is always to be

¹⁰³ Jackson (n 5) 739.

¹⁰⁴ M Damaska 'The Uncertain Fates of Evidentiary Transplants: Anglo-American and Continental Experiments' (1997) 45 *American Journal of Comparative Law* 839, 840.

¹⁰⁵ P Legrand 'European Legal Systems Are Not Converging' (1996) 45 *ICLQ* 52, 55.

regarded as culture-specific.¹⁰⁶ Convergence into a single European model as a result of adopting foreign procedures and ideologies may therefore be unfeasible.

Despite this, it is clear that very real shifts have occurred in both common and civil law jurisdictions. Jorg *et al.* are among those who believe that changes occurring in Europe point to a convergence.¹⁰⁷ Whilst countries which assume civil law procedure appear to be increasingly influenced by the necessity for fairness in truth finding at the trial stage, the common law systems are beginning to take on direct truth finding characteristics. For example, the logic of the English 'adversarial' type trial has been substantially qualified by duties of disclosure of evidence between parties.¹⁰⁸ Other trends away from adversarialism in England include greater judicial management over the criminal process, curtailing the right to silence, and limiting the privilege against self-incrimination. Converging trends that have been identified in civil law countries include increasing party control, the diminishing authority of professional judges, a shift from the pre-trial to trial phase of adjudication, and greater importance being attached to oral evidence and the right to confrontation. There has also been less reliance on the accused as a source of testimonial evidence.¹⁰⁹

Sharing a common, hybrid model by European polities, which brings rules of evidence closer together, would allow greater cooperation across Europe, for example, by bringing offenders to trial and sharing evidence between jurisdictions.¹¹⁰ However, McEwan believes that the alterations in England's criminal justice system are not towards civil law models, but towards one which prioritises efficiency.¹¹¹ She argues that those jurisdictions associated with the inquisitorial model are similarly dispensing with some of their own traditional features to replace them, not so much according to adversarial ideals, but for the sake of economy and expediency. Provisions for guilty pleas and plea bargaining are one way continental countries may be moving towards an efficiency model. Thus, convergence is not towards a centre ground between the two kinds of system, but possibly towards a new model which shares elements of both.¹¹² This reflects the desire for efficiency and managerialism discussed above. However, given the difficulties in adopting and implementing foreign procedures, in order to attain a specific desired end, many of the changes that appear to

¹⁰⁶ Ibid 62-64.

¹⁰⁷ Jorg *et al.* (n 6) 54.

¹⁰⁸ Ibid 53.

¹⁰⁹ Jackson (n 5) 737.

¹¹⁰ McEwan 'From Adversarialism to Managerialism: Criminal Justice in Transition' (n 15) 520.

¹¹¹ Ibid.

¹¹² Ibid.

bring individual European jurisdictions closer together may be attributable more to the ECHR and the jurisprudence of the European Court, and less to a natural harmonisation of the legal systems, or a common drive for efficiency.

3.5.2 Influence of the ECHR

There are several EU-wide criminal justice initiatives. The majority of these, such as the European Arrest Warrant, are concerned with law enforcement.¹¹³ However, in 2003, the European Commission issued a Green Paper with a view to setting minimum safeguards for suspects and defendants in the EU.¹¹⁴ The key concerns were legal advice and assistance; provision of interpreters; protection for vulnerable suspects; consular assistance; and knowledge of the existence of rights. Individual governments objected to this on the grounds that it breached the principle of subsidiarity, could result in the lowering of minimum standards, and that implementing common standards would be technically difficult.¹¹⁵ A draft framework on procedural rights in criminal proceedings throughout the EU, issued by the Commission in 2004, also faced government objections.¹¹⁶ These concerns reflect the fact that individual criminal justice systems within the EU are very diverse, and so too are the ways in which they consider themselves to have satisfied their obligations to guarantee fair trials and protect those accused of criminal wrongdoing.¹¹⁷ Nevertheless, even in the absence of a framework of procedural rights, a distinct European rule of law may be emerging as a result of the ECHR.

Harding *et al.* believe that the process of ‘Europeanisation’ is not just irreversible, it ‘affects national systems of criminal justice more deeply and in more varied ways than is commonly realised.’¹¹⁸ Summers argues that letting go of the adversarial/inquisitorial typology and devoting more consideration to the European procedural tradition will facilitate the development of a more coherent and consistent vision of the rights set out in Article 6 by the European Court.¹¹⁹ Similarly, Jackson contends that the continuing use of the terms ‘adversarial’ and ‘inquisitorial’ have obscured the transformative nature of the European Court’s jurisprudence. He goes further in stating that the Court has been developing a new

¹¹³ See Cape *et al.* (n 63).

¹¹⁴ *Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union* Brussels, 19 February 2003, COM (2003) 75f.

¹¹⁵ Cape *et al.* (n 63) 3.

¹¹⁶ *Ibid* 4.

¹¹⁷ *Ibid*.

¹¹⁸ Harding *et al.* (n 3) xvi.

¹¹⁹ Summers (n 2) 98.

procedural model best characterised as ‘participatory’ because it seeks to enable all those capable of giving relevant evidence to do so in as least a coercive manner as possible.¹²⁰ Jackson advanced this argument largely in the light of the Court’s recognition of a right to adversarial procedure which has affected the procedural nature of individual jurisdictions across Europe.

Reference to ‘adversarial procedure’ began to appear in European Court judgments in the late 1980s, often in relation to the equality of arms principle.¹²¹ Given the debate surrounding procedural models within comparative law scholarship, the use of the term ‘adversarial’ might have been expected to prove controversial, yet it has received little attention.¹²² This may reflect the Court’s use of the terminology; the right to adversarial procedure in this context only refers to the requirement that the accused be present at trial and that the defence be able to challenge the submissions and observations of the prosecution and to lead its own evidence.¹²³ Yet, the notion of adversarial procedure has had a significant impact on the procedural traditions of some member states, particularly those countries with strong inquisitorial roots where the defence has traditionally played a subsidiary role. For example, it seems to be contrary to the attitude within French criminal procedure to equip suspects and defendants with workable defence rights, such as silence and access to lawyers, since it potentially undermines the search for the truth, and gives them an unfair advantage.¹²⁴

The ECHR’s biggest impact, in terms of creating a distinct European procedural identity, has been through Article 6(3) which includes those rights to ‘adversarial’ proceedings. Article 6(3) sets out the right to confrontation and the role of the parties in presenting their own evidence. The emphasis given to equal participation by the parties has underlined the need to distinguish those responsible for prosecuting and those responsible for judging and, in doing so, has broken with old continental practices which tended to blur the distinction.¹²⁵ This result has not been welcomed by all of the member states. The translation of

¹²⁰ Jackson (n 5) 740.

¹²¹ See for example *Rowe and Davis v UK* (2000) 30 EHRR 1 [60], where the court states: ‘It is a fundamental aspect of the right to a fair trial that criminal proceedings, including elements of such proceeding which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence.’

¹²² Summers (n 2) 113.

¹²³ Ibid.

¹²⁴ See Hodgson ‘Human Rights and French Criminal Justice: Opening the Door to Pre-Trial Defence Rights’ (n 44).

¹²⁵ Jackson (n 5) 751.

Convention rights into the French 'inquisitorial' context has been problematic, creating tensions within prevailing legal cultures.¹²⁶ This is evident from the high level of condemnation by the European Court for faults which seemed endemic to the French system, such as police brutality, disregard for defence rights and excessive periods of detention before trial.¹²⁷ France has even been held to have violated Article 3 in a case involving the torture of a suspect in police custody.¹²⁸ Legislation enacted in 1993 and 2000 sought explicitly to bring French criminal procedure into line with the ECHR. However, Hodgson identifies two faces of French criminal justice which have emerged as a result. On the one hand, there is a claim to embrace the ECHR and to incorporate it through formal legal mechanisms. On the other hand, there is a parallel domestic discourse which seeks to downplay the impact of the ECHR on criminal procedure, reassuring those responsible for its implementation that police powers are not significantly curbed, and that any change in procedure is minimal.¹²⁹ In practice, therefore, the influence of the ECHR in creating a distinct European model may not be as stark as it appears.

Within England, the domestic courts have made it clear that Europe does not have the final say in the determination of fairness. In *Horncastle*,¹³⁰ the Supreme Court stated that there would be rare occasions where the Court had concerns as to whether a decision in Strasbourg sufficiently appreciated or accommodated particular aspects of the domestic process. In such circumstances it was open to the Supreme Court to decline to follow the Strasbourg decision, giving reasons for adopting this course.¹³¹ In this particular case, the Court found that the European Court's rule against admitting hearsay evidence which formed the 'sole or decisive' evidence against the accused did not apply, as England had sufficient safeguards to ensure fairness in cases where such evidence was relied upon. Dennis has found that there has been a tendency for the English courts to treat 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.¹³² Recently Lord Irvine, architect of the Human Rights Act 1998 which gave the ECHR domestic force, called

¹²⁶ Hodgson *French Criminal Justice* (n 33) 33.

¹²⁷ *Ibid* 35.

¹²⁸ *Selmouni v France* (2000) 29 EHRR 403.

¹²⁹ Hodgson 'Human Rights and French Criminal Justice: Opening the Door to Pre-Trial Defence Rights' (n 44) 200.

¹³⁰ [2009] UKSC 14.

¹³¹ *Ibid* [11].

¹³² I Dennis 'The Human Rights Act and the Law of Evidence Ten Years On' (2011) 33 *Sydney Law Review* 333, 337.

for a more critical approach to Strasbourg jurisprudence. He argues that it is the constitutional duty of judges to reject Strasbourg decisions they feel are flawed in favour of their own judgments.¹³³

A centralised European procedure, if it can be accepted that there is such a thing, does not dictate what individual jurisdictions aim to achieve, but it can influence how they achieve it. The formulation of defence rights within Article 6, and the adversary ideologies they impose, suggests that restrictions apply and these may affect a state's ability to legitimately penalise a defendant for not cooperating in the criminal process. For example, Article 6 includes the fundamental right not to participate through the right to silence and the privilege against self-incrimination.¹³⁴ However, as will be shown in later chapters, internationally recognised defence rights have failed to protect the accused from penalties for non-compliance. On the one hand, the ECHR has undoubtedly had an impact on many European jurisdictions, in attempting to bring standards and practices closer together. On the other hand, the significance and impact of the deeply engrained traditions of different legal systems within Europe, and concerns about national subsidiarity, will affect the ECHR's ability to create a single procedural model. Shifts in English criminal procedure away from concerns for fairness and respect for rights may also signal a reluctance to adopt a procedural model based on the ECHR, rather than an acceptance of it.

3.6 Conclusion

Most procedural systems try to find a balance between what Packer describes as the Due Process and Crime Control models.¹³⁵ Packer's models are unique, as they are intended to represent two separate value systems that compete for priority in the operation of the criminal process, rather than being separate models representing different jurisdictions. The crime control system is underlined by values 'based on the proposition that the repression of criminal conduct is by far the most important function to be performed by the criminal process.'¹³⁶ This model must produce a high rate of apprehension and conviction with a premium on speed and finality. It, thus, has links to the managerial model and is more

¹³³ M Wolfe-Robinson and O Bowcott 'Lord Irvine: Human Rights Law Developed on False Premise' *The Guardian* (London, 14th December 2011).

¹³⁴ *Murray v UK* (1996) 22 EHRR 29.

¹³⁵ H Packer *The Limits of the Criminal Sanction* (Stanford University Press: Stanford, 1968).

¹³⁶ *Ibid* 158.

consistent with inquisitorial ideologies than adversarial ones. The due process model, on the other hand, insists on 'formal, adjudicative, adversary fact-finding processes in which the factual case against the accused is publicly heard by an impartial tribunal and is evaluated only after the accused has had a full opportunity to discredit the case against him.'¹³⁷ It uses the criminal process to police itself and, so, corresponds more closely to adversarialism and theories of procedure based on fairness, procedural regularity and testing the prosecution's case. Because England is more closely associated with adversarialism than any other single procedural style, it might be concluded that it gives more weight to due process values. As such, the defendant's rights should not be violated, for example, by requiring his participation and penalising his non-cooperation.

McEwan argues that, rather than occupying a position along the continuum between the Crime Control and Due Process models, a new value choice may reflect the view that both models are too costly. In an era where criminal processes must be viewed as much through the lenses of cooperation and management as from the perspective of the 'battle' premise on which Packer's models are founded, she submits that his classic linear representation must be replaced by a triangular one; because either crime control or due process requirements may be diluted according to managerialist ends, as may inquisitorial or adversarial characteristics.¹³⁸ It is true that concerns for efficiency, demonstrated through a managerial emphasis, have had an effect on the nature of English criminal procedure and the way it pursues its aims of accurate fact finding and conflict resolution. However, the remaining chapters uncover the development of a participatory model of procedure which requires defence and defendant participation in order to achieve its aims as efficiently as possible. The emergence of this participatory model has caused a shift away from adversarialism. Although accurate fact finding and conflict resolution can be pursued within all of the models discussed above, it is the necessary constraints which fairness, legitimacy and respect for rights can impose which should keep England on the adversarial side of the spectrum. Adversarial ideologies provide a good forum for testing the prosecution's case and requiring the state to justify the accusations and request for condemnation and punishment it brings against the accused.

¹³⁷ Ibid 164.

¹³⁸ McEwan 'From Adversarialism to Managerialism: Criminal Justice in Transition' (n 15) 520.

Defendant Participation

4.1 Introduction

The defendant's participation throughout the criminal process may assist in efficiently furthering the process aims and justifying the outcome. Yet, requiring the defendant to participate remains controversial. It can involve breach of established procedural rights and norms, thus disregarding the necessary constraints which should be imposed on the criminal process. In this chapter, it is argued that, to respect the defendant's rights and uphold the fundamental features of English criminal procedure, participation should be a choice rather than a requirement.¹ This approach rests on the idea that it is for the prosecution to prove the case against the accused, whilst the defence may test the prosecution's case. This is an essential aspect of the normative theory of the criminal process in which the state should be held to account for its accusations and request for condemnation and punishment of the accused. However, there is an alternative school of thought which holds that the participation of, and communication with, the defendant should be central to the criminal trial whose aim should be to call the defendant to account.

This chapter begins with an assessment of Anthony Duff's normative theory of calling the accused to account. Duff's theory raises important issues surrounding defendant participation, and helps to develop the theory of criminal procedure based on calling the state to account. The chapter then traces the historical development of defendant participation through the emergence of the adversarial system in England. Developments during this time shaped many of the norms which now govern matters of fairness and legitimacy, and these norms should limit the extent to which a defendant can be expected to participate in the criminal process. It then analyses the accused's current position as a participant in the criminal process, particularly at trial, and highlights the trend towards an

¹ Features which are considered fundamental in this context are those rights and norms, including the presumption of innocence and burden of proof, which have become well established in domestic law and internationally through provisions such as Article 6 ECHR. Ho describes human rights as fundamental in the sense that they protect essential aspects of human dignity and secure crucial human interests. HL Ho 'The Presumption of Innocence as a Human Right' in P Roberts and J Hunter *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Hart: Oxford, 2012) 261.

obligation to participate, irrespective of fundamental rights not to do so. Finally, the definition and rationale behind the presumption of innocence is briefly explored, since it forms a key element of the argument against requiring participation, and underpins the normative theory of criminal procedure based on calling the state to account. This chapter provides a basis for the following chapters to examine specific examples of the way in which defendants are now penalised for their non-cooperation. The idea of defendant participation is approached as both a normative concept and in terms of actual practice.

4.2 Calling to account

In *The Trial on Trial* book series, Duff *et al.* develop a theory of the criminal trial aimed at calling the defendant to account for his criminal wrongdoing.² It builds on Duff's previous work which envisages the criminal process as one in which the defendant is called to participate as a rational moral agent.³ The core argument of the theory is that the criminal trial is a process through which defendants are called to answer a charge of criminal wrongdoing and, if they are proved to have committed the offence charged, to answer for their conduct. The defendant answers for his conduct by offering a defence, if the commission of the offence is admitted or proved; or by accepting guilt.⁴ If the defendant is found not only to have committed the offence, but also to have no defence, he is condemned through a guilty verdict which holds him to account for his wrongdoing.⁵ The author's argue that calling defendants to account accords them the respect they are due as responsible agents and citizens. In a separate work Duff writes: 'We are criminally responsible, in a liberal democracy, to our fellow citizens: we must answer to them, through the criminal courts, for our alleged criminal wrongs.'⁶ We are thus held responsible, or called to account, by and in the criminal courts on behalf of, and in the name of, the polity as a whole.⁷ Much emphasis is put on the communicative nature of the trial; to call a person to account for wrongdoing through a communicative judgment involves an attempt to

² A Duff, L Farmer, S Marshall and V Tadros (eds) *The Trial on Trial Volume 1* (Hart: Oxford, 2004); A Duff, L Farmer, S Marshall and V Tadros (eds) *The Trial on Trial Volume 2* (Hart: Oxford, 2006); A Duff, L Farmer, S Marshall and V Tadros (eds) *The Trial on Trial Volume 3* (Hart: Oxford, 2007).

³ See A Duff *Trials and Punishments* (Cambridge University Press: Cambridge, 1986) chapter 4.

⁴ Duff *et al.* *The Trial on Trial Volume 3* (n 2) 108, footnote 47.

⁵ *Ibid* 3.

⁶ A Duff 'Who is Responsible, for What, to Whom?' (2005) 2 *Ohio State Journal of Criminal Law* 441, 441.

⁷ Duff *et al.* *The Trial on Trial Volume 3* (n 2) 134.

persuade her to accept the judgment that she did wrong, and make it her own.⁸ Within this view of the trial, the court does not presuppose responsibility or liability for the commission of the criminal wrongdoing, but does presuppose responsibility to answer to the charge.⁹

Duff *et al.* reject the traditional instrumentalist, or standard, approach which sees the trial process as geared towards aims identified in chapter 2 (namely ensuring the accuracy of the verdict subject to constraints such as fairness and respect for rights). They see this as not completely wrong, but suggest that it is too simplistic.¹⁰ Calling to account, on the other hand, is:

‘To give the defendant a central, and at least ideally an active, role in the trial - as the person to whom the criminal charge is addressed; who is summoned to answer that charge; and to answer for his conduct if proved to be criminal; and who is expected to accept responsibility for what he has done, and to accept the condemnation that a conviction expresses if his guilt is proved.’¹¹

Although Duff *et al.* suggest that there is reciprocity in the practice of calling to account, as in the defendant can also call the prosecution and court to account,¹² they concentrate so much on calling the defendant to account that this seems to be the primary purpose of the trial. A distinction should be made at this point between the substance and the form of the trial. The form of the existing criminal trial may, on the face of it, appear to lend support to Duff *et al.*'s normative conception, whereby the prosecution present a case against the defendant and, if the court is satisfied that there is a case to answer, the defence have the opportunity to present their own case or test the prosecution's evidence. However, in substance the trial does not operate in the way suggested by Duff *et al.* It is not assumed that the defendant has anything to 'answer' for until a guilty verdict has been reached. Thus, it does not call, or require, the defendant to 'answer' for his conduct in the way proposed by Duff *et al.* There is a difference between finding that there is a case to answer for the defence, and the normative account put forward by Duff *et al.* which seems to imply that the defendant should answer for his alleged conduct during the trial, ahead of a verdict having been reached.

⁸ Ibid 140.

⁹ Ibid.

¹⁰ Ibid 64.

¹¹ Duff et al. *The Trial on Trial Volume 2* (n 2) 2.

¹² For example, they do claim that 'calling to answer or account is properly a two-way process'. Duff et al. *The Trial on Trial Volume 3* (n 2) 96.

As a general principle, if a defendant pleads 'not guilty', then, given the presumption of innocence, it is for the prosecution to prove his guilt. Conversely, as Duff *et al.* see it, a criminal trial in which guilt is contested consists of three stages.¹³ The first stage of proving guilt is to prove that the defendant committed the offence charged. Until that is proved, there is nothing for which the defendant has to answer. If the prosecution succeeds in proving guilt, the second stage is for the defendant to answer by offering a defence.¹⁴ Finally, if the prosecution completes its whole task, both proving that the defendant did commit the offence charged, and disproving any defence for which evidence is adduced, it is then for the fact finder to convict the defendant. This account is flawed both in terms of the substance of existing trials and from a normative standpoint. Deciding whether the defence have a case to answer at the close of the prosecution case is not tantamount to finding that it is proved that the defendant has committed the offence charged.¹⁵ It simply means that there is sufficient evidence on which a reasonable jury could convict, but not that they will or must do so.¹⁶

The decision as to whether the prosecution has proved its case comes at the close of the trial, after all of the evidence has been heard, including that of the defence. In the landmark case of *Woolmington v DPP*, Viscount Sankey stated that 'it is not till the end of the evidence that a verdict can properly be found and that at the end of the evidence it is not for the prisoner to establish his innocence, but for the prosecution to establish his guilt.'¹⁷ Furthermore, if the defence choose not to 'answer' the prosecution case, a conviction does not automatically follow. A judge may direct a jury to acquit a defendant where there is no evidence that could justify a conviction, but there are no circumstances in which a judge is entitled to direct a jury to return a verdict of guilty.¹⁸ The right to challenge the prosecution's case does not imply a requirement to account for oneself. The latter is difficult to justify in terms of the presumption of innocence and the burden of proof.

¹³ Ibid 147-148.

¹⁴ The authors actually use the word 'prove' several times when discussing the first stages of the process, i.e. the prosecution having a requirement to 'prove' that the defendant committed the offence before the defence presents its case. Ibid 147.

¹⁵ HL Ho 'Book Review: Duff, Farmer, Marshall and Tadros, *The Trial on Trial* (vol. 3): Towards a Normative Theory of the Criminal Trial' (2008) 6 *International Commentary on Evidence* Article 3, 3.

¹⁶ The general approach to the issue of no case to answer was laid down by Lord Lane CJ in *R v Galbraith* [1981] 1 WLR 1039.

¹⁷ *Woolmington v DPP* [1935] AC 462 [481].

¹⁸ *R v Wang* [2005] UKHL 9.

It is not completely clear what is required by stating that the defendant is 'called to answer' a charge. In *Wang*, the House of Lords confirmed the defendant's right to a jury verdict.¹⁹ This applies even if he makes no attempt to address the prosecution's case. If the defendant should not be required to provide any answers to the prosecution's case, then how plausible is it to construe the trial as having the point of calling him to answer to the charge?²⁰ Duff *et al.*'s theory seems strained when it tries to accommodate the defendant's choice not to participate. In their view, the right to silence and the right to participate are not on an equal footing. The right to participate and be heard is a feature of the trial's positive aims which are fully achieved only if that right is exercised, whereas the right to silence flows from constraints which should be placed on the pursuit of that end: 'A trial in which the right [to silence] is exercised is a legitimate trial, but its positive purpose is frustrated.'²¹ The theory is so focused on defendant participation that any right not to participate becomes difficult to accommodate. Within a criminal process based on calling the state to account, on the other hand, use of the right to silence may constrain and delay the aims of accurate fact finding and conflict resolution, but the purpose of the trial cannot be said to be frustrated, as the trial provides a forum to test the prosecution's case. This can be done by a silent defendant putting the prosecution to proof.

Duff *et al.* acknowledge that, within their model, there would ideally be a civic duty, and even a legal duty, to participate in one's own trial.²² From this, Ho suggests, it also follows that the defendant should carry the legal burden of proving any defence he wishes to claim,²³ and that 'the heavy emphasis on calling the defendant to account is likely to lack appeal in liberal democracies.'²⁴ There may be means of enforcing a legal duty to participate, aside from the imposition of legal burdens, for example through an offence of contempt for failure to participate.²⁵ Yet, any such legal duty would undermine the relationship between citizen and state in a liberal democracy. Duff *et al.* incorrectly perceive the defendant's role in the trial as one in which he is responsible for disproving the case against him. Prior to 1935, there was considerable authority to show that the defendant carried a legal burden of

¹⁹ *Ibid.*

²⁰ Ho 'Book Review: Duff, Farmer, Marshall and Tadros, *The Trial on Trial* (vol. 3): Towards a Normative Theory of the Criminal Trial' (n 15) 3.

²¹ Duff *et al.* *The Trial on Trial Volume 3* (n 2) 102.

²² *Ibid.* 120.

²³ In this context, defence is considered to mean technical defences that go beyond a simple denial.

²⁴ Ho 'Book Review: Duff, Farmer, Marshall and Tadros, *The Trial on Trial* (vol. 3): Towards a Normative Theory of the Criminal Trial' (n 15) 5.

²⁵ See *R v Rochford* [2010] EWCA Crim 1928.

proving any common law defence he wished to raise.²⁶ However, in *Woolmington*, the House of Lords stated that, 'No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.'²⁷ This principle reinforces a conception of the criminal process as one in which the state must account for the accusations it makes against the accused. Whilst Duff *et al.* claim that the defendant is merely invited to answer the charge and account for his alleged wrongdoing, if the central purpose of the criminal trial is for the defendant to provide an account, the most obvious and effective method of achieving this would be to require him to do so.

Viewing the trial as part of the process of calling the state to account is a more logical approach than calling the defendant to account, at least in terms of fairness, legitimacy, and respect for rights. The state has powerful resources for the detection, investigation and prosecution of crimes that may be wrongfully used against citizens. On this basis, and in accordance with due process values, the trial provides a safeguard against abuses of state resources. It helps to ensure that the state is justified in using its powers against the accused. It also protects the accused from being wrongly stigmatised as a criminal. The trial should therefore be construed as a means of calling the state to account for its request for blame and punishment of the accused and not, as Duff *et al.* argue, calling the defendant to account for why he is undeserving of the same. Where the accused chooses to plead guilty or enter into a plea bargain without being coerced, the purpose of the trial is not frustrated, as he is effectively waiving his right to a trial and is forfeiting the opportunity to test the prosecution's case. In this situation, the criminal process has achieved conflict resolution and, assuming the defendant is in fact guilty, accurate fact finding. Ho believes that the central point of the criminal trial is the provision by the state of their justification for the conviction they seek from the court, and critical scrutiny by the court of the justification that is provided by the state.²⁸ This can be achieved even if the defendant declines to answer the charge or give an account of his conduct.

²⁶ A Stumer *The Presumption of Innocence: Evidential and Human Rights Perspectives* (Hart: Oxford, 2010) 5-8.

²⁷ *Woolmington v DPP* [1935] AC 462 [481]. This was subject to the exception of the common law defence of insanity.

²⁸ Ho 'Book Review: Duff, Farmer, Marshall and Tadros, *The Trial on Trial* (vol. 3): Towards a Normative Theory of the Criminal Trial' (n 15) 4.

In order to better determine who is (or should be) called to account, one may look at existing procedural practices. A convincing normative theory of the criminal process needs to be properly connected to facts about actual criminal processes.²⁹ As both potential victims and defendants, the general public have an interest in the criminal process as a whole. As such, the requirement that trials be public can support both theories. The public nature of the trial stage of the criminal process is a well recognised requirement, but is not easy to justify.³⁰ One reason frequently offered in support of the rule is that public justice is accountable and that it promotes confidence in the courts. On this basis, the public nature of the trial may assist in ensuring that the aims of the criminal process are subject to the constraints of fairness and respect for rights which help secure legitimacy. This is particularly important when the trial is viewed as a means of ensuring the state's accusations are justified and that its powers are not unduly applied. The public nature allows the credibility and reliability of prosecution evidence to be tested, and helps to safeguard the defendant's rights, particularly those allowing confrontation.³¹ Early common law writers, such as Bentham, were proponents of the claim that the trial must be public in order to limit the power of the state and discourage perjury. Bentham criticised the secrecy of European inquisitorial procedures as leaving the door wide open to 'mendacity, falsehood, and partiality.'³² Blackstone also supported public justice, believing that the examination of witnesses in public would deter perjury and be more conducive of truth finding.³³

The public nature of the criminal trial may also be accounted for on the basis that, since crimes are public wrongs, from which the criminal law seeks to protect citizens, the public have an interest in the trial of those accused of committing them. Duff *et al.* rely on this idea of public interest, believing that the value of holding trials in public lies in the critical scrutiny that it allows. They argue that there is a clear connection to be found in the idea that breaches of criminal law constitute public wrongdoing for which members of the community are publicly called to account and through which members of the criminal justice system can themselves be held accountable. In this sense, public justice must be seen as a core element

²⁹ A Ashworth and M Redmayne *The Criminal Process* 4th edn (Oxford University Press: Oxford, 2010) 24.

³⁰ An in depth and critical account of the principle of open justice is given in J Jaconelli *Open Justice* (Oxford University Press: Oxford, 2001).

³¹ ECHR, Article 6(3)(d).

³² J Bentham *Rationale of Judicial Evidence* (Hunt and Clarke: London, 1827) Vol 2, Book III, 408.

³³ W Blackstone *Commentaries on the Law of England* (Clarendon Press: Oxford, 1765-69) Book III, 373.

of the process of calling to account.³⁴ However, this concept of public justice can be viewed in terms of the defendant's ability to call the state to account, since the public have an interest in ensuring that the state is acting within its powers, that innocent people are not convicted, and that there is accountability in the enforcement of the criminal law. Ho sees openness as an intrinsic feature of the liberal conception of the trial: a trial is a process of public justification. The insistence on an open trial is an insistence on a condition for the exercise of public liberty. The citizenry can examine and evaluate the grounds for the exercise by the state of its coercive powers only if those grounds are presented for public scrutiny.³⁵

These justifications for public justice do not explain why it is framed as a defence right. According to Duff *et al.*, the defendant's right to a public trial should be seen as a right to have his trial subject to critical scrutiny.³⁶ However, the defendant has no choice but to have his verdict open to scrutiny. Furthermore, public scrutiny appears to be in the interest of the public rather than the defendant. Indeed, the defendant may be put at a substantial disadvantage by having his trial open to scrutiny, principally because of the stigma and social consequences that often follow an association with crime. Jaconelli questions the 'right' to a public trial in a way which casts doubt on both the 'right' in general and Duff *et al.*'s account of it. He argues that whereas most rights claims are capable of being analysed in terms of the will and interest theories, neither can accommodate the right to a public trial.³⁷ The defendant can neither exercise a choice over the operation of the right nor necessarily benefit from it. Other commentators also find the 'right' to a public trial difficult to comprehend. For instance, Trechsel believes that it is something of a hybrid right and that the public interest in it is so strong that it almost outweighs that of the accused.³⁸ Despite the difficulties encountered in labelling the public trial requirement as a 'right', it does provide a means of ensuring that the state can be held accountable for the accusations and request for condemnation it brings against the accused. Dennis notes that, when a liberal polity seeks to enforce the criminal law against a citizen, it is required to demonstrate to the defendant and to the public at large how and why conviction and punishment is justified.³⁹ The defendant has an interest in publicity as a means of potentially increasing the factual

³⁴ Duff *et al.* *The Trial on Trial Volume 3* (n 2) 261.

³⁵ HL Ho 'Liberalism and the Criminal Trial' (2010) *Singapore Journal of Legal Studies* 87, 101.

³⁶ Duff *et al.* *The Trial on Trial Volume 3* (n 2) 270.

³⁷ J Jaconelli 'Rights Theories and Public Trial' (1997) 14 *Journal of Applied Philosophy* 169, 169.

³⁸ S Trechsel *Human Rights in Criminal Procedure* (Oxford University Press: Oxford, 2005) 126.

³⁹ I Dennis 'The Right to Confront Witnesses: Meanings, Myths and Human Rights' [2010] *Crim LR* 225, 262.

accuracy of adjudication.⁴⁰ By achieving factual accuracy and fairness, the state can account for its accusations. Thus, while the public trial is not always in the defendant's personal interest, it may be in his greater interest to ensure that the state can account for the allegations it makes against him.

Another practice which appears to lend support to Duff *et al.*'s theory is the requirement that the defendant be fit to plead. Whilst it might be contended that the defendant must be fit to plead in order to be held accountable as a rational moral agent, this requirement can also be seen as a way of ensuring that the defendant is capable of participating if he chooses to, and not that he must participate. Although existing practices can support both the assertion that the defendant is being called to account as well as the assertion that the state is being called to account, it is important to note that they are being called to account in different ways. Whereas, by Duff's reasoning, the trial offers a forum for the defendant to be called to account for his alleged wrongdoing, the normative theory put forward here uses the criminal process to call the state to account for the accusations it makes against the defendant and, in doing so, to justify its request for condemnation and punishment of the defendant.

A critique of Duff *et al.*'s theory of the criminal trial is not reliant on an opposing theory purporting that the trial should be part of the process of calling the state to account. Although many of the criticisms expressed above are largely based on existing norms and practices, whereas the theory itself is a normative one, Duff *et al.* do not give enough consideration to the constraints which fundamental norms, such as the presumption of innocence and the burden of proof, can have on the defendant's participatory role in the trial. Other criticisms stem from the strain that the theory sometimes seems to be under. This has already been mentioned in terms of trying to accommodate the defendant's choice not to participate and in relation to the right to a public trial. However, Peter Duff, who contributed to the first volume of the *Trial on Trial* series, adds to this by claiming that Duff *et al.* sometimes overstate the importance of the communicative aspect of the trial. An example is their argument that the presumption against admitting bad character evidence arises from the need to address the accused as a 'reasonable agent' rather than from 'instrumental' due process concerns.⁴¹ Duff *et al.* support constraints being placed on the

⁴⁰ Ibid 261.

⁴¹ P Duff 'The Trial on Trial Volume 3: Towards a Normative Theory of the Criminal Law' (2009) 1 *Edinburgh Law Review* 165, 166.

admission of bad character evidence primarily on the basis that a defendant, viewed as a responsible agent, should not be judged on his past behaviour. They frame bad character evidence as a bar to communication rather than as potentially prejudicial and unfair. Redmayne is sceptical of the view that using such evidence against the accused is inconsistent with respect for his ability to change.⁴² He claims that Duff *et al.*'s argument, which objects to treating the defendant as if his past determined his future, 'loses its pull if expressed in terms of influence'.⁴³ We can treat a person's conduct as being influenced by the past without assuming he is unable to change. Duff *et al.* are at pains to accommodate existing practices which can be more easily explained from other perspectives which emphasise due process values.

The theory may also be critiqued on the basis that it seems incomplete, as it does not account for the pre-trial or sentencing stages of the criminal process. Duff *et al.* justify this by claiming that the trial is the centre point of the criminal process and that covering the other stages would increase their book's density.⁴⁴ However, in order for their theory to be fully developed and taken forward, it may need to be incorporated into the larger criminal process picture. Omitting the sentencing stage is particularly problematic because not only do the potential consequences of a guilty verdict hang over the trial, but also it is where the communicative nature of the process is most prevalent, especially given the role of mitigating and aggravating factors, and victim impact statements. The communication between the court and those involved in the offence is not as constrained at this stage by procedural and evidential rules as the trial itself. It is where the wrongness of the act, as well as its consequences, can be communicated to the defendant and the public. Furthermore, since the defendant cannot truly be called to account for his criminal conduct until his guilt has been established through a guilty verdict at the end of the trial, it is not until the sentencing stage that the defendant can really begin to account, or answer, for that conduct. As such, it is surprising that Duff *et al.* failed to give it due consideration.

Duff *et al.*'s theory was developed in the 'social and historical context that is particular to the modern adversarial trial',⁴⁵ but they state that it will be 'relevant to any polity that

⁴² M Redmayne 'The Ethics of Character Evidence' (2008) 61 *Current Legal Problems* 371, 386.

⁴³ *Ibid* 387.

⁴⁴ Duff *et al.* *The Trial on Trial Volume 3* (n 2) 12.

⁴⁵ *Ibid* 11.

claims to be a liberal democracy.⁴⁶ They believe that their model of communicative participation favours neither an adversarial nor an inquisitorial system.⁴⁷ However, the success of a trial or process aim will have something to do with its institutional setting. Not only does the theory offend liberal ideals, but also the emphasis on partisanship in the adversarial system hardly seems as well placed to accommodate it as does the truth seeking inquisitorial system that already places greater emphasis on the defendant's participation. It may be more successful in jurisdictions, such as France, where, according to Hodgson, the accused is required to take responsibility for his actions, to reflect on the consequences of what he has done and to participate in the process.⁴⁸ This is played out in practice by defendants being questioned directly by the judge in court; there is already a sense in which they are held to account as erring citizens.⁴⁹

The theory of calling the state to account, on the other hand, could be applied more readily within an adversarial type system, though it is founded upon factors which should be upheld in any liberal democracy, regardless of its procedural form. The following section will illustrate why the notion of calling the accused to account fits uncomfortably within the adversarial model which views the trial as a forum for testing the prosecution case rather than communicating with the defendant. Although English criminal procedure has become pre-occupied with efficient fact finding, and cannot be accurately described as adversarial, some of the values and rights associated with the adversarial system remain relevant. So much so that a theory of calling the defendant to account is not only unrealistic in practice, but also at odds with established norms necessary to ensure a fair trial.

4.3 Defendant participation in the development of the adversarial trial

Examining the development of the modern criminal trial provides a key to understanding some of the values which underpin the criminal process, and the nature of the participatory role of the defendant and the defence. An account of the history of the English criminal process and the development of adversarialism is unavoidably messy, as important developments occurred gradually and inconsistently throughout the whole realm of criminal

⁴⁶ Ibid 57.

⁴⁷ Ibid 201.

⁴⁸ J Hodgson *French Criminal Justice* (Hart Publishing: Oxford, 2005) 21.

⁴⁹ Ibid.

law and procedure. As such, it can easily become oversimplified or overly complicated and drawn-out. What is significant for present purposes is the shift in the role of the defendant from active participant to potentially passive observer. The following examination is intended to focus on this narrow aspect of adversarial history and draw out those elements that are most relevant to it. It will highlight the important link between rights and participation and help to build on the foundations of the normative theory of calling the state to account.

Although the adversarial system primarily took shape throughout the eighteenth and nineteenth centuries, many of its components had been developing for centuries. These include the rise of the jury and the idea of party participation. The pre-adversarial legal institutions which paved the way for the adversarial system largely arose between 1200 and 1700.⁵⁰ Immediately before the emergence of the adversarial trial, the defendant was an active participant who played a central role. The underlying model, according to Duff *et al.*, treated 'participation and deliberation' as 'central to the idea of the political community'.⁵¹ The trial, during this period, is often referred to as the 'altercation trial'. However, Langbein describes it as the 'accused speaks' trial because the defendant was effectively forced to speak in order to defend himself.⁵² The altercation trial emerged at the end of the Middle Ages, when older methods of proof, such as trial by wager and ordeal, phased out and the shifting population made it difficult to have a self-informing, active jury. The purpose of the altercation trial was to give the defendant the opportunity to respond to accusing evidence, hence the image of the 'accused speaks' trial.⁵³ It was based on the active participation of those involved, and was much less structured than the adversarial trial. Because of the private nature of the majority of prosecutions, in some sense, the trial was comparable to civil cases, thus creating an expectation that the defendant would participate. The criminal law's apparent focus on protecting property also supports this assertion,⁵⁴ as do the similarities between the laws of evidence applied in civil and criminal trials at the time.⁵⁵

⁵⁰ S Landsman *The Adversary System: A Description and Defence* (American Institute for Public Policy Research: Washington, 1984) 8-10.

⁵¹ Duff et al. *The Trial on Trial Volume 3* (n 2) 21.

⁵² JH Langbein *The Origins of the Adversary Criminal Trial* (Oxford University Press: Oxford, 2003).

⁵³ *Ibid* 48.

⁵⁴ D Hay 'Property, Authority and the Criminal Law' in D Hay, P Linebaugh, JG Rule, EP Thompson, and C Winslow (eds) *Albion's Fatal Tree* (Penguin Books: Harmondsworth, 1975).

⁵⁵ Stumer (n 26) 6.

Securing the defendant as an informational resource was a central preoccupation of the altercation trial.⁵⁶ Contemporaries seemed to have believed that subjecting the accused to the pressures and hardships of having to defend himself unprepared and unaided was actually truth promoting. The defendant had no access to the indictment and would usually enter court completely ignorant of the case against him. Facing the defendant with the evidence in court for the first time was thought to help the judge and jury ascertain the sincerity of his denials.⁵⁷ Accurate fact finding was thus a key aim of the process. This formed a primary justification for the rule denying defence counsel in felony cases; the accused was better suited than counsel to respond to questions of fact. However, the reality was seldom so straight forward. Beattie sums up the situation:

Under this system of prosecution, which lasted well into the eighteenth century, the accused had few rights. He or she was to be committed to trial without knowing the exact nature of the charge as it would appear on the indictment, or without having access to the depositions of the prosecution witnesses. Virtually all accused felons were held in jail to await trial, and in conditions that made preparation difficult. It had been the magistrate's duty to bind over the prosecution witnesses in recognizances to appear in court to give their evidence. The accused could not compel the attendance of witnesses. At the trial itself, accused felons had to speak in their own defence and to respond to prosecution evidence as it was given, and as they heard it for the first time. If they did not or could not defend themselves, no one would do it for them.⁵⁸

This system allowed no room for a workable privilege against self-incrimination or right to silence. In fact, the defendant effectively had no trial or pre-trial rights, making the 'accused speaks' trial the ultimate way of calling the defendant to account. There is an important link here between holding rights and having a choice to participate which will be returned to later. When a defendant has rights he has a protection against the power of the state, irrespective of the role he plays at trial. It then becomes harder to hold him to account and easier for him to demand that the case against him be proven.

Not only did the accused have to speak in order to mount a defence, but also a lack of participation could have serious consequences given the wide spread use of capital punishment in felony cases. This was especially true at the end of the eighteenth century, when 'capital punishment overshadowed the whole of the criminal law.'⁵⁹ Beattie has

⁵⁶ Langbein *The Origins of the Adversary Criminal Trial* (n 52) 61.

⁵⁷ *Ibid* 63.

⁵⁸ JM Beattie 'Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries' (1991) 9 *Law and History Review* 221, 223.

⁵⁹ L Radzinowicz *A History of English Criminal Law Volume 4: Grappling for Control* (Stevens and Sons: London, 1968) v.

examined the fluctuating level of capital punishment throughout the seventeenth and eighteenth centuries. He attributes its decline to the development of alternative sanctions for serious crime, most notably imprisonment and transportation to the colonies.⁶⁰ The pattern of capital punishment was also largely shaped by the prosecution of property crimes. However, by 1861, for all practical purposes, the only offence to carry the death penalty was murder.⁶¹ For much of the period up to the mid-nineteenth century, the threat of capital punishment hung over many, if not most, felony trials. Langbein claims that contemporaries in the late eighteenth and early nineteenth century were willing to tolerate the truth-defeating consequences of the emerging adversary procedure because in the realm of the criminal trial 'too much truth brought too much death.'⁶² Although a powerful phrase, this may be overstating the situation, as roughly half of those condemned to death during the eighteenth century did not go to the gallows.⁶³ It was felt that the law over-threatened the use of capital punishment and jurors and judges would use techniques, such as down charging and clemency, to avoid it.⁶⁴ Nevertheless, the defendant's participation remained a crucial factor in his fate.

The assumption that denying defence counsel promoted truthful outcomes was undermined in the celebrated treason trials of the late 1600s.⁶⁵ These trials often involved perjured evidence which resulted in the execution of innocent persons. Public revulsion at this led to the Treason Trials Act 1696, a momentous step in the emergence of the adversarial system. The Act granted the defendant a right to a copy of the indictment, pre-trial assistance of counsel, full assistance of counsel at trial and the ability to compel the attendance of defence witnesses. It also allowed the defendant's witnesses to testify on oath.⁶⁶ Even though the central purpose of the criminal trial was to hear the accused speak, he spoke unsworn until the Criminal Evidence Act of 1898. The 1696 Act allowed counsel only to defendants accused of high treason.

In the 1730s, lawyers began to appear for defendants in ordinary felony trials, but it was not until the Prisoner's Counsel Act of 1836 that legislation provided for this. When defence

⁶⁰ JM Beattie *Crime and the Courts in England 1660-1800* (Clarendon Press: Oxford, 1986) 450-619.

⁶¹ Radzinowicz (n 59) v.

⁶² Langbein *The Origins of the Adversary Criminal Trial* (n 52) 334.

⁶³ Hay (n 54) 43.

⁶⁴ Langbein *The Origins of the Adversary Criminal Trial* (n 52) 336.

⁶⁵ *Ibid* 3.

⁶⁶ An Act of 1702 extended this reform to cases of felony although there had been some judicial discretion to subpoena defence witnesses prior to this. See *Ibid* 53.

lawyers first entered the felony trial they were permitted only to do what judges had previously done for the defendant: cross-examine witnesses and speak to issues of law. They could not speak to the jury or offer a defence against the facts put in evidence. It was essential that the judge and jury hear the defendant's account.⁶⁷ The rule against defence counsel did not apply to misdemeanour trials. There is no clear account of why this was, but the thinking at the time may have been that it was particularly important to avoid counsel interfering with the court's access to the accused as an informational resource in cases of serious crime.⁶⁸ That concern would have been less acute for misdemeanour offences, where lesser sanctions were at stake.

The reason for the increase in defence counsel activity is unknown. However, it is thought to be a result of the judge's perception that the balance in the courtroom had been shifting further to the detriment of the defendant.⁶⁹ Most prosecutions in the early eighteenth century were initiated by victims, giving them the power to make the law serve their own purpose.⁷⁰ They could also hire counsel to run their whole case without the restrictions faced by defence counsel. The apparent equality and appearance of balance that existed in the altercation trial courtroom arising from the confrontation between the victim and accused, was breaking down.⁷¹ This was exacerbated by government efforts to increase the level of prosecution by offering monetary rewards for the successful prosecution of offenders who committed certain crimes. Those who took on this task were known as thieftakers. The reward system (which also operated privately) was fraught with incentives for false accusations and perjured witnesses, something of which judges were very aware.⁷² The judicial concern about these factors contributed to the introduction of defence counsel. The presence of defence counsel in ordinary felony trials has largely been inferred from information within the *Old Bailey Sessions Papers* which were in existence from the 1670s into the nineteenth century with varying degrees of detail and consistency. The number of

⁶⁷ Beattie 'Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries' (n 58) 231.

⁶⁸ Langbein *The Origins of the Adversary Criminal Trial* (n 52) 39.

⁶⁹ Beattie 'Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries' (n 58) 224.

⁷⁰ Hay (n 54) 41.

⁷¹ Beattie 'Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries' (n 58) 224.

⁷² Langbein *The Origins of the Adversary Criminal Trial* (n 52) 157.

counsel employed cannot be known for sure, but there was a definite increase from the mid-eighteenth century, even though the majority of defendants remained unrepresented.⁷³

In the 1780s, there was not merely an increase in the number of lawyers involved in felony trials, but also an apparent change in their attitudes and behaviours, especially those acting for the defence.⁷⁴ Even though their role remained restricted, counsel became more aggressive and actively committed to the defendant's interest. They found ways to effectively speak to the jury through clever cross-examination and by disguising the remarks as comments to the judge on points of law.⁷⁵ They would cast doubt on the truth of prosecution evidence and the credibility of prosecution witnesses, leading to a more sceptical view of the prosecution than previously.⁷⁶ At the same time, there were changing ideas about the rights of defendants, including the development of the presumption of innocence and the beyond reasonable doubt standard of proof. According to Langbein, 'defence counsel would ultimately end the altercation trial, silence the accused, marginalise the judge, and break up the working relationship of judge and jury.'⁷⁷ The role of defence counsel that developed at this time is observable in England's current system; they are expected to use their special knowledge of the law and criminal procedure to manage and win cases on behalf of their clients. In so doing, it may become necessary, or at least beneficial, for the defendant to take a passive role. Langbein attributes the development of the adversarial system to the development of the role of defence counsel.⁷⁸ Thus, a model of justice within which the defendant can play a passive role may be attributable to the role played by his advocate.

The emergence of the adversarial system also impacted defendant participation through the development of defence rights. One example is the burden of proof. As with present practices, in the early adversarial trial, the court could dismiss a case if the prosecution did not present sufficient evidence against the accused. Allowing defence counsel had the effect of separating the tasks of probing for whether the prosecution had presented its case, and

⁷³ Beattie estimates that in 1740, 3.1% of cases had prosecution counsel and 0.5% had defence counsel but by 1800, 21.2% had prosecution counsel and 27.9% had defence counsel. Beattie 'Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries' (n 58) 227.

⁷⁴ Ibid 229.

⁷⁵ Ibid 233.

⁷⁶ Ibid 235.

⁷⁷ Langbein *The Origins of the Adversary Criminal Trial* (n 52) 177.

⁷⁸ Ibid.

offering defensive evidence.⁷⁹ Defence counsel insisted on asking the judge whether the prosecution had discharged its burden. Where they were successful, the accused was completely silenced. Accordingly, 'the recognition of the prosecution's burden, combined with the use of defence counsel to test whether that burden had been met, materially reduced the amount of speaking that the accused had to do in order to defend effectively.'⁸⁰ However, the burden of proof was not fully established until the early twentieth century.⁸¹ Another important factor which helped to stifle the defendant's participation was the formulation and acceptance of the beyond reasonable doubt standard of proof which was crystallised in the later eighteenth century. Setting a high standard of proof encouraged the jury to probe the prosecution case, rather than focusing on whether or how the defendant gave evidence.⁸²

Unlike the burden and standard of proof, the underlying presumption of innocence is ancient and can be traced to Classical Roman law.⁸³ However, our modern understanding of the principle as a statement of the prosecution's burden and as a direction to officials on how to treat the accused arose towards the end of the seventeenth century. Beattie states that, within the old altercation trial, the assumption 'was not that [the defendant] was innocent until the case against him was proved beyond a reasonable doubt, but that if he *were* innocent he ought to be able to demonstrate it for the jury by the quality and character of his reply to the prosecutor's evidence.'⁸⁴ It was only when the trial could be conceived as a contest between two parties, rather than between two individuals, that the defendant could remain silent and the trial could be organised around the presumption of innocence.⁸⁵ As a consequence of the presumption of innocence, even in a narrow, trial-centred sense, it is the accused's right to have the case against him proved beyond reasonable doubt. This right provides one reason for viewing the trial as a means of holding the state to account for its accusations and request for punishment.

By the end of the nineteenth century, the majority of European countries had accepted an understanding of criminal proceedings as based on two opposing parties and an

⁷⁹ Ibid 258.

⁸⁰ Ibid 259.

⁸¹ *Woolmington v DPP* [1935] AC 462.

⁸² Langbein *The Origins of the Adversary Criminal Trial* (n 52) 266.

⁸³ Stumer *The Presumption of Innocence: Evidential and Human Rights Perspectives* (n 26); *Coffin v United States*, 156 U.S. 432 (1895).

⁸⁴ Beattie *Crime and the Courts in England 1660-1800* (n 60) 341. Original emphasis.

⁸⁵ Ibid 349.

independent judge. Summers notes that it was the rights of the defence as a party and not of the accused as an individual that were seen as important in the works of the nineteenth century writers.⁸⁶ Only through the assistance of counsel would those accused of criminal offences be able to engage with legal formalities and make proper use of the guarantees afforded to them in presenting their defence.⁸⁷ There is, thus, a distinction between the institutional rights of the defence and the personal rights of the defendant which he can insist on exercising himself. This distinction between the defendant as a person and the defence as a party remains an important aspect of criminal procedure. For example, while the defendant is prohibited from cross-examining certain witnesses in person, his counsel remains able to do so on his behalf.⁸⁸ In many situations, as long as the defence is conceived of as a party that can exercise rights, the defendant can choose whether to participate and successfully put the prosecution to proof.

Important defence rights became workable within a system which effectively discouraged defendant participation, and it was these rights which, in turn, facilitated that lack of participation. The burden and standard of proof on the prosecution meant that the defendant did not have to prove his case, and that the presumption of innocence could be given much greater force, again, turning the attention of the court on the prosecution. Two other significant participatory factors which emerged during the rise of adversarialism were the defendant's right to silence and his privilege against self-incrimination. Langbein believes that the privilege against self-incrimination and the right to silence became a workable part of the common law criminal procedure when defence counsel succeeded in restructuring the criminal trial in the way described above, and made it possible to defend a silent accused.⁸⁹ Through an examination of the *Old Bailey Session Papers* from 1670, Langbein did not find one instance of an accused remaining silent on the grounds of a right to do so until the late 1780s, when defence counsel had become a regular trial feature and had alleviated the accused of his participatory burden.⁹⁰

⁸⁶ S Summers *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights* (Hart: Oxford, 2007) 61.

⁸⁷ *Ibid* 71.

⁸⁸ Youth Justice and Criminal Evidence Act 1999, ss.34-40.

⁸⁹ JH Langbein 'The Historic Origins of the Privilege Against Self-Incrimination at Common Law' (1993) 92 *Michigan Law Review* 1047.

⁹⁰ Langbein *The Origins of the Adversary Criminal Trial* (n 52) 279. The origins of the privilege against self-incrimination are discussed in more detail in chapter 5.

The privilege against self-incrimination has become an integral element of many legal systems. It now exists as an implicit part of Article 6 of the European Convention on Human Rights;⁹¹ it is also expressly catered for in Article 14 of the International Covenant on Civil and Political Rights. The presumption of innocence is also acknowledged in these international documents and its international status can be traced back to the Universal Declaration of Human Rights which was adopted by the United Nations General Assembly in 1948. Although these documents stem from the mid-twentieth century, they are a restatement of what was already recognised in a significant number of legal systems. Thus, what emerged in response to, and which now facilitates, the defendant's ability to choose whether to cooperate in the criminal process has a significant link to the development of the adversarial system as a means of protecting the defendant from the potentially oppressive power of the state which had previously seen defendants face the allegations against them, unprepared and unaided.

Following the development of the adversarial system, defendants did not need to be active participants in the criminal process. Strengthening their rights and allowing counsel to run their case meant that they did not even have to speak. The onus was firmly on the prosecution. By the 1820s, the defendant's participation was so limited that the French observer, Cottu, commented that 'his hat stuck on a pole might without inconvenience be his substitute at the trial.'⁹² The emphasis had shifted from the 'accused speaks' trial, in which the defendant was truly called to account, to one which allowed the state's powers to be limited and the prosecution's case to be tested. Concern for legitimacy, fairness and respect for rights became necessary constraints on the achievement of accurate fact finding and conflict resolution. Langbein asserts that with the development of the adversarial trial came a new theory of the purpose of the trial, which endures into our day, that it is primarily an opportunity for the defence to probe the prosecution case.⁹³ The concept of adversarialism has become so well entrenched in criminal procedure that the European Court have recognised a right to adversarial proceedings in so far as 'both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party.'⁹⁴

⁹¹ *Murray v UK* (1996) 22 EHRR 29.

⁹² C Cottu *On the Administration of Criminal Justice in England; and the Spirit of the English Government* (Translated from French, London: for Richard Stevens and Charles Reader, 1822) 105.

⁹³ Langbein *The Origins of the Adversary Criminal Trial* (n 52) 253.

⁹⁴ *Laukkanen and Manninen v Finland* no. 50230/99 3 Feb 2004 [34].

A criminal process operating on an adversarial basis cannot easily be reconciled with the idea of requiring defendant participation and penalising disobliging defendants. Although an assessment of the history of adversarialism does not in itself uncover a normative theory of the criminal process, it does highlight the developments that led to the rights and procedures which underpin the normative theory of the criminal process in which the state is called to account for its accusations and request for condemnation and punishment of the accused. In order to respect those rights which we have come to accept as fundamental, a defendant must be given a choice to participate and should not be required to do so.

4.4 Defendant participation in today's criminal process

The participatory role of the accused declined throughout the development of the adversarial system, as a result of defence counsel and workable defence rights. Although the English criminal process can no longer be labelled as strictly adversarial, many of the values that developed within it constitute fundamental aspects of criminal procedure which govern issues of fairness and legitimacy. Furthermore, the criminal trial remains structured largely on an adversarial basis. As described in chapter 3, the adversarial trial consists of a competition between two equal sides that are responsible for organising and presenting their case in front of a passive judge and, often, lay decision-makers. However, inquisitorial and European influences, along with efficiency concerns, have influenced criminal procedure, and England now appears to have a participatory model. What follows is a general examination of the defendant's current position as a participant in the criminal process, particularly at the trial stage. It outlines the right to participate as well as some of the requirements and pressures put on defendants to do so. The focus is on the participation of the defendant rather than the defence as a party. It is often the existence of the defence party which allows the defendant to exercise his rights not to participate. The defendant is a participant where he is actively involved as an individual through such means as responding to questioning, providing information and giving evidence. For present purposes, the defence party are active participants when they raise a defence, call witnesses and adduce evidence to further that defence, but not when they simply dispute or test the prosecution's case through, for example, cross-examination of prosecution witnesses.

Beyond requirements to be present at one's trial, participation is an option; there are no *prima facie* legal obligations on the defendant to participate. However, the presence of the accused is both a requirement and a right. Whilst it is recognised in the ECHR, there can be consequences for absent defendants. Summers sees the right to be present at trial as a main facet of adversarial procedure as it is understood under the ECHR.⁹⁵ In *Colozza v Italy*, it was held that the object and purpose of Article 6 taken as a whole 'show that a person "charged with an offence" is entitled to take part in the hearing.'⁹⁶ Yet, his absence is not, in principle, incompatible with the Convention. Within England, there are different procedures for dealing with the absence of an accused at summary trials and trials on indictment.

In trials on indictment, the accused should normally be present to plead and remain present throughout his trial. The rationale behind this general rule might be to promote fairness by allowing the defendant to hear the evidence against him and by ensuring that he has an opportunity to participate, if he chooses to participate. He may wish to respond to unforeseen arguments or evidence that emerges during the trial. The fact that he is required, rather than given a choice, to be present might be thought to undercut this rationale. Like the public trial requirement, it is difficult to reconcile the defendant's duty to be present with the fact that it is a right and therefore presumably for his benefit. Duff *et al.*, however, may find this duty easier to justify as a means of calling the accused to account. Notwithstanding, the requirement to be present does not infer a requirement to participate or to 'account for oneself'. Like the public trial requirement, the duty to be present may be in the defendant's greater interest by ensuring that he has the opportunity to hold the state to account and test the prosecution's case. It may also be more easily accepted by both the defendant and the general public that the state has, or has not, accounted for its accusations, if the defendant is present during the process. Nevertheless, although the defendant may benefit from being present, the requirement makes it difficult to justify as a right.

The conflicting justifications for the right-requirement might be a matter of history. Historically, the trial was a very quick process, averaging about half an hour by the mid-eighteenth century.⁹⁷ The accused was virtually always the most efficient potential witness, and so his presence and participation would have contributed to the brevity of the trial.

⁹⁵ Summers (n 86) 113.

⁹⁶ *Colozza v Italy* (1985) 7 EHRR 516 [27].

⁹⁷ Langbein *The Origins of the Adversary Criminal Trial* (n 52) 19.

Furthermore, the defendant was sentenced immediately following conviction;⁹⁸ his presence may have been necessary to ensure that punishment was carried out. Today, if the accused fails to appear in the Crown Court, the judge will normally have to adjourn the case and, depending on the circumstances, issue a warrant for his arrest.⁹⁹ However, a trial may proceed in the defendant's absence. In *Haywood*,¹⁰⁰ the Court of Appeal held that the right to be present can be waived if the defendant deliberately and voluntarily absents himself or if he behaves in such a way as to obstruct the proper course of the proceedings. In *Jones*,¹⁰¹ the House of Lords held that the court have a discretion to commence a trial in the absence of the defendant and that the priority is to ensure that the trial is as fair as circumstances permit and that justice is achieved. The focus on fairness suggests the importance of the defendant's choice to participate; it does not imply that he must take part in the proceedings. Summary trials can, and often do, take place in the defendant's absence.¹⁰² Section 12 of the Magistrates' Courts Act 1980 (MCA) allows the defendant to plead guilty by post, and sections 11 and 13 set out the options open to the magistrates when an accused, who has not pleaded guilty by post, fails to appear at the trial.

Section 11(1) of the MCA grants magistrates with discretion to proceed in the accused's absence, unless the court considers that there is an acceptable reason for his failure to appear. However, if the accused had been summoned to be at the trial the case cannot be tried without proof that he knew of the hearing. If proceedings begin with an arrest rather than summons, no proof of the defendant's knowledge of the proceedings is needed. The court shall not in a person's absence sentence him to imprisonment, but where imprisonment is imposed, he must be brought before the court before being taken to begin serving his sentence.¹⁰³ Where the accused fails to appear in answer to a summons, a warrant for arrest can only be issued if there is proof of service of the summons, and the offence to which the warrant relates is punishable with imprisonment, or the court, having convicted the accused, proposes to impose a disqualification on him.¹⁰⁴ Where the court,

⁹⁸ Ibid 57.

⁹⁹ J Sprack *A Practical Approach to Criminal Procedure* 12th edn (Oxford University Press: Oxford, 2008) 336.

¹⁰⁰ [2001] 3 WLR 125.

¹⁰¹ [2002] UKHL 5.

¹⁰² Sprack (n 99).

¹⁰³ Magistrates' Courts Act 1980, s.11(3) and s.11(3)(A)

¹⁰⁴ Magistrates' Courts Act 1980, s.13(3)

instead of proceeding in the absence of the accused, adjourns or further adjourns the trial, the court may issue a warrant for his arrest.¹⁰⁵

The fact that the defendant must ordinarily be present when he is faced with imprisonment is consistent with the suggestion that the presence requirement may stem from the historical continuation of the trial into sentencing and punishment. An important provision in magistrates' court trials is that if an accused does not physically attend but his legal representative does, he is for most purposes deemed to be present.¹⁰⁶ In this situation the distinction between the defendant as a participant and the defence participating as a party is broken down. The defendant's presence may make little difference in the exercise of holding the state to account if the defence are able to participate as a party.¹⁰⁷ Although there is no general requirement for the defendant to be present at a summary trial, and a trial can proceed in his absence at the Crown Court, if a defendant has been granted bail and fails to surrender to custody he may be charged with absconding under the Bail Act 1976.

Besides these rules relating to the presence of the defendant, he is not formally required to actively participate in the pre-trial or trial process. A legal culture which discourages participation developed in England over a long period of time, and there are many bars to effective communication within the existing system. Duff *et al.* believe that calling the defendant to account is a reason to create the legal and cultural conditions whereby participation is facilitated. This includes altering the formality of the trial, the conduct of professionals, and the passivity of judge and jury. In many ways, changing these aspects would reflect the old, pre-adversarial trial in which counsel played a minimal role and the defendant, judge and jury were active participants. However, the conditions which facilitated this type of trial were built on a lack of rights and resources for the defendant and, so, would not withstand scrutiny under most constitutional documents, including the European Convention on Human Rights. For instance, the presumption of innocence, the prosecution's burden of proof, the right to silence, the privilege against self-incrimination, the right to a lawyer and effective representation, and the recognition of the defence as a

¹⁰⁵ Magistrates' Courts Act 1980, s.13(1)

¹⁰⁶ Magistrates' Courts Act 1980, s.122(2)

¹⁰⁷ In *R v Kepple* [2007] EWCA Crim 1339, the court held that defence counsel for an absent defendant can ask questions of prosecution witnesses in as much detail as they wish based on their instructions, but without indicating what the defendant's evidence might have been and in the knowledge that he cannot call evidence to contradict the answers given. They may do this in the hope of either showing that the defendant's account is accepted by the witnesses or to cast doubt on the coherence or accuracy of their accounts.

party rather than as an individual would need to be set aside or at least substantially weakened.

Duff *et al.* state that in England and Wales, 'it is regarded as a central principle of criminal trials that the defendant can sit back and wait for the prosecution to prove the case against him.'¹⁰⁸ In some respects, this is true, but the defendant is now often faced with detrimental consequences for his failure to participate in the criminal process. Before the trial has even begun, the defence are expected to participate by disclosing their case to the prosecution. The Criminal Procedure and Investigations Act 1996 and the Criminal Justice Act 2003 extended the realm of defence participation by requiring the defendant to provide a statement setting out, *inter alia*, the nature of his defence and any points of law on which he wishes to rely. Failure to issue a defence statement, or departing from it, can result in adverse inferences of guilt being drawn against the defendant.¹⁰⁹ Pressure on the accused to actively participate also stems from provisions which allow adverse inferences to be drawn from the defendant's silence under the Criminal Justice and Public Order Act 1994. This is dealt with in detail in chapter 6, but it is important to note that these provisions, along with other reforms designed to secure the defendant's cooperation, have created a tension between adversarial ideologies and efficient truth finding. The increasing emphasis on efficient truth finding at the expense of adversarial ideologies is affecting the defendant's capacity to choose whether or not to participate in the criminal process.

Until relatively recently, the accused could tell his side of the story by making an unsworn statement from the dock. He was not then subject to questioning from his own counsel, prosecuting counsel or anybody else. This practice, which was abolished by s.72 of the Criminal Justice Act 1972, offered a compromise between remaining silent and being subject to the sometimes harsh risks inherent in cross-examination. The accused now has to choose between saying nothing and being subject to possible adverse inferences of guilt, or giving evidence and being subject to cross-examination. It also seems that the defendant is now expected to participate constructively in his cooperation with the criminal process. Recent legislation, including the disclosure requirements and the case management regime set out in the Criminal Procedure Rules, as well as increasing concern for accurate fact finding, has

¹⁰⁸ Duff et al. *The Trial on Trial Volume 3* (n 2) 199.

¹⁰⁹ See chapter 7.

rendered ambush defences unacceptable.¹¹⁰ There have been several recent cases upholding convictions where the defence had attempted to ambush the prosecution (or co-defendant) with late defences or purposely failed to point out prosecution errors until too late to rectify them.¹¹¹ From an adversarial standpoint, in which the trial takes the form of a competition between two equal sides, a failure to mention or rectify a mistake made by the prosecution is not ordinarily objectionable. Nor is it objectionable within a conception of the trial as a means of calling the state to account for the accusations it makes, as the defence should not be expected to assist the state in its duty to prove guilt. However, there may be a distinction between passive and active obstruction of the opponent's case. Whilst failing to point out mistakes made by the opposing side, particularly by the prosecution, would seem unobjectionable, deliberately sabotaging the opponent through, for example, tampering with evidence and, therefore, perverting the course of justice, distorts the appearance of fairness and undermines the process' legitimacy. The expectation of constructive participation which now seems to exist is further shifting the procedural arena away from an adversarial style contest in which the prosecution can be put to proof without the participation or assistance of the defence.

The defendant's participatory rights are evident in Article 6(3) ECHR which gives the accused the rights to be informed promptly, and in detail, of the nature and cause of the accusation against him; to have adequate time and the facilities for the preparation of his defence; to defend himself in person or through legal assistance; to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; and to have the free assistance of an interpreter if he cannot understand or speak the language used in court. Article 6 has been interpreted to also recognise the right not to participate in the form of the right to silence and the privilege against self-incrimination.¹¹² The right not to participate is therefore an implicit part of Article 6 and must be considered alongside the right to participate, and not as a bar to it. Duff *et al.* suggest that it is difficult to justify both the defendant's rights to participate and his right not to participate.¹¹³ But, if one considers that the right to participate is a choice which does not have to be exercised, then both can easily be

¹¹⁰ The Court of Appeal stated that ambush defences are 'no longer acceptable' in *R v Gleeson* [2003] EWCA Crim 3357 [35]. See chapter 7 for further discussion.

¹¹¹ See for example, *R v Gleeson* [2003] EWCA Crim 3357; *Malcolm v DPP* [2007] EWHC 363 (Admin); *Musone v R* [2007] EWCA Crim 1237; *Writtle v DPP* [2009] EWHC 236 (Admin); *R (on the application of Santos) v Stratford Magistrates' Court* [2012] EWHC 752 (Admin).

¹¹² *Murray v UK* (1996) 22 EHRR 29.

¹¹³ Duff *et al.* *The Trial on Trial Volume 3* (n 2) 100.

accommodated. If participation were an obligation that could not be waived, like the public trial requirement, it would be hard to recognise it as a 'right'. However, unlike the public trial requirement, a participatory obligation would be unjustifiable on other grounds, such as ensuring fairness and legitimacy, since it is concern for these factors which allows the defendant to choose whether or not to participate.

Duff *et al.* find difficulty in accepting both a defendant's right to be heard and his right to silence. They believe that there is a normative expectation that the defendant should take part, and that the right to be heard is intrinsic to the proper purpose of the trial.¹¹⁴ However, when the trial is viewed as part of the process of calling the state to account for its accusations and request for punishment, and as a forum to test the prosecution's case, or when it is seen in the light of the development and cultural resonance of the adversarial system, there should be no such normative expectation for the defendant to participate. The defendant's participation may be beneficial for accurate fact finding, but having an interest in the outcome of the case cannot justify a disregard for legitimacy, fairness and respect for rights. Within a democratically liberal polity which accords importance to individual dignity and autonomy, and in which the state holds vast resources and criminal convictions come with far-reaching consequences, defendants should not be required or expected to participate in the criminal process. Citizens should be entitled to see that the state properly proves its accusations against them before subjecting them to condemnation and punishment. An important mechanism to ensure this is the presumption of innocence. When the emphasis is on the defendant's participation, the presumption becomes less pronounced. This was the case during the altercation trial in which the court effectively assumed guilt and called upon the defendant to offer an explanation, and it also seems to hold less influence in Duff *et al.*'s normative concept of the trial.

4.5 The presumption of innocence and legal burdens

As set out in chapter 1, the presumption of innocence provides an argument against requiring defendant participation. It also underpins the normative theory of criminal procedure based on calling the state to account. It is enshrined in every international human rights document, including Article 6(2) of the ECHR which provides that, 'Everyone charged

¹¹⁴ Ibid 101.

with a criminal offence shall be presumed innocent until proved guilty according to law.’ In its narrow sense, the presumption, as a reflection of the prosecution’s burden of proof at trial, is widely accepted as a fundamental principle. Its importance was endorsed by Viscount Sankey in *Woolmington v DPP*, when the duty of the prosecution to prove the defendant’s guilt was declared a ‘golden thread’ of the English criminal law.¹¹⁵ Within the wider human rights conception of the presumption of innocence, the state has a duty to recognise the defendant’s legal status of innocence at all stages prior to conviction and after acquittal. Trechsel identifies this as a ‘reputation-related’ aspect of the presumption.¹¹⁶ It should protect the accused from any official insinuation that he is guilty and can be infringed by public figures as well as by judges and courts. European human rights law supports a wider approach to the presumption in so far as Article 6 applies to both the pre-trial and trial stages of the criminal process.¹¹⁷ Pre-trial procedures should therefore be conducted, so far as possible, as if the defendant were innocent. This can act as a restraint on the various compulsory measures that may be taken against suspects in the period before trial,¹¹⁸ including requirements to cooperate with the police and prosecution.

Although the presumption of innocence is internationally recognised as a fundamental right, it is important to identify the reasons behind it. These rationales largely correspond to those supporting the normative account of criminal procedure based on calling the state to account. They also help to present the basis on which the presumption provides a good reason not to penalise those who fail to cooperate. One rationale for the presumption of innocence is its role as a procedural protection against wrongful convictions. At the very least, criminal justice systems must strive to ensure that the public censure of a conviction, and the ensuing sentence, should not be imposed on an innocent defendant.¹¹⁹ Ashworth notes that, ‘It is because the criminal conviction constitutes public censure and leads to liability to punishment, both invasions of what are normally rights, that the presumption of innocence becomes a vital protection.’¹²⁰ Stumer believes that this rationale is of such importance that it cannot, in general, be subjugated to other interests.¹²¹ He identifies three ways in which the presumption of innocence, in its narrow sense, reduces the risk of

¹¹⁵ *Woolmington v DPP* [1935] AC 462 [481].

¹¹⁶ Trechsel (n 38) 164.

¹¹⁷ Article 6 applies to anyone ‘charged’ with a criminal offence. This has been given a substantive rather than formal meaning by the European Court. *Deweert v Belgium* (1980) 2 EHRR 439.

¹¹⁸ A Ashworth ‘Four Threats to the Presumption of Innocence’ (2006) 10 *E and P* 241, 243.

¹¹⁹ *Ibid* 247.

¹²⁰ *Ibid* 247.

¹²¹ Stumer (n 26) chapter 2.

wrongful convictions: it allocates the burden of proof to the party with the greater resources; it acts to counter a tendency in criminal trials to assume guilt of the defendant and to discount the defendant's evidence; and it allocates the risk of non-persuasion to the prosecution.¹²² Penalising those who fail to participate, particularly through inferences that link the failure directly to guilt, weakens the presumption of innocence and puts innocent defendants at risk of wrongful conviction.

Dennis notes that while the presumption has a vital epistemic dimension in requiring the prosecution to prove the truth of its allegation that the defendant committed the offence charged, it also has a non-epistemic dimension. It gives effect to a claim to fair treatment by the state. The claim being that, as a matter of principle, a liberal polity should treat all its citizens as law-abiding until it proves otherwise.¹²³ Similarly, Ashworth believes that there are good reasons for arguing that the presumption of innocence is inherent in any proper conception of the relationship between citizen and state in an 'open and democratic society'.¹²⁴ It is not a statement of probability but a statement of political belief. It allows citizens to challenge the state and hold it to account before it can exert its powers of condemnation and punishment. It thus provides a strong reason against requiring the accused to participate in the criminal process or to assist the state in discharging its burden.

The examples of penalising non-cooperation explored in the following chapters operate so as to weaken the effect of the presumption of innocence. However, it is important to note that, in practice, there is disagreement as to the proper scope and implications of the presumption. Whereas, for the normative theory presented here, it seems implicit in the presumption that the accused has no obligation to assist the state and, so, should not be required to do so, in reality, the presumption is not so absolute.¹²⁵ For example, it is open to debate whether, as an implication of the presumption of innocence, the accused should have no role in assisting the prosecution through the imposition of legal burdens on the defence. In practice, there are many exceptions to the general principle that the defendant need not ordinarily establish an excuse or justification for his conduct. This occurs where there is a defence or an element of an offence which specifies a reverse legal burden, requiring the defendant to prove, or disprove, the defence or element of the offence on a

¹²² Ibid 33.

¹²³ I Dennis 'The Human Rights Act and the Law of Evidence Ten Years On' (2011) 33 *Sydney Law Review* 333, 354.

¹²⁴ Ashworth (n 118) 249.

¹²⁵ *Salabiaku v France* (1988) 13 EHRR 379.

balance of probabilities. In order to do this, it is likely that the defendant will need to actively participate.

Legal burdens must be distinguished from evidential burdens which require the defendant to adduce sufficient evidence to raise an issue, but do not require the defendant to assume a risk of conviction, as the prosecution will carry the legal burden of disproving the issue. If the evidential burden is not discharged, the fact finder need not consider that issue. The mechanism of an evidential burden has been described as 'a convenient and efficient method of narrowing the matters in issue in a criminal trial.'¹²⁶ The evidential burden is, therefore, simply a burden of adducing sufficient evidence to support a case. It is not a burden of proof.¹²⁷ However, in order to satisfy an evidential burden, the defendant may have to testify. In *Lambert*,¹²⁸ Lord Hope suggested that discharging the evidential burden would require evidence of a degree little short of that necessary to discharge the legal burden. He felt that, 'an evidential burden is not to be thought of as a burden which is illusory. What the accused must do is put evidence before the court which, if believed, could be taken by a reasonable jury to support his defence.'¹²⁹ He went on to state that, 'the practical effect of imposing an evidential burden only on the accused and not a persuasive burden is likely to be minimal'.¹³⁰

However, an evidential burden does not necessarily require the accused to participate directly. For example, it may be discharged by the testimony of other witnesses or through expert evidence, or by pointing to some evidence already adduced by the prosecution. There is no universally accepted formula to describe how much evidence is needed to satisfy the burden, and much will depend on the nature of the issue to which the burden relates.¹³¹ There exists an important distinction between evidential and legal burdens in terms of the defendant's position as a participant since, in theory at least, the burden of adducing evidence places less pressure on the defendant to participate. It is sufficient to raise an issue which the prosecution must then disprove beyond reasonable doubt. As Ashworth points out, discharging the evidential burden does place an obligation on the defendant, and, for that reason, it requires justification and should not be casually imposed. But the burden is

¹²⁶ Stumer (n 26) 16.

¹²⁷ *Jayasena v R* [1970] AC 618 [624].

¹²⁸ [2002] 2 AC 545.

¹²⁹ *Ibid* [588].

¹³⁰ *Ibid* [589].

¹³¹ Stumer (n 26) 17.

much lighter than the onus of proving an issue on the balance of probabilities, and hence is less objectionable.¹³²

Reverse legal, or persuasive, burdens require proof of innocence and can be a determinative factor in the outcome of the case. With the exception of the common law defence of insanity, all reverse legal burdens are either expressed or implied in statutes. They are highly controversial as they *prima facie* violate the presumption of innocence. Despite this, in 1996, Ashworth and Blake determined that no fewer than 40 per cent of offences triable in the Crown Court appear to impose a legal burden on the defence.¹³³ In summary trials, s.101 of the MCA 1980 places the legal burden of proof on the defendant when he relies on any statutory exception, exemption, proviso, excuse or qualification, and in *Edwards*,¹³⁴ the Court of Appeal held that this is a restatement of the common law position which applies to the interpretation of indictable offences. However, where a linguistic construction does not indicate clearly on whom the burden of proof should lie, the court might look to other considerations to determine the intention of Parliament, such as the mischief at which the provision was aimed, and practical considerations such as the ease or difficulty for the respective parties of discharging the burden.¹³⁵

The European Court of Human Rights and the domestic courts have held reverse legal burdens to be a justifiable exception to Article 6(2). In what Ashworth and Redmayne have described as 'one of the loosest and least convincing judgments of the Strasbourg Court',¹³⁶ it was held that Article 6 is not absolute and that legal burdens on the defence can be upheld where they are proportionate to a legitimate aim.¹³⁷ As explained in chapter 2, Article 6 is what Ashworth and Redmayne refer to as a 'strong right' because it is not qualified in the way that some other Convention rights are.¹³⁸ As such, it should not be so readily interfered with, and particularly not on the same basis as qualified rights. Nevertheless, the domestic courts have also focused on proportionality to a legitimate aim as a means of determining the legitimacy of legal burdens on the defence. Dennis points out that this has led to an uncertain and inconsistent approach to the application of criteria to determine compatibility

¹³² Ashworth (n 118) 269.

¹³³ A Ashworth and M Blake 'The Presumption of Innocence in English Criminal Law' [1996] *Crim LR* 306.

¹³⁴ [1975] QB 27. Approved by the House of Lords in *R v Hunt* [1987] AC 352.

¹³⁵ *R v Hunt* [1987] AC 352.

¹³⁶ Ashworth and Redmayne (29) 34.

¹³⁷ *Salabiaku v France* (1988) 13 EHRR 379.

¹³⁸ Ashworth and Redmayne (29) 38.

with Article 6.¹³⁹ He notes six relevant factors judges have used in determining the justifiability of reverse onuses. These are: judicial deference and the weight the courts should give to the decisions of the legislature; classification of offence and whether the offence is 'truly criminal' or 'regulatory'; construction of criminal liability and whether the matter to be proven is an essential element of the offence or an exculpatory defence; the maximum penalty for the offence; ease of proof and peculiar knowledge; and the significance of the presumption of innocence.¹⁴⁰ Each one of these factors is problematic, and do not offer a consistent approach.

Although the issue seems to come down to one of proportionality, the inconsistency and lack of clarity in determining the operation of the presumption of innocence is concerning. Notwithstanding, it remains the approach of the courts. In *Chargot*,¹⁴¹ a case concerning the death of an employee, the House of Lords followed the proportionality path. It was held that sections 2 and 3 of the Health and Safety at Work etc. Act 1974 impose a duty on employers to ensure the health and safety at work of all employees and persons employed by them, and that a legal burden on them to prove that it was not 'reasonably practicable' to do so was not disproportionate to the aim of creating an environment free of material risks to health and safety. As a result, where employers fail to prove their innocence, simply on the basis that an accident has occurred, they will be liable to pay an unlimited fine and face up to two years imprisonment. Imprisonment in such cases is a recent punitive measure imposed by Parliament which did not seem to affect the Court's conclusions. It has been noted that, 'What is punished is no longer negligent conduct in the running of your business, but the fact of being an employer or director in an organisation where an industrial accident has happened.'¹⁴²

Duff offers a different account of the justifiability of reverse legal burdens. He identifies three possible responses to them. The first is to reject them as inconsistent with a substantive presumption of innocence; the second is to admit that they are inconsistent with the presumption, but argue that at least some of them constitute justified infringements (this is the position of the European and domestic courts); and the third is to

¹³⁹ I Dennis 'Reverse Onuses and the Presumption of Innocence: In Search of Principle' [2005] *Crim LR* 901.

¹⁴⁰ *Ibid* 908-917.

¹⁴¹ [2009] 1 WLR 1.

¹⁴² JR Spencer 'Criminal Liability for Accidental Death: Back to the Middle Ages?' (2009) 68 *Cambridge Law Journal* 263, 265.

argue that they are sometimes consistent with the presumption by identifying what counts as a reasonable doubt to be raised by the defendant in order to avoid conviction.¹⁴³ In taking this third approach, Duff believes that presumptions which the defendant must disprove are specifications of what is to count as proof beyond reasonable doubt and a reconstruction of the meaning of reasonable doubt is justified because it stems from citizens' responsibilities to account for themselves. For instance, added responsibility can be imposed where there is a special risk, such as the responsibility that a factory owner has in ensuring the health and safety of his employees who operate machinery.¹⁴⁴ This is similar to the 'classification of offence' and 'ease of proof' factors discussed by Dennis, but instead of accepting that the burden violates the presumption of innocence, Duff frames it as a way of working within the presumption by extending the meaning of reasonable doubt in such cases.

Stumer has also explored the relationship between the presumption of innocence and reverse burdens. He believes that the dual rationale of the presumption of innocence in its narrow form, as an expression of the prosecution's burden, is protecting the innocent from wrongful conviction and promoting the rule of law.¹⁴⁵ Only when the first rationale is not called into play or is called into play in an attenuated sense should the court consider limiting the presumption of innocence through the use of reverse burdens. The rationale of protecting the innocent may be attenuated either because there is a low risk of wrongful conviction, or because the consequences of conviction are minimal.¹⁴⁶ In cases where the rationale of protecting the innocent is attenuated, the courts can take account of the community interest in obtaining convictions by applying a proportionality analysis within which the courts must give weight to the continually applicable rationale of promoting the rule of law. Stumer believes the proportionality enquiry should focus upon 'necessity' of a reverse burden, and not upon its 'reasonableness' or 'balance'.¹⁴⁷ The necessity test asks whether the less restrictive measure of an evidential burden would suffice to meet the problems of proof faced by the prosecution.¹⁴⁸ Because discharging the evidential burden in practice often requires evidence of a degree little short of that necessary to discharge the legal burden, the necessity test would result in many less reverse burdens than presently imposed on the defendant. However, this approach still applies a proportionality test and

¹⁴³ A Duff *Answering for Crime* (Hart: Oxford, 2007) 238.

¹⁴⁴ Ibid 242-243.

¹⁴⁵ Stumer (n 26) chapter 2.

¹⁴⁶ Ibid 27.

¹⁴⁷ Ibid chapter 5.

¹⁴⁸ Ibid 140.

prevents the state from having to account for its accusations against the accused in certain circumstances.

Within a conception of criminal procedure based on calling the state to account, reverse legal burdens should be rejected as inconsistent with the presumption of innocence. This was the approach taken by the Criminal Law Revision Committee in 1972 who recommended that the defence should never bear more than an evidential burden.¹⁴⁹ It is also consistent with Roberts' suggestion that familiarity with the presumption of innocence may breed contempt or at least complacency.¹⁵⁰ Roberts concludes that the current legislative practices of placing the legal burden on the defendant are unjustifiable, and that the 'legal rules relating to the burden and standard of proof in criminal trials promote individual freedom and are bulwarks against oppression. They are not to be dispensed with, either directly or by more circuitous means, whenever they happen to inconvenience prosecutors or police officers.'¹⁵¹ Giving the presumption of innocence the weight it warrants, as such a fundamental aspect of criminal justice, strengthens the assertion that the defendant should not be expected to participate. Violating the presumption and limiting its operation, on the other hand, shifts English criminal procedure further away from adversarial ideologies and rights based accounts of the criminal process, and helps open the door to practices which require the participation of the defendant.

4.6 Conclusion

This chapter has set out Duff *et al.*'s communicative theory of the criminal trial and, in so doing, has further developed the normative theory of the criminal process in which the state should be called to account for its accusations and request for condemnation and punishment of the accused. It has also examined the development of the adversarial system which provided many of the legal norms which underpin this theory, and which create an important link between the existence of workable rights and the accused's ability to choose whether to participate. It has set out the current position of the defendant in terms of his participatory rights and obligations, and identified an increasing emphasis on defence

¹⁴⁹ Criminal Law Revision Committee *Eleventh Report, Evidence (General)*, Cmnd 4991 (HMSO: London, 1972).

¹⁵⁰ P Roberts 'Taking the Burden of Proof Seriously' [1995] *Crim LR* 783, 785.

¹⁵¹ *Ibid* 796.

participation. Lastly, it has discussed the importance of the presumption of innocence in forming an argument against requiring cooperation. It has been argued that, in line with the normative account of the criminal process, the defendant should not be required, or even expected, to participate, regardless of how useful this may be in advancing the aims of the criminal process. Placing the emphasis on the accused's cooperation, and providing incentives and penalties to secure it, is part of the participatory model of criminal procedure which has developed. It has resulted from greater concern for accurate fact finding, something more akin to inquisitorial systems, as well as a desire to ensure efficiency in criminal justice. This has occurred at the expense of England's adversarial history and some of the important legal norms it entails. The following chapters will examine the ways in which the participatory model has developed through specific examples of how defendants can now be penalised for their non-cooperation.

The Privilege Against Self-Incrimination

5.1 Introduction

The previous three chapters examined the aims and values of the criminal process, identified several models of criminal procedure, and explored the role of the defendant as a participant in the criminal process. It has been established that whilst the emergence of adversarialism in England led to many procedural norms which grant the accused the right to choose whether or not to participate, current legislative and judicial trends are rather concerned with defence cooperation. As a result, a participatory model of procedure has emerged. This move emphasises efficiency and accurate fact finding at the expense of fairness, legitimacy and respect for defence rights. Whilst the previous three chapters provided a theoretical framework, the remaining chapters will assess specific examples of the ways in which defendants are now penalised for their non-cooperation. The first example is through the limitations placed on the privilege against self-incrimination.

The privilege against self-incrimination is an important aspect of criminal procedure and is widely regarded as fundamental to human liberty. The European Court of Human Rights has described it as one of the 'generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6.'¹ Subject to interpretation of its scope, the privilege means that a suspect cannot be required to provide the authorities with information that might be used against him in a criminal trial.² As a principle under which the state should not place a suspect under a duty to cooperate with a prosecution which is being brought against him,³ limits placed on the privilege often lead to requirements to cooperate. Sanctions imposed for breach of such requirements constitute a penalty for non-cooperation. This forms one of the most striking examples of penalising those who do not cooperate in the criminal process. The fact that the privilege applies during the investigative

¹ *Murray v UK* (1996) 22 EHRR 29 [45].

² M Redmayne 'Rethinking the Privilege Against Self-Incrimination' (2007) 7 *Oxford Journal of Legal Studies* 209, 209.

³ A Ashworth and M Redmayne *The Criminal Process* 4th edn (Oxford University Press: Oxford, 2010) 152.

stage, before the prosecution process (from charge to verdict) has begun, makes the prospect of being penalised for non-cooperation even more apparent.

The privilege against self-incrimination is often considered together with the right to silence, since both are concerned with the legal significance of silence. However, the privilege can extend to potentially incriminating information beyond speech. For instance, it may apply to documents, material objects and bodily samples. In practice, the scope of the privilege has been restricted in such a way that it does not apply to material which has an existence independent of the will of the accused. Nevertheless, it remains a broader concept than the right to silence and can extend to a refusal to participate in administrative investigations where that information may be used in future criminal proceedings. The sanctions for non-cooperation by way of exercising the right to remain silent and the privilege against self-incrimination also differ. Whereas silence can lead to what may be called the 'indirect' penalty of adverse inferences, reliance on the privilege can lead to the 'direct' penalty of criminal prosecution for non-cooperation. The latter therefore provides a more substantive example of penalising the accused for not cooperating in the criminal process.

This area of procedural law is complicated. In order to understand its current position in the criminal process, the effect it has on the values and style of criminal procedure, and the way in which defendants are penalised for their non-cooperation, it is important to try and make some sense of it. This chapter will begin with a brief discussion of the origins of the privilege before critically examining the justifications often put forth for it. It will then consider the current scope of the privilege. This has not been clearly defined by the authorities and has been increasingly restricted. The lack of a consistent scope for the privilege, and the willingness to limit it through penalising non-cooperation, may be attributable to the lack of a coherent rationale for it, in particular a failure to appreciate its role in reinforcing the relationship between the individual and the state. As a result, developments in this area are shifting English criminal procedure further away from concerns for defence rights and fairness.

5.2 Origins of the modern privilege against self-incrimination

Two main theories of the origins of the privilege against self-incrimination have emerged from the literature. Under the first theory the privilege became part of the common law criminal procedure as a result of the abolition of the courts of Star Chamber and High Commission in 1641.⁴ However, more contemporary commentators believe that the privilege became an enforceable and recognisable right in the late eighteenth century, as a result of the emerging adversary system.⁵ The maxim *nemo tenetur prodere seipsum*, loosely translated to mean ‘no one is obliged to accuse himself’, is ancient; it has been traced to the medieval Roman and Canon laws. It served as a guarantee that people would not become the source of their own prosecution.⁶ Having been associated with the modern common law privilege, this maxim has become a source of confusion in deciphering the privilege’s origins.⁷ *Nemo tenetur prodere seipsum* influenced practices in the ecclesiastical courts and was later used by Puritans to resist being punished for failing to cooperate with the *ex officio* oath procedure. This procedure required defendants in the ecclesiastical courts to take an oath to answer all questions put to them on pain of punishment. Commentators subscribing to the first theory of the privilege’s origins believe that it became internalised in criminal procedure with the abolition of the *ex officio* oath procedure along with the courts of Star Chamber and High Commission in 1641. However, the modern privilege, as we understand it today, seems to have derived instead from the rise of adversarialism and as an extension of the privilege provided to witnesses.

The witness privilege meant that witnesses were not required to answer questions that might later incriminate them or even damage their reputation. It did not apply to parties to the proceedings, did not allow for selective answering, and did not carry any exclusionary remedy for its breach until the mid-nineteenth century.⁸ It was engaged primarily from the second half of the eighteenth century to limit the scope of cross-examination of prosecution witnesses at a time when cross-examination was one of few tools for defence counsel.⁹

⁴ L Levy *Origins of the Fifth Amendment: The Right Against Self-Incrimination* (Oxford University Press: New York, 1968) 267.

⁵ JH Langbein ‘The Historic Origins of the Privilege Against Self-Incrimination at Common Law’ (1993) 92 *Michigan Law Review* 1047.

⁶ See RH Helmholz ‘The Privilege and the *Ius Commune*: The Middle Ages to the Seventeenth Century’ in RH Helmholz, CM Gray, JH Langbein, E Moglen, HE Smith and AW Alschuler (eds) *The Privilege Against Self-Incrimination: Its Origins and Development* (University of Chicago Press: Chicago, 1997).

⁷ Langbein ‘The Historic Origins of the Privilege Against Self-Incrimination at Common Law’ (n 5) 1072.

⁸ HE Smith ‘The Modern Privilege: Its Nineteenth Century Origins’ in RH Helmholz, CM Gray, JH Langbein, E Moglen, HE Smith and AW Alschuler (eds) *The Privilege Against Self-Incrimination: Its Origins and Development* (University of Chicago Press: Chicago, 1997) 146.

⁹ JH Langbein *The Origins of the Adversary Criminal Trial* (Oxford University Press: Oxford, 2003) 283.

Smith, in particular, attributes the origins of the defendant's privilege in the mid-nineteenth century to an extension of the witness privilege.¹⁰ He recognises that this would not have been possible without the significant procedural changes that were made during the establishment of the adversarial system from the seventeenth century onwards, particularly the use of defence counsel from the later eighteenth century.¹¹ Once defence counsel were able to address the jury and speak to issues of both law and fact, and once the presumption of innocence had been crystallised as a workable principle, the defendant was able to effectively claim a privilege against self-incrimination at trial. It was at this point that the 'altercation', or 'accused speaks', trial gave way to the adversarial trial.

Prior to the emergence of the adversary system, as discussed in the previous chapter, any privilege that may have existed for the defendant would have had little practical effect. Langbein believes that the privilege against self-incrimination entered common law procedure as part of the profound reordering of the trial, under the influence of defence counsel, into an opportunity for the defendant's lawyer to test the prosecution case.¹² Smith submits that the Criminal Evidence Act of 1898 effectively codified the privilege against self-incrimination by providing that a person charged with an offence should not be called as a witness except upon his own application.¹³ This account of the origins of the modern privilege holds more ground than the first, as it was not until this time that defendants were able to form a defence without actively participating. Furthermore, it was not until the late 1780s that sources show the privilege being claimed by, or on behalf of, defendants in ordinary criminal trials.¹⁴ However, it is important to note that the defendant could not testify on oath, and thus was not a competent witness, until the 1898 Act. Prior to this, he could give an unsworn statement. Although there had historically been a general mistrust in the evidence of the parties to the case,¹⁵ one reason why the defendant was not a competent witness was to protect him. There was concern that it would put pressure on the accused to give evidence, and fear that some defendants, coerced into the witness box,

¹⁰ Smith (n 8).

¹¹ Ibid 163.

¹² Langbein 'The Historic Origins of the Privilege Against Self-Incrimination at Common Law' (n 5) 1048.

¹³ Smith (n 8) 179. Criminal Evidence Act 1898, s.1(1). This is subject to s.1(2) which provides that a defendant who does give evidence can be asked in cross-examination any question notwithstanding that it would tend to incriminate him as to any offence with which he is charged in the proceedings.

¹⁴ Langbein *The Origins of the Adversary Criminal Trial* (n 9) 280.

¹⁵ I Dennis *The Law of Evidence* 4th edn (Sweet & Maxwell: London, 2010) 543. An extensive list of persons disqualified from giving evidence by reason of presumed untrustworthiness developed in the early common law. These were gradually dismantled by legislation throughout the nineteenth century.

would be susceptible to tricky cross-examination from prosecution counsel, which would lead to false self-incrimination.¹⁶ To address this, the 1898 Act originally included a section (s.1(b)) which stated that the failure of an accused person to give evidence could not be made the subject of any comment by the prosecution.

This brief overview of the origins of the privilege against self-incrimination has focused on a very narrow area of developments which occurred over the course of hundreds of years. However, it establishes a link between the privilege and adversarialism. As suggested in chapter 4, the ability of the defendant to exercise a right not to participate was dependent upon having someone to speak on his behalf. The safeguards and procedural norms which developed in the adversarial system made this possible. A departure from these norms signals a serious shift away from a model of criminal procedure based on adversarialism and testing the prosecution case. What follows examines the extent to which the privilege against self-incrimination has been undermined as a result of penalising defendant non-cooperation, and the implications this has for criminal procedure. However, in order to critically assess the current scope of the privilege, it is important to seek a rationale for it.

5.3 Justifying the privilege against self-incrimination

Despite being widely recognised as a fundamental right, the privilege against self-incrimination remains controversial. It is difficult to explain coherently why the state should not compel us to incriminate ourselves, and the privilege seems to be as widely criticised as it is defended. Jeremy Bentham, one of the privilege's most prominent critics, felt that it was a product of irrational prejudice, for which no convincing justification could be advanced.¹⁷ He believed that an accurate verdict was likely to result from a consideration of all the relevant evidence including self-incriminatory evidence. However, Bentham's views were expressed during the early nineteenth century, at a time when English criminal procedure was settling into the still developing adversarial model and adjusting to the rights that came with it. They do not necessarily reflect or translate into the modern understanding of the privilege or the problems surrounding it. Also, Bentham gave little consideration to the

¹⁶ Ibid 540.

¹⁷ J Bentham *Rationale of Judicial Evidence* (Hunt and Clarke: London, 1827).

advantages which might accrue from an adversarial scheme of justice.¹⁸ He dismissed assertions that the privilege ensures fairness as an ‘old woman’s’ argument, and dismissed what he called the ‘fox hunters argument’ under which the fox hunter regards criminals as sporting prey that must be given a run for their money.¹⁹

Bentham’s views of the privilege against self-incrimination were part of a broader argument aimed at liberating evidence.²⁰ The privilege has the potential to impede the discovery and gathering of reliable evidence. This impediment may interfere with the aims of the criminal process, particularly its quest for accurate fact finding. If the privilege is not qualified, then the state may be denied access to much relevant and reliable evidence. However, as a defence right, the privilege acts as a necessary constraint on the aims of the criminal process for the sake of fairness and legitimacy. It was explained in chapter 2 that the criminal process is legitimised not only through accurate verdicts, but also through respect for individual rights, due process and fair procedures. In the absence of these latter considerations, even a factually accurate verdict should not be accepted as legitimate. The way in which the process aims are achieved is fundamental to its successful operation and, so, we should accept that a loss of evidence may be a necessary consequence of exercising the privilege.

The privilege against self-incrimination might also be criticised for impacting the efficiency of the investigation of crimes. It may be argued that, because the privilege can deprive the court of reliable evidence of guilt, it is an unjustified obstruction to the efficient investigation and prosecution of criminals.²¹ This concern lends itself to a procedural model based on ‘crime control’ as opposed to ‘due process’.²² Eradicating the privilege would be a positive step towards attaining a procedural model based on efficiency and managerialism, as discussed in chapter 3. However, whilst efficiency has become a major concern within criminal procedure, the privilege is not generally restricted on this basis, and any attempt to do so can be opposed on the same grounds as the claim that the privilege acts as a bar to accurate fact finding; legitimacy of the process must take precedence over efficiency concerns.

¹⁸ A Lewis ‘Bentham’s View of the Right to Silence’ (1990) 43 *Current Legal Problems* 135, 145.

¹⁹ *Ibid* 148.

²⁰ *Ibid* 151.

²¹ I Dennis ‘Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege Against Self-Incrimination’ (1995) 54 *Cambridge Law Journal* 342, 343.

²² See H Packer *The Limits of the Criminal Sanction* (Stanford University Press: Stanford, 1968).

Despite criticisms of the privilege, compelling suspects to provide evidence against themselves is generally considered wrong. Yet, it has been difficult for courts and commentators to articulate exactly why with any degree of consistency. In *Saunders v UK*,²³ the European Court of Human Rights attempted to rationalise the privilege:

The rationale lies, *inter alia*, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence.²⁴

This important passage highlights a number of possible justifications for the privilege. Not least, it suggests that it can protect the innocent and uphold the presumption of innocence. These process values are considered below along with the substantive value the privilege may have as a means of preventing cruelty and protecting privacy. The way in which the privilege can reinforce and regulate the relationship between the citizen and the state is then considered. The nature of this relationship is also an important element of the normative theory of calling the state to account. Gerstein suggests that any defence of the privilege against self-incrimination should provide a solid basis for its core as we know it, while offering criteria for a sound and rationalised scope for its applicability.²⁵ As will become apparent, such a defence is difficult, if not impossible, to decipher. However, within a liberal democracy and on the basis of a normative theory of criminal procedure in which the state is called to account, the privilege holds significant value.

5.3.1 Process values

The two process values explored here link the privilege to certain due process concerns. This section explores whether the presumption of innocence and the avoidance of miscarriages of justice can justify the privilege against self-incrimination.

The presumption of innocence

²³ (1997) 23 EHRR 313.

²⁴ *Ibid* [68].

²⁵ R Gerstein 'Privacy and Self-Incrimination' (1970) 80 *Ethics* 87, 87.

The link between the privilege against self-incrimination and the presumption of innocence was expressly stated in *Saunders*. The interest in not being obliged to incriminate oneself has links to the values attached to the freedom and dignity of the individual, and is said to be embodied in the fundamental procedural principle that it is for the prosecution to prove the accused's guilt, and not for the accused to prove his innocence.²⁶ If the accused is presumed to be innocent, it is wrong, in principle, to compel him to be a source of incriminating information. He must be given the privilege of declining to cooperate in procedures designed to establish his guilt.²⁷ However, the strength of the link between the privilege and the presumption of innocence depends on one's interpretation of the presumption. For instance, if it is interpreted broadly as requiring the state to make its case without any help from the accused, then the privilege can uphold the presumption by ensuring that the accused is not required to assist in the case against himself. On the other hand, if the presumption is understood only in a very narrow sense, in terms of the prosecution's burden at trial to prove its case beyond reasonable doubt, then a no assistance interpretation of the privilege lacks a connection to the presumption of innocence.²⁸ The standard of proof remains the same, although it may become easier for the prosecution to reach that standard.

Redmayne notes another way to link the presumption and the privilege. When the presumption is understood as a rule about how the state should treat citizens, it may be connected to the privilege. The state should treat citizens as innocent unless it has good reason to think otherwise and, therefore, one should not be expected to respond to accusations, unless they are backed up with evidence.²⁹ This argument is derived from Greenawalt's account of the right to silence which recognises a principle under which we should not be expected to respond to accusations unless they are supported with evidence.³⁰ However, from the perspective of a criminal process based on calling the state to account, it should not even be necessary for the citizen to respond when the accusations against him are backed up with evidence. Until guilt is proven, the state should treat citizens as if they had nothing to account for, since it is the state that must justify the accusations that it has made. This is consistent with a broad definition of the presumption of innocence,

²⁶ Dennis 'Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege Against Self-Incrimination' (n 21) 353.

²⁷ Ibid 354.

²⁸ Redmayne (n 2) 218.

²⁹ Ibid 219.

³⁰ K Greenawalt 'Silence as a Moral and Constitutional Right' (1981) 23 *William & Mary Law Review* 15.

as set out in chapter 4, which operates at trial by requiring the prosecution to prove the defendant's guilt, and operates beyond the trial as a direction to officials to treat the suspect as if he were innocent at all stages, until guilt is proven. Normatively, the accused should not have to play an active role in the state's obligation to account for its accusations. A broad notion of the privilege against self-incrimination reinforces this position. Limiting the scope of the privilege against self-incrimination, therefore, operates so as to weaken the effect of the presumption of innocence.

Dennis finds the justification of the privilege based on the presumption of innocence to be over-inclusive.³¹ It has the potential to account for all manner of evidence that the suspect may be in a position to disclose, including confessions, fingerprints, breath or blood samples, documents and other real evidence. In practice, though, the scope of the privilege is not so encompassing. For example, it does not ordinarily apply to the collection of fingerprints, breath or blood samples. Even in the US, where the privilege has express constitutional force, it has been limited to testimonial evidence.³² This evidence must result from compulsion and must lead to self-incrimination.³³ Dennis's criticism of the presumption of innocence as a justification for the privilege is dependent on a restrictive scope of the privilege, as it currently exists. If we look at it from a normative perspective, there is no reason why the presumption of innocence should not prevent the privilege from allowing suspects to withhold any evidence that may incriminate them.³⁴ Therefore, from a normative perspective, the presumption of innocence offers a sound justification for the privilege and an argument against penalising those who rely on it. Given the reluctance to interpret the privilege broadly, however, the presumption of innocence justification will remain over-inclusive in practice.

Protecting the innocent

The *Saunders* Court stated that the privilege against self-incrimination helps prevent miscarriages of justice. It is unlikely that the privilege will assist in securing accurate convictions, as it acts to prevent the gathering of potentially relevant information, but it may have value in its ability to secure the acquittal of innocent suspects through the prevention

³¹ Dennis 'Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege Against Self-Incrimination' (n 21) 355.

³² See for example, *Schmerber v California*, 384 U.S. 757 (1966), where the use of a blood sample taken from the defendant against his will did not violate the Fifth Amendment.

³³ *Fisher v United States*, 425 U.S. 391 (1976).

³⁴ The normative response to certain policy arguments which have been advanced in order to limit the privilege are addressed below in relation to its scope.

of disclosure of false information. This is most relevant in the context of police questioning, where the privilege can act as an inhibitor on over-zealous police officers. A requirement to answer questions or provide other evidence can put undue pressure on suspects, particularly vulnerable ones. This concern can often be addressed through other measures, such as those found in the Police and Criminal Evidence Act 1984 (PACE), including the recording of interviews and the provision of legal advice. Furthermore, s.76 of PACE provides for the exclusion of unreliable confessions, and s.78 allows judges to exclude prosecution evidence that would have an adverse effect on the fairness of the proceedings. Dennis sees the value in the use of these other available safeguards, since they do not carry the costs associated with the privilege (i.e. loss of reliable evidence).³⁵ Adopting alternative safeguards may have the same effect in the individual cases in which they can be relied on, but they do not render the privilege against self-incrimination as a potential means of protection redundant. The privilege has the benefit of offering a blanket protection, and its application does not rely on the discretion of any individual.

Dennis believes that an account of the privilege based on its protection of the innocent is plainly under-inclusive. He suggests that the privilege is probably ineffective in preventing compelled false incrimination from innocent suspects in the peculiar environment of police interrogation, and that such limited protection as it may offer is unnecessary where the custodial regime is closely regulated by legislation and the willingness of courts to use exclusionary principles in the interest of securing legitimate verdicts.³⁶ He concludes that the most likely beneficiaries of the privilege under this theory are the hardened, but innocent suspects who currently take advantage of the right to silence and who are at risk from increased pressure if it is removed.³⁷ Likewise, Dolinko believes that the instances in which the privilege prevents conviction of the innocent are likely to constitute so small a proportion of all its uses that it is difficult to take seriously the notion that the privilege is justified as a safeguard for the innocent.³⁸ However, some commentators see real value in the privilege as a means of protecting the innocent. For instance, Seidmann and Stein claim that allowing suspects to remain silent and not incriminate themselves discourages guilty

³⁵ Dennis 'Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege Against Self-Incrimination' (n 21) 344.

³⁶ Ibid 353.

³⁷ Ibid 350.

³⁸ D Dolinko 'Is There a Rationale for the Privilege Against Self-Incrimination?' (1986) 33 *UCLA Law Review* 1063, 1076.

defendants from giving false accounts.³⁹ With fewer false accounts being given, the claims of innocent suspects will be taken more seriously. This is linked to the specific application of the privilege to remaining silent. The effect of silence during questioning, as well as the pressures put on suspects to speak, is a prominent issue in debates on the right to silence. This is addressed in the following chapter.

Schulhofer also proposes that it is possible to defend the privilege on the grounds that it offers some protection to the innocent, particularly during police interrogation.⁴⁰ He argues that it is difficult to know when an innocent suspect has actually been protected by the privilege, and so the absence of obvious examples in which the privilege has protected the innocent, hardly shows that real cases involving harm to innocent suspects would not occur if the privilege were abolished.⁴¹ Schulhofer does not claim that the privilege is essential for most innocent defendants, but that acquitting the innocent defendants whom it may help is more important than convicting an equal or larger number of guilty defendants.⁴² Again, these arguments are largely based on the application of the right to silence during police questioning; it remains the case that the broader conception of the privilege as a means of protecting the innocent is a weak justification.

5.3.2 Substantive values

The substantive values of the privilege against self-incrimination are concerned with the instrumental protection of certain interests of the suspect. This section examines whether the privilege can be defended on the grounds that it protects the accused's privacy and prevents him from facing a cruel choice imposed on him by the state.

Preventing cruel choices

The privilege against self-incrimination may be rationalised on the basis that it prevents suspects and defendants from facing the 'cruel trilemma' of having to choose between being penalised for non-cooperation, providing the authorities with incriminating evidence, or lying and risking prosecution for perjury. Redmayne has referred to this as the most intuitive

³⁹ D Seidmann and A Stein, 'The Right To Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege' (2001) 114 *Harvard Law Review* 430.

⁴⁰ S Schulhofer 'Some Kind Words for the Privilege Against Self-Incrimination' (1991) 26 *Valparaiso University Law Review* 311, 328.

⁴¹ *Ibid* 329.

⁴² *Ibid*.

defence for the privilege.⁴³ However, not all commentators agree. Bentham was a critic of this rationale. He labelled those who object to such harshness as 'old women'.⁴⁴ One problem with defending this justification is that it is only the guilty who suffer from the trilemma. It is, thus, inconsistent with the presumption of innocence because the underlying premise assumes that the suspect is guilty and, therefore, the privilege operates to protect the guilty, not the innocent. It may seem hard to comprehend the appearance of the state prioritising the interests of guilty suspects over those of their victims.⁴⁵ However, one must recall that, despite the 'balancing' rhetoric and the increasing recognition of the interests of victims discussed in chapter 2, the criminal process is about the relationship between citizen and state, and the privilege is concerned with what the state can legitimately require of suspects, irrespective of their guilt. Nevertheless, the limited applicability of this justification, and its incompatibility with a broad interpretation of the presumption of innocence, makes it difficult to advance.

It may be argued that the cruel choices justification is applicable to all accused persons, because innocent people can face a similar trilemma. For instance, innocent suspects in road traffic cases who are required to disclose the driver of their vehicle at a particular place or time may have a difficult choice in deciding whether to face sanctions for non-cooperation or incriminate a close friend or family member. Redmayne finds this duty to 'other-incriminate' disturbing, as it does not recognise affective bonds and may undermine a person's feelings of personal integrity.⁴⁶ It is not just an issue in regard to close relationships, but may also pose a difficult situation for a witness to a crime they believe is justified.

Proponents of the cruelty justification may also assert that it does more than face the accused with a difficult choice; it requires him to inflict harm on himself by increasing the likelihood of conviction and punishment, as well as subjection to community condemnation and ridicule. However, Dolinko explains that conviction, punishment and condemnation are often the desired end results of the criminal justice system and, so, should not be labelled 'cruel'.⁴⁷ So long as we accept that the general practice of punishment is not inherently

⁴³ Redmayne (n 2) 221.

⁴⁴ Lewis (n 18) 148.

⁴⁵ Dennis submits that from the victim's perspective there is a double wrong if the state refuses to vindicate the victim by placing evidential pressure on the offender to admit the offence. Dennis 'Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege Against Self-Incrimination' (n 21) 359.

⁴⁶ Redmayne (n 2) 222.

⁴⁷ Dolinko (n 38) 1103.

cruel, we are deprived of one possible basis for thinking it cruel to compel someone to help bring punishment on himself.⁴⁸ From a normative perspective, what matters is that the state has accounted for its accusations before punishment is imposed. But the cruelty does not necessarily lie in the consequence; it may lie in the circumstances that lead the suspect to face that consequence. Self-incrimination (or other-incrimination) might be considered cruel because it forces people to make an exceptionally difficult choice. It is contrary to basic human instinct of self-preservation that few of us could conform to.⁴⁹ For this reason, it is wrong to punish people for failing to disclose self-incriminatory information when almost all of us would do the same. Dolinko gets around this by noting that we punish people for other forms of 'self-preservation', such as destroying evidence or committing perjury.⁵⁰ It is interesting to note, however, that this latter type of 'self-preservation' requires the active involvement of the suspect, whereas refusing to incriminate oneself (particularly in the face of direct questioning) is ordinarily a passive activity for which punishment for non-cooperation may seem particularly harsh. Nevertheless, the guilty suspect puts himself in that position by committing the crime. Dolinko finds no cruelty or hypocrisy in this.⁵¹

The prevention of cruelty does not offer a solid rationale for the privilege. The purpose of compelling self-incrimination is not in itself to inflict cruelty onto the suspect, but rather to further the aims of the criminal process, and it is difficult to maintain that the trilemma which the accused faces is actually 'cruel'.

Protection of privacy

The witness privilege of the eighteenth and nineteenth century could be used as a safeguard of privacy, saving the witness from answering questions that may harm his reputation.⁵² The modern privilege afforded to suspects and defendants has also been justified on privacy grounds. Galligan claims that, in principle, there is no difference between requiring the suspect to provide incriminating information through speech and plugging him into a mind-reading machine.⁵³ Beyond questioning, physical searches and the requirement to provide real evidence may also impede privacy. However, whereas the privilege is said to concern the use made of the evidence obtained rather than the nature of the disclosure, issues of

⁴⁸ Ibid 1104.

⁴⁹ Ibid 1095.

⁵⁰ Ibid 1106.

⁵¹ Ibid 1100.

⁵² Smith (n 8) 158.

⁵³ DJ Galligan 'The Right to Silence Reconsidered' (1988) 41 *Current Legal Problems* 69, 89.

privacy will inevitably arise from the nature of the disclosure.⁵⁴ As a result, the privacy justification runs into difficulties.

There are two other immediate problems with a justification for the privilege based on privacy. These are that, the privilege protects only against *self*-incrimination and not the disclosure of private information by others, and that the privilege can only ensure the privacy of potentially *incriminating* information and not other potentially harmful information.⁵⁵ Even when the notion of privacy is limited to the suspect's consciousness, it is still possible to gather information about the suspect's thoughts, beliefs and feelings through other means, such as physical evidence or through questioning other people.⁵⁶ Gerstein tries to develop a good reason for retaining the privilege based on privacy by showing that it is a necessary part of a system of criminal law which is based on a respect for individual dignity.⁵⁷ He links the idea of privacy to the control that we have over information about ourselves, with any compulsory self-incrimination being an obvious involuntary relinquishment of control over information.⁵⁸ Gerstein sees self-incriminatory information as particularly important for the individual to be able to control because a confession involves the admission of wrongdoing, self-condemnation and the revelation of remorse. He argues that a man ought to have absolute control over the making of such revelations as these.⁵⁹

Although this theory seems to solve the problem of why the privilege only protects incriminating information obtained from the suspect himself, it is open to criticism because the disclosure of incriminating information has no direct nor necessary link to feelings of wrongdoing, self-condemnation or remorse. Confessing to what one has done is not tantamount to confessing how one feels about these actions, even if the offender considers himself part of the same moral community as those whom he has harmed. It is entirely possible to rationalise and justify one's conduct in such a way that a confession or other means of self-incrimination does not express feelings of wrongdoing, self-condemnation or remorse. Furthermore, what interests the police and prosecution in the first instance is not the accused's personal feelings about the offence committed, but the bare facts of the

⁵⁴ Dennis 'Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege Against Self-Incrimination' (n 21) 358.

⁵⁵ Dolinko (n 38) 1108.

⁵⁶ Ibid 1110.

⁵⁷ Gerstein (n 25).

⁵⁸ Ibid 89.

⁵⁹ Ibid 90.

crime.⁶⁰ Gerstein's approach protects against a very narrow range of intrusions upon privacy, not enough to claim the protection of privacy as a general justification for the privilege against self-incrimination. The protection of privacy justification is thus flawed by its narrow applicability. It would allow penalties to be imposed against suspects for not cooperating in ways that do not engage their privacy and, so, does little to advance the argument for a criminal process based on calling the state to account for its accusations against the accused.

5.3.3 The relationship between citizen and state

With the exception of the presumption of innocence, the justifications discussed above suffer as self-contained accounts of the privilege against self-incrimination. However, whilst the presumption offers a rationale consistent with the normative theory put forward in this thesis, it is hampered when applied to the privilege in practice. Like the presumption of innocence, the privilege against self-incrimination expresses some pivotal principles about the relationship between the citizen and the state. More needs to be said about the nature of this relationship, as it forms an important basis for the normative theory of calling the state to account and provides an argument against requiring participation.

Normatively, the state ought to treat each citizen as if he or she were innocent until convicted of a criminal offence, and the accused should not be required or expected to assist the state in accounting for its allegations or proving guilt. This is because, in a liberal democratic society, the state's powers in relation to the detection and prosecution of crime should be exercised according to certain standards that show respect for the dignity and autonomy of each individual.⁶¹ Autonomy is respected by allowing freedom of choice, exhibited in many legal rights and norms, including the privilege against self-incrimination. It affords the accused with a choice of whether to participate in criminal proceedings. The state's power can be kept in check by placing limitations on what it can legitimately require of the accused. The privilege against self-incrimination offers one means of doing so and helps ensure that the state can be held to account without the active participation or assistance of the accused.

It is clear that one key reason to reinforce this relationship between citizen and state stems from the need to regulate the use of state power and protect those accused of criminal

⁶⁰ Schulhofer (n 40) 320.

⁶¹ A Ashworth 'Four Threats to the Presumption of Innocence' (2006) 10 *E and P* 241, 249.

wrongdoing from abuses of that power. Dennis argues that the best justification for the privilege is to be found in the idea that it is necessary to prevent the abuse of state power.⁶² This is, in turn, referable to the overall aim of the law of evidence to safeguard the legitimacy of criminal proceedings and its outcome.⁶³ As explained in chapter 2, Dennis's notion of a legitimate verdict has three qualities: it should be factually accurate; it should be morally authoritative; and it should be founded on respect for the rule of law.⁶⁴ In an adversary system of criminal adjudication based on formal equality of parties, there is an inherent danger of unfairness in the state exploiting its enforcement power to place an individual in a vulnerable position.⁶⁵ Dennis points to the risk that either investigative powers may be used to obtain evidence that is factually unreliable or they may be misused to compel the production of incriminating evidence by means inconsistent with the fundamental values of criminal law. If either of the risks materialises, the legitimacy of the criminal verdict may be compromised.⁶⁶ The benefit of the privilege in this regard is not limited to Dennis's conception of the legitimate verdict. By protecting suspects from abuse of state power, the privilege may also uphold a more general conception of legitimacy based on accurate fact finding, respect for rights, due process and fair procedures. The role that the privilege plays in restricting the abuse of state power is particularly apparent in the context of police interrogation where there is also the most potential for the privilege to protect innocent suspects.

The privilege against self-incrimination may also regulate and reinforce the relationship between the citizen and the state by acting as what Redmayne has described as a 'distancing mechanism'.⁶⁷ On this basis, no distinction should be drawn between requirements to speak and requirements to provide real evidence.⁶⁸ A duty to cooperate creates a requirement to help, or assist the state, suggesting identification with the state's goals. Although one can give evidence reluctantly or defiantly, and the state cannot force us to agree with it, the fact remains that one is helping the state, and it then becomes difficult to distance oneself from the assistance. In this respect the privilege operates as a distancing mechanism, allowing us to disassociate ourselves from, or disavow, particular criminal prosecutions. This ability to keep some distance between us and the state is valuable when assisting a prosecution

⁶² Dennis *The Law of Evidence* (n 15) 198.

⁶³ *Ibid.*

⁶⁴ *Ibid* 54.

⁶⁵ *Ibid* 208.

⁶⁶ *Ibid.*

⁶⁷ Redmayne (n 2).

⁶⁸ *Ibid* 225.

would conflict with deeply held commitments.⁶⁹ The privilege allows citizens to avoid what will often be a significant personal sacrifice.⁷⁰ Such sacrifices could interfere with the citizen's autonomy and dignity which should be maintained in a liberal democracy. The interest of all suspects in not being obliged to incriminate themselves derives from the values attached to freedom and dignity of the individual.⁷¹ A justification for the privilege based on the relationship between citizen and state and the citizen's ability to distance himself from the state, therefore, applies equally to guilty and innocent suspects.

As Redmayne notes, arguments surrounding the privilege are closely connected to difficult questions of political morality and liberalism.⁷² These questions are about the ways in which we can demand that citizens support state institutions, about when it is legitimate to sanction conduct, and about how we can preserve a degree of citizen autonomy while maintaining a functioning state.⁷³ This makes it hard to coherently articulate the purpose of the privilege. Jackson argues that it would seem to be difficult to justify the privilege against self-incrimination in terms of a self-standing right that should exist independently of the absolute right not to be subjected to cruel, inhuman and degrading treatment and the qualified rights to privacy and the general right of silence.⁷⁴ He contends that if it is difficult to make out a convincing case for such a substantive right on its own ground, it is equally difficult to make a convincing case for the need for such a privilege in order to safeguard other principles.⁷⁵ At the end of his detailed analysis on the subject, Dolinko concludes that leading contemporary efforts to justify the privilege as more than a historical relic are uniformly unsatisfactory and that no efforts along similar lines are likely to succeed.⁷⁶ However, he goes on to acknowledge that a rule that lacks any principled justification may nevertheless come to serve important functions in the legal system as a whole.⁷⁷

Despite Jackson and Dolinko's conclusions, there is a case to submit that the privilege against self-incrimination is useful in its own right as a way of defining and reinforcing our relationship as individuals with the state, as well as reinforcing the role of the criminal

⁶⁹ Ibid.

⁷⁰ Ashworth and Redmayne (n 3) 155.

⁷¹ Dennis *The Law of Evidence* (n 15) 210.

⁷² Redmayne (n 2) 232.

⁷³ Ibid.

⁷⁴ J Jackson 'Re-conceptualizing the Right to Silence as a Fair Trial Standard' (2009) 58 *ICLQ* 835, 845.

⁷⁵ Ibid.

⁷⁶ Dolinko (n 38) 1064.

⁷⁷ Ibid.

process as calling the state to account for its accusations and request for condemnation and punishment of the accused. When we recognise these reasons for respecting the decision of defendants not to cooperate, we have a reason to recognise a privilege against self-incrimination. This can support a wide interpretation of the privilege which does not impose sanctions on those who rely on it. When we limit the privilege by using state powers to require defendant participation and by sanctioning those who do not cooperate, we are transforming the relationship of the state and the citizen as well as the nature of criminal procedure. The privilege against self-incrimination operates as a restraint on the state's power, as a distancing mechanism, and as a means of protecting the accused's autonomy and dignity. Even a limited scope for the privilege can go some way to protecting the relationship between citizen and state. However, because the precise purpose of the privilege lacks clarity, its scope cannot readily be defined and, as discussed in the following section, this has led to confusion and inconsistency. Nonetheless, recognising it as a reinforcement of the relationship between citizen and state in a liberal democracy can offer a reason for adopting a broad scope.

5.4 The scope of the privilege against self-incrimination

Most commentators accept that even if valuable, we should be prepared to recognise exceptions to the privilege against self-incrimination.⁷⁸ However, since the privilege is concerned with preventing the state from requiring the cooperation of the accused, recognising exceptions may in practice result in requirements for the accused to cooperate and the imposition of penalties for failure to comply. These penalties currently include prosecution for specific offences of non-compliance. This has significant implications for a procedural model affiliated with adversarialism, and even greater implications for a theory of the criminal process based on calling the state to account. This section examines the existing scope of the privilege and its ramifications.

Because the scope of the privilege is not spelt out in the constitutional documents in which it is found, it becomes a matter of interpretation for the courts. The extent to which suspects and defendants can currently rely on the privilege against self-incrimination is

⁷⁸ See for example Dennis 'Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege Against Self-Incrimination' (n 21); Redmayne (n 2).

unclear. This is largely due to confusing and inconsistent judgments from both the domestic courts and European Court of Human Rights. In order to gain some understanding of the current scope of the privilege, and when it is considered acceptable to penalise non-cooperation, it is necessary to evaluate the significant cases.

5.4.1 The case law

The privilege against self-incrimination was first recognised by the European Court of Human Rights as an implicit fair trial guarantee under Article 6 in *Funke v France*.⁷⁹ The applicant had been suspected of tax evasion and required to provide customs authorities with statements of his overseas bank accounts. He was fined for not complying with this requirement. The European Court held that the special features of customs law could not justify an infringement of the rights of anyone charged with a criminal offence to remain silent and not to contribute to incriminating themselves. This case was significant not only because it recognised the privilege as a fundamental right, but also because the privilege's ability to obstruct the role of the suspect as an informational resource is at odds with the inquisitorial tendencies of many of the contracting states. However, the decision did not specify whether the implied right to the privilege was absolute and, thus, did little to set out a comprehensive scope for it.

The potentially broad recognition of the privilege in *Funke* was refined in a less than satisfactory way in *Saunders v UK*.⁸⁰ This case involved an administrative as opposed to criminal inquiry which in itself does not engage Article 6. However, the applicant's refusal to cooperate with the investigation under the Companies Act 1985 could have led to a finding of contempt of court and the imposition of a fine or committal to prison for up to two years. It was no defence to such refusal that the questions were of an incriminating nature.⁸¹ Furthermore, any information gained from the inquiry could be used against the applicant in criminal proceedings. Although the Court found that there had been a violation of the privilege, it held that:

As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, [the privilege against self-incrimination] does not extend to the use in criminal proceedings of material which may be obtained from the accused through use of compulsory powers but which has an existence independent of the will of the suspect such as, *inter alia*, documents acquired pursuant to a

⁷⁹ (1993) 16 EHRR 297.

⁸⁰ (1997) 23 EHRR 313.

⁸¹ *Ibid* [70].

warrant, breath, blood and urine samples and bodily tissue for the purposes of DNA testing.⁸²

In placing these restrictions on the breadth of the privilege the Court made three distinctions with regard to its application. These concerned: the type of material sought to be obtained; the use made of that material; and the existence of criminal proceedings against the suspect. Confusingly, the type of material covered by the privilege explicitly excluded pre-existing documents which were held to fall within the privilege in *Funke*. This has subsequently led to uncertainty regarding when, and in relation to what, the privilege applies. It is also curious why there should be a distinction between answers to questions (which are dependent on the will of the suspect) and other evidence. In the later Privy Council case of *Brown v Stott*,⁸³ Lord Bingham noted that the distinction between answering questions and providing physical samples should not be pushed too far. He maintained that while it is true that the respondent's answer to a question would create new evidence which did not exist previously, it may also be acknowledged that, although the percentage of alcohol in one's blood is a fact existing before being tested, the whole purpose of requiring a person to blow into a breathalyser is to obtain evidence not available until that has been done.⁸⁴ Furthermore, providing physical samples can be much more invasive than requiring answers to questions. It is thus not easy to comprehend why a requirement to answer a question is objectionable, whereas a requirement to undergo a breath test is not.

What concerned the Court in *Saunders* was not the requirement to provide information, but the use made of that information in a subsequent criminal trial.⁸⁵ The decision gave rise to the concept of 'use immunity' whereby information can be obtained under compulsion, but not subsequently used against a person in criminal proceedings. This is important in relation to the apparent exception to the privilege that arises during administrative investigations. For example, the Serious Fraud Office and the Department for Business, Innovation and Skills have compulsory powers to require people to answer questions and provide information with the threat of criminal sanction for non-compliance. The existence of such powers is generally argued to be essential for establishing how relevant enterprises were managed and for tracing the whereabouts of missing assets.⁸⁶ The inquisitorial nature of these powers

⁸² Ibid [69].

⁸³ [2001] 2 All ER 97.

⁸⁴ Ibid [705].

⁸⁵ *Saunders v UK* (1997) 23 EHRR 313 [67].

⁸⁶ Dennis 'Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege Against Self-Incrimination' (n 21) 369.

is thought to impliedly remove the privilege.⁸⁷ Although the legitimate use of such evidence has varied, as a result of *Saunders*, information obtained in this way cannot subsequently be used in criminal proceedings against those required to disclose it. Section 59 and Schedule 3 of the Youth Justice and Criminal Evidence Act 1999 inserted use immunity provisions into a large number of the statutory powers concerned with fraudulent investigations. An important caveat of use immunity is that it protects answers and statements, but not pre-existing documents disclosed under compulsion.

Despite the confusion created by the judgment in *Saunders*, Ward and Gardner claim to have found logic in it. They believe that the Court had made an important distinction; the privilege would serve to prevent the use at trial of material obtained through the *active cooperation* of the accused.⁸⁸ This would seem to tally with a criminal process based on calling the state to account, in which the accused's cooperation should be a choice rather than a requirement. However, *Saunders* does not provide for this. The taking of bodily samples and the handing over of pre-existing documents might require the suspect to take positive steps, or at least cooperate with procedures for obtaining the evidence.⁸⁹ In order for this interpretation of the privilege to be consistent with a 'no assistance' approach, the material would need to be taken by force. This poses other legal problems. Not only has the European Court found a violation of the privilege in circumstances where evidence was forcibly obtained from a suspect, but they also held that this violated Article 3.⁹⁰ The same problem occurs for a conception of the privilege suggested by Redmayne: If we interpret the scope of the privilege broadly it protects us from a requirement to cooperate and so must apply to all manner of information including that which has an existence independent of our will.⁹¹ The privilege is thus means, not material based. It applies to a certain means of obtaining information, a means that requires cooperation, and not to a particular type of information.⁹² If real evidence and physical samples are forcibly taken then the privilege is not breached. If this interpretation is correct then the privilege is breached when material is obtained by threatening suspects with prosecution for non-cooperation, and not when that material can be obtained without cooperation. Although this is normatively consistent, as

⁸⁷ Ibid.

⁸⁸ T Ward and P Gardner 'The Privilege Against Self-Incrimination: In Search of Legal Certainty' (2003) *European Human Rights Law Review* 388. Original emphasis.

⁸⁹ The police have powers to obtain fingerprints and non-intimate bodily samples by force under s.61 and s.63 of the Police and Criminal Evidence Act 1984.

⁹⁰ *Jalloh v Germany* (2007) 44 EHRR 32.

⁹¹ Redmayne (n 2) 215.

⁹² Ibid.

already noted, it is not the practical reality and post-*Saunders* cases have required the 'active cooperation' of the suspect in providing both pre-existing material and material dependent on his will.

In *Brown v Stott*⁹³ the Privy Council found that it was difficult to obtain clear guidance from the European jurisprudence and that there had been a 'defect in the reasoning' of *Saunders*.⁹⁴ However, the court's *ratio decidendi* in *Brown* is also unconvincing. The applicant had been compelled to incriminate herself by telling the police who had been driving her car before having to provide a breath sample which proved positive for alcohol. In finding no violation of Article 6, the court relied on the fact that the compulsion involved answering one single, simple question, and found that the pursuit of road safety outbalanced the suspect's individual right to a privilege against self-incrimination.⁹⁵ Lord Bingham was of the opinion that the single, simple answer to the question of who was driving the car could not of itself incriminate the suspect, since it is not without more an offence to drive the car. It may however provide proof of a fact necessary to convict. Yet, it is obvious that in certain circumstances, for an individual to state he was the driver of a car will be tantamount to a confession of an offence. The court limited the privilege on the same proportionality basis as qualified Convention rights; namely that the single, simple question was proportionate to the legitimate aim of road safety. This public interest argument had already been dismissed by Strasbourg in *Funke* and in *Saunders* where it was unconvinced by the government's argument that the public interest in the investigation of corporate fraud could justify a departure from the privilege.⁹⁶ By diverging from the European jurisprudence, this case signals a rejection of a European model of criminal procedure based on the European Convention on Human Rights.

Despite the Privy Council's more restrictive approach, Strasbourg initially continued to follow its own jurisprudence. In *Heaney and McGuinness v Ireland* the European Court held that any interference with the privilege must not destroy its 'very essence'.⁹⁷ The applicants were suspected of involvement in a terrorist bombing which resulted in several deaths and injuries. They had been required to account for their movements during a specific twenty-four hour period. Failure to meet this requirement was in itself a criminal offence of which

⁹³ [2001] 2 All ER 97.

⁹⁴ *Ibid* [720]-[721].

⁹⁵ The problem of balancing rights against other interests is discussed in chapter 2.

⁹⁶ *Saunders v UK* (1997) 23 EHRR 313 [74].

⁹⁷ *Heaney and McGuinness v Ireland* (2001) 33 EHRR 12 [55].

the applicants were convicted. The European Court followed its previous rejection of proportionality arguments and held that the requirement to provide the information could not be justified on security and public order grounds. There was thus an infringement of Article 6. The fact that this was a particularly serious case, which could have had a strong public interest, strengthens the argument against limiting the privilege on proportionality and public interest grounds.

*JB v Switzerland*⁹⁸ is another European Court case which involved requirements to produce documents and declare a source of income. The applicant, who had been the subject of tax evasion proceedings, was fined for non-compliance with those requirements. The tax evasion proceedings against him were themselves criminal proceedings and the court found that the procedure by which the applicant was fined for non-compliance was also the determination of a criminal charge. The Court therefore found a breach of the privilege. However, this was another poorly reasoned judgment. Despite relying on *Saunders* and citing the distinction between material having an existence independent of the suspect and material obtained through defiance of the suspect's will, the court held that the pre-existing documents were within the realm of the privilege.

The decision in *Allen v UK*⁹⁹ suggests that the existence of a criminal prosecution for failure to comply with a requirement to provide information may be the decisive factor in determining whether there has been a breach of the privilege. The European Court found no violation of the privilege, as the applicant had been prosecuted for providing false information, not for refusing to provide information. The case was distinguished from *Funke*, *Heaney* and *JB* on the basis that the applicant was not prosecuted for failing to provide information which might have incriminated him in pending or anticipated criminal proceedings.¹⁰⁰ However, had he refused to provide information there would have been a penalty attached. The defining feature was therefore the existence of an actual, not potential, prosecution. The court noted that there was no pending or anticipated criminal proceeding against the applicant and that he might have provided false information to prevent the revenue authorities from uncovering conduct which could have led to a prosecution. This did not suffice to bring the privilege into play.

⁹⁸ [2001] Crim LR 748.

⁹⁹ (2002) 35 EHRR CD 289.

¹⁰⁰ *Ibid* [5].

*King v UK*¹⁰¹ followed the distinction drawn in *Saunders* between criminal and administrative investigations. Here, the Court held that there was no infringement of Article 6, partly because any criminal proceedings the applicant faced were from a refusal to provide information to the tax authorities so that tax liability could be calculated, and not from a refusal to cooperate with a prosecution. A similar distinction was drawn in *Weh v Austria*¹⁰² in which the applicant was fined for providing inaccurate information regarding the driver of his car. As criminal proceedings had not been initiated against the applicant for the initial driving offence, he could not claim the protection of the privilege. The court found no links between the criminal proceedings which had been initiated against persons unknown for the driving offence and the proceedings in which the applicant was fined for giving inaccurate information. However, three dissenting judges felt that the applicant had been effectively charged with a criminal offence at the time he was asked to provide information and that there was thus a breach of Article 6. These last four cases in particular (*JB, Allen, King, and Weh*) highlight the distinction between administrative and criminal investigations. Where the investigation is administrative in nature, criminal proceedings against the suspect in relation to the required information seem necessary in order to engage the privilege. This was also the case in *Saunders* where refusal to cooperate with the Department of Trade and Industry inspectors was punishable as an offence. Even when the requirement to provide information in an administrative investigation is held to fall outside the scope of the privilege, the use of the information in any subsequent prosecution may violate Article 6.

*Jalloh v Germany*¹⁰³ differed from the cases concerning administrative investigations. Instead, it concerned the use of evidence obtained through the forcible administration of emetics. The relevant evidence was a bag of cocaine swallowed by the applicant. This case demonstrates the potential difficulties in gathering incriminating evidence from the suspect which, on the face of it, exists independent of his will. The court found that the bag of cocaine could fall into the category of material having an existence independent of the will of the suspect, the use of which is generally not prohibited in criminal proceedings. However, there were several elements held to distinguish it from the examples of such material given in *Saunders*. These were: that the administration of emetics were used to retrieve real evidence in defiance of the applicant's will; that the degree of force used to obtain the evidence differed significantly from that normally required to obtain the types of

¹⁰¹ [2004] STC 911.

¹⁰² (2005) 40 EHRR 37.

¹⁰³ (2007) 44 EHRR 32.

material referred to in *Saunders* which can usually be produced through the normal functioning of the body; and that the evidence was obtained through a procedure which violated the applicant's right not to be subject to torture or inhuman or degrading treatment under Article 3.¹⁰⁴ The Court thus found a violation of the privilege.

Whilst it was settled that incriminating evidence obtained through torture should never be relied on as proof of guilt, the *Jalloh* court left open the question of whether the use of real evidence obtained through inhuman or degrading treatment always rendered a trial unfair. In *Gafgen v Germany*,¹⁰⁵ the European Court followed *Jalloh* in so far as it held that obtaining a confession in violation of Article 3 can impact the fairness of criminal proceedings under Article 6. In this case, the defendant, who was accused of kidnap and murder, had been subjected to real and immediate threats of torture by the police in order to gain a confession and acquire the location of the victim. This amounted to inhuman treatment. However, the Court held that the fairness of the trial was only compromised by inhuman treatment if the admission of the impugned evidence had a bearing on the outcome of the proceedings against the defendant. In this case it did not, hence there was no violation of the privilege against self-incrimination.

Jalloh is also significant for adopting what appears to be a wholly new approach to determining the applicability of the privilege. Four factors were set out to determine violations of the right: the nature and degree of compulsion used to obtain the evidence; the weight of the public interest in the investigation and punishment of the offence in question; the existence of any relevant safeguards in the procedure; and the use to which any material so obtained is put.¹⁰⁶ Most significant here is the reference to the public interest in the investigation and punishment of the offence. It contradicts the decisions in *Funke*, *Saunders*, and *Heaney*, but it does follow Lord Bingham's approach to the issue in *Brown v Stott*. Taken together, the factors presented in *Jalloh* draw significant parallels with the *Brown v Stott* judgment, and show that the European Court is leaning towards a restrictive scope for the privilege based on proportionality.

¹⁰⁴ Ibid [113]-[116].

¹⁰⁵ (2011) 52 EHRR 1.

¹⁰⁶ *Jalloh v Germany* (2007) 44 EHRR 32 [117].

This new proportionality approach was evident in *O'Halloran and Francis v UK*.¹⁰⁷ This case involved the same provisions of the Road Traffic Act 1988 as *Brown v Stott*. Under s.172 of the Act, failure of a car owner to declare who was driving their car at a specific time is a criminal offence punishable by a fine and penalty points. Similarly, sections 6 and 7 make it an offence to refuse to provide breath or blood samples if one is suspected of drunk driving. The Road Traffic Act thus provides one of the more striking examples of imposing penalties for non-cooperation in the criminal process. The vehicles registered to the two applicants in *O'Halloran* had been caught speeding. They were each asked to provide the name and address of the driver of the vehicle at the relevant time and were informed that failure to comply was a criminal offence under s.172. Mr O'Halloran named himself as the driver and, as a result, was convicted of the driving offence. Mr Francis, on the other hand, refused to supply the information and was convicted for his failure to comply. As this was a case of direct compulsion in a criminal investigation to provide information dependent on the will of the suspect, and was subject to criminal prosecution for non-compliance, it should have fallen directly within the scope of the privilege as set out in *Saunders*.

In finding that the privilege had not been breached, the court considered three of the factors set out in *Jalloh*: the nature and degree of compulsion; the existence of relevant safeguards; and the use to which the information was put. They did not have explicit regard for the public interest. However, the approach seems to be one of proportionality in all but name, being based on a weighting of various factors in the particular context.¹⁰⁸ They followed a line of argument presented in *Brown v Stott*, namely that although there was direct compulsion, this flowed from the regulatory regime to which car owners and drivers are subject. Those who choose to keep and drive motor cars can be assumed to have accepted certain responsibilities and obligations as part of the regulatory regime relating to ownership of a motor vehicle. This includes the obligation to inform authorities of the identity of the driver in the event of suspected commission of a road traffic offence.¹⁰⁹ This argument parallels the more general approach of the criminal law in regards to the imposition of positive duties, such duties being most common in regulatory areas like health and safety legislation.¹¹⁰ As discussed in chapter 4, the regulatory nature of certain activities has been used to justify legal burdens on the defence. Reverse burdens have themselves been held to

¹⁰⁷ (2008) 46 EHRR 21.

¹⁰⁸ Dennis *The Law of Evidence* (n 15) 168.

¹⁰⁹ *O'Halloran and Francis v UK* (2008) 46 EHRR 21 [57].

¹¹⁰ Redmayne (n 2) 230.

be a justifiable infringement of Article 6 when they are a proportionate response.¹¹¹ As such, Article 6 is not absolute; possibly making limitations to the privilege appear less controversial. However, relying on proportionality concerns to limit fundamental rights is always going to be a risky pursuit which can act to undermine the presumption of innocence, burden of proof, and the general perception of the criminal process as fair and legitimate.

In a powerful dissent, Judge Pavlovski found that the majority decision in *O'Halloran* was not only wrong, but also 'an extremely dangerous approach.'¹¹² He went on to state that:

[I]n the particular circumstances of the case, compelling an accused to provide self-incriminating evidence contrary to his will under the threat of criminal prosecution amounts to a kind of compulsion which runs counter to the notion of a fair trial and, accordingly, is incompatible with the Convention standards.¹¹³

As to the 'regulatory regime' imposed on car owners, this new criterion is incompatible with the established case law. Public interest considerations pave the way for justifiable violations of the privilege to other crimes. Judge Pavlovski fears that, 'if one begins seeking justification from the basic principles of modern criminal procedure and the very essence of the notion of a fair trial for reasons of policy, and if the Court starts accepting such reasons, we will face a real threat to the European public order as protected by the Convention.' In their dissenting opinion in *Weh v Austria*, Judges Lorenzen, Levits and Hajiyev also expressed concern with balancing the public interest in road safety against the privilege against self-incrimination. They stated that provisions requiring car owners, on pain of penalty, to admit driving their car at the time of a specific offence will require them to provide the prosecution with a major element of evidence, being left with limited possibilities of defence in the subsequent criminal proceedings. Seen in this light, the infringement of the privilege does not appear proportionate to the aim of road safety. They felt that the vital public interest in the prosecution of traffic offences could not justify a departure from the basic principles of a fair procedure.¹¹⁴

Both *Jalloh* and *O'Halloran* signal a significant shift in the European jurisprudence on the privilege against self-incrimination and create even more uncertainty as to its scope. It is becoming increasingly difficult to determine when, in practice, it might be considered acceptable to penalise those who do not cooperate in the criminal process. As a result of

¹¹¹ *Salabiaku v France* (1988) 13 EHRR 793.

¹¹² *O'Halloran and Francis v UK* (2008) 46 EHRR 21 [O-II20].

¹¹³ *Ibid* [O-II53].

¹¹⁴ *Weh v Austria* (2005) 40 EHRR 37 [O-14].

these cases, the privilege, like reverse burdens of proof, may be opened up to a broader balancing exercise against other legitimate aims in the public interest. If this position is reached it will mean that every case in which the privilege is engaged could be decided according to the balance between the privilege and the interests of the public.¹¹⁵ Ashworth fears that, having stepped away from key points in its *Saunders* judgment, the European Court will come to regard the privilege and other Article 6 rights as capable of being traded off against the public interest.¹¹⁶ Such an approach is contrary to both the adversarial history of English criminal procedure and a conception of the criminal process whereby the state is called to account.

O'Halloran is significant for several reasons: it appears to have brought the European Court in line with the domestic approach; it has further restricted the European view of the privilege by allowing compulsory questioning on pain of penalty in the determination of a criminal charge; and it has further paved the way for public interest concerns to be used as acceptable criteria for limiting the privilege. Although Mr O'Halloran initially disclosed the required information, Mr Francis was punished for making use of his fundamental right not to incriminate himself. In all of the European cases, up to this point, in which direct compulsion was applied to obtain information which contributed or could have contributed to a suspect's conviction, the court had found a violation of Article 6. *O'Halloran* was followed by *Luckhof and Spanner v Austria*.¹¹⁷ This case also involved direct compulsion on the applicants to disclose information about the driver of their vehicles at the time of a specific driving offence. The case was held to be not materially different from *O'Halloran* and therefore fell to be decided on the same principles.

5.4.2 Making sense of the scope

The current scope of the privilege against self-incrimination is more bewildering than ever, with the more recent cases of *Jalloh* and *O'Halloran* making the older cases such as *Saunders* appear coherent and principled. As it stands, the privilege does not seem to apply to: the gathering of information which has an existence independent of the will of the accused

¹¹⁵ A Ashworth 'Privilege Against Self-Incrimination- Offence Under the Road Traffic Act 1988 s.172 of Failing to Furnish Information' [2007] *Crim LR* 897, 899.

¹¹⁶ *Ibid* 900.

¹¹⁷ (58452/00) Unreported January 10, 2008 (ECHR).

(except where obtaining that information would violate the suspect's Article 3 rights); information which it is necessary to obtain in the interest of road safety (but perhaps not for the prevention of terrorism or fraud); and information obtained during administrative investigations where that information is not subsequently used in criminal proceedings. Furthermore, as a result of the inconsistencies between the judgments in *Funke*, *Saunders* and *JB*, there is still confusion over exactly when, and under what circumstance, pre-existing documents fall within the scope of the privilege.

Although the European Court initially granted the privilege status as an Article 6 right in a decision which left it open to a broad interpretation, it has since been upholding dangerous restrictions in controversial, inconsistent and confusing judgments. The continuation of such an approach leaves little hope for a process in which the accused can choose whether to participate and in which using state power to compel the cooperation of the accused is viewed as unacceptable. Instead, it has contributed to the emergence of a participatory model of procedure which relies on the participation of the defendant to achieve accurate outcomes. The restrictive scope of the privilege, and the imposition of penalties, is designed to secure cooperation with requirements to provide information. The value of the defendant's participation in acquiring evidence and contributing to accurate fact finding is given greater weight than concern for his fundamental rights. In a system based on calling the state to account, the privilege must be afforded a broad scope. No distinction should be drawn between requirements to speak and requirements to provide the authorities with documents, blood samples and the like. Where these can be obtained without the active cooperation of the accused then no issue surrounding the privilege is raised because he has not been required to incriminate himself. The key point is that the suspect should not be required to actively cooperate or assist in proceedings against himself. When cooperation is a choice the autonomy of the accused is respected.

5.5 Conclusion

Dennis believes that the restrictions on the privilege against self-incrimination have happened, at least in part, due to the weakness of the main justifications for it.¹¹⁸ Without

¹¹⁸ Dennis 'Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege Against Self-Incrimination' (n 21) 373.

having a clear understanding of what the privilege is for, it is inevitably difficult to know where to draw the line. Likewise, without a clear scope of the privilege, it will remain difficult to determine just what purpose it serves in practice. The current situation does little to clarify either the privilege's scope or its rationale. Nevertheless, as a procedural right and a key component of the accused's ability to choose whether to participate, it should not be so easy to interfere with it.

The privilege against self-incrimination has clear links to the rise of adversarialism and, therefore, to workable defence rights in general. Its link to the presumption of innocence may also have something to do with this history. However, what seems most prevalent is the impact that the privilege can have on our relationship as individuals with the state; its ability to uphold certain elements of liberal democracy by ensuring our freedom to choose participation, rather than having it forced upon us. This is an underlying factor of the normative theory of the criminal process in which the state must account for its accusations and request for condemnation and punishment. Conversely, by restricting the breadth of the privilege in such a way that allows the state to compel its citizens to participate in the criminal process, English criminal procedure has shifted further away from its adversarial history to a participatory model of criminal procedure.

If we take value in the privilege as a mechanism for reinforcing the boundaries of the state's relationship with its citizens, and accept that these boundaries include the notion that the state cannot compel the active cooperation of the accused, then not only is there some sort of value or purpose in having the privilege, but there is also a means for determining its scope. This scope should be broad, prohibiting any requirement on the suspect to take active steps to incriminate himself. Such a conception of the privilege would help ensure that the process aims of accurate fact finding and conflict resolution are pursued without interfering with the necessary constraints which legitimise the system. Penalising those who exercise their choice not to participate by relying on the privilege is an unacceptable use of state power which is inimical to the relationship between the citizen and the state and the fairness of the proceedings.

The Right to Silence

6.1 Introduction

This chapter presents further examples of the ways in which defendants are penalised for their non-cooperation. It explores the right to silence and the implications of drawing adverse inferences from silence. The right to silence implies that a person accused of criminal wrongdoing is under no obligation to account for allegations or respond to questioning. However, there is no consensus regarding what the right entails. In *R v Director of Serious Fraud Office Ex p. Smith*, Lord Mustill identified six immunities from which the right to silence is used to refer:

- (1) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions posed by other persons or bodies.
- (2) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them.
- (3) A specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind.
- (4) A specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock.
- (5) A specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority.
- (6) A specific immunity (at least in certain circumstances, which it is unnecessary to explore), possessed by accused persons undergoing trial, from having adverse comment made on any failure (a) to answer questions before the trial, or (b) to give evidence at the trial.¹

Despite their differences in 'nature, origin, incidence and importance', all six immunities concern the legal significance of silence and the protection of citizens against the abuse of powers.²

Like the privilege against self-incrimination, the right to silence reinforces the accused's ability to choose whether to participate in the criminal process. However, whilst the privilege encompasses a more general right not to provide incriminating information to the

¹ *R v Director of Serious Fraud Office Ex p. Smith* [1993] AC 1 [30]-[32].

² *Ibid* [30].

authorities, the right to silence, as a derivative application of the privilege, is more specific. If defined as an absolute right, it should protect suspects from being adversely affected by their refusal to answer questions or give testimony in criminal proceedings. On this basis, to say that there is a right to silence should mean that no disadvantage can flow from exercising that right. This is an important element of the normative conception of criminal procedure in which the state must be able to account for its accusations and request for punishment without the active assistance of the accused. However, this understanding of the right to silence has been largely undermined by sections 34 to 39 of the Criminal Justice and Public Order Act 1994 (CJPOA). The CJPOA permits adverse inferences to be drawn from a suspect's silence during police questioning, at trial, and where he fails to account for certain suspicious circumstances. In effect, it substantially qualifies the accused's ability to exercise his right to silence free from consequence. It creates an expectation of cooperation and participation in order to further the aim of accurate fact finding, and to do so efficiently.

It is not an offence or contempt to remain silent. This allows the courts to maintain that there is no direct duty to speak.³ Nevertheless, the CJPOA regime penalises suspects and defendants who refuse to cooperate in the pre-trial and trial stages of the criminal process, by pressuring them to participate, despite what should be their fundamental rights not to and by expressly allowing, if not encouraging, adverse inferences which correlate silence with guilt. Non-cooperation can therefore have a detrimental effect on the accused and the case outcome. This chapter begins with an assessment of the debate leading to the enactment of the CJPOA. It then looks at how the individual provisions have been interpreted and applied. It will be shown that, by equating silence with guilt, it has become difficult for defendants to test the prosecution case without actively participating. After assessing the individual provisions, the practical, normative and theoretical implications of the CJPOA are examined. Penalising those who rely on the right to silence, by allowing adverse inferences to be drawn, interferes with the factors which underlie the normative idea that the criminal process should call the state to account. It is also incompatible with notions of fairness and adversarialism set out in earlier chapters. The CJPOA has, thus, contributed to the emergence of a participatory model of procedure.

6.2 The silence debate

³ *Murray v UK* (1996) 22 EHRR 29 [48]; *Condon v UK* (2001) 31 EHRR 1 [59].

Nearly two hundred years ago, Jeremy Bentham stated that, 'Innocence claims the right of speaking, as guilt invokes the privilege of silence.'⁴ Like Bentham, many critics feel that the right to silence acts as a shield for the guilty. These critics might argue that silence in the face of accusations constitutes reliable evidence of guilt which should be taken into consideration; denying consideration of such evidence could impede accurate fact finding. They might also consider silence a barrier to the efficient management of a case, particularly by hampering police efforts to investigate crimes. This argument would claim that even if drawing adverse inferences did not lead to an increase in the confession or conviction rate, by encouraging suspects to talk at an early stage, police questioning could be more productive and would tend to tie the suspect to a particular account.⁵ Requiring a suspect to answer questions put to him could therefore increase efficiency and case management, something which has been of particular concern in recent years.⁶ Reforms to the right to silence on this basis suggest a shift in the style of English criminal procedure towards a model of efficiency and managerialism, whereas the use of silence as a reliable indicator of guilt better reflects the inquisitorial emphasis on truth finding. However, what appears to have emerged from these concerns is a participatory style of procedure.

Prior to the CJPOA, reform to the law on the right to silence, which prohibited adverse prosecutorial comment and restricted judicial discretion to comment on the relevance of silence, had been considered by numerous Committees, Commissions and Working Groups. It was also an issue raised in public speeches by politicians, legal professionals and senior police officers who often believed the right was being exploited by professional criminals.⁷ Those in favour of amending the right to silence included the police service, Crown Prosecution Service and the majority of judges, whilst those opposed to reform included the Bar Council, Law Society and the Criminal Bar Association.⁸ In 1972, the Criminal Law Revision Committee's *Eleventh Report* recommended that courts allow adverse inferences to be drawn from silence in the police station and at trial.⁹ However, these proposals were met

⁴ J Bentham *Rationale of Judicial Evidence* (Hunt and Clarke: London, 1827).

⁵ M Redmayne 'English Warnings' (2008) 30 *Cardozo Law Review* 1047, 1048.

⁶ See chapter 3.

⁷ See for example, the Dimpleby Lecture in 1973 by then Metropolitan Police Commissioner Sir Robert Mark and the 1987 Police Foundation Lecture by then Home Secretary Douglas Hurd.

⁸ Royal Commission on Criminal Justice *Report* (HMSO: London, 1993).

⁹ Criminal Law Revision Committee *Eleventh Report, Evidence (General)*, Cmnd 4991 (HMSO: London, 1972).

with heavy criticism,¹⁰ and, in 1981, the majority of the Royal Commission on Criminal Procedure recommended that 'the present law on the right to silence in the face of police questioning after caution should not be altered.'¹¹ They were unanimous in regards to the right to silence in court, stating that to require the accused to answer a *prima facie* case at trial would tend to weaken the initial burden of proof which an accusatorial system places upon the prosecution.¹² Conversely, a Home Office Working Group, established in the late 1980s, recommended reforms allowing adverse inferences to be drawn, provided certain safeguards were in place.¹³ In 1993, the Royal Commission on Criminal Justice advised against reforming the right to silence. The majority of the Commission felt that the possible increase in convictions of the guilty was outweighed by the risk of extra pressure on suspects to talk, possibly leading to miscarriages of justice.¹⁴

6.2.1 Pre-trial reform

There were different rationales for reforming the right to silence pre-trial and at trial. In relation to pre-trial silence, there was a belief that silence offered a shield for the guilty. Reform could therefore increase accurate convictions. However, in summarising the pre-CJPOA research evidence on silence in the police station, the Royal Commission found that the right was exercised only in a minority of cases, and those who remained silent were more likely to plead guilty or be found guilty.¹⁵ The research evidence neither confirmed nor refuted the suggestion that silence is used by a disproportionate number of experienced criminals who exploit the system in order to obtain an acquittal.¹⁶ Although reform would not necessarily increase factually accurate convictions, in 1993, the then Home Secretary, Michael Howard, announced the intention to modify the right to silence at a Conservative Party Conference. It was felt that drawing adverse inferences from silence was a matter of common sense, and despite the findings of the Royal Commission as well as later studies on the impact of the CJPOA,¹⁷ judges continue to speak in these terms. For example, in

¹⁰ S Greer 'The Right to Silence: A Review of the Current Debate' (1990) 53 *MLR* 709, 715.

¹¹ Royal Commission on Criminal Procedure *Report* Cmnd 8092 (HMSO: London, 1981) 4.53.

¹² *Ibid* 4.66.

¹³ Home Office Working Group on the Right of Silence *Report* (HMSO: London, 1989).

¹⁴ Royal Commission on Criminal Justice (n 8) 53.

¹⁵ Prior to the CJPOA between 6% and 10% of suspects outside of the Metropolitan police district remained silent in the police station to some extent. Within the Metropolitan police district the figure rose to between 14% and 16%. *Ibid* 53-54.

¹⁶ *Ibid* 53.

¹⁷ T Bucke, R Street and D Brown *The Right to Silence: The Impact of the Criminal Justice and Public Order Act 1994* (2000) Home Office, Research Study No.199. See below.

Webber,¹⁸ a case from 2004, the House of Lords stated that ‘the object of s.34 is to bring the law back into line with common sense.’¹⁹

Those opposing reform to the right to silence, prior to the CJPOA, argued that silence is not necessarily an indication of guilt and pointed to the many possible innocent explanations for silence.²⁰ For example, pre-trial silence might be a response to: an emotional and highly suggestible state of mind; ignorance to some vital facts which explain away otherwise suspicious circumstances; confusion and liability to make mistakes which could be interpreted as deliberate lies at trial; the protection of others; a reluctance to admit to having done something discreditable but not illegal; fear of reprisal; or a generally negative attitude or conception of the police and thus reluctance to cooperate with them.²¹ There were concerns that reform would weaken the protection which the right to silence affords to innocent suspects. Writing ahead of the CJPOA, Greer claimed that the right to silence should not merely remain a vital part of the criminal justice system; it should be strengthened.²² This is because its abolition would make it easier for the prosecution to establish guilt, thus increasing the possibility of wrongful convictions with no obvious gains for law enforcement.²³ There exists a link here between the right to silence and the allocation of the burden of proof which is returned to in the examination of the theoretical implications of the reforms.

Another rationale behind reforming the right to pre-trial silence concerned the use of ambush defences whereby a previously undisclosed defence is put forward at trial, catching the prosecution off guard. The threat of adverse inferences being drawn from silence at the pre-trial stage might encourage a defendant to adopt a consistent account of events. However, this rationale cannot extend to reforming the right to silence at trial. The defendant’s fear of being cross-examined on his new defence, coupled with the fear of having adverse inferences drawn if he does not testify, must be strong enough to tie him to one previously disclosed account. The ambush defence argument seems too weak to justify the inclusive approach to adverse inferences catered for by the CJPOA. Furthermore, ambush defences were not as significant a problem as suggested by pro-reformers. In a

¹⁸ [2004] UKHL 1.

¹⁹ *Ibid* [33].

²⁰ Greer (n 10).

²¹ For more detailed discussion see *Ibid* 727.

²² *Ibid* 709.

²³ *Ibid* 725.

study undertaken on behalf of the Royal Commission in 1993, Leng found that the proportion of contested cases in which ambush defences were raised was at most five per cent.²⁴ Similarly, Zander and Henderson found a rate of seven to ten per cent in a sample of Crown Court cases, with two fifths of these causing no problem for the prosecution.²⁵ Regardless of the prevalence of ambush defences, interfering with an established defence right is not an appropriate way of dealing with them. When the prosecution encounter specific difficulties in addressing an ambush defence they may be better dealt with through the use of short adjournments to allow the prosecution time to investigate the new defence. Disclosure rules also intended to curb the use of ambush defences, such as those introduced by the Criminal Procedure and Investigations Act 1996, pose their own difficulties for a conception of criminal procedure based on calling the state to account, whilst further contributing to a shift in the style of English criminal procedure.²⁶

6.2.2 Trial reform

Owing to the vulnerability of suspects and the risk of abuse of power associated with custodial interrogation, there has been more academic objection towards curtailing the right to silence in the police station than in court.²⁷ However, most of the key arguments for reform were aimed at diminishing the negative effects of pre-trial silence on accurate outcomes and efficiency. Silence at trial can have little impact on the efficient investigation of crime or on the use of ambush defences. One might assume that participation at trial affects accurate fact finding in so far as it allows the defendant's evidence to be tested and taken into account, but the actual impact this has on the factual accuracy of outcomes is questionable and relies on an assumption that silence is an indicator of guilt. Situations in which an innocent defendant might decline to testify at trial include: an unsympathetic character; being vulnerable or suggestible; sensitive or embarrassing subject matter; a physical or mental condition falling short of that required to be unfit to plead; an inability to recall the incident in question; stress or anxiety; fear of undermining a co-defendant's case; or fear of reprisals.²⁸

²⁴ R Leng *The Right to Silence in Police Interrogation: A Study of Some of the Issues Underlying the Debate*, Royal Commission on Criminal Justice Research Study No.10 (HMSO: London, 1993) 58.

²⁵ M Zander and P Henderson *Crown Court Study* Royal Commission on Criminal Justice, Research Study No.19 (HMSO: London, 1993).

²⁶ See chapter 7.

²⁷ I Dennis *The Law of Evidence* 4th edn (Sweet & Maxwell: London, 2010) 210.

²⁸ S Easton *The Case for the Right to Silence* (Ashgate Publishing: Hants, 1998) 145; Royal Commission on Criminal Justice (n 8) 52; Bucke et al. (n 17) 54.

Reforming the right to silence in court was intended to do more than clarify the common law's position on judicial discretion to comment on silence.²⁹ Given that it does little to address the reformer's concerns regarding ambush defences and efficiency, it seems that its purpose was to increase participation. Redmayne points out that adverse inferences should not be drawn for instrumental reasons, such as encouraging defendants to speak.³⁰ However, this appears to be the intention of drawing adverse inferences from silence at trial. Its utility is in calling the accused to account and assisting the prosecution in securing convictions. It therefore adds force to the shift away from adversarialism and the idea of the trial as a forum for testing the prosecution case. The situation is comparable to the pre-adversarial altercation trial in which there was an expectation that the accused would participate.³¹ Ultimately, the arguments against reform to the right of silence were either ignored or overlooked. The CJPOA introduced the reforms which had attracted significant criticism each time they were proposed. The following three sections set out the relevant CJPOA provisions and the key issues surrounding them.

6.3 Sections 36 and 37

Although the focus of this chapter is on sections 34 and 35, it is also important to consider sections 36 and 37.

Section 36 provides that:

- (1) Where —
- (a) a person is arrested by a constable, and there is —
 - (i) on his person; or
 - (ii) in or on his clothing or footwear; or
 - (iii) otherwise in his possession; or
 - (iv) in any place in which he is at the time of his arrest, any object, substance or mark, or there is any mark on any such object; and
 - (b) that or another constable investigating the case reasonably believes that the presence of the object, substance or mark may be attributable to the participation of the person arrested in the commission of an offence specified by the constable; and
 - (c) the constable informs the person arrested that he so believes, and requests him to account for the presence of the object, substance or mark; and
 - (d) the person fails or refuses to do so,
- then if, in any proceedings against the person for the offence so specified, evidence of those matters is given, subsection (2) below applies.

²⁹ *R v Cowan* [1996] QB 373 [378]. See below.

³⁰ Redmayne (n 5) 1052.

³¹ See chapter 4.

(2) Where this subsection applies —

...

(c) the court, in determining whether there is a case to answer; and
(d) the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure or refusal as appear proper.

Section 37 provides that:

(1) Where —

(a) a person arrested by a constable was found by him at a place at or about the time the offence for which he was arrested is alleged to have been committed; and
(b) that or another constable investigating the offence reasonably believes that the presence of the person at that place and at that time may be attributable to his participation in the commission of the offence; and
(c) the constable informs the person that he so believes, and requests him to account for that presence; and
(d) the person fails or refuses to do so,
then if, in any proceedings against the person for the offence, evidence of those matters is given, subsection (2) below applies.

(2) Where this subsection applies —

...

(c) the court, in determining whether there is a case to answer; and
(d) the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure or refusal as appear proper.

It is important to draw attention to these often overlooked provisions, as they penalise those who do not cooperate in the criminal process in much the same way as sections 34 and 35, albeit in more limited circumstances. Section 36 allows inferences to be drawn from an arrested person's failure to account for suspicious objects, substances and marks. Section 37 permits adverse inferences to be drawn from an arrested person's failure to account for his suspicious presence at a particular place around the time that an offence was committed. Before these sections can operate, the police must explain why the circumstances are suspicious and that adverse inferences may be drawn.³² Furthermore, the investigating constable must reasonably believe that the circumstances may be attributable to the accused's participation in the commission of the offence and advise the accused of this.³³ As well as reinforcing the suspiciousness of certain circumstances, sections 36 and 37 signal a desire for the accused to cooperate in the criminal process. Great pressure is placed upon them to offer an explanation, and failure to comply is penalised through adverse inferences. Unlike s.34 which requires the defendant to rely on a previously unmentioned fact before an adverse inference can be drawn, sections 36 and 37 apply regardless of the

³² s.36(4) and s.37(3).

³³ s.36(1)(b) and 37(1)(b).

particulars of the accused's subsequent defence. The fact that he failed to explain the circumstances when questioned is sufficient. This suggests that the inferences which may be drawn under these sections relate directly to guilt rather than to the credibility of any defence at trial.³⁴ However, silence cannot be the sole or main evidence against the defendant and the jury must be given a direction similar to that under s.34 and in line with the Judicial Studies Board specimen directions, discussed below. The most crucial point is that the jury must be told that they can only hold against the defendant a failure to give an explanation if they are sure that he had no acceptable explanation to offer.³⁵

Since the accused must be under arrest before these sections become applicable, he will have been cautioned and made aware of the consequences of failing to cooperate. However, unless he is at an authorised place of detention when questioned, he will not have been given access to a solicitor.³⁶ He will therefore be expected to account for the relevant suspicious circumstances without the benefit of legal advice. As a result, the threat of adverse inferences could be used to encourage the accused to offer an explanation, regardless of the fact that he may be largely ignorant of the circumstances surrounding the offence, his arrest, the criminal process, or his rights as a suspect. Although detrimental for the accused, this might be advantageous for the police and prosecution, particularly in cases of secondary liability, such as joint enterprise and aiding and abetting where the accused's failure to answer questions at the scene of a crime may help establish a case through the use of inferences under s.37. This is further compounded by the fact that the defendant's presence at the scene of a crime can in itself constitute encouragement of a crime if it was intended to, and did in fact, do so.³⁷

The fact that legal advice is not necessary before inferences can be drawn under sections 36 and 37 when the accused has been questioned outside of the police station may be in conflict with the European Court's decision in *Murray v UK*.³⁸ They suggested that access to a lawyer was of paramount importance from the initial stage of police interrogation where the accused faces a dilemma relating to his defence.³⁹ Such a dilemma arises where exercising

³⁴ Bucke et al. (n 17) 7.

³⁵ *R v Compton* [2002] EWCA Crim 2835 [37].

³⁶ s.36(4)(A) and s.37(3)(A) prevent adverse inferences if the accused was questioned at a police station and did not have the opportunity to consult a solicitor.

³⁷ *R v Clarkson* [1971] 1 WLR 1402.

³⁸ (1996) 22 EHRR 29.

³⁹ *Ibid* [66].

the right to silence may lead to adverse inferences. In addition, the application of sections 36 and 37 in the absence of legal advice may be at odds with the Supreme Court's decision in *Cadder*.⁴⁰ Following the Strasbourg ruling in *Salduz v Turkey*,⁴¹ they held that, under Article 6, the suspect must have access to legal advice before being interrogated by the police. Nonetheless, this decision seems to be confined to the point at which the suspect is in police detention. Sections 36 and 37 may fall outside of these decisions on the grounds that the right to access to legal advice, found in s.58 of the Police and Criminal Evidence Act 1984 (PACE), applies to arrested persons held in custody. Furthermore, it may be argued that inferences drawn from silence outside of the police station in the absence of legal advice are justifiable because the police and suspect are on more equal terms.⁴² If the decisions in *Murray* and *Cadder* acted to prohibit police questioning in the absence of provision for legal advice before detention in police custody, sections 36 and 37 could lose much of their applicability.

A possible connection between silence and acceptance of guilt in suspicious circumstances arose in *Collins*.⁴³ Two defendants were approached by the police and, before being cautioned or arrested, were questioned about a crime that had recently been committed nearby. The issue was whether one of the defendants had adopted his co-defendant's lie by remaining silent and omitting to correct it. It was held that in this instance mere silence could not of itself amount to adoption of an answer, that the defendant had been entitled to exercise his right to silence and that the trial judge had been wrong to allow the co-defendant's lie to be treated as the defendant's adopted answer. However, following the common law on pre-trial silence which is discussed below, the Court of Appeal found that an accused can, through his reaction, join in the answer given in response to an important question asked in his presence. This is subject to the jury being directed to consider whether in all the circumstances, the question called for some response from the defendant and whether by his reaction, he adopted the answer given.⁴⁴ There is, therefore, scope for an accused's silence to amount to adoption of another's answer, even in the face of police questioning so long as they are on equal terms.⁴⁵ Although *Collins* does not directly relate to

⁴⁰ [2010] UKSC 43.

⁴¹ (2008) 49 EHRR 42.

⁴² *R v Collins* [2004] 1 WLR 1705. Also see discussion below in relation to pre-trial silence at common law.

⁴³ [2004] 1 WLR 1705.

⁴⁴ *Ibid* [35].

⁴⁵ *R v Chandler* [1976] 1 WLR 585.

the application of s.36 or s.37, it does demonstrate how an accused's failure to cooperate in the face of suspicious circumstances, and in the absence of legal advice, can be used against him.

Unlike sections 34 and 35, sections 36 and 37 have received little academic attention; also they have generated very little case law. It may be that they are seldom used in practice, or they may be thought unobjectionable because of their very specific applicability and the fact that they require clear notice to the suspect.⁴⁶ It may also be connected to the fact that inferences drawn from incriminating circumstances are already permitted at common law. An example is drawing inferences from circumstantial evidence. In order to reach a conclusion from circumstantial evidence, inferences will be drawn connecting the evidence to a conclusion of fact. Circumstantial evidence can be enough to lead to a conviction or acquittal. A more specific example is the case of handling stolen goods, where the jury may infer that a defendant, having deliberately closed his eyes to the circumstances, knew or believed the goods to be stolen.⁴⁷

In *Raviraj*⁴⁸ the Court of Appeal upheld a conviction after the judge had implied in his summing up that where the facts indicated recent possession of stolen goods, an exception to the right to silence existed. They found that the doctrine of recent possession is a particular aspect of the general proposition that where suspicious circumstances appear to demand an explanation, but no explanation or an entirely incredible explanation is given, the lack of explanation may warrant an inference of guilty knowledge in the defendant. This, in turn, is part of a wider proposition that guilt may be inferred from the unreasonable behaviour of a defendant when confronted with facts which seem to accuse.⁴⁹ In some cases a s.36 or s.37 inference may overlap with an inference of guilty knowledge in a handling of stolen goods case when the defendant, after being cautioned and questioned, has failed to account for the presence of stolen goods. Sections 36 and 37 thus strengthen the fact finder's capacity to infer guilt from certain circumstances. Yet, by emphasising the expectation on the accused to participate and increasing the pressure on him to cooperate, the provisions are going further than the common law and are extending the circumstances in which inferences can be drawn. As such, they are contributing to the participatory style of

⁴⁶ Redmayne (n 5) 1049.

⁴⁷ *R v Griffiths* (1974) 60 Cr App R 14.

⁴⁸ (1987) 85 Cr App R 93.

⁴⁹ *Ibid* [103].

procedure in which the accused's active participation and cooperation are used to efficiently further the accurate fact finding aim.

In the one reported case regarding s.36, the Court of Appeal took an expansive approach to its applicability. In *Compton*,⁵⁰ two appellants had been convicted of conspiracy to supply heroin and cocaine, while a third was convicted of possessing proceeds of drug trafficking. They argued that no s.36 direction should have been given regarding their alleged failure to account for the presence of heroin contaminated money in their homes, claiming that they had not failed to 'account' for it. Upon being cautioned, two of the defendants had stated that the money had come from legitimate means, with one also pointing out that he was a heroin addict. This, it was held, did not 'account' for the presence of the heroin contaminated money. At trial, the defendants gave more specific accounts, stating the legitimate sources of the money. However, unlike s.34, s.36 invites no comparison between statements in interview and the evidence at trial. The sole question under s.36 was whether the defendant accounted for the presence of the substance, as put to him by the police officer.⁵¹ The Court of Appeal held that it is not enough to refer to other states of fact from which it can be inferred what the account might be.⁵²

The third defendant, when interviewed before the heroin had been detected, said that his wife was a heroin addict and that the money had come from his father and the sale of a vehicle. When re-interviewed after the heroin had been detected he exercised his right to silence. Again, he was held to have failed to account for the heroin contaminated money, even though it could have been inferred that the heroin came from his father who was a known drug dealer, his wife, or the purchaser of the vehicle. He had not accounted for a specific state of fact. In arriving at these conclusions, the Court of Appeal took a restrictive view as to when an accused can be said to have accounted for suspicious circumstances. The implication is that suspects must not only cooperate by offering a possible explanation, but must do so in a specific and detailed way. It can be assumed that the same is true of s.37.

The general perception of sections 36 and 37 as uncontroversial, which is reinforced through the lack of case law and academic attention, cannot disguise the fact that they have contributed to the shift in English criminal procedural style away from adversarialism and

⁵⁰ [2002] EWCA Crim 2835.

⁵¹ *Ibid* [32].

⁵² *Ibid* [34].

due process concerns. They penalise defendants who fail to cooperate in the criminal process through offering a specific account of certain circumstances to the police. However, their applicability is more specific and less open-ended than sections 34 and 35 and, as such, arguably has less potential to cause injustice.

6.4 Pre-trial silence

6.4.1 Common law

At common law, silence as a response to accusations made by the police has been treated differently from accusations made by another citizen. In *Christie*⁵³ the House of Lords held that an accused could, by his demeanour, wholly or partly accept the truth of accusations made by another citizen. Silence could thus be interpreted as acceptance of accusing statements.⁵⁴ Later cases clarified the principle that silence as a reaction to an accusation by a person on an equal footing can attract an inference of acceptance of that accusation.⁵⁵ However, the evidential use of silence in the face of police accusations was less clear. In *Chandler*⁵⁶ the Court of Appeal held that the *Christie* principle, whereby silence can be tantamount to acceptance of accusations, could apply during police questioning before caution, when the suspect and the police were speaking on equal terms. The presence of a solicitor also tended to put the suspect and police on a more equal footing. *Chandler* appeared to make a substantial inroad into the pre-trial right to silence, but its practical impact depended on when the suspect was cautioned.⁵⁷ As a result of PACE, the police are required to caution a suspect when they have grounds to suspect him of committing an offence.⁵⁸ It follows that in most cases the caution will have to be administered at the beginning of an interview, and that there will be no scope for the application of the *Christie* principle.⁵⁹ In practical terms, silence in the face of accusations by the police was unlikely to warrant judicial comment that inferences can be drawn at common law.

⁵³ [1914] AC 545.

⁵⁴ Dennis *The Law of Evidence* (n 27) 171.

⁵⁵ *Parke v R* [1976] 1 WLR 1251.

⁵⁶ [1976] 1 WLR 585.

⁵⁷ Dennis *The Law of Evidence* (n 27) 173.

⁵⁸ PACE, Code C 10.1.

⁵⁹ Dennis *The Law of Evidence* (n 27) 173.

In *Gilbert*,⁶⁰ the defendant was charged with murder and raised the issue of self-defence at trial, having not mentioned this to the police during questioning. The trial judge, in asking the jury to consider whether it was remarkable that, when making his statement to the police, the appellant said nothing about self-defence, effectively invited the jury to reject this defence. The Court of Appeal, who noted that it was not possible to reconcile all of the judicial decisions on the use of pre-trial silence, held that this comment was a misdirection. They rejected the purported distinction between silence as evidence of guilt and silence as affecting the weight of subsequent evidence, with the latter amounting to no more than an indirect way of inferring the former. *Gilbert* consolidated the suspect's right to silence in the police station and provided a significant contrast to the limits expressed in *Chandler*.⁶¹ Although s.34 effectively reverses *Gilbert*, s.34(5) states that when evidence of silence falls outside the scope of s.34, such as when the accused has not been cautioned, the common law will still apply. This preserves the *Christie* principle as applied in *Chandler*, and, so, allows inferences to be drawn from a suspect's failure to deny accusations in certain circumstances.

6.4.2 Section 34

Section 34 provides that:

(1) Where, in any proceedings against a person for an offence, evidence is given that the accused —

(a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or

(b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact,
being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, subsection (2) below applies.

(2) Where this subsection applies —

...

(c) the court, in determining whether there is a case to answer;
and

(d) the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure as appear proper.

Before a jury can be invited to draw adverse inferences under s.34, certain conditions must be satisfied: the accused must have been questioned about an offence by the police under caution; the constable carrying out the questioning must have been trying to discover

⁶⁰ (1977) 66 Cr App R 237.

⁶¹ Dennis *The Law of Evidence* (n 27) 174.

whether or by whom the offence was committed; the accused must have failed to mention, when questioned, a fact later relied on in his or her defence in criminal proceedings; and the fact must be one which, in the circumstances existing at the time, the accused could reasonably have been expected to mention when questioned.⁶² Silence alone cannot generate an inference; the suspect must rely on a fact at trial which was not mentioned during police questioning. In addition to these triggering conditions, the defendant must have been offered access to legal advice before being questioned.⁶³

Section 34 is a radical departure from the common law under which an invitation to draw adverse inferences from pre-trial silence would usually be a misdirection.⁶⁴ It is a controversial provision which has generated an extensive and complex body of case law. Some judges initially resisted an expansive approach to drawing adverse inferences from silence. In *Bowden*, the Court of Appeal stated that, 'since [the CJPOA provisions] restrict rights recognised at common law as appropriate to protect defendants against the risk of injustice, they should not be construed more widely than the statutory language requires.'⁶⁵ This reflects a view that the silence provisions should be approached carefully, perhaps because they contradict a procedural tradition within which the accused is not legally obliged to participate. Dennis believes that a combination of European Court of Human Rights and Court of Appeal jurisprudence has made the reform to the right to silence in the police station significantly less radical in certain respects than it might have been.⁶⁶ This is largely a result of the numerous pre-conditions and essential directions which have developed and which must now be given before a s.34 inference can be drawn.⁶⁷ Nonetheless, s.34 itself invites an expansive interpretation and the effect of the legislation as a whole has been to greatly inhibit the accused's free choice to remain silent under police questioning. As the case law has developed further, a broader understanding of s.34 has emerged. This has been particularly acute in regards to certain aspects of its application, such as the relevance of legal advice in determining the appropriateness of adverse inferences.

⁶² s.34(1).

⁶³ s.34(2A).

⁶⁴ *R v Gilbert* (1977) 66 Cr App R 237.

⁶⁵ *R v Bowden* [1999] 2 Cr App R 176 [181].

⁶⁶ I Dennis 'Silence in the Police Station: The Marginalisation of Section 34' [2002] *Crim LR* 25.

⁶⁷ For example, its operation can be avoided by the use of pre-prepared written statements, and inferences from silence may not constitute the sole or the main evidence for conviction. See *Ibid*.

Despite the confusing and contradictory case law, the effect of s.34 has been to further distance the English criminal process from the adversarial model within which the right to silence became a workable safeguard for the accused. The provision is not only objectionable because of a loss of protection for innocent suspects in the police station and the increased risk of miscarriages of justice,⁶⁸ but also because it hinders the accused's right to choose whether to participate. The normative implications of s.34 are briefly examined in this section, but they are explored in more detail in a later section. By examining the law and how it has been applied, this part of the chapter demonstrates the extent to which the accused is penalised for his pre-trial non-cooperation and lack of participation.

Reliance on a fact

It is the failure to mention a fact later relied on in defence which triggers s.34. What constitutes a fact for the purposes of the provision has been interpreted quite liberally, expanding the potential range of situations in which a defendant can be penalised for his non-cooperation. In *Webber*,⁶⁹ the object of bringing the law back into line with common sense was held by the House of Lords to justify a broad approach to the meaning of 'fact', covering any alleged fact which is in issue and is put forward as part of the defence case. A 'fact' may include: assertions made by the accused during cross-examination;⁷⁰ reliance on a fact adduced by defence witnesses or in cross-examination of prosecution witnesses;⁷¹ adopting the evidence of a co-defendant;⁷² and putting forward factual explanations for facts asserted by the prosecution.⁷³ However, in this last situation, the explanation must go beyond a hypothetical or speculative possibility which does not have a foundation of fact known to the defendant at the time of police interview.⁷⁴

In *Betts and Hall*,⁷⁵ it was held that a bare admission of a fact asserted by the prosecution did not constitute a fact relied on by the defendant at trial. This is consistent with the Strasbourg judgment in *Condrón v UK*⁷⁶ which found that inferences from pre-trial silence should be restricted to cases in which the accused makes a positive assertion at trial. In

⁶⁸ Royal Commission on Criminal Justice (n 8); Greer (n 10).

⁶⁹ [2004] UKHL 1.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *R v Milford* [2001] Crim LR 330.

⁷⁴ *R v Nickolson* [1999] Crim LR 61.

⁷⁵ [2001] 2 Cr App R 16.

⁷⁶ (2001) 31 EHRR 1.

Smith,⁷⁷ the Court of Appeal held that a judge had been wrong to direct a jury under s.34 that it could draw an adverse inference from the fact that the defendant had given a no comment police interview where the only facts potentially giving rise to the adverse inference were the defendant's admission of an agreed fact and his denial of any involvement in the offence with which he had been charged. However, denials of facts asserted by the prosecution can be treated as facts relied on by the defendant. Thus, in *Betts and Hall*, Hall's claim that, contrary to the prosecution's assertion, he did not know the victim by sight, was asserting a fact. Asserting, or denying, a previously unmentioned fact will usually indicate that the defendant is relying on that fact, thus ensuring that the pre-conditions for drawing adverse inferences under s.34 are met. Because of the expansive judicial interpretation of 'fact', and despite some attempt to restrict it, it has become increasingly difficult for a defendant to exercise his right to silence during police questioning without facing adverse consequences for doing so.

Drawing adverse inferences

The adverse inferences that can be drawn from silence are those that 'appear proper'.⁷⁸ In the context of s.34, this will most likely be an inference that the fact not mentioned during police questioning, but relied on at trial, was fabricated. This inference could then contribute to a finding of guilt. A s.34 inference can be drawn by the court when it is considering whether there is a case to answer (assuming that the defence rely on a previously undisclosed fact during cross-examination of prosecution witnesses), and when the court or jury are determining the guilt of the accused.⁷⁹ According to s.38(3), silence cannot be the sole basis for these decisions. This has been supplemented by the European Court's decision that silence should not be a main decisive factor.⁸⁰ Although this is intended as a safeguard, there remains room for silence to play a role in convicting the accused. The Judicial Studies Board specimen direction and the case law insist that a jury may not consider silence unless satisfied that the other evidence discloses a *prima facie* case.⁸¹ However, this is inconsistent with allowing the court to draw adverse inferences when determining whether there is a case to answer in the first place. Evidence of silence may therefore play a more significant role than merely providing support for an already established case.⁸² Dennis points out that

⁷⁷ [2011] EWCA Crim 1098.

⁷⁸ s.34(2).

⁷⁹ s.34(2)(c) and (d).

⁸⁰ *Murray v UK* (1996) 22 EHRR 29 [47].

⁸¹ *Condron v UK* (2001) 31 EHRR 1; *R v Gill* [2001] 1 Cr App R 11.

⁸² Dennis *The Law of Evidence* (n 27) 193.

the *prima facie* case requirement is probably essential to comply with the European Court's restriction that silence may not provide the main evidence for conviction.⁸³ Moreover, the requirement may go beyond insistence on a bare *prima facie* case. It has been suggested that the prosecution case should be so strong that it clearly calls for an answer by the defendant.⁸⁴

The Judicial Studies Board (JSB) specimen direction on inferences from pre-trial silence states that the judge should direct the jury that:

you may draw the conclusion ... from his failure that he [had no answer then/had no answer that he then believed would stand up to scrutiny/has since invented his account/has since tailored his account to fit the prosecution's case/(*here refer to any other reasonable inferences contended for ...*)]. If you do draw that conclusion, you must not convict him wholly or mainly on the strength of it ...but you may take it into account as some additional support for the prosecution's case ... and when deciding whether his [evidence/case] about these facts is true.⁸⁵

The directions state also that the jury should be satisfied that when interviewed, the defendant could reasonably have been expected to mention the facts on which he now relies.⁸⁶ This direction has been affirmed by the Court of Appeal.⁸⁷ According to Redmayne, the JSB directions operate like a magic formula; so long as they are given by the judge, the jury can be left to draw an inference, with courts generally loath to identify factual situations where an inference should not be drawn.⁸⁸ Even where the directions are not followed, there is no guarantee that the courts will interfere.⁸⁹ A defective direction will not necessarily render a conviction unsafe.⁹⁰ Thus, despite the need for a direction and a *prima facie* case, there remains scope for silence to influence a finding of guilt.

The European Court's approach

It was thought by some that s.34 might be found incompatible with the ECHR.⁹¹ However, the European authorities have held inferences from silence to be within the limits of Article

⁸³ Ibid.

⁸⁴ *R v Petkar and Farquhar* [2003] EWCA Crim 2668; *Murray v DPP* [1994] 1 WLR 1.

⁸⁵ Judicial Studies Board *Crown Court Bench Book: Specimen Directions* (2007) 40.2.

⁸⁶ Ibid 40.3.

⁸⁷ *R v Condrón and Condrón* [1997] 1 Cr App R 185.

⁸⁸ Redmayne (n 5) 1060.

⁸⁹ *Adetoro v UK* (46834/ 06) Unreported April 20, 2010.

⁹⁰ *R v Chivers* [2011] EWCA Crim 1212.

⁹¹ I Dennis 'The Criminal Justice and Public Order Act 1994: The Evidence Provisions' [1995] *Crim LR* 4, 6.

6, so long as certain safeguards are in place. In *Murray v UK*,⁹² a case concerning the Northern Irish equivalent to the CJPOA, the European Court of Human Rights stated that:

On the one hand, it is self-evident that it is incompatible with the immunities under consideration to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself. On the other hand, the Court deems it equally obvious that these immunities cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution.⁹³

They went on to say that:

Whether the drawing of adverse inferences from an accused's silence infringes Article 6 is a matter to be determined in the light of all the circumstances of the case, having particular regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation.⁹⁴

A significant point in this case was that Murray had been tried by a Diplock court, and a reasoned judgment was given on the facts. It was suggested that the situation might be different in a jury trial. However, in *Condon v UK*,⁹⁵ the Court clarified that adverse inferences could be drawn in jury trials, but stated that particular caution is required and that the jury should be directed carefully as to the conditions under which an inference can be drawn. On the facts in *Condon* the Court found that the judge's directions to the jury left them 'at liberty to draw an adverse inference notwithstanding that it may have been satisfied as to the plausible explanation',⁹⁶ and that, as a matter of fairness, the jury should have been directed that it could only draw an adverse inference if satisfied that the applicants' silence at the police interview could only sensibly be attributed to their having no answer or none that would stand up to cross-examination.⁹⁷ A direction to that effect would have been more than 'merely "desirable"'.⁹⁸ In *Beckles v UK*,⁹⁹ the Court confirmed that the jury should draw inferences when the defendant's silence was, in effect, consistent only with guilt.

⁹² (1996) 22 EHRR 29.

⁹³ *Ibid* [47].

⁹⁴ *Ibid*.

⁹⁵ (2001) 31 EHRR 1.

⁹⁶ *Ibid* [61].

⁹⁷ *Ibid*.

⁹⁸ *Ibid* [62].

⁹⁹ (2003) 36 EHRR 13.

However, *Adetoro v UK*¹⁰⁰ shows that such a direction is not always necessary. The trial judge had not made it clear that the jury must be sure that the defendant had no answer to give or none that would hold up to scrutiny before drawing an adverse inference under s.34, an important element of the direction. Although both the prosecution and Court of Appeal had acknowledged this mistake, the European Court found no breach of the Convention. The case against the defendant had been strong and there was no realistic possibility that the jury believed the defence story to be true, but at the same time drew an adverse inference against the defendant. Thus, in rejecting his defence, the jury must also have rejected the defendant's excuse for silence. The Court distinguished two types of reasons for silence: those unconnected to the defendant's substantive defence at trial, such as legal advice to remain silent; and those inherently linked to the substantive defence.¹⁰¹ A full direction appears less essential to ensure fairness in the second category.

Notwithstanding European attempts to restrict the force of pre-trial silence through cautious directions to the jury, the broad nature of s.34 as well as judicial reluctance to interfere with initial decisions as to its application, grant it significant potential to affect the outcome of cases. Furthermore, a finding by the European Court that the CJPOA is consistent with fairness does not automatically lead to the conclusion that the defendant's rights are not negatively affected. Normatively, the European Court's decisions should not be taken as definitive, as the defining standard of fairness. Namely, their reluctance to meddle in the applicability of the CJPOA does not render the provisions unobjectionable.

Silence and legal advice

The relationship between s.34 inferences and legal advice has caused a particular problem for the practical application of s.34. Although it has suffered from an inconsistent judicial approach, an unnecessarily expansive interpretation of the provision has prevailed in this area. In *Condrón and Condrón*,¹⁰² it was held that the nature of any legal advice given was just one factor to be considered in a wider assessment of the reasonableness of an accused's silence. Legal advice could not in itself circumvent an inference being drawn under s.34; to do so would render the section 'wholly nugatory'.¹⁰³ This is doubtful due to both the limited

¹⁰⁰ (46834/ 06) Unreported April 20, 2010.

¹⁰¹ *Ibid* [51].

¹⁰² [1997] 1 Cr App R 185.

¹⁰³ *Ibid* [191].

use of pre-trial silence in practice and the fact that silence will not always be recommended as the best strategy.

In *Betts and Hall*,¹⁰⁴ the Court of Appeal held that if a defendant genuinely relied on legal advice, then no inference could be drawn. However, in *Howell*,¹⁰⁵ it was suggested that the defendant should not only have genuinely relied on the legal advice given to him, but that it should also have been reasonable for him to do so. Laws, LJ placed s.34 in the context of a general move towards a more participatory style of procedure which imposes normative expectations on the accused:

It seems to us that this provision is one of several enacted in recent years which has served to counteract a culture, or belief, which had long been established in the practice of criminal cases, namely that in principle a defendant may without criticism withhold any disclosure of his defence until the trial. Now, the police interview and the trial are to be seen as part of a continuous process in which the suspect is engaged from the beginning... This benign continuum ... is thwarted if currency is given to the belief that if a suspect remains silent on legal advice he may systematically avoid adverse comment at his trial. And it may encourage solicitors to advise silence for other than good objective reasons.¹⁰⁶

As well as pointing out the role of the CJPOA in discouraging ambush defences, this passage suggests that legal advice, and perhaps legal representatives more generally, should not be permitted to disturb the shift in English criminal procedure towards a participatory model of procedure. This is in contrast to the fact that legal representatives were responsible for much of the shift towards adversarialism in the eighteenth and nineteenth centuries, as explained in chapter 4.¹⁰⁷ To negate the effect of legal advice by allowing adverse inferences to be drawn, irrespective of it, constitutes another step away from adversarialism.

Howell contradicts the earlier decision of *Betts and Hall* in so far as the former requires an assessment of the quality of the advice as well as the factual issue of whether it was relied on. It has been described as 'a mischievous decision which has created inconsistent case law on the important issue of the evidential consequences of remaining silent on legal advice.'¹⁰⁸ The Court in *Hoare*¹⁰⁹ tried to reconcile the two decisions by stating that it is the true reason for silence which is important:

¹⁰⁴ [2001] 2 Cr App R 16.

¹⁰⁵ [2005] 1 Cr App R 1.

¹⁰⁶ *Ibid* [23] and [24].

¹⁰⁷ See JH Langbein *The Origins of the Adversary Criminal Trial* (Oxford University Press: Oxford, 2003).

¹⁰⁸ A Choo and A Jennings 'Silence on Legal Advice Revisited: R v Howell' (2003) 7 *E and P* 185, 189.

¹⁰⁹ [2004] EWCA Crim 784.

The whole basis of s.34... is an assumption that an innocent defendant... would give an early explanation to demonstrate his innocence.

The section 34 inference is concerned with flushing out innocence at an early stage or supporting other evidence of guilt at a later stage, not simply with whether a guilty defendant is entitled, or genuinely or reasonably believes that he is entitled, to rely on legal rights of which his solicitor has advised him. Legal entitlement is one thing. An accused's reason for exercising it is another. His belief in his entitlement may be genuine, but it does not follow that his reason for exercising it is.¹¹⁰

The assumption here is that silence is suspicious and an indicator of guilt, with a broad interpretation of s.34 given as a result. The question for the jury is whether, regardless of legal advice genuinely given and genuinely accepted, an accused remained silent because of it and not because he had no story to give or none that would withstand scrutiny. In *Beckles*, the Court of Appeal approved *Hoare*, and emphasised that the ultimate question is the reasonableness of the defendant's decision.¹¹¹

In a system which is centred around putting the prosecution to proof and calling the state to account for its accusations and request for punishment of the accused, the genuineness or reasonableness of a suspect's reliance on legal advice is of little import. It is his entitlement to remain silent which is important, and which should prevent adverse inferences from being drawn. Yet, in practice, entitlement has been given less-than-due weight. There is an inconsistency between directing the jury to only draw an adverse inference if the only sensible explanation for silence is that the defendant had no answer to give, or none that would withstand scrutiny, and allowing adverse inferences to be drawn where a defendant has relied on legal advice to remain silent.¹¹² Legal advice can always constitute an explanation for silence. Thus, whilst juries cannot rationally draw an adverse inference from silence in such cases, they are told that they can. Redmayne labels this area of s.34 case law a 'sad mess.'¹¹³

Another inconsistency arises from the fact that the operation of s.34 depends on the accused being afforded access to legal advice;¹¹⁴ yet, the content of that advice, in so far as the accused is advised to remain silent, has become irrelevant. As Cooper points out, 'There would seem to be little point, if any, in insisting that a suspect receives (or at least has the

¹¹⁰ Ibid [53] and [54].

¹¹¹ *R v Beckles* [2004] EWCA Crim 2766 [46].

¹¹² Redmayne (n 5) 1071.

¹¹³ Ibid.

¹¹⁴ s.34(2A) CJPOA 1994.

opportunity to receive) legal advice in the police station if the jury might then conclude that it effectively amounts to an admission by conduct to accept a solicitor's advice to remain silent.¹¹⁵ This challenges the position taken by the European Court in *Condrón*; that access to legal advice and the physical presence of a solicitor during police interview must be considered a particularly important safeguard for dispelling any compulsion to speak which may be inherent in the terms of the caution.¹¹⁶ In *Armstrong*,¹¹⁷ the Court of Appeal did attempt to limit the risk of eliminating the weight to be given to the fact of legal advice altogether. The convictions of the two appellants were declared unsafe because the judge invited the jury to question whether one of the appellants had even been advised to remain silent, despite the fact that this was not an issue since the record of interview showed that such advice had been given.

Legal advice is an essential element of the right to a fair trial,¹¹⁸ but the approach of the Court of Appeal in relation to s.34 has effectively weakened its protective role, such that its value is in danger of being seriously eroded.¹¹⁹ Cape argues that, as a matter of principle, a suspect should be able to rely on legal advice without fear of being penalised for doing so.¹²⁰ If defendants can never be sure that they are acting reasonably in relying on legal advice, then they can never be sure that they should accept that advice. Even before the CJPOA, instead of seeing legal advice as justifying silence, the Court of Appeal construed the presence of a solicitor as legitimising the evidential significance of silence.¹²¹ This was the case in *Chandler*¹²² where the presence of a solicitor helped put the police and suspect on even terms. However, the presence of a legal adviser will not necessarily enhance the position of the accused. In *Paris, Abdullahi and Miller*,¹²³ one suspect had, in the presence of a solicitor, been intimidated and bullied into giving a false confession after denying involvement in an offence over three hundred times. As a result of the jurisprudence concerning the relationship between s.34 and legal advice, even a defendant who has

¹¹⁵ S Cooper 'Legal Advice and Pre-Trial Silence – Unreasonable Developments' (2006) 10 *E and P* 60, 67.

¹¹⁶ *Condrón v UK* (2001) 31 EHRR 1 [60].

¹¹⁷ [2009] EWCA Crim 643.

¹¹⁸ See PACE, s.58; ECHR, Article 6; *R v Samuel* [1988] 2 All ER 135; *Murray v UK* (1996) 22 EHRR 29.

¹¹⁹ E Cape 'Sideline Defence Lawyers: Police Station Advice After Condrón' (1997) 1 *E and P* 386, 402.

¹²⁰ *Ibid.*

¹²¹ S Easton 'Legal Advice, Common Sense and the Right to Silence' (1998) 2 *E and P* 109, 119.

¹²² [1976] 1 WLR 585.

¹²³ (1993) 97 Cr App R 99.

genuinely accepted and acted upon legal advice to remain silent may face a penalty for his non-cooperation.

Silence, legal advice and legal privilege

As the fact finder must be satisfied of the genuineness of the defendant's reliance on legal advice to remain silent, the grounds for that advice may need to be disclosed to the court. Likewise, to discredit a claim of recent fabrication put forward by the prosecution, the defendant may wish to disclose both the fact that he had told his solicitor of the facts on which he now relies and the details of their conversation. This might entail a waiver of legal privilege. Where legal professional privilege arises, the effect of the privilege is essentially that neither legal adviser nor client can be required to disclose the privileged communication.

In *Seaton*,¹²⁴ the Court of Appeal analysed the previous domestic and European case law regarding the relationship between silence, legal advice, and legal privilege. They took particular account of *Wilmot*,¹²⁵ *Bowden*,¹²⁶ and *Loizou*,¹²⁷ and came to some important conclusions. They held that a defendant cannot be asked whether he told his solicitor or counsel that what he now says is true unless he has waived privilege; if the defendant does give evidence of what passed between him and his solicitor he is not thereby waiving privilege entirely and generally. The test to determine what has been made available by his waiver is fairness and/or the avoidance of a misleading impression. However, if a defendant says that he gave his solicitor the account he offers at trial, he can be cross-examined about exactly what he told his solicitor on the topic. A defendant who adduces evidence that he was advised by his lawyer not to answer questions but goes no further than that does not thereby waive privilege. However, a defendant who adduces evidence of the content of, or reasons for, such advice does waive privilege, at least to the extent of opening up questions which properly go to whether such reason can be the true explanation for silence.¹²⁸ In most cases a defendant will be able to give evidence of the fact that he informed his solicitor at the police station of the facts upon which he now relies in his defence, without waiving

¹²⁴ [2010] EWCA Crim 1980.

¹²⁵ (1989) 89 Cr App R 341.

¹²⁶ [1999] 2 Cr App R 176.

¹²⁷ [2006] EWCA Crim 1719.

¹²⁸ *R v Seaton* [2010] EWCA Crim 1980 [43].

privilege in relation to the entire pre-interview communication.¹²⁹ Nevertheless, the effect of s.34 is to exert undue pressure on the defendant to waive privilege in order to convince a jury not to penalise him for non-cooperation.

In *Condon*, the European Court held that the fact that the applicants had been subjected to cross-examination on the content of their solicitor's advice could not be said to raise an issue of fairness under Article 6: 'They were under no compulsion to disclose the advice given, other than the indirect compulsion to avoid the reason for their silence remaining at the level of a bare explanation.'¹³⁰ Because the applicants had chosen to make the content of their solicitor's advice a live issue as part of their defence, they could not complain that the scheme of s.34 overrode the confidentiality of their discussions with their solicitor. However, the 'indirect compulsion' put the defendants under pressure to waive privilege and cooperate in the criminal process by offering a detailed explanation for their earlier non-participation. Faced with a difficult choice between adverse inferences of guilt or waiving privilege and disclosing potentially damaging information, defendants find themselves on the horns of a dilemma. This raises the pressure upon them to second guess legal advice.

Advising Silence

One significant reason for advising silence is inadequate disclosure by the police, and it is in these circumstances that one might expect the courts to take a more restrictive approach to s.34. The police are under no obligation to disclose their evidence to a suspect during interview; this may be a concern for both innocent and guilty suspects who do not want to be misled. In *Argent*,¹³¹ the Court of Appeal rejected the argument that insufficient disclosure by the police should make evidence of the accused's silence inadmissible, with the crucial issue being whether the police have given sufficient information to enable legal advisers to advise their clients properly. In *Roble*,¹³² the Court of Appeal suggested that good reason for silence may arise if the interviewing officer has disclosed so little that the solicitor cannot usefully advise his client, or if the nature of the offence, or the material in the hands of the police, is so complex, or relates to matters so long ago, that no sensible immediate response is feasible.¹³³ In *DPP v Ara*,¹³⁴ a decision to stay proceedings as an abuse of process

¹²⁹ M Stockdale and N Wortley, "A Singularly Delicate Relationship": Silence and the Waiver of Legal Professional Privilege' (2006) 167 *Criminal Lawyer* 3, 8.

¹³⁰ *Condon v UK* (2001) 31 EHRR 1 [60].

¹³¹ [1997] 2 Cr App R 27.

¹³² [1997] Crim LR 449.

¹³³ *Ibid.*

was held to be justified in the light of police refusal to disclose to a solicitor the terms of an interview with the defendant. Without this the defendant could not be given appropriate advice on whether to consent to a caution. It was held that, although there could be no general duty on the police of disclosure prior to charge, the failure to disclose the terms of the interview in the instant case, followed by the commencement and pursuit of criminal proceedings, had provided sufficient justification for the decision to stay the proceedings. This may have been an exceptional circumstance. Redmayne suggests that so long as a suspect knows the allegation against him, he is basically expected to respond with his defence even if there appears to be very little evidence against him.¹³⁵

Legal advisors have devised a way of preventing adverse inferences being drawn from pre-trial silence through the use of pre-prepared statements followed by 'no comment' interviews. The defendant presents the police with a written statement and then refuses to answer questions. This is one area where a restrictive approach to the applicability of s.34 was initially taken; preventing a direction allowing the jury to draw adverse inferences if the account in the prepared statement is consistent with the defendant's evidence at trial.¹³⁶ However, this tactic requires the defendant to commit to a particular account of events and, recently, the courts have found that even the slightest omission or deviation from the statement can invite adverse inferences. In *Mohammad*,¹³⁷ there were three matters regarding facts relied on by the defendant at trial, which the prosecution successfully argued had not been mentioned previously. All three of these matters were not materially different from those in the defendant's pre-prepared statement. The Court of Appeal acknowledged that, in relation to two of the matters, the defendant had simply been putting flesh and bones on the facts he had already set out in the statement, and that the third matter was inconsequential for either the prosecution or defence.¹³⁸ Nevertheless, they upheld the conviction, stating that it had not been wrong in law to give the jury a direction under s.34.¹³⁹ This fastidious approach to pre-prepared statements pushes the application of s.34 beyond its initial purpose of ensuring the early disclosure of defence cases. It shows a desire to secure defendant participation and a willingness to penalise non-cooperation. In

¹³⁴ [2002] 1 WLR 815.

¹³⁵ Redmayne (n 5) 1064.

¹³⁶ *R v Knight* [2003] EWCA Crim 1977.

¹³⁷ [2009] EWCA Crim 1871.

¹³⁸ *Ibid* [24].

¹³⁹ *Ibid* [25].

Parradine,¹⁴⁰ the Court of Appeal held that whether a s.34 direction should be given notwithstanding a pre-prepared statement will depend on the particular facts of the case. In this case, like in *Mohammad*, there had been no alteration in the defence. The defendant was held to have relied on a previously unmentioned fact by adding information about a man identified in his statement.

Section 34 has given rise to many difficulties such that the benefits of keeping it may not outweigh the burdens imposed by its retention.¹⁴¹ Aside from the lack of uniformity in the judicial approach and the amount of time and resource the courts must put into clarifying s.34, its focus on the accused's participation undermines the role of the defence as a party,¹⁴² the defendant's ability to exercise his rights, and the necessary constraints which fairness concerns place on the operation of the criminal process. It does not have a place in an adversarial system in which the defendant need not participate and the trial operates as a forum to test the prosecution case. Neither does it fit into the normative theory of calling the state to account.

6.5 Trial Silence

6.5.1 Common law

The accused became a competent witness on his own behalf by virtue of section 1 of the Criminal Evidence Act 1898. The Act was one of the final developments in the emergence of the adversarial system which had been gradually increasing the competency of defence witnesses. Whilst s.1(a) granted the defendant competency as a witness, s. 1(b) stated that the failure of an accused person to give evidence could not be made the subject of any comment by the prosecution. This provision was presumably intended to protect the defendant from being coerced into the witness box where he might be tricked into incriminating himself during cross-examination.¹⁴³ Although the defendant was an incompetent witness until 1898, he could give an unsworn statement from the dock. As

¹⁴⁰ [2011] EWCA Crim 656.

¹⁴¹ D Birch 'Suffering in Silence: a Cost-Benefit Analysis of Section 34 of the Criminal Justice and Public Order Act 1994' [1999] *Crim LR* 769, 770.

¹⁴² It is the rights held by the defence as a party which allow the prosecution to be put to proof without the active participation of the defendant. See chapter 4; S Summers *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights* (Hart: Oxford, 2007); Langbein (n 107).

¹⁴³ Dennis *The Law of Evidence* (n 27) 541.

explained in chapter 4, prior to the establishment of full defence counsel in the nineteenth century, the defendant was expected to speak on his own behalf to refute the evidence against him. The precise evidential status of unsworn statements was obscure,¹⁴⁴ but the practice continued until its abolition by the Criminal Justice Act 1972. Section 1(b) of the 1898 Act was repealed by the CJPOA.¹⁴⁵

Whilst 'prosecutorial comment' on a defendant's in-court silence was forbidden, the 1898 Act did not expressly prevent the judge or co-accused from passing comment. It had been held that a co-accused had a right to comment.¹⁴⁶ However, the judicial position was less clear and a good deal of often inconsistent case law ensued. Whereas the initial view seemed to imply an unfettered discretion of the judge to comment on a defendant's failure to testify,¹⁴⁷ later cases restrained this by imposing a duty on the judge to exercise caution when commenting on failure to give evidence.¹⁴⁸ In *Bathurst*,¹⁴⁹ Lord Parker CJ stated that:

The accepted form of comment is to inform the jury that, of course, he is not bound to give evidence, that he can sit back and see if the prosecution have proved their case, and that while the jury had been deprived of the opportunity of hearing his story tested in cross-examination, the one thing they must not do is to assume that he is guilty because he has not gone in the witness box.¹⁵⁰

Subsequent cases held that stronger comment may be appropriate, depending on the particular facts of the case.¹⁵¹ In *Mutch*,¹⁵² a distinction was drawn between cases of simple denial where the defendant puts the prosecution to proof, and cases in which the defence put forward a positive account and the defendant failed to give evidence in support of it. In this second category of 'confession and avoidance', stronger comment might be warranted.¹⁵³ This approach was reaffirmed by the Court of Appeal,¹⁵⁴ it seems also to have been adopted by the House of Lords in its determination of the Northern Irish equivalent to s.35.¹⁵⁵

¹⁴⁴ Ibid 540.

¹⁴⁵ s.168(3), sch.11.

¹⁴⁶ *R v Wickham* (1971) 55 Cr App R 199.

¹⁴⁷ *R v Rhodes* [1899] 1 QB 77.

¹⁴⁸ *Waugh v R* [1950] AC 203.

¹⁴⁹ [1968] 2 QB 99.

¹⁵⁰ Ibid [107].

¹⁵¹ *R v Sparrow* [1973] 1 WLR 488.

¹⁵² [1973] 1 All ER 178.

¹⁵³ Ibid [81].

¹⁵⁴ *R v Martinez-Tobon* (1994) 98 Cr App R 375.

¹⁵⁵ *Murray v DPP* [1994] 1 WLR 1 [155].

The common law position on in-court silence was reviewed by the Court of Appeal in *Martinez-Tobon*,¹⁵⁶ shortly before the CJPOA came into force. The Court recognised that previous cases on the subject were not easily reconcilable.¹⁵⁷ They summarised the principles that apply at common law where a defendant does not testify as follows:

(1)The judge should give the jury a direction along the lines of the Judicial Studies Board specimen direction based on *R v Bathurst* ... (2) The essentials of that direction are that the defendant is under no obligation to testify and the jury should not assume he is guilty because he has not given evidence. (3) Provided those essentials are complied with, the judge may think it appropriate to make a stronger comment where the defence case involves alleged facts which (a) are at variance with prosecution evidence or additional to it and exculpatory, and (b) must, if true, be within the knowledge of the defendant. (4) The nature and strength of such comment must be a matter for the discretion of the judge and will depend upon the circumstances of the individual case. However, it must not be such as to contradict or nullify the essentials of the conventional direction.¹⁵⁸

Although an absolute right to silence did not exist prior to the enactment of the CJPOA, the boundaries of acceptable comment were significantly more restricted. If directed properly, it would be clear to the jury that the defendant is under no obligation to participate and that it is the state, through the prosecution, who must account for its allegations against him. Some defendants would have chosen to remain silent at trial on the basis that it would allow the defence to attack prosecution witnesses without evidence of the defendant's previous bad character being admitted.¹⁵⁹ The Criminal Justice Act 2003 terminated this by significantly broadening the circumstances in which the defendant's bad character can be admitted such that silence no longer provides the defendant with a shield.¹⁶⁰ He may now feel pressured to testify in an attempt to mitigate bad character evidence. However, even in cases that only called for the traditional *Bathurst* direction, a defendant might have been inhibited from remaining silent for fear that the jury would hold it against him. Whether this fear went beyond what one would ordinarily experience, given the possibility of 'common sense' inferences being drawn from a failure to testify, is questionable. Although the direction may have drawn the jury's attention to something they would otherwise have thought to be inconsequential, it may have also acted to restrict how they took account of silence, by emphasising the existence of the right to silence and the fact that silence is not an indicator of guilt. It is, therefore, difficult to determine what the precise impact of comment under the

¹⁵⁶ (1994) 98 Cr App R 375.

¹⁵⁷ *Ibid* [397].

¹⁵⁸ *Ibid*.

¹⁵⁹ Criminal Evidence Act 1898, s.1(3). Since repealed by the Criminal Justice Act 2003.

¹⁶⁰ Criminal Justice Act 2003, s.98-113.

common law would have been on the defendant. Nonetheless, the defendant was better equipped to hold the state to account and put the prosecution to proof under the common law than he is under the CJPOA.

6.5.2 Section 35

Section 35 provides that:

(1) At the trial of any person for an offence, subsections (2) and (3) below apply unless —
(a) the accused's guilt is not in issue; or
(b) it appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence;

...

(2) Where this subsection applies, the court shall, at the conclusion of the evidence for the prosecution, satisfy itself (in the case of proceedings on indictment, in the presence of the jury) that the accused is aware that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence and that, if he chooses not to give evidence, or having been sworn, without good cause refuses to answer any question, it will be permissible for the court or jury to draw such inferences as appear proper from his failure to give evidence or his refusal, without good cause, to answer any question.

(3) Where this subsection applies, the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences as appear proper from the failure of the accused to give evidence or his refusal, without good cause, to answer any question.

Section 35 allows adverse inferences to be drawn from a defendant's failure to testify in court, unless his physical or mental condition makes it undesirable for him to do so. Before an inference can be drawn, the defendant must have been made aware at the end of the prosecution's case that the stage has been reached at which he can give evidence and the possible consequences of not doing so. Implicit in s.35 is the requirement that the prosecution must have presented a *prima facie* case, based on their own evidence, before the jury can be invited to draw inferences from the defendant's in-court silence. In the absence of a *prima facie* case, the judge should find that the defence have no case to answer and the defendant will not be called upon to give evidence. Section 35(4) is believed to preserve the right to silence, as it provides that the accused is not a compellable witness and that he is not guilty of contempt of court if he does not testify. However, the overall effect of s.35 is to penalise defendants who do not actively participate through placing pressure on them to testify, and allowing adverse inferences of guilt to be drawn if they do not. This pressure will be even more acute for those defendants who feel they need to explain their pre-trial silence.

This part of the chapter examines the link which s.35 makes between silence and guilt, and shows how a broad judicial approach has made it increasingly difficult to avoid its application. Linking silence directly to guilt creates an expectation that the defendant should participate in the proceedings, and affects the ability of the defence to put the prosecution to proof.

Silence as an indicator of guilt

Section 35 is the only provision in the CJPOA which treats silence alone as suspicious and deserving of adverse treatment. Whereas sections 34, 36 and 37 require some triggering condition on the part of the accused before adverse inferences can be drawn, namely reliance on a previously unmentioned fact or silence in the face of suspicious circumstances, s.35 merely requires a competent defendant to exercise his right to remain silent. Consequently, subject to an appropriate direction to the jury, s.35 inferences can go straight to the issue of guilt rather than to the plausibility of specific facts, asserted by the prosecution or relied on by the defence. In this way, it has a more corrosive effect on the defendant's fundamental right to silence than do the other provisions. This is compounded by the fact that it has been interpreted in a way that undermines the existence of innocent reasons for in-court silence.

The Court of Appeal have held that it would be inappropriate for a judge to embark or invite the jury to embark on possible speculative reasons consistent with innocence which might prompt a defendant to remain silent.¹⁶¹ Consequently, where the defendant resists the pressure to testify at trial and can produce no evidence to explain his silence, he will have no choice but face the possibility of adverse inferences. Pattenden argues that the need to produce evidence for an innocent explanation places a new and unprincipled evidential burden on the accused.¹⁶² It is irreconcilable with the traditional theory that an accused can contest the case against him without calling evidence. This, it has been claimed, is a subtle subversion of the burden of proof and a 'misguided, new development in the law of evidence.'¹⁶³ Without knowing what the innocent explanation for a refusal to cooperate might be, it must be more consistent with fairness to, at least, take into account the fact that innocent explanations for silence do exist. Jackson points out that:

¹⁶¹ *R v Cowan* [1996] QB 373 [385].

¹⁶² R Pattenden 'Silence: Lord Taylor's Legacy' (1998) 2 *E and P* 141, 153.

¹⁶³ *Ibid* 156.

No matter how strong the evidence, the court or jury is in a position to draw the 'proper' inference from silence only where it knows the reason for silence. Without knowledge of that reason, it would only seem safe to draw an inference of guilt where the trier of fact is already convinced of guilt on the basis of existing proof beyond reasonable doubt. But the inference then becomes merely an *ex post facto* rationalisation of what the trier of fact is already convinced of, and the provision becomes redundant. If the trier of fact is already convinced on the basis of lesser than this, then the provision is being used to do what in many cases it cannot do, namely provide the necessary evidence to bring the proof up to standard.¹⁶⁴

Thus, whilst the jury can only be sure that the defendant's explanation for silence is false or that his silence stems from guilt where other evidence proves him guilty, s.35 allows silence to contribute to a finding of guilt. The fact that the burden is essentially on the defendant to produce evidence of a justification for silence acts to reinforce the conclusion that the provision is intended to increase participation.

In order to address some aspects of the injustice inherent in equating silence directly with guilt, the trial judge could be under a duty, as part of his direction to the jury on silence, to remind them that silence is not necessarily an indicator of guilt, and that there could be a possible explanation for which the defence have not adduced evidence. This would assist the jury in making informed assessments of whether to infer guilt from silence.¹⁶⁵ If applied to all of the silence provisions, it would likely decrease the risks of wrongful conviction and go some way to reasserting a strong right to silence. Among those advocating such a direction are Greer who maintains that, 'the basic principle should be that, in trials on indictment, judges should be obliged to point out to jurors that silence...may be entirely innocent', with possible grounds for an innocent explanation being listed by trial judges.¹⁶⁶ Likewise, Pattenden suggests something similar to the *Lucas* direction given in relation to lies.¹⁶⁷

The argument for a *Lucas* type direction, indicating to the jury that there may have been innocent reasons for failure to give evidence, has been rejected by the House of Lords on the basis that it might mislead the jury as to the reason for silence, and result in unfounded speculation.¹⁶⁸ This ignores the fact that the jury is already being asked to speculate guilt

¹⁶⁴ J Jackson 'Interpreting the Silence Provisions: The Northern Ireland Cases' [1995] *Crim LR* 587, 600.

¹⁶⁵ A Owusu-Bempah 'Judging the Desirability of a Defendant's Evidence: An Unfortunate Approach to s.35(1)(b) of the Criminal Justice and Public Order Act 1994' [2011] *Crim LR* 690, 703.

¹⁶⁶ Greer (n 10) 730.

¹⁶⁷ Pattenden (n 162) 154. This includes in appropriate cases that the jury be reminded that 'people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family.' See *R v Lucas* [1981] QB 720 [724].

¹⁶⁸ *R v Becouarn* [2005] UKHL 55.

from the defendant's decision not to testify. With respect to s.34, the defendant may benefit from the incorporation of a *Lucas* direction into the s.34 direction if the case includes a lie as well as a failure to mention a fact later relied on, and the factual context is such that the defendant is entitled to a *Lucas* direction.¹⁶⁹ It has been held that it is usually unhelpful to give both a s.34 and *Lucas* direction; and that the judge should adopt the direction more appropriate to the facts and issues in the case.¹⁷⁰ Ignoring the possibility of innocent reasons for silence, and drawing adverse inferences from that can damage the aim of accurate fact finding rather than promote it. This unfortunate situation might occur where the defendant has failed to testify due to fear of reprisals from a co-accused or some other interested party. It would be difficult for the defence to produce evidence of this fear without exposing the defendant to that of which he was afraid. In practice, the need to offer evidence of an innocent explanation at trial puts further pressure on the defendant to actively participate.

In the absence of a positive defence, putting the prosecution to proof may not attract an adverse inference under s.34. However, failure to testify in such circumstances can lead to adverse inferences being drawn under s.35. In *Whitehead*,¹⁷¹ a s.35 inference was held to be appropriate where the defence case was essentially that the complainant was lying about sexual abuse. In this type of 'I didn't do it' case, the defendant does not have a positive defence; he can only deny the allegations made against him. Here, the applicability of s.35 goes further than the distinction made at common law between 'confession and avoidance' cases which raise a positive defence with a factual basis within the defendant's knowledge, and cases which simply deny the prosecution's allegations and put them to proof.¹⁷² Section 35 targets both defendants who put the prosecution to proof and defendants who do not support a positive defence with their own testimony. Redmayne notes that in those cases where a positive defence is not put forward, the s.35 inference appears to be extremely tenuous.¹⁷³ It is a fundamental problem that s.35 makes such a strong connection between silence and guilt; it forces the defendant to participate if he wishes to prevent this link. To penalise those who do not testify through asserting the tenuous link between silence and guilt is counter to a system that allows the defence to test the prosecution case, whilst respecting defence rights and ensuring fairness. It is, thus, inconsistent with adversarial and

¹⁶⁹ *Hackett v R* [2011] EWCA Crim 380 [26].

¹⁷⁰ *Ibid* [13].

¹⁷¹ [2006] EWCA Crim 1486.

¹⁷² *R v Martinez-Tobon* (1994) 98 Cr App R 375.

¹⁷³ Redmayne (n 5) 1075.

rights based accounts of criminal procedure, as well as the normative theory which requires the state to account for the accusations it makes against the accused.

Judicial directions

The Court of Appeal was given its first opportunity to restrict the scope of s.35 in *Cowan*.¹⁷⁴ Instead, however, they rejected the assertion that the provision should be used only exceptionally. They confirmed that the CJPOA was intended by Parliament to alter the law on the right to silence, but were adamant that the right to silence is preserved by s.35(4).¹⁷⁵ The Court endorsed the JSB specimen direction on silence at trial, but stated that it may be necessary to adapt or add to it in the particular circumstances of an individual case. They highlighted certain essential elements of the direction:

(1) The judge will have told the jury that the burden of proof remains upon the prosecution throughout and what the required standard is. (2) It is necessary for the judge to make clear to the jury that the defendant is entitled to remain silent. That is his right and his choice. The right to silence remains. (3) An inference from failure to give evidence cannot on its own prove guilt. That is expressly stated in section 38(3) of the Act. (4) Therefore, the jury must be satisfied that the prosecution have established a case to answer before drawing any inferences from silence. Of course, the judge must have thought so or the question whether the defendant was to give evidence would not have arisen. But the jury may not believe the witnesses whose evidence the judge considered sufficient to raise a prima facie case. It must therefore be made clear to them that they must find there to be a case to answer on the prosecution evidence before drawing an adverse inference from the defendant's silence. (5) If, despite any evidence relied upon to explain his silence or in the absence of any such evidence, the jury conclude the silence can only sensibly be attributed to the defendant's having no answer or none that would stand up to cross-examination, they may draw an adverse inference.¹⁷⁶

Although appearing to place some limit on a potentially broad discretion to equate silence with guilt, a departure from an essential element of the judicial direction will not necessarily result in a successful appeal.¹⁷⁷ Once the jury have satisfied themselves that the defendant has a case to answer, they are entitled to infer guilt from his failure to testify if it appears

¹⁷⁴ [1996] QB 373.

¹⁷⁵ Ibid [376].

¹⁷⁶ Ibid [380].

¹⁷⁷ *Adetoro v UK* (46834/ 06) Unreported April 20, 2010; *R v Birchall* [1999] Crim LR 311. However, in this case the Court held that it was essential to the interest of justice that a jury should not consider whether to draw an adverse inference until they had concluded that there was a case to answer and as such, the trial judge's omission of this point constituted a reason for finding in favour of the appellant.

proper to do so.¹⁷⁸ As with s.34, the underlying assumption is that the innocent, with nothing to hide, will want to speak.

Judges retain discretion as to whether, and in what terms, they should advise a jury for or against drawing inferences. In *Cowan* it was stated that the Court would not lightly interfere with the exercise of that discretion.¹⁷⁹ However, in *Lancaster*¹⁸⁰ the Court of Appeal did warn that, without individual consideration of the circumstances, the routine application of s.35 'can lead to unnecessary problems, whilst not necessarily contributing to the achievement of justice.'¹⁸¹ This may be particularly true where the defendant is testing the prosecution case without asserting a positive defence, or where the jury cannot be alerted to an innocent explanation for silence. For this reason, it is imperative that the jury are aware that the defendant commits no wrong by remaining silent, and that they do not attach more weight to the fact of silence than is necessary. In a conception of the criminal process based on calling the state to account this would be taken further, with the jury being advised not to use the fact of silence against the defendant who should not be penalised for exercising an established right. Although such a direction might interfere with the jury's 'common sense' assessment of the case, like a direction alerting the jury to the possibility of innocent explanations for silence, it could protect the defendant from the risk of injustice, and ensure the fair and legitimate operation of the criminal process.

Barriers to s.35 inferences

There remains an unresolved issue as to the circumstances in which a jury should be directed against drawing adverse inferences from the defendant's failure to testify. In *Cowan*, the Court of Appeal, in declining to address this query, stated that it is not possible to anticipate all of the circumstances in which a judge might think it right to direct or advise a jury against drawing an adverse inference.¹⁸² Likewise, in *Murray*, the European Court stated that it must not speculate on circumstances where inferences may or may not be drawn.¹⁸³ However, it has also been made clear that the operation of s.35 is not to be reduced or marginalised,¹⁸⁴ and the courts have generally been reluctant to minimise the

¹⁷⁸ In *Murray v DPP* [1994] 1 WLR [11], the House of Lords made clear that, in an appropriate case, an inference that the defendant was guilty might properly be drawn from his refusal to testify.

¹⁷⁹ *R v Cowan* [1996] QB 373 [382].

¹⁸⁰ [2001] EWCA Crim 2836.

¹⁸¹ *Ibid* [17].

¹⁸² *R v Cowan* [1996] QB 373 [380].

¹⁸³ *Murray v UK* (1996) 22 EHRR 29 [56].

¹⁸⁴ *R v Becouarn* [2005] UKHL 55 [23].

scope of s.35 by reference to asserted excuses. A submission that adverse inferences should not be drawn because the defendant had not been interviewed by the police at a time when events were fresh in his mind has been rejected.¹⁸⁵ As has the argument that silence is necessary to conceal previous convictions.¹⁸⁶ In the more recent case of *Hamidi and Cherazi*,¹⁸⁷ the Court of Appeal held that it did not follow that because a jury should be directed not to draw adverse inferences against an absent co-accused, they should also be directed against drawing such inferences against the appellants. The Court reiterated the point made in *Cowan* that it would only be in exceptional cases that the ability to draw an adverse inference would be removed from the jury by direction.¹⁸⁸ Had there been significant issues of fact between the appellants and their co-accused, the consideration of which would have been affected by the s.35 direction, there may have been exceptional circumstances which required the judge to ensure the parity sought.¹⁸⁹

The one substantive barrier to drawing adverse inferences from in-court silence is s.35(1)(b), when it appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence. This provision has the potential to act as a safeguard for vulnerable defendants against an indiscriminate application of adverse inferences which can be drawn under s.35, notwithstanding the possibility of a legitimate explanation for silence. However, the provision is being applied too restrictively and is failing to fulfil its potential.¹⁹⁰ In *Friend*,¹⁹¹ the first case to examine s.35(1)(b), the judge gave a s.35 direction, despite the defendant's young age (fifteen years) and low IQ (mental age of around nine). The Court of Appeal felt that the trial judge had acted within his discretion, and went on to state that a physical condition might include a risk of an epileptic attack, and a mental condition might include latent schizophrenia.¹⁹² 'Undesirable' was, thus, interpreted in terms of the impact that testifying would have on a defendant's immediate health. Little consideration was given to the quality of the defendant's evidence or the fact that he may create a highly unfavourable impression through no fault of his own.

¹⁸⁵ *R v Napper* [1996] Crim LR 591.

¹⁸⁶ See *R v Cowan* [1996] QB 373 and *R v Becouarn* [2005] UKHL 55. This argument is no longer relevant as a result of the bad character provisions in the Criminal Justice Act 2003.

¹⁸⁷ [2010] EWCA Crim 66.

¹⁸⁸ *Ibid* [21].

¹⁸⁹ *Ibid* [24].

¹⁹⁰ *Owusu-Bempah* (n 165) 691.

¹⁹¹ [1997] 2 Cr App R 231.

¹⁹² *Ibid* [242].

Consequent upon the restrictive approach taken by the courts, all but those defendants who are borderline unfit to plead are expected to testify so that their credibility can be judged, even if they can do no more than deny the accusations.¹⁹³ In order to safeguard those who are fit to plead, yet suffer from some mental or physical condition which may affect their testimony, the notion of 'undesirable' should be given a broader scope.¹⁹⁴ In *Friend's* second appeal, the Court opened up the possibility of a broader interpretation of s.35(1)(b) by quashing the conviction in the light of new expert evidence that Friend suffered from Attention Deficit Hyperactivity Disorder.¹⁹⁵ Despite this, the judicial approach to s.35(1)(b) has remained narrow.¹⁹⁶ This is particularly worrying for young defendants whose age is unlikely to impact the 'desirability' of their testimony.¹⁹⁷ In *Lancaster*, the Court of Appeal stated that there might be some force in the argument that *Friend* applied an unduly restrictive interpretation of s.35(1)(b), but did not elaborate on this point.¹⁹⁸

In *Tabbakh*,¹⁹⁹ the defendant had some degree of mental health problems, suffered from post-traumatic stress disorder and had self-harmed for some time. The Court of Appeal held that the trial judge had correctly ruled that the jury would be able to draw an adverse inference from his failure to give evidence. It was concluded that the defendant's own health and welfare were not the only issue. The fact that he had a condition that might have created some difficulty in giving evidence was thought insufficient to justify the conclusion that it was undesirable that he should do so.²⁰⁰ It was submitted by the appellant that the greater the importance of the evidence, the less desirable it was for him to testify. Conversely, it was held that, given the potential importance of the defendant's evidence to the case, the increased risk of self-harm (which was not of the most serious kind) did not make it undesirable for him to give evidence.²⁰¹ The Court found that all of the circumstances of a case need to be taken into account such that when a defendant has a marginal health condition which would create a marginal risk of modest or temporary distress or regression if he were to give evidence, and if the only issue to which his evidence

¹⁹³ Redmayne (n 5) 1087.

¹⁹⁴ Owusu-Bempah (n 165) 699.

¹⁹⁵ *R v Friend* [2004] EWCA Crim 2661.

¹⁹⁶ See, *R v LH* [2001] EWCA Crim 1344; *R v Ensor* [2009] EWCA Crim 2519.

¹⁹⁷ *R v Friend* [1997] 2 Cr App R 231; *R v AC* [2001] EWCA Crim 713; *R v LH* [2001] EWCA Crim 1344.

¹⁹⁸ *R v Lancaster* [2001] EWCA Crim 2836 [18].

¹⁹⁹ [2009] EWCA Crim 464.

²⁰⁰ *Ibid* [11].

²⁰¹ *Ibid* [8].

could go were one of very peripheral significance, the judge would be entitled to take that into account in concluding that it was undesirable for him to give evidence.²⁰²

The Court's rejection of the appellant's argument signals the underlying importance of defendant participation. As a result of this decision, the extent to which the defendant's wellbeing might be affected, if he were to give evidence, should be considered in the light of the importance of the evidence that he can provide; the greater the importance of the evidence, the more desirable it is for him to testify. Yet, the exercise of determining the desirability of a defendant's testimony in relation to the importance of his evidence seems somewhat superfluous, as the defendant's testimony will always be significant and has the potential to influence the jury's assessment of the case, even where he is simply denying the allegations against him. The manner of giving evidence can have just as significant an impact as the content of that evidence. As it now stands, in order to fall within s.35(1)(b), the defendant will most likely need to show that he is suffering from a physical or mental condition that will certainly be triggered or worsened by giving evidence, and that his evidence will be of little importance to the case.²⁰³

Practitioners worry about the vulnerability of defendants who are not considered 'undesirable' witnesses for the purpose of s.35(1)(b). A post-CJPOA study found that there was apprehension that such defendants, having been effectively forced into the witness box, may come across poorly and damage their case; this may, in turn, raise the possibility of wrongful conviction.²⁰⁴ Because of the burden on the defence to produce evidence of an explanation for silence, in the absence of expert evidence as to why the defendant has not testified, the defence party will have to make a difficult decision as to whether or not the defendant should take the stand. Even where expert evidence has been presented, the judge does not have to draw the jury's attention to it in his summing up on s.35, so long as the summing up as a whole made it clear that the expert evidence can be taken into account.²⁰⁵ The defendant's participation in the trial process seems to be of paramount importance, above other considerations, including his wellbeing.

²⁰² Ibid [9].

²⁰³ See, Owusu-Bempah (n 165).

²⁰⁴ Bucke et al. (n 17) 56.

²⁰⁵ *R v Lancaster* [2001] EWCA Crim 2836.

6.6 The CJPOA in practice

Like many aspects of criminal justice research, it is harder to pinpoint the effect of the CJPOA on outputs than it is to identify its impact on judicial activity.²⁰⁶ However, Bucke, Street and Brown conducted empirical studies into the practical effects of the CJPOA.²⁰⁷ It is worth noting that, although a detailed and useful report, the information was gathered not long after the CJPOA came into force, at a time when the case law was beginning to develop. Fifteen years later, the situation might be quite different. This was the experience in Singapore where provisions similar to those in the CJPOA, and inspired by the Criminal Law Revision Committee's 1972 report, had little effect initially, but saw much greater use in later years. This has been attributed to a cultural shift in criminal procedure and wider society towards tougher attitudes on crime and the creation of a tougher criminal justice system, resulting in the progressive erosion of the right to silence and privilege against self-incrimination in Singapore.²⁰⁸ A shift in attitudes toward crime is also evident in England, with much more emphasis being put on securing convictions, 'balancing' the system, victim interests, and efficiency. As a result, English criminal procedure now places greater emphasis on the participation of the accused. The shift towards increased participation may have led to greater influence of the silence provisions.

A principal conclusion from Bucke *et al.*'s post-CJPOA research is that the silence provisions do not have a major impact on the outcome of cases, with no discernible increase in the conviction rate or the rate of guilty pleas. Conviction rates since the study was published have varied. Whilst some sources suggest an increase of around ten per cent by 2007, others cite a roughly stable rate.²⁰⁹ However, there are many variables which can influence conviction rates such as changes in recording practices, making it difficult to determine the precise impact of the CJPOA.²¹⁰ Nevertheless, the incentive element of the CJPOA may have encouraged more suspects and defendants to talk. Bucke *et al.*'s research points to a significant reduction in the extent to which suspects rely on their right to silence during police questioning, with the proportion of suspects refusing to answer some or all police

²⁰⁶ Bucke *et al.* (n 17) 69.

²⁰⁷ *Ibid.*

²⁰⁸ A Tan 'Adverse Inferences and the Right to Silence: Re-examining the Singapore Experience' [1997] *Crim LR* 471.

²⁰⁹ Redmayne (n 5) 1081-1082.

²¹⁰ *Ibid* 1082.

questions falling from 23 to 16 per cent.²¹¹ Still, there was no change in the proportion of suspects providing admissions.²¹² This is consistent with a police perception that more suspects are lying. As to the use of silence in court, the impression of practitioners is that gradually more defendants have been testifying. Virtually all barristers, CPS staff and defence solicitors agreed that fewer defendants were declining to testify.²¹³

The possibility that juries may have taken into consideration a defendant's silence prior to the CJPOA raises further questions about the extent of the provisions' impact. However, to try to isolate the effect of the CJPOA on juries' decision-making would be problematic. In the absence of research into jury deliberations, the impact of silence on the outcome of cases will remain speculative. Nonetheless, perceptions of increased participation amongst defendants do point to the conclusion that the pressure imposed on them to cooperate and the adverse inferences that may be drawn if they do not, has actually increased participation. Bucke, Street and Brown concluded that the provisions have had a marked impact on: suspects' use of silence at the police station; police practices in relation to interviewing and disclosure; the advice given at the police station by legal advisers; the proportion of defendants testifying at trial; the way in which cases are prosecuted and defended at trial; and on judge's directions to the jury.²¹⁴ The CJPOA may have also increased efficiency in the investigation stages, particularly by way of more productive interviews, greater scope for the investigation of accounts provided by suspects during interviews, and greater certainty of convictions where silence augments other evidence.²¹⁵ Despite a lack of change in plea, charge and conviction rates, the CJPOA has had an impact on the working of the criminal process, particularly the role of the accused as a participant.

6.7 Theoretical implications of the CJPOA

The CJPOA makes it difficult for the accused to successfully put the prosecution to proof and test the case against him without actively participating in the criminal process. It seems to place participatory burdens on the defendant both before and during trial. This is particularly so where the defendant wishes to assert an excuse for his earlier silence, such as

²¹¹ Bucke et al. (n 17) ix.

²¹² Ibid 34.

²¹³ Ibid 52.

²¹⁴ Ibid xiii.

²¹⁵ Ibid.

reliance on legal advice. Hodgson notes that, through the silence provisions, the accused is systematically restrained from behaving in an adversarial way, with penalties attached to the exercise of the right to put the prosecution to proof.²¹⁶ The effect of the CJPOA is, thus, to move English criminal procedure further away from its adversarial style from which developed many legal norms now considered essential to guarantee a fair process. The result of this shift is a procedural model much more participation-focused, yet distinctive from the models identified in chapter 3. This final part of the chapter identifies some of the different perspectives from which the scope and value of the right to silence can be viewed in order to gain a better understanding of the theoretical and normative impact of the CJPOA. As the right to silence is an application of the privilege against self-incrimination, there are some overlaps between this section and the justifications for the privilege set out in the previous chapter. However, since the two rights are being approached separately, and since the accused is penalised in different ways for relying on them, the focus here is specifically on the implications of limiting the right to silence.

6.7.1 The value of the right to silence

The merit of a right to silence as part of criminal procedure can be examined from a number of perspectives. One obvious issue relates to the relationship between silence and accurate outcomes. The nature of this relationship produced arguments for both supporters and opponents of reform prior to the CJPOA. Those who opposed reform believed that, by equating silence with guilt, innocent suspects and defendants would be put at risk of wrongful conviction.²¹⁷ For those who supported reform, silence was perceived as suspicious and an indicator of guilt. Both the domestic and European Courts have taken the 'silence as an indicator of guilt' approach in their assessments of the CJPOA, and have, for the most part, adopted an expansive interpretation of the provisions. For example, it has been largely felt that drawing adverse inferences from silence is a matter of 'common sense'.²¹⁸ However, this common sense argument is weakened by the many possible innocent explanations for silence. Furthermore, as Easton points out, common sense can be 'unreliable, impressionistic and unsystematic'.²¹⁹ It is because of the weakness of common sense thinking that clear judicial guidance is so important.²²⁰ Common sense may wrongly equate

²¹⁶ J Hodgson 'The Future of Adversarial Criminal Justice in 21st Century Britain' (2010) 35 *North Carolina Journal of International Law and Commercial Regulation* 319, 332.

²¹⁷ Greer (n 10).

²¹⁸ *Murray v DPP* [1994] 1 WLR 1; *R v Webber* [2004] UKHL 1.

²¹⁹ Easton 'Legal Advice, Common Sense and the Right to Silence' (n 121) 114.

²²⁰ *Ibid.*

silence with guilt and fail to consider other possible factors underlying silence, such as fear and anxiety. Juries may not be able to distinguish suspicious silence from innocent silence; they are being asked to speculate. This is unlikely to generate truth finding. Not only are adverse inferences from silence a dangerous and unnecessary application of 'common sense', they also undermine other criminal process values which are important for the normative theory of calling the state to account. The link between silence and the process aim of accurate fact finding is not sufficiently strong to warrant the CJPOA.

Another perspective from which the right can be examined is based on policy considerations concerning protection against abuses of process. As an application of the privilege against self-incrimination, the right to silence can help ensure that the authorities act legitimately in furthering the aims of the criminal process. This is particularly important during police interrogations where the right to silence can limit the pressure on a suspect to offer a false confession or disclose information that might be construed as criminal. The potential for abuse of law enforcement powers is at its greatest in relation to custodial interrogation by the police where there is also considerable physical and psychological pressure to cooperate. Suspects may be misrepresented or misunderstood, may panic or get confused, and the police may take advantage of this. Dennis argues that such pressure, if taken to extremes, can be inconsistent with the fundamental values of the criminal law and may produce confessions that are unreliable.²²¹ He submits that the curtailment of the right to silence in the police station is objectionable, and that section 34 'ought to be repealed as a matter of principle.'²²² Circumstances change at the trial stage of the criminal process where the accused knows the precise charges against him, has heard the evidence against him, has had the opportunity to challenge it, and is participating in a public hearing before an impartial tribunal. Although silence may offer some protection against miscarriages of justice at trial, it is difficult to justify a strong right to silence in court on the same policy basis as silence in the police station.

From the standpoint of a criminal process based on calling the state to account, greater concern must exist for the broader normative implications of limiting the right to silence. The idea that the state should be called to account for the accusations it makes against the defendant and in doing so, justify its request for punishment of the defendant, stems from

²²¹ Dennis *The Law of Evidence* (n 27) 209.

²²² *Ibid* 210.

such fundamental legal norms as the presumption of innocence, fair trial guarantees which constrain the state's powers against the accused, and a conception of the proper relationship between state and citizen in a liberal democracy. As illustrated below, the right to silence forms a valuable part of this. It allows the prosecution case to be tested whilst promoting fairness and legitimacy.

6.7.2 The scope of the right to silence

The appropriate limits of state-induced pressure on the accused to respond to a case against him depend on one's view of the political obligation between state and citizen.²²³ A strong libertarian view of the relationship between citizen and state, such as the one expressed here, holds that citizens must be accorded maximum freedom in deciding whether to cooperate with state investigations. As such, there should be no formal consequences for refusing to actively participate in the police station or at trial. Regard for suspects and defendants as autonomous citizens of a liberal polity who should be protected from the state's potentially oppressive penal power should prevent us from requiring them to participate in proceedings against themselves. As already noted, autonomy is respected by allowing freedom of choice. This can be exhibited through the right to silence. A less rigorous view would argue that it is not, in principle, unfair to expect citizens to respond to well-founded accusations. This view draws parallels with Greenawalt's argument that adverse inferences can be a proper response to silence if substantial evidence of wrongdoing exists.²²⁴ The jurisprudence surrounding the CJPOA seems to correspond to this approach. On the other end of the spectrum is the view that direct pressure in the form of criminal sanctions for non-cooperation should be imposed to secure participation where it is not forthcoming. Although imposing criminal sanctions would represent an unnecessary and unacceptable use of state power, this is the approach that has been taken in regards to certain information that would ordinarily be thought to fall within the privilege against self-incrimination.²²⁵ It is, therefore, not too farfetched to envisage such an approach being taken in regards to the right to silence, if doing so is believed to further the aims of the criminal process.

²²³ Ibid 551.

²²⁴ K Greenawalt 'Silence as a Moral and Constitutional Right' (1981) 23 *William & Mary Law Review* 15, 43.

²²⁵ See, *O'Halloran and Francis v UK* (2008) 46 EHRR 21 and chapter 5.

Whilst a theory of criminal procedure based on calling the state to account obviously calls for a strong liberal approach to the right to silence, other models and conceptions of criminal procedure do not accommodate a right to silence so easily. In an inquisitorial model, the nature and environment of the process emphasise participation, such that it would be rare for an accused to assert silence. In this situation, it is conceivable that there would be undesirable consequences for remaining silent, even in the absence of provisions for adverse inferences. Rules and procedures, including a proactive judiciary and reliance on a written dossier, place fewer impediments in the way of a defendant's active participation. A jurisdiction which adopts these 'inquisitorial' characteristics is at greater ease in qualifying the right to silence. In France, for example, it is considered to be against the suspect's own interests to exercise the right to silence.²²⁶ Duff *et al.* also struggle to accommodate a workable right to silence in their conception of the criminal trial as calling the defendant to answer to the charge against him and answer for any criminal conduct that he is proved to have committed.²²⁷ They believe there should be a normative expectation on him to take part in the trial process.²²⁸ This expectation is not easily reconcilable with a freely enforceable right to silence.

A legal culture which discourages participation has developed in England over a long period of time. Also, there are many bars to effective communication with the accused, including the role of the judge and counsel, and the many complex rules of evidence. The professionalisation and formality of the criminal process, particularly at trial, together with factors such as the legal language used and dress code employed, may be far removed from the accused's own social background and experiences. He may not understand much of the process, and feel alienated or intimidated. It would, thus, seem more appropriate for the English system to uphold a liberal interpretation of the right to silence, rather than to penalise those who exercise it. By adopting the CJPOA, England has clearly altered its procedural style. This is objectionable because the participation-focused model which appears to have been adopted has much less regard for issues of fairness and legitimacy.

6.7.3 Implications of limiting the right to silence

²²⁶ J Hodgson 'Human Rights and French Criminal Justice: Opening the Door to Pre-Trial Defence Rights' in S Halliday and P Schmidt, *Human Rights Brought Home: Socio-legal Perspectives on Human Rights in the National Context* (Hart: Oxford, 2004) 15.

²²⁷ A Duff, L Farmer, S Marshall and V Tadros (eds) *The Trial on Trial Volume 3* (Hart: Oxford, 2007).

²²⁸ *Ibid* 101.

The right to silence belongs to a cluster of criminal justice rights closely linked to the general issue of fairness. These rights include the presumption of innocence and burden of proof. Adherence to the presumption of innocence indicates that it is wrong to require an individual to supply evidence against himself. This, Ashworth believes, should be the practical meaning of the right to silence and the privilege against self-incrimination.²²⁹ On the other hand, Dennis believes that the claim that adverse inferences from silence violate the presumption of innocence seems to imply a claim that it is necessarily improper to draw any inferences from a person's failure to explain away incriminating evidence.²³⁰ This, he submits, is contrary both to common sense and to existing law. However, by expressly catering for adverse inferences, the CJPOA goes beyond common sense by creating an expectation of participation whilst undermining explanations for silence that are not indicative of guilt.

From a normative perspective, the presumption of innocence operates at trial by requiring the prosecution to prove the defendant's guilt and operates beyond the trial as a direction to officials to treat the suspect as if he were innocent at all stages, until guilt is proven. It implies that the accused should not have to play a role in the state's obligation to account for its accusations. Penalising non-cooperation through drawing adverse inferences of guilt against those who do not answer police questions or give evidence at trial is at odds with this interpretation of the presumption. However, the CJPOA also impacts narrower interpretations of the presumption by implying that if an accused cannot, or does not, account for allegations against him, then those allegations must be true. This is reminiscent of the pre-adversarial, altercation, or 'accused speaks' trial under which it was felt that an innocent defendant ought to be able to demonstrate his innocence for the jury.²³¹ When the emphasis is on the defendant's participation, the presumption of innocence is much less pronounced. Strengthening the prosecution's position through an expectation that the defendant will cooperate and equating silence with guilt affects the burden of proof in a similar way.

Setting a high standard of proof encourages the jury to probe the prosecution case, rather than focusing on whether or how the defendant gives evidence. Instead, the defendant now

²²⁹ A Ashworth 'Self-Incrimination in European Human Rights Law- A Pregnant Pragmatism?' (2008) 30 *Cardozo Law Review* 751, 768.

²³⁰ Dennis *The Law of Evidence* (n 27) 204.

²³¹ JM Beattie *Crime and the Courts in England 1660-1800* (Clarendon Press: Oxford, 1986) 341.

appears to have a participatory burden which detracts from the prosecution's general burden of proof. Jackson points out that the 'common sense' approach to silence eases the burden which the prosecution must discharge by permitting the trier of fact to draw a direct inference of guilt on the basis that the accused was not prepared to assert his innocence on oath because he was not innocent.²³² This would appear to allow the trier of fact to raise the prosecution case up to the standard of proof beyond reasonable doubt when the case standing alone cannot reach this standard.²³³

In reviewing the impact of the CJPOA, Bucke *et al.* found a difference in opinion amongst criminal justice practitioners as to whether the provisions had, in practice, if not in law, shifted the burden of proof onto the defendant. Those who felt that it did so argued that the defendant now has to effectively prove his innocence by accounting for his silence. Those who thought the opposite argued that the prosecution still have to prove its case beyond reasonable doubt.²³⁴ However, even some of those who thought that the burden of proof has not been affected considered that to allow inferences to be drawn from silence sat rather uneasily with a presumption of innocence; they expressed also misgivings about statements that the right to silence had been expressly preserved.²³⁵ Like practitioners, academic commentators are also divided on this point.²³⁶ Even if the burden of proof has not been expressly reversed, to allow inferences of guilt to be drawn from silence is to significantly restrict the perimeters of doubt, and, thereby, make it easier to find that the prosecution have discharged their burden.

There are clearly several view-points from which the value and appropriate limits of the right to silence can be examined. From the perspective of the normative theory of criminal procedure influenced largely by adversarialism, due process and rights based concerns, there should be a liberal approach to the right to silence. This would protect the accused's freedom to choose whether or not to participate. The English system has steered away from this approach and has become much more participation-orientated in an attempt to further the aim of accurate fact finding and increase efficiency. As such, it has resorted to penalising

²³² Jackson (n 164) 600.

²³³ Ibid.

²³⁴ Bucke *et al.* (n 17) 57.

²³⁵ Ibid 58.

²³⁶ Compare GW O'Reilly 'England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice' (1994) 85 *The Journal of Criminal Law and Criminology* 402, and BL Ingraham 'The Right to Silence, the Presumption of Innocence, the Burden of Proof, and a Modest Proposal: A Reply to O'Reilly' (1996) 86 *The Journal of Criminal Law and Criminology* 559.

suspects and defendants for their non-cooperation, while justifying this as ‘common sense’. It is tempting, but difficult, to label this as ‘inquisitorial’, because inquisitorialism usually emphasises and encourages participation in its structure and procedural style without the need to expressly penalise those who do not cooperate. The reforms to the right to silence might also link the English system with an emerging efficiency model which also gains support from recent developments, such as the Criminal Procedure Rules. However, despite the advantages that suspect cooperation may have for police investigations, as Birch points out, it is costly in terms of time and focus during the trial stage.²³⁷ It is also difficult to see how the CJPOA has brought English procedure closer to the Continent. Although continental Europe is relatively participation-focused, legislation allowing adverse inferences does not reflect common practice in Europe.²³⁸ Furthermore, the European Court of Human Rights has, for the most part, taken a more restrictive approach to the CJPOA than the domestic courts. The CJPOA has, instead, contributed to the emergence of a procedural model which emphasises the defendant’s participation in pursuit of its aims, and which finds it harder to accommodate the widely recognised defence rights which developed as part of the adversarial system.

6.8 Conclusion

This chapter has explored how the CJPOA has changed the style of English criminal procedure, and why it now seems incompatible with both traditional notions of adversarialism and a normative concept of the criminal process in which the state must account for its accusations and justify its request for condemnation and punishment of the accused. The CJPOA has had an impact on fundamental process norms, such as the presumption of innocence and burden of proof; it has created a new evidential burden on the defendant to provide an explanation for his silence in order to prevent adverse inferences against him; it forces him to second guess his solicitor’s advice to remain silent; and reverses a long history of English jurisprudence which upheld a right to silence. It does these things without significantly furthering its desired objectives of increasing the rate of confessions and convictions, increasing efficiency, and solving the problem of ambush defences. However, it has increased participation, by putting the focus on the accused and

²³⁷ Birch (n 141).

²³⁸ G Van Kessel ‘European Perspectives on the Accused as a Source of Testimonial Evidence’ (1998) 100 *West Virginia Law Review* 799.

creating an expectation of cooperation. The rules of criminal justice now reflect a *prima facie* obligation to participate; the courts have been reluctant to interfere with this. It must, nonetheless, be stressed that in order to have due respect for the necessary constraints which legitimacy and fairness should place on the criminal process, participation should be a choice rather than a penalty-backed requirement. The adverse inference from silence regime highlights the conflict between the aims of the criminal process and considerations of fairness, legitimacy and respect for rights.

Disclosure

7.1 Introduction

Requiring the prosecution and defence to engage in pre-trial disclosure can influence the nature and outcome of criminal proceedings. Disclosure moulds the informational environment by contributing to both the way parties prepare for trial and the cases they put forward at the trial itself.¹ It may promote accurate fact finding by preventing ambush defences which lead to unjust acquittals, and by preventing wrongful convictions which might occur as a result of prosecution non-disclosure. There are also obvious efficiency benefits in having notice of the evidence and arguments of the opposing party prior to trial, as it can save the courts both time and money. As a final example of penalising non-cooperation, this chapter explores requirements for the defence to disclose their case before trial, and the provisions which permit adverse inferences to be drawn against those who fail to comply. A broad disclosure obligation for the prosecution is relatively easy to justify, as it is for the state, through the prosecution, to prove the defendant's guilt beyond a reasonable doubt. Without foreknowledge of the case against the accused, the defence may not know how to prepare for trial or what evidence to call.² Furthermore, since the defence lacks the resources and statutory powers to carry out a full investigation, they will usually have to rely on evidence uncovered by the police and prosecution in order to support their case. Consequently, they have a strong interest in gaining access 'to all the fruits of the police investigation'.³ It is difficult to advance an argument in favour of defence disclosure on similar grounds.

Prior to the Criminal Procedure and Investigations Act 1996 (CPIA), the defence were under no general duty to disclose their case to the prosecution. This can be justified as a reflection of the principle that the defendant need not respond until the prosecution have established a *prima facie* case in court.⁴ It is consistent with the normative theory of criminal procedure

¹ M Redmayne 'Criminal Justice Act 2003: (1) Disclosure and its Discontents' [2004] *Crim LR* 441, 442.

² *Ibid.*

³ I Dennis *The Law of Evidence* 4th edn (Sweet & Maxwell: London, 2010) 352.

⁴ R Leng 'Losing Sight of the Defendant: the Government's Proposals on Pre-Trial Disclosure' [1995] *Crim LR* 704, 704.

in which the state is called to account for its accusations without resource from the accused. The CPIA reduced prosecution disclosure obligations at common law, and imposed radical new duties on the defence. The most significant element of the legislation, for the purposes of this chapter, is the requirement to provide a defence statement which sets out the details of the defence case. Failure to comply is penalised through provisions allowing adverse comment to be made and adverse inferences of guilt to be drawn. The defendant may also be penalised if disclosure is late or inconsistent with previous disclosure.

This chapter begins with a brief review of the concerns which led to the enactment of the CPIA. This is followed by an examination of the current prosecution disclosure obligations. The focus then shifts to the requirements placed on the defence to disclose their case ahead of trial and the sanctions imposed for non-cooperation. The chapter then examines the issues of principle arising from defence disclosure obligations. Requirements on the defence to disclose the details of its case may interfere with important elements of the normative conception of criminal procedure that is based on calling the state to account. These include fairness guarantees and the proper relationship between citizen and state. The implications which the CPIA regime has for English criminal procedure are then discussed. Of particular interest is the impact of the link between the disclosure regime, the case management provisions of the Criminal Procedure Rules, and the perceived need to tackle ambush defences. Within this area of law, it is not only the provisions for adverse inference which shape the procedural style, but also the general statutory duties placed on the defence. Defence disclosure aims to secure convictions as quickly and efficiently as possible. Underlying this is a desire to obtain the cooperation and participation of the defence. The current regime has, thus, contributed to the shift in English criminal procedure away from adversarialism to a participatory model. It is at odds with the normative theory of calling the state to account, interferes with the defendant's ability to test the prosecution case, and raises important issues of principle.

The key components of the CPIA regime are as follows:

s. 3 Initial duty of prosecutor to disclose

(1) The prosecutor must-

(a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused, or

(b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a).

s. 5 Compulsory duty by accused

(5) Where this section applies, the accused must give a defence statement to the court and the prosecutor.

s.6A Contents of defence statement

(1) For the purposes of this Part a defence statement is a written statement -

- (a) setting out the nature of the accused's defence, including any particular defences on which he intends to rely;
- (b) indicating the matters of fact on which he takes issue with the prosecution;
- (c) setting out, in the case of each such matter, why he takes issue with the prosecution;
- (ca) setting out the particulars of the matters of fact on which he intends to rely for the purposes of his defence;⁵ and
- (d) indicating any point of law (including any point as to the admissibility of evidence or an abuse of process) that he wishes to take, and any authority on which he intends to rely for that purpose.

S.7A Continuing duty of prosecutor to disclose

(2) The prosecutor must keep under review the question whether at any given time (and, in particular, following the giving of a defence statement) there is prosecution material which —

- (a) might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused, and
- (b) has not been disclosed to the accused.

S.11 Faults in disclosure by accused

(1) This section applies in the three cases set out in subsections (2), (3) and (4).

(5) Where this section applies —

- (a) the court or any other party may make such comment as appears appropriate;
- (b) the court or jury may draw such inferences as appear proper in deciding whether the accused is guilty of the offence concerned.

7.2 Disclosure reform

Prosecution non-disclosure can result (and has resulted) in miscarriages of justice. High profile cases include *Ward*,⁶ in which police interview records revealing inconsistent and retracted confessions, as well as the results of scientific tests conducted by government forensic scientists, were withheld from the defence. In *Taylor*,⁷ senior police officers had not disclosed key facts about a prosecution witness which put his evidence and credibility into

⁵ This provision was inserted by the Criminal Justice and Immigration Act 2008, s.60(1) and applies to cases in which Part 1 of the CPIA applied by virtue of s.1(1) or (2) before November 3rd 2008.

⁶ [1993] 1 WLR 619.

⁷ (1994) 98 Cr App R 361.

question. In the case of *Sally Clark*,⁸ the fault for non-disclosure of test results which would have undermined the prosecution's case lay with the Home Office pathologist and not the police or prosecution themselves. However, as a Home Office employee, the pathologist was an agent of the state and the state might therefore absorb accountability for his non-disclosure. Despite these and other high profile cases of prosecution non-disclosure resulting in wrongful conviction,⁹ the concerns which led to the enactment of the CPIA were primarily focused on the negative implications of defence non-disclosure. As a result, the government's consultation paper on reform was largely 'one-sided'.¹⁰

The few statutory disclosure obligations placed on the defence, and the absence of any obligations at common law, were thought to have provided them with an unwarranted advantage which allowed them to ambush the prosecution with defences they were not prepared to address. This view persisted, despite evidence to show that ambush defences were not a significant problem.¹¹ With the Criminal Justice and Public Order Act 1994 (CJPOA) already in place to address the issue of ambush defences, it might be presumed that the problem was even less significant at the time the CPIA was enacted. There was also concern that the expansive approach to prosecution disclosure at common law allowed the defence to go on fishing expeditions; purposely wasting the time and resources of the police and prosecution by requiring them to sort through large masses of material in the hope of either causing delay or finding something that would provoke the prosecution to drop the case. The defence could supposedly do this through successive requests for material far beyond the stage at which it could reasonably be claimed that the information was likely to cast doubt upon the prosecution case.¹² However, there was, again, a lack of evidence to support these assertions; in other words, the reform campaign relied largely on anecdote.¹³ The point that the defence is the best judge of what is relevant to its case supports wide

⁸ [2003] EWCA Crim 1020.

⁹ Other cases include: *R v Kiszko*, *The Times*, 18 February, 1992; *R v Maguire* (1992) 94 Cr App R 133.

¹⁰ A Ashworth 'Crime, Community and Creeping Consequentialism' [1996] *Crim LR* 220, 228.

¹¹ Leng found that ambush defences were raised in 5% of contested cases at the most: R Leng *The Right to Silence in Police Interrogation: A Study of Some of the Issues Underlying the Debate*, Royal Commission on Criminal Justice Research Study No.10 (HMSO: London, 1993); Zander and Henderson found a rate of 7% to 10% in a sample of Crown Court cases, with two fifths of these causing no problem for the prosecution. M Zander and P Henderson *Crown Court Study* Royal Commission on Criminal Justice, Research Study No.19 (HMSO: London, 1993). See chapter 6 for further discussion on the proportion of ambush defences.

¹² Royal Commission on Criminal Justice *Report* (HMSO: London, 1993) 93.

¹³ M Redmayne 'Process Gains and Process Values: The Criminal Procedure and Investigations Act 1996' (1997) 60 *MLR* 79, 81.

disclosure, and 'fishing expeditions' may be a useful way of leading to evidence which will assist an innocent defendant.¹⁴

The CPIA is largely a result of the Royal Commission on Criminal Justice's recommendations.¹⁵ The Commission recommended a disclosure regime, based on two stages, whereby the prosecution would make primary disclosure, followed by the disclosure of a statement from the defence outlining the basics of its case. The prosecution would then make further disclosure of any information likely to help the defence case. According to the Commission's report, the objective of the proposals was to 'bring forward the moment at which the issues which the jury will have to decide can be clearly and concisely laid out'.¹⁶ The Commission believed that there were powerful reasons for extending disclosure obligations to the defence: it would encourage earlier and better preparation of cases; result in the prosecution being dropped in light of the defence disclosure; result in earlier resolutions through guilty pleas; or the fixing of an earlier trial date. The length of the trial could also be more readily estimated, leading to better use of the time both of the court and of those involved in the trial, and ambush defences would be kept to a minimum.¹⁷ These are pragmatic reasons which focus on increasing efficiency and eliminating surprises to the prosecution. However, Zander argued that a general requirement of defence disclosure would involve significant extra delays, costs and inefficiencies which, in practice, have been barriers to a smooth operation of the provisions.¹⁸

Leng also felt that the proposals were flawed in principle and unlikely to deliver their promised gains. He opposed them on the basis that they would effect a significant change in the values of the criminal process away from procedural rights in the interests of efficiency.¹⁹ In reality, the regime may have decreased efficiency; significant delays, often lasting two to four hours or more, on the morning of trials, whilst advocates address disclosure issues, are not uncommon.²⁰ In five per cent of cases examined by the CPS Inspectorate, some aspect of non-compliance with the disclosure regime resulted in

¹⁴ Redmayne 'Criminal Justice Act 2003: (1) Disclosure and its Discontents' (n 1) 444.

¹⁵ Royal Commission on Criminal Justice (n 12) chapter 6.

¹⁶ Ibid 84.

¹⁷ Ibid 97.

¹⁸ Ibid 22.

¹⁹ Leng 'Losing Sight of the Defendant: the Government's Proposals on Pre-Trial Disclosure' (n 4).

²⁰ Crown Prosecution Service Inspectorate *A Thematic Review of the Duties of Disclosure of Unused Material Undertaken by the CPS* (Crown Prosecution Service: London, 2008) 6.

adjournments and ineffective trials whilst disclosure issues were being resolved.²¹ Although the Royal Commission stressed the efficiency benefits of reform, the government, particularly in relation to further reforms made under the Criminal Justice Act 2003 (CJA), focused on case outcomes. Increased incentives and sanctions for defence non-disclosure were intended to increase convictions.²² This demonstrates the twin-purpose of the disclosure regime as efficiently securing convictions.

The original disclosure scheme, under the CPIA, was based on proposals set out in the Home Office Consultation Paper²³ which was, itself, a response to the Royal Commission's recommendations. However, the CPIA went further than the Commission had recommended; it introduced a more restrictive approach to prosecution disclosure and a broader approach to defence disclosure. It placed a greater emphasis on the alleged problems which disclosure causes to the prosecution than its importance as a safeguard against wrongful convictions. Initially the new disclosure regime did not work as intended. It was not enforced with vigour and, unlike the CJPOA 1994, produced little case law on the applicability of adverse inferences. In order to resolve this, amendments were made by Part 5 of the CJA 2003. Although these amendments helped rectify the prosecution's restrictive and subjective obligations, they also extended defence disclosure obligations, and made it easier to penalise defendant's non-cooperation.

Whether the CJA reforms made any practical improvements to the disclosure regime is questionable. Quirk believes that the disclosure provisions cannot work, because they lack consideration for the working of cultures and practices of the key protagonists and, so, result in inappropriate allocations of responsibilities.²⁴ As shown below, the statutory regime requires the culturally adversarial police to fulfil an effectively inquisitorial function, prosecutors to view material from a defence perspective, the defence to act in the interest of the administration of the justice system rather than of their clients, and defendants' to cooperate with proceedings against themselves.²⁵ These are all requirements which the respective parties are not necessarily well-equipped to fulfil and, therefore, promote a shift in procedural style.

²¹ Ibid.

²² Home Office *Justice for All* CM5563 (HMSO: London, 2002) chapter 3.

²³ Home Office *Disclosure: A Consultation Document* Cm.2864 (HMSO: London, 1995).

²⁴ H Quirk 'The Significance of Culture in the Criminal Procedure Reform: Why the Revised Disclosure Scheme Cannot Work' (2006) 10 *E and P* 42.

²⁵ Ibid 46.

7.3 Prosecution disclosure

This chapter focuses on the disclosure obligations imposed on the defence. However, it is worth setting out the duties of the prosecution in order to gain a fuller understanding of the disclosure regime as a whole. The important position which prosecution disclosure holds in English criminal procedure can be traced back to the emergence of the adversarial system and, in particular, the Treason Trials Act of 1696 which included a provision granting treason defendants the right to obtain a copy of the indictment prior to the trial. In the preceding altercation trial, the defendant would often be unaware of the charges against him, and would have no knowledge of the prosecution's case. The belief was that facing the defendant with the evidence in court for the first time would help the judge and jury ascertain the sincerity of his denials.²⁶ Conversely, the requirement for the defendant to know the evidence against him has developed into a crucial safeguard against miscarriages of justice.

It has become a fundamental principle that a defendant should not be tried without knowing the nature of the case against him.²⁷ Article 6(3)(a) of the ECHR provides that everyone charged with a criminal offence has the right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him. In England it has been accepted that adequate prosecution disclosure forms part of the defendant's right to a fair trial. The Court of Appeal have endorsed this: 'in our adversarial system, in which the police and prosecution control the investigatory process, an accused's right to fair disclosure is an inseparable part of his right to a fair trial.'²⁸ It is also an essential part of ensuring equality of arms between the parties. Equality of arms is one of the foundations of the adversarial system of adjudication,²⁹ and has been referred to by the European Court of Human Rights as forming part of the right to an 'adversarial trial'. In *Rowe and Davis v UK*,³⁰ they stated that, 'It is a fundamental aspect of the right to a fair trial that criminal proceedings, including elements of such proceedings which relate to procedure,

²⁶ JH Langbein *The Origins of the Adversary Criminal Trial* (Oxford University Press: Oxford, 2003) 63.

²⁷ *Jespers v Belgium* (1981) 27 DR 61; *Edwards v UK* (1992) 15 EHRR 417; *Secretary of State for the Home Department v F* [2009] UKHL 28.

²⁸ *R v Brown* [1995] 1 Cr App R 191 [198].

²⁹ *Dennis* (n 3) 352.

³⁰ (2000) 30 EHRR 1.

should be adversarial and that there should be equality of arms between the prosecution and defence.³¹ The term 'adversarial' in this context was used by the European Court to refer to the requirement that the accused be present at trial and that the defence be able to challenge the submissions and observations of the prosecution and to lead its own evidence.³² It does not describe a pure adversarial model as defined in chapter 3. Article 6(1) requires that the prosecution disclose to the defence all material evidence in their possession for or against the accused.³³ By limiting prosecution disclosure, the CPIA puts the parties in a less equal position and, thus, compromises the defendant's ability to have a fair trial. Also, it shifts the English criminal process further away from adversarialism and the norms which govern issues of fairness.

A distinction can be made between three types, or stages, of prosecution disclosure. The first is during the period between arrest and committal. Here the CPIA does not apply, but the police and prosecution may have some duty to disclose the information necessary to enable the accused to receive informed advice from his solicitor. In *DPP v Ara*,³⁴ the decision to stay proceedings as an abuse of process was justified in the light of police refusal to disclose to a solicitor the terms of an interview with the defendant. However, this case may be confined to its specific facts, since the defendant could not be given appropriate advice from his solicitor on whether to consent to a caution without the disclosure. It was held that acceptance of a caution is inextricably linked with entitlement to informed legal advice.³⁵ There is no general duty on the police to disclose material before charge, and pre-committal disclosure requirements cannot normally exceed the duty of disclosure under the CPIA after committal. The test is what justice and fairness requires of the responsible prosecutor in the circumstances of each case.³⁶ The two other types of disclosure occur after committal and are covered by the CPIA. These are disclosure of the evidence which the prosecution intends to present at trial, and disclosure of material not being used by the prosecution. Although the principle that the prosecution should disclose the evidence it will rely on has long been established and is generally uncontroversial, there are difficult issues surrounding the disclosure of unused material which is gathered during the investigation, but not put

³¹ Ibid [60].

³² S Summers *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights* (Hart: Oxford, 2007) 113.

³³ *Rowe and Davis v UK* (2000) 30 EHRR 1 [60].

³⁴ [2002] 1 WLR 815.

³⁵ Ibid.

³⁶ *R v DPP Ex p Lee* [1999] 2 Cr App R 304.

forward by the prosecution at trial. This evidence may potentially assist the defendant in establishing innocence or developing a case.

The Attorney General first set out guidelines on disclosure in 1981.³⁷ These stated that unused material should be made available to the defence if it had some bearing on the offences charged and the surrounding circumstances of the case. There were also a number of grounds on which the prosecution could refuse disclosure, such as endangering a witness. However, the guidelines did not have the force of law, and subsequent cases set a broader test for prosecution disclosure.³⁸ As the prosecution are supposed to be concerned with the pursuit of truth, as opposed to convicting the innocent, it seems fair that the defence have access to relevant unused material. The prosecution should be regarded as the trustee rather than the monopoly owner of the evidence in its possession.³⁹ Yet, prosecution disclosure has frequently been inadequate, leading to miscarriages of justice, such as those referred to above, and continuing to result in unsafe convictions.⁴⁰ Redmayne points out that it may be that the adversarial process promotes non-disclosure through its tendency to encourage practitioners to think in terms of tactical advantage.⁴¹ This is part of the contest analogy, or combat effect,⁴² of the adversarial system and highlights a contradiction within it; although the idea of prosecution disclosure developed during the rise of adversarialism, the adversarial culture itself discourages it.

Despite the importance of prosecution disclosure of unused material, when the CPIA was introduced, it was seen as responding to complaints by the police that prosecution disclosure had become too generous.⁴³ The perceived unfettered right to disclosure was claimed by senior police officers to have led to the dropping of significant numbers of prosecutions where the police were not prepared to reveal sensitive documents.⁴⁴ The CPIA restricted the prosecution's duty of disclosure by initially splitting it into two stages. The first stage was governed by s.3 which originally provided that the prosecution must disclose

³⁷ *Attorney-General Guidelines* (1981) 74 Cr App R 302.

³⁸ *R v Ward* [1993] 1 WLR 619; *R v Keane* [1994] 1 WLR 746; *R v Brown* [1998] AC 367.

³⁹ P O'Connor 'Prosecution Disclosure: Principle Practice and Justice' [1992] *CLR* 464, 476.

⁴⁰ See for example, *R v Barkshire* [2011] EWCA Crim 1885, where the prosecution failed to disclose material relating to the role of an undercover police officer, as well as material capable of supporting the defence case.

⁴¹ Redmayne 'Process Gains and Process Values: The Criminal Procedure and Investigations Act 1996' (n 13) 80.

⁴² Langbein (n 26) 1.

⁴³ R Morgan 'The Process is the Rule and the Punishment is the Process' (1996) 59 *MLR* 306.

⁴⁴ Dennis (n 3) 355.

materials 'which in the prosecutor's opinion might undermine the case for the prosecution against the accused.' It now provides for the disclosure to the accused of 'any prosecution material ... which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused.'⁴⁵ This is a more objective standard. Assuming that the defence duty to provide a defence statement was then complied with, the original CPIA imposed upon the prosecution secondary disclosure obligations under s.7. This required them to 'disclose to the accused any prosecution material which has not been previously disclosed to the accused and which might be reasonably expected to assist the accused's defence.' The original two-stage procedure, which was highly subjective and dependent on defence disclosure, was amended by the CJA 2003. Section 7A now requires the prosecutor to keep under review whether there is any evidence capable of undermining the prosecution case or assisting the defence. The amended s.3 and the new s.7A effectively eliminate the distinction between primary and secondary disclosure, and make it difficult to regard prosecution disclosure as being conditional on the service of a defence statement.⁴⁶ However, the two remain linked in a practical way: the more the defence discloses in its statement, the more likely it is to alert the prosecution to disclosable material in its possession.⁴⁷

In terms of enforcement, Redmayne has noted a marked asymmetry in the Act.⁴⁸ Whereas defence non-compliance may be penalised with adverse comment and adverse inferences, there are no such provisions to encourage prosecution disclosure. It might be said that there is, in fact, no disparity here. As explained below, the prosecution and defence are required to disclose different aspects of their case. Whilst the defence must essentially disclose all of the issues being raised, the prosecution must disclose the evidence being relied on and that capable of assisting the defence or undermining the prosecution. Since the nature of the disclosure differs, it could be argued that there is no need for corresponding penalties for non-compliance. Furthermore, specific provisions for penalising prosecution non-compliance may be felt unnecessary, since the defence can apply for further disclosure under s.8 if there is reasonable cause to believe that there is prosecution material required to be disclosed by s.7A. However, this only applies if the defence have complied with their obligation to furnish a defence statement. There is, also, the possibility of the judge using s.78 of the Police and

⁴⁵ s.3(1)(a)

⁴⁶ Redmayne 'Criminal Justice Act 2003: (1) Disclosure and its Discontents' (n 1) 445.

⁴⁷ Ibid.

⁴⁸ Redmayne 'Process Gains and Process Values: The Criminal Procedure and Investigations Act 1996' (n 13) 83.

Criminal Evidence Act 1984 (PACE) to exclude prosecution evidence not previously disclosed where its admission would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. Likewise, the judge could refuse leave to rely at trial on documents disclosed late, in breach of a Court order and without good cause.⁴⁹ However, unlike s.78, this could apply equally to the defence. Nevertheless, an effect of the CPIA is to demonstrate a greater concern for defence cooperation by expressly subjecting defence failures to specific penalties. As a result, defence cooperation takes precedence over other considerations, such as the avoidance of wrongful convictions.

The CPIA is accompanied by a number of guidelines intended to ensure proper prosecution disclosure.⁵⁰ The most significant is the Code of Practice issued under Part II of the Act. The Code is particularly important because it regulates disclosure of information by the police and CPS. It requires two schedules listing unused material to be drawn up by the police, one for sensitive and one for non-sensitive material. The non-sensitive schedule will be disclosed to the defence at the same time as initial disclosure. The schedules are crucial to the disclosure regime. They form the basis on which the CPS will make decisions as to what material should be disclosed, and are the primary means by which the defence can make a claim that relevant material has not been disclosed.⁵¹ However, the institutional divide between the police and the prosecution is problematic. The police may not know enough about the legal elements of the case to appreciate the significance of some of the material, and the CPS is unable to disclose information to the defence which has not been disclosed to them by the police through the schedules.⁵² A likely result of this is that the defence will lack material relevant to its case. In addition, the police, who know that undisclosed material will often not be discovered, may be reluctant to reveal information likely to damage the prosecution's case.

The police can perceive themselves, and are often perceived by the public, as agents of the prosecution. So, concerns have been expressed as to whether any police employee, even

⁴⁹ Lord Justice Gross *Review of Disclosure in Criminal Proceedings* (Judiciary of England and Wales: London, 2011) 76.

⁵⁰ The Attorney General's Guidelines on Disclosure; the Supplementary Attorney General's Guidelines on Disclosure, Digitally Stored Material; Disclosure: A Protocol for the Control and Management of Unused material in the Crown Court; The Disclosure Manual.

⁵¹ A Ashworth and M Redmayne *The Criminal Process* 4th edn (Oxford University Press: Oxford, 2010) 260.

⁵² Redmayne 'Process Gains and Process Values: The Criminal Procedure and Investigations Act 1996' (n 13) 82.

those not directly involved in the case, can be sufficiently impartial to execute this role.⁵³ In *Maxwell*,⁵⁴ the Court of Appeal had quashed the appellant's convictions of murder and robbery following a reference from the Criminal Cases Review Commission on the ground that they had been procured by gross prosecutorial misconduct on the part of the police. Although the majority of the Supreme Court upheld the Court of Appeal's decision to order a retrial, Lord Brown stated that: 'To describe police misconduct on this scale as merely shocking and disgraceful is to understate the gravity of its impact upon the integrity of the prosecution process. It is hard to imagine a worse case of sustained prosecutorial dishonesty designed to secure a conviction at all costs.'⁵⁵ The police had misled the court, CPS and counsel by concealing and lying about a variety of benefits received by an informant and his family; had colluded in the informant's perjury at trial; had lied in response to enquiries following conviction; and had perjured themselves in the *ex parte* leave hearing in the Court of Appeal. The CPS had no knowledge of this. More recently, the CPS were forced to discontinue proceedings in the trial of eight former police officers accused of conspiracy to pervert the course of justice.⁵⁶ A review of a certain section of the unused material uncovered that some copies of files, originally reviewed but not considered disclosable at the time, were missing. These copies had been destroyed and no record of the reason for their destruction had been made by the police officers concerned. Prosecution counsel and the CPS had been unaware of this. The former police officers in the case were accused of fabricating evidence which led to the wrongful conviction of the Cardiff Three.⁵⁷

The Code of Practice is intended to rectify the problems that arise from requiring the police to act in a way inconsistent with their occupational interests. For instance, the investigating officers have a duty to record all information received and to make disclosure of it to the prosecutor.⁵⁸ They are also required to pursue all reasonable lines of inquiry.⁵⁹ Despite this, research on the operation of the CPIA found that schedules prepared by the police were poor, contained insufficient detail to enable prosecutors to make informed decisions about

⁵³ Quirk (n 24) 48.

⁵⁴ [2010] UKSC 48.

⁵⁵ *Ibid* [83].

⁵⁶ Crown Prosecution Service *CPS Statement on R v Mouncher and Others*, 1st December 2011.

Available at

http://www.cps.gov.uk/news/press_statements/cps_statement_on_r_v_mouncher_and_others/.

Last accessed 29th April 2012.

⁵⁷ *R v Paris, Abdullahi and Miller* (1993) 97 Cr App R 99.

⁵⁸ Code of Practice, paras 4.1, 4.4, 7.1.

⁵⁹ Code of Practice, para 3.5.

what should be disclosed, and sometimes failed to mention significant information.⁶⁰ The Crown Prosecution Service Inspectorate found defects in schedules in more than half of the cases it studied.⁶¹ Furthermore, the CPS was found to have inadequate resources for review of the schedules, and often made late or incomplete disclosure to the defence.⁶² Incremental improvements have been noted by the CPS Inspectorate since their initial review in 2000.⁶³ Yet, there remain concerns as to the police ability to understand the likely defence perspective on potential disclosure issues at the outset of an investigation.⁶⁴

Doubts have also been expressed as to the motivation of the prosecution when undertaking work of this nature, in particular whether they have the incentive to do a thorough job.⁶⁵ Quirk believes that the clash between disclosure requirements and occupational cultures led to the initial breakdown of secondary prosecution disclosure under the original CPIA, as practitioners adopted or ignored the provisions in accordance with their workloads or sense of justice.⁶⁶ Although there is now an ongoing obligation on the prosecution to make adequate disclosure, the CPIA and accompanying Code of Practice continue to fail in considering the working routines of the police and prosecution which can lead to inadequate disclosure, with negative consequences for the defence. Currently, there are very few cases in which there is total compliance with all of the procedures and guidance within the disclosure regime.⁶⁷ The initial duty of disclosure is properly complied with in just over half of cases.⁶⁸ The CPIA appears to be compromising the adversarial role of criminal procedure without achieving gains in fairness or legitimacy.

7.4 Defence disclosure

⁶⁰ J Plotnikoff and R Woolfson *A Fair Balance? Evaluation of the Operation of Disclosure Law* (Home Office Research, Development and Statistics Directorate: London, 2001) chapter 4.

⁶¹ Crown Prosecution Service Inspectorate *The Inspectorate's Report on the Thematic Review of the Disclosure of Unused Material* (Crown Prosecution Service: London, 2000).

⁶² Lord Justice Auld *Review of the Criminal Courts of England and Wales* (The Stationery Office: London, 2001) 450.

⁶³ Crown Prosecution Service Inspectorate *A Thematic Review of the Duties of Disclosure of Unused Material Undertaken by the CPS* (n 20).

⁶⁴ Lord Justice Gross (n 49) 36.

⁶⁵ *Ibid.*

⁶⁶ Quirk (n 24) 46.

⁶⁷ Crown Prosecution Service Inspectorate *A Thematic Review of the Duties of Disclosure of Unused Material Undertaken by the CPS* (n 20) 6.

⁶⁸ *Ibid.*

Prior to the CPIA, the general rule was that the defence had no obligation to disclose its case to the prosecution before trial. There were limited exceptions to this: disclosure of alibi defences and alibi witnesses were required in trials on indictment;⁶⁹ disclosure of expert evidence was required in trials on indictment;⁷⁰ and a more general requirement to disclose a defence in some serious or complex cases of fraud.⁷¹ The first two exceptions are restricted to specific evidence which the prosecution might have particular difficulty rebutting without notice, and the third provided the model for the disclosure scheme introduced by the CPIA.⁷² Although breach of these requirements could result in the exclusion of evidence, in practice, judges were reluctant to deprive the jury of the opportunity of hearing evidence which might help to establish the defendant's innocence.⁷³

The CPIA imposed, for the first time in the history of English criminal procedure, a general duty on the defence to make pre-trial disclosure. Under the original CPIA, defence disclosure was voluntary in the magistrates' court, but compulsory in the Crown Court.⁷⁴ This is significant because nearly all criminal cases are heard in the magistrates' court. However, since prosecution and defence disclosure remain linked in a practical way, the defence may gain from disclosing their case in summary trials. Whilst the general requirement to produce a defence statement remains voluntary in summary trials, compliance with sections 6C and 6D are compulsory in both the magistrates' and Crown courts. These provisions were introduced by the CJA 2003, and provide for the disclosure of information regarding witnesses and experts. They are discussed in more detail below. Whereas the Royal Commission recommended the defence only disclose sufficient information for the prosecution to understand the substance of its case, s.5 requires disclosure of a much more detailed defence statement. This must be given once the prosecution have made disclosure under s.3. This part of the chapter begins with a critical discussion of the information which the defence are required to disclose, before examining the penalties for non-compliance.

7.4.1 Defence statements

A central requirement of the CPIA is that defendants must disclose a statement detailing the nature of their defence, and indicating the matters on which they take issue with the

⁶⁹ Criminal Justice Act 1967, s.11.

⁷⁰ Police and criminal Evidence Act 1984, s.81.

⁷¹ Criminal Justice Act 1987, s.9(5).

⁷² Dennis (n 3) 356.

⁷³ Royal Commission on Criminal Justice (n 12) 97.

⁷⁴ CPIA, s.5 and s.6.

prosecution as well as why they do so. The current statutory regime for the content of defence statements was inserted by the CJA 2003 and can be found in s.6A(1) as set out above. It requires the accused to 'specify his defence with particularity.'⁷⁵ Subsection (2) provides that a defence statement which discloses an alibi must give particulars of it, including the name, address and date of birth of any alibi witnesses. The defence originally had to submit the statement within a 14 day time limit, as set out in s.12. This was predicated upon the importance of processing cases expeditiously in accordance with prevailing concerns for efficiency and managerialism.⁷⁶ However, Denyer notes that the time limit was extended in most cases, and done so without any formal application. He believed the 14 day time limit to be 'absurd', particularly in heavy cases with defendants who are in custody.⁷⁷ The time limit has now been extended to 28 days in the Crown Court, but remains 14 days in the magistrates' court.⁷⁸ Section 6B creates a duty of updated defence disclosure, putting the accused under a duty to provide an updated defence statement or to provide a written statement that no changes have been made.

As well as extending the particulars that must be disclosed, the CJA 2003 also inserted s.6D which requires disclosure of details of experts consulted by the defence, but not used. The original proposed provision would have required the unused expert reports to be disclosed, but this was abandoned in the light of concerns over litigation privilege and the privilege against self-incrimination.⁷⁹ This provision is not yet in force, but it will make it necessary for the defence to disclose the names and addresses of consulted experts. The provision was presumably intended to prevent the defence from 'shopping around' for experts who would support their case. However, the number of experts consulted may have no impact on the validity of their views. Although shopping around occurs very rarely in practice,⁸⁰ it may be necessary in a case concerning a developing field or where a medical opinion is needed in connection with a mental disorder or some other condition for which diagnosis is not an exact science. Given the effect of legal privilege, it seems unlikely that the prosecution would benefit from the disclosure of consulted experts. Nevertheless, the possibility that it may happen raises questions about whether the defence are effectively being made to do

⁷⁵ Dennis (n 3) 365.

⁷⁶ Quirk (n 24) 55.

⁷⁷ RL Denyer 'The Defence Statement' [2009] *Crim LR* 340, 340.

⁷⁸ The Criminal Procedure and Investigations Act 1996 (Defence Disclosure Time Limits) Regulations 2011.

⁷⁹ Redmayne 'Criminal Justice Act 2003: (1) Disclosure and its Discontents' (n 1) 448.

⁸⁰ M Zander *Consultation on Proposals for Advance Disclosure of Defence Witness Lists and Unused Defence Expert Witness Reports*, 2002, 12.

the prosecution's work, and may even discourage the defence from consulting experts.⁸¹ From the jury's point of view, the adverse view of an expert originally consulted by the defence might carry more weight than that of the prosecution expert because it would seem to be evidence coming from the defence stable.⁸² Even without evidence of the consulted expert's opinion, the defendant may be prejudiced by disclosing the fact that numerous experts were approached. The jury might over speculate to the detriment of the defendant, despite the fact that legal privilege would prevent them from hearing evidence of the expert's opinion.

Section 6C, which came into force in 2010, provides for the disclosure of the names, addresses and dates of birth of defence witnesses. Like the general defence statement, witness notices must be disclosed within 28 days of the prosecution complying with s.3.⁸³ Where the accused decides to call a witness who was not included in the original notice under s.6C, he must serve an amended notice. In many cases, the witness list will be tentative, as the defence cannot be sure whom to call until after completion of the prosecution evidence. This raises questions about the enforceability of s.6C in practice. The Royal Commission had decided not to recommend the disclosure of the names and addresses of defence witnesses, partly on the basis that such a requirement might lead to a breach of the principle that the defence should not be required to help the prosecution prove its case as the prosecution might itself call any witnesses disclosed by the defence but whom they decide not to call.⁸⁴ Although it is early days for this provision, in the light of the extra time and resources that would be required, it seems unlikely that police will routinely interview defence witnesses. This is most probable in high profile or particularly serious or complex cases.

Possible implications of the provision raise concerns. One such concern is that the police will put pressure on defence witnesses and 'use the interview to browbeat, cajole or wheedle the witness to change his evidence or, failing that, not to testify for the defence.'⁸⁵ Zander believes that giving the police the power to influence witnesses is itself an invitation to poison the well by 'undue influence', as they naturally want to get the evidence that will

⁸¹ Redmayne 'Criminal Justice Act 2003: (1) Disclosure and its Discontents' (n 1) 449.

⁸² Zander (n 80) 14.

⁸³ Criminal Procedure and Investigations Act 1996 (Notification of Intention to Call Defence Witnesses) (Time Limit) Regulations 2010 (SI 2010/214).

⁸⁴ Royal Commission on Criminal Justice (n 12) 99.

⁸⁵ Zander (n 80) 2.

convict the defendant.⁸⁶ In response to concerns about police conduct, s.21A of the CPIA provides for a Code of Practice regulating police interviews of defence witnesses.⁸⁷ The Code of Practice requires the police to notify defence lawyers before the interview and give an opportunity for the defence to be present at any such interview. It also states that the witness must consent to the interview, and is entitled to be accompanied by a solicitor.

Hungerford-Welch identifies a number of shortcomings with the Code of Practice.⁸⁸ For instance, there is nothing in the Code to ensure that consent is freely given, and there are issues as to the availability of funding for the attendance of a solicitor. There are also concerns that having their details passed on to the prosecution will deter some witnesses from cooperating with the defence.⁸⁹ Where the witness gives consent for the defendant's solicitor to attend, paragraph 8.2 of the Code of Practice limits his role to that of observer. The defendant's solicitor is not entitled to intervene if the police questioning becomes inappropriate, thus, preventing him from serving a useful purpose during the interview.⁹⁰ The witness must also consent before a copy of the record of interview is given to the accused. Where consent is not forthcoming, the possibility that the prosecution will ambush the defence arises. For instance, when the witness is testifying for the defence, the prosecution may put an adverse matter from the interview to him in cross-examination.⁹¹ Such matters might require pre-trial disclosure as part of the prosecution's CPIA obligations. However, where the evidence assists the prosecution case or undermines the defence case, rather than undermine the prosecution or assist the defence, it would not need to be disclosed under s.7A. Such a situation may occur when the prosecution uses information gathered during the interview to challenge the witness's credibility or as evidence of an inconsistent statement. In *R v H*, Lord Bingham stated that: 'If material does not weaken the prosecution case or strengthen that of the defendant, there is no requirement to disclose it....neutral material or material damaging the defendant need not be disclosed and should not be brought to the attention of the court.'⁹² The possibility that s.6C and the accompanying Code expose the defence to ambush is worrying, particularly given that concern over the use of ambush defences contributed to the enactment of the CPIA. Although the prosecution ambush may not go to an issue in the case in the same way as

⁸⁶ *Ibid.*

⁸⁷ Code of Practice for Arranging and Conducting Interviews of Witnesses Notified by the Accused.

⁸⁸ P Hungerford-Welch 'Prosecution Interviews of Defence Witnesses' [2010] *Crim LR* 690, 694.

⁸⁹ *Ibid* 695.

⁹⁰ *Ibid.*

⁹¹ *Ibid* 696.

⁹² *R v H* [2004] UKHL 3 [35].

ambush defences can, there is a contradiction in this approach. It highlights the underlying goal of securing defence cooperation above other concerns.

Where witnesses decline to be interviewed by the police, it seems likely that the prosecution will want to cross-examine them on their refusal in an attempt to undermine the credibility of their evidence. This runs the risk of distracting the fact finder from the real issues of the case, and places the accused in danger of being prejudiced by a refusal to cooperate over which he may have little or no control.⁹³ The defence case may thus be damaged by the witness's unwillingness to be subject to scrutiny or to confirm the defence's case prior to trial. Although this situation would not give rise to the possibility of adverse inferences under the CPIA, it does put the prosecution in an advantageous position. It reaffirms the aim of securing convictions; it also highlights the priority given to defence participation in the criminal process. Because they are not likely to be used often, Redmayne notes that the amendments concerning witnesses and experts can give the impression that they are designed more for their symbolic resonance than for their practical utility.⁹⁴ They raise difficulties of enforceability and address no obvious problem. Yet they allow the government to claim that it is getting tough on defendants who abuse the disclosure regime or that it is tilting the system's balance back towards the police and victims.⁹⁵ They also contribute to the shift in procedural style towards a model in which the defence are expected to participate.

In an examination of the original CPIA, Plontikoff and Woolfson found that 41 per cent of defence statements contained a bare denial of guilt, and a further 13 per cent fell short of the requirements set out for them.⁹⁶ Even after the CJA 2003 amendments, there are still serious questions of compliance. It is the content of defence statements which seems to have caused the most concern for the courts. In *Bryant*,⁹⁷ it was stated that the defence statement in issue was 'woefully inadequate.'⁹⁸ It consisted of a general denial of the counts in the indictment accompanied by the sentence, 'the defendant takes issue with any witness purporting to give evidence contrary to his denials.' The court stated that, 'that sort of observation is not worth the paper it is written on. It is not the purpose of a defence case

⁹³ Hungerford-Welch (n 88) 699.

⁹⁴ Redmayne 'Criminal Justice Act 2003: (1) Disclosure and its Discontents' (n 1) 448.

⁹⁵ Ibid.

⁹⁶ Plotnikoff and Woolfson (n 60) 55.

⁹⁷ [2005] EWCA Crim 2079.

⁹⁸ Ibid [12].

statement.⁹⁹ If the defendant has no positive case to advance at trial, but declines to plead guilty, the Court of Appeal have suggested that the defence statement must say that the defendant does not admit the offence and calls the Crown to prove it; it must also say that he advances no positive case. If he is going to advance a positive case that must appear in the defence statement and notice must be given. Otherwise it would be open to defendants to simply ignore sections 5 and 6A.¹⁰⁰ In this way, the judiciary are giving effect to the government's agenda of increasing defence participation. In *Essa*,¹⁰¹ it was held by the Court of Appeal that, where there has been no defence statement and no positive defence put forward at trial, the significance of the absent defence statement may be marginal and a degree of judgment is advisable in the decision whether to embark upon cross-examination about it and, if cross-examination is embarked upon, the terms in which a direction be given to the jury.¹⁰² Nevertheless, the disclosure failure remains capable of leading to adverse comment and inferences of guilt.

In the Review of Disclosure Obligations in Criminal Proceedings undertaken by Lord Justice Gross for the Judiciary of England and Wales, it was declared that 'a defence refusal to engage in the disclosure process, coupled with persistent sniping at its suggested inadequacies, is unacceptable- and reflects a culture with which the system should not rest content.'¹⁰³ It is believed that neither the fairness of the trial nor the fearless protection of the defendant's legitimate interests warrant such an approach.¹⁰⁴ However, the duty of providing information to the prosecution in advance of trial compromises the role of the defendant and defence, particularly when the duty is as broad and specific as that under the CPIA. The general effect of the CPIA is to shift the roles of the parties away from adversarialism, with the defence disclosure requirements making it increasingly difficult for the defendant to decline to participate and for the defence as a party to test the prosecution case.

Edwards has noted that great tension is caused by over aggressive judicial attitudes to the completion of defence statements, such that they have progressed from their original

⁹⁹ Ibid.

¹⁰⁰ *R v Rochford* [2010] EWCA Crim 1928 [24].

¹⁰¹ [2009] EWCA Crim 43.

¹⁰² Ibid [22].

¹⁰³ Lord Justice Gross (n 49) 73.

¹⁰⁴ Ibid.

purpose of facilitating prosecution disclosure.¹⁰⁵ They have become a case management form, particularly the requirements to set out the nature of the defence, the facts on which the defence rely, and identifying relevant points of law. As a result, there may be cases where to disclose such information will enable the prosecution to strengthen its case or weaken the effects of defence cross-examination.¹⁰⁶ This situation arose in *R (on the application of Firth) v Epping Magistrates' Court*,¹⁰⁷ a case concerning assault occasioning actual bodily harm. During a committal hearing, the prosecution were allowed to rely on a case progression form prepared by the defence when the allegation was one of common assault. The form stated that 'Only contact was made in self defence'. This was held to amount to evidence of acceptance that the defendant was involved in a physical encounter with the complainant. Since the defence submitted at the hearing that there was no case to answer, as there was no identification evidence, the earlier disclosure assisted the prosecution in strengthening, if not establishing, its case. The decision in this case has been affected by the more recent decision in *Newell*¹⁰⁸ which is discussed below. However, it remains possible for information provided in case management forms and defence statements to be used to strengthen the prosecution's case.

7.4.2 Adverse inferences

Defence disclosure is enforced through s.11 of the CPIA under which failure to disclose a defence statement, late disclosure, or departure from the statement can result in adverse comment and adverse inferences.¹⁰⁹ By way of safeguards, s.11(8) states that where the accused puts forward a defence which is different to that in his defence statement, the court should have regard to the extent of the differences between the defences, and to whether there is any justification for a change in defence. Pursuant to s.11(10), the accused cannot be convicted solely on an inference drawn under s.11(5).¹¹⁰

It has already been noted that the CPIA had been found to work poorly, with many defence statements lacking the required detail. Yet, judges have been reluctant to sanction defendants with adverse inferences. This is evidenced by the lack of case law dealing directly

¹⁰⁵ A Edwards 'Case Management Forms' [2011] *Crim LR* 547, 549.

¹⁰⁶ *Ibid.*

¹⁰⁷ [2011] EWHC 388.

¹⁰⁸ [2012] EWCA Crim 650.

¹⁰⁹ See, s.11(2) and s.11(5).

¹¹⁰ It is likely that, following Strasbourg's approach to inferences from silence, disclosure failures should not be a main decisive factor either. *Murray v UK* (1996) 22 EHRR 29 [47].

with the conditions under which an adverse inference can be drawn from non-disclosure.¹¹¹ They seem more concerned with the inadequacy of defence statements from a managerial point of view, and it makes little sense to invite adverse inferences of guilt on the basis that non-disclosure interferes with efficiency. Lord Justice Gross has recommended scant tolerance of late or uninformative defence statements.¹¹² His report contends that, provided the prosecution's tackle is in order, there can generally be no excuse for a defence failure to engage and at an early stage in the proceedings.¹¹³ These propositions reiterate the desire to ensure defence cooperation through the existing disclosure regime, which includes penalising defence failures through the use of adverse inferences.

One reason why judges may have felt reluctant to give an adverse inference direction under the original CPIA was because fault in defence disclosure was likely to lie with the defence lawyer rather than the defendant.¹¹⁴ As a response, the CJA 2003 amendments imposed a tougher regime on defendants. Not only do defence statements need to be more detailed than previously, but also, under s.6E, unless the contrary is proved, defence statements will be deemed to have been given with the authority of the accused. The responsibility and burden of showing that it is not the defendant's statement is that of the defendant, and it is not enough that he has not signed the statement, and denies having seen it.¹¹⁵ In *Haynes*, it was suggested that the defendant should have called his solicitors or the person from whom initial instructions had been taken to disprove that the statement was his.¹¹⁶ The effect of s.6E is that even if the accused has not signed the statement it will be regarded as his statement made by his authorised agent. The statement is, therefore, admissible as part of the prosecution case if it contains admissions or inconsistencies with the accused's testimony at trial, and he may be cross-examined on it.¹¹⁷

However, s.6E is unlikely to change the fact that it is defence lawyers who are generally responsible for disclosure and not the defendant himself. It has, therefore, become easier to penalise the defendant for non-cooperation, despite the fact that he may be no more culpable. In *Essa*,¹¹⁸ it was claimed that no defence statement had been served on the basis

¹¹¹ Redmayne 'Criminal Justice Act 2003: (1) Disclosure and its Discontents' (n 1) 445.

¹¹² Lord Justice Gross (n 49) 73.

¹¹³ *Ibid* 74.

¹¹⁴ Redmayne 'Criminal Justice Act 2003: (1) Disclosure and its Discontents' (n 1) 445.

¹¹⁵ *R v Haynes* [2011] EWCA Crim 3281 [4].

¹¹⁶ *Ibid*.

¹¹⁷ Dennis (n 3) 365; *R v Haynes* [2011] EWCA Crim 3281.

¹¹⁸ [2009] EWCA Crim 43.

of legal advice. The Court of Appeal could not see the logic behind such advice, stating that: 'It is not open to those who advise defendants to pick and choose which statutory rules applicable to the conduct of criminal proceedings they obey and which they do not.'¹¹⁹ The prosecution were allowed to make comment and raise the issue in cross-examination. Had there been evidence of the solicitor's advice, the Court felt that it should have been dealt with in the same way as advice to remain silent is dealt with under s.34 CJPOA.¹²⁰ Such advice would not in itself prevent adverse comment or inferences. The recent disclosure review has suggested that, provided the prosecution take a grip of its disclosure obligations from the outset, there is much to be said for the proposal that in appropriate cases the Court should press for involvement from the defendant personally, not merely his legal representatives.¹²¹

The CJA 2003 also removed the requirement for leave to be given by the court before 'such comment as appears appropriate' is made by the prosecutor or co-defendant. However, leave is still required where the defence's failure is in not having disclosed a point of law that was relied on or the names and addresses of witnesses called,¹²² and there are no specific sanctions for a failure to disclose the names and addresses of experts consulted, but not called. Regardless of whether the courts are ready and willing to penalise defendants for their failure to comply with the disclosure requirements, the statutory regime is significant in its effect on criminal procedure, by imposing new participatory expectations on the defendant and imposing penalties for non-cooperation. As a consequence, it has played a significant role in the changing nature of the English procedural model in much the same way as the CJPOA has.

Section 11 is a further indication of the state's intention to secure the defendant's participation. However, as Redmayne points out, drawing adverse inferences of guilt from disclosure failures seems largely artificial.¹²³ Even though the regime largely mirrors that imposed in relation to silence under the CJPOA, the CJPOA relies on a supposed pre-existing link between silence and guilt under which silence is in itself inherently suspicious. Adverse inferences from non-disclosure, on the other hand, depend on the creation of disclosure

¹¹⁹ Ibid [18].

¹²⁰ Ibid [21]. See chapter 6.

¹²¹ Lord Justice Gross (n 49) 73.

¹²² CPIA, s.11(6) and s.11(7).

¹²³ Redmayne 'Criminal Justice Act 2003: (1) Disclosure and its Discontents' (n 1) 446.

duties.¹²⁴ The defendant's failure to disclose the details of his defence before trial is only suspicious because the law places an obligation on him to do so. For this reason, the inference that the defence is fabricated, or that the defendant is guilty, may be weak.¹²⁵ This is not to say that non-disclosure of evidence presented at trial will never be the result of fabrication or guilt, but that the link is not a straightforward or obvious one. This is particularly true where the non-disclosure relates to a point of law, or where the problem is an insufficiently detailed defence statement but the defence raised is along the same lines as that disclosed. It is difficult to see how the lack of detail can point to guilt.¹²⁶ It is also difficult to draw reliable inferences against the defendant where the issue is late disclosure. Inferences of guilt stemming from a failure to comply with the CPIA are thus hard to justify as 'common sense' in the way which inferences from silence have been. This might partly explain why s.11 is not enforced with any vigour, despite the research suggesting that most defence statements are insufficiently detailed to meet the requirements of the Act.¹²⁷

While s.11 inferences are largely ineffective in practice, the provision is normatively important, and has raised issues in the courts. In *Rochford*,¹²⁸ the Court of Appeal addressed some significant questions as to the scope of the rules in s.6A and s.11. In this case, which concerned the offence of dangerous driving, the relevant part of the defence statement read: 'The Defendant was not the driver of the vehicle in question at the material time. He accepts he may have been the person shown on the CCTV at the garage.' The judge at the plea and case management hearing took the view that the statement did not comply with s.6A, as it did not say where the defendant was at the material time if he was not in the driving seat. The judge directed counsel to amend the statement, and said that a failure to do so would be treated as contempt of court. No amendment was made and the judge imposed a sentence upon the defendant of 28 days' imprisonment. The judge had acknowledged the sanctions set out in s.11, but believed that they only applied once the case had been set out to the jury. He concluded that there must be sanctions at the pre-trial stage and that the relevant one was the ability of the court to order compliance and to punish as a contempt of court disobedience to the order.¹²⁹ However, it is not possible to determine whether there has been a breach of s.6A until the evidence has been presented

¹²⁴ Ibid.

¹²⁵ Ashworth and Redmayne (n 51) 263.

¹²⁶ Redmayne 'Criminal Justice Act 2003: (1) Disclosure and its Discontents' (n 1) 447.

¹²⁷ Plotnikoff and Woolfson (n 60) 55.

¹²⁸ [2010] EWCA Crim 1928.

¹²⁹ Ibid [14].

to the jury. Although unlikely, it may have been that the defendant was going to make no positive case at all, and not raise the issue of his possible location elsewhere. If he were simply going to play a passive role and put the prosecution to proof, there would have been no breach. The Court of Appeal noted that there is no entitlement to order compliance with s.6A and then punish as a contempt of court disobedience of that order. The sanctions for non-compliance exist in s.11. It is not open to the courts to add an additional extra statutory sanction of punishment of contempt of court.¹³⁰ Had the Court of Appeal felt differently, the notion of the trial as a forum for testing the prosecution case would be completely undermined.

In *R (on the application of Tinnion) v Reading Crown Court*,¹³¹ the Divisional Court clarified that the sanction against someone who fails to give notice of an alibi defence and intention to call witnesses for that defence is adverse comment and adverse inferences, not inadmissibility of the evidence. The Court believed that the trial judge may have been confused as the pre-CPIA penalty for failure to disclose a defence of alibi was exclusion of the evidence. This decision was upheld in *Ullah*¹³² where the trial judge was held to have made an error in principle by not allowing the evidence of a surprise alibi witness who had appeared in court after the close of the defence case. Although the earlier penalty of exclusion seems harsher, in some instances the penalty of adverse comments and inferences is worse for the defendant. In *Tinnion*, there was already doubt about the credibility of the defence and the defence witnesses. It might have been more damaging for the defendant to have had his defence the subject of adverse inferences than to not produce evidence for the defence at all.

Whilst it is positive that the courts have confined the sanctions for non-compliance to those specified in s.11, and have dismissed attempts to extend them, the fact remains that the defendant's non-cooperation is subject to penalty. Adverse inferences may be permissive rather than mandatory, but they still penalise defendants by allowing non-compliance to contribute to a finding of guilt. Furthermore, there appears to be an insufficient link between the breach and the punishment, again bringing to light the main driver for inferences from non-disclosure: ensuring defence cooperation. Nonetheless, the Court of Appeal have made it clear that in the light of the judicial control over the prosecution's right

¹³⁰ Ibid [18].

¹³¹ [2009] EWHC 2930 (Admin).

¹³² [2011] EWCA Crim 3275.

to comment on the absence of a defence statement, s.11(5) is compatible with the defendant's right to a fair trial under the ECHR.¹³³

7.5 Issues of principle

It has already been noted that the CPIA imposed general disclosure obligations on the defence for the first time, and that this has contributed to a shift in the style of English criminal procedure away from adversarialism towards a more participatory focused model. As such, the legislation raises significant matters of principle. By requiring the defence to disclose its case prior to trial, and by penalising non-cooperation through adverse comment and inferences of guilt, the CPIA erodes norms of fairness, such as the privilege against self-incrimination, the presumption of innocence and the burden of proof. The obligation to cooperate, and the potential to assist the prosecution in establishing a case against the defendant, also affects the proper state-citizen relationship that should prevail in a liberal democracy. The CPIA is, therefore, detrimental to the normative conception of criminal procedure within which the state should be called to account for its accusations and request for condemnation and punishment of the accused. In his dissent from the Royal Commission's proposals, Zander stated that defence disclosure is 'designed to be helpful to the prosecution and, more generally, to the system. But it is not the job of the defendant to be helpful either to the prosecution or to the system. His task, if he chooses to put the prosecution to proof, is simply to defend himself.'¹³⁴

7.5.1 Issues of fairness

Obligatory defence disclosure may hamper important principles necessary to maintain fairness and uphold the right to a fair trial. To assume that it is legitimate to require the defendant to provide the prosecution with information that may assist them in securing a conviction sits uneasily with the privilege against self-incrimination. For example, disclosure may lead to incrimination by establishing the *actus reus* through a defence such as self defence, as was the case in *Firth*. However, the decision in *Firth* has been complicated by the more recent case of *Newell*¹³⁵ in which it was held that, although a statement in a Plea and

¹³³ *R v Essa* [2009] EWCA Crim 43 [24].

¹³⁴ Royal Commission on Criminal Justice (n 12) 221.

¹³⁵ [2012] EWCA Crim 650.

Case Management Hearing Form was admissible at trial against the defendant, the judge should have used his discretion under s.78 of PACE to exclude it.

The charge in *Newell* was possession of cocaine with intent to supply. On the form, the defence had written 'no possession', whereas in a later defence statement, and at trial, the defence admitted possession, but denied intent to supply. The prosecution had used the earlier form to show this inconsistency and rely on it as evidence of guilt. As a consequence of this case, judges should use their discretion to exclude evidence against the defendant in Plea and Case Management Hearing Forms in the Crown Court and Trial Preparation Forms in the magistrates' court. However, this is on the condition that the defence have followed the 'letter and spirit of the Criminal Procedure Rules'.¹³⁶ This means that directly incriminating evidence from such forms can be rightly admitted where the defence have failed to comply with case management directions, or have attempted to ambush the prosecution, or perhaps even failed to provide a defence statement as required by the CPIA. One of the reasons why the Court felt that the evidence should have been excluded in this case was because the defendant had provided a defence statement which made the case clear, and had been the subject of an adverse inference direction, due to late disclosure of the statement.¹³⁷ This sanction was thought to be sufficient, and this was a case where there was no disadvantage to the Crown. However, because this case concerned the use of case management forms, rather than defence statements, it remains open for directly incriminating information contained in defence statements to be used against the defendant. One other point worth noting about *Newell* is that, once the prosecution had received the defence statement which stated that the defendant was in possession, but had no intent to supply, they added a further count of simple possession to which the defendant then pleaded guilty. Thus, the defence statement led directly to a conviction for possession.

The Royal Commission rejected the objection that defence disclosure infringes the privilege on the basis that disclosure of the substance of the defence case at an earlier stage will no more incriminate the defendant nor help prove the case against him than it does when it is given in evidence at the hearing.¹³⁸ The Commission believed that the matter was simply one of timing.¹³⁹ However, even where disclosure does not directly incriminate the accused, it

¹³⁶ Ibid [36].

¹³⁷ Ibid [37].

¹³⁸ Royal Commission on Criminal Justice (n 12) 84.

¹³⁹ Ibid 98.

may lead the police or prosecution to uncover incriminating information. In this way, the defendant will have assisted the prosecution in incriminating him. For example, details of an alibi defence will provide a timeline and witnesses for investigation. Also, details of defence witnesses disclosed under s.6C will provide material for investigation, and may lead to defence witnesses changing their evidence, or incriminating the defendant. When coupled with pressures to participate stemming from the CJPOA, there is a significant danger that defendants will be coerced into providing incriminating information to the prosecution. To claim that the defendant is not being compelled to say anything incriminating has been described as 'naïve'.¹⁴⁰

In *Rochford*, the Court of Appeal stated that the privilege against self-incrimination survives s.6A, as the defendant is not obliged to incriminate himself if he does not wish to do so.¹⁴¹ Non-compliance is not an offence. So, it could be argued that, because the adverse inferences of guilt that can be drawn under s.11 are not mandatory, they do not raise issues regarding the privilege. However, the potentially serious consequences that flow from adverse comment and inferences create an expectation of cooperation, and may result in undue pressure on the defendant to cooperate. Though a clear notion of the scope and rationale of the privilege might help to determine how far the defence disclosure obligations interfere with it, as suggested in chapter 5, this is difficult to gauge. Nevertheless, the privilege is one of the generally recognised international standards which lie at the heart of the notion of a fair procedure,¹⁴² and is an important tool for maintaining a proper relationship between citizens and state in which freedom and autonomy are respected.¹⁴³ Requiring the defendant to disclose information which might incriminate him or lead to self-incrimination is at odds with the normative theory of calling the state to account. Also, it signals the system's drift from fairness and legitimacy concerns.

Linked to the implications which the disclosure obligations have for the privilege against self-incrimination are concerns for its impact on the presumption of innocence. A broad interpretation of the presumption of innocence requires the accused to be treated as innocent at all stages, until guilt has been established. The accused should not have to contribute in the discharge of the state's obligation to prove guilt, either expressly or in

¹⁴⁰ J Richardson 'A "Just" Outcome: Losing Sight of the Purpose of Criminal Procedure' (2011) *Journal of Commonwealth Criminal Law* Inaugural Issue 105, 117.

¹⁴¹ *R v Rochford* [2010] EWCA Crim 1928 [21].

¹⁴² *Murray v UK* (1996) 22 EHRR 29 [45].

¹⁴³ See chapter 5.

consequence of a procedural requirement. Requiring the defence to supply even potentially incriminating information is not in the spirit of this conception of the presumption of innocence. To associate late, inconsistent, or non-disclosure with guilt by way of adverse inferences, is also damaging to the principle of the presumption of innocence. Like the CJPOA, the CPIA creates an expectation of participation and improperly links non-cooperation to guilt. It also compromises a narrower interpretation of the presumption of innocence, which simply reflects the prosecution's burden of proof.

An absence of defence disclosure duties acts to uphold the burden of proof, because defence non-disclosure serves as an expression of the prosecution's burden; if the state cannot make a *prima facie* case without the defence's help, it should not bring a case to trial.¹⁴⁴ Although the prosecution must prove its case beyond reasonable doubt, like the reforms to the right to silence, as well as developments in the realm of the privilege against self-incrimination, the disclosure regime has an impact on the burden of proof, through its potential to assist the prosecution in discharging its burden. Richardson has argued that, because it is for the prosecution to adduce evidence to establish all the elements of the offence charged and show why the defendant is guilty, the imposition of an obligation on the defendant to say why he is not guilty immediately eases the burden on the prosecution.¹⁴⁵ On the other hand, Redmayne contends that the burden of proof can be conceived of as a rule about the amount of evidence the prosecution needs to produce, that it says nothing about the source of that evidence.¹⁴⁶ However, the source of evidence will determine the burden of proof, as the burden implies that it is for the prosecution to provide evidence of guilt. That is, they cannot rely on the defence to disclose it. To do so would undermine the defendant's ability to test the prosecution's case. Furthermore, the adverse inferences of guilt, which can be drawn where disclosure requirements are not complied with, have the potential to assist the prosecution in meeting its burden and reach a standard of proof beyond reasonable doubt.

There is a lack of symmetry within the CPIA which also affects the prosecution's burden of proof. With regard to the content of disclosure, the prosecution must disclose the evidence they will rely on, and not the case as they will put it in court, though the indictment will

¹⁴⁴ Redmayne 'Process Gains and Process Values: The Criminal Procedure and Investigations Act 1996' (n 13) 85.

¹⁴⁵ Richardson (n 140) 117.

¹⁴⁶ Redmayne 'Criminal Justice Act 2003: (1) Disclosure and its Discontents' (n 1) 452.

provide the defence with such particulars of the conduct constituting the commission of the offence, so as to make clear what the prosecution alleges.¹⁴⁷ The defence, on the other hand, must essentially disclose the case that they will present, including specific matters of fact and points of law. This means that the prosecution are better prepared to address the defence case at trial than the defence are to address the prosecution. The defence may be ignorant of the details of the prosecution's arguments and, where they choose to address the prosecution's case, may find it harder to dissuade the jury from convicting. If the defence raise an undisclosed argument, they can be accused of ambushing the prosecution, or become subject to adverse inferences of guilt. Thus, whilst the prosecution may be able to adapt their case theories at trial, the defence are essentially locked into a particular approach. This lack of symmetry could be rectified by placing obligations on the prosecution to disclose their whole case to the defence. However, as well as subjecting the prosecution to the same difficulties which the defence face in adapting to new evidence, it would not solve the issues of principle which arise from the defence disclosure obligations.

7.5.2 A 'no assistance' approach

In Zander's view, with the 'reasonable exceptions' of disclosure of alibi and expert evidence, 'it is wrong to require the defendant to be helpful by giving advance notice of his defence and to penalise him by adverse comment if he fails to do so.'¹⁴⁸ This critique of defence disclosure reflects a 'no assistance' approach to the defence and the defendant's role in the criminal process, which is consistent with a normative theory based on calling the state to account. The state should be required to prove its case without assistance from the defendant; if the prosecution cannot anticipate a defence, its case deserves to fail. Although this claim may appear harsh, it is not unreasonable. Prior to the CPIA, in the vast majority of cases, the prosecution were able to anticipate the defence, and were seldom successfully ambushed by the defence.¹⁴⁹ However, it has been argued that this absolutist position goes too far by permitting defence tactics specifically designed to throw the prosecution off balance. Redmayne believes that ambush defences cannot be justified in that manner, and that the system has no reason to accommodate tactics designed to gain illegitimate acquittals.¹⁵⁰ He contends that the absolutist position can be modified to make it more attractive, by distinguishing two different ways in which the defence can assist the

¹⁴⁷ Criminal Procedure Rules, Rule 14.

¹⁴⁸ Royal Commission on Criminal Justice (n 12) 221.

¹⁴⁹ See footnote 11.

¹⁵⁰ Redmayne 'Criminal Justice Act 2003: (1) Disclosure and its Discontents' (n 1) 451.

prosecution.¹⁵¹ Whilst knowing something about the defence that will be presented may help the prosecution to anticipate attacks on its case at trial, disclosure of the defence case will not necessarily help the prosecution establish a *prima facie* case. If the principle is that the defence should not have to assist the prosecution to make its *prima facie* case, then there should be no objection to disclosure.¹⁵²

However, there is no guarantee that disclosure will not assist the prosecution in establishing its case. Disclosure of a defence, such as self-defence or duress, may help the prosecution establish the *actus reus*, and even the disclosure of an alibi may assist the prosecution by providing the police with a time-frame of the defendant's whereabouts and movements. Once defence cooperation actually helps the prosecution make its case, the defendant may become less forthcoming about his defence. Redmayne argues that the possibility of disclosure helping the prosecution make a *prima facie* case can be rectified with the modified 'no assistance' approach, by preventing the prosecution from using the fruits of disclosure as part of its case in chief.¹⁵³ This may be difficult to apply in practice and, again, there is no guarantee that the defence disclosure has not provided assistance to the prosecution in establishing its case. For example, it may give prosecution witnesses a chance to tailor their evidence to the defence disclosed. Edwards highlights the example of a plain-clothes police officer in the case of a youth who hits the officer during a stop and search. Disclosing that the defence will rely on the fact that the officer did not identify himself by documentation, as required under s.2(2) of PACE, will allow the officer to ensure that he mentions this fact in his evidence.¹⁵⁴

Early indication of the proposed defence case, which is the purpose of defence statements, can be used to improve the prosecution case even if it is not intended to help establish it; the defence becomes an object of investigation, and the prosecution case is reinforced as a result.¹⁵⁵ In practice, the courts have not made a distinction in relation to the use of defence disclosure. As a result of *Firth*¹⁵⁶ and *Newell*,¹⁵⁷ at least where it can be said that the defence have not followed the letter and spirit of the Criminal Procedure Rules, the fruits of

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ A Edwards 'Do the Defence Matter?' (2010) 14 *E and P* 119, 126.

¹⁵⁵ Ibid.

¹⁵⁶ [2011] EWHC 388.

¹⁵⁷ [2012] EWCA Crim 650.

disclosure can be used as evidence to establish a *prima facie* case. Moreover, such cases as *Essa*¹⁵⁸ and *Haynes*¹⁵⁹ show that the prosecution are capable of cross-examining the defendant on disclosure failures, pursuant to the CPIA, even where the defendant denies responsibility for the failure. Arguably, this assistance to the prosecution, even if inadvertent, undermines the presumption of innocence and the burden of proof.¹⁶⁰

To expect, let alone require, the defendant to assist the prosecution in making its case is inconsistent with a conception of the relationship between citizen and state which underlies the normative theory of holding the state to account. As a consequence of the autonomy and dignity accorded to citizens in a liberal democracy, and the need to regulate the use of state powers and resources against citizens, the state must justify its allegations and request for conviction and punishment of the accused. It should not expect or require the accused to actively assist in the matter. Although the disclosure of some specific elements of the defence case, such as alibi or expert evidence, may seem necessary from a practical perspective, from the normative standpoint, protecting rights, fairness and autonomy take precedence. Where particularly significant problems arise for the prosecution, and the interests of justice are at stake, short adjournments may be used to allow time for the prosecution to address new or unanticipated evidence or arguments raised by the defence. Although this would upset the current emphasis on efficiency, it should be recalled that delays and adjournments are currently commonplace within the disclosure regime.¹⁶¹ Nevertheless, this solution is unlikely to appeal in practice.

Normatively, the right of the accused not to participate in proceedings against himself would be strong enough to justify an absolute rule against pre-trial defence disclosure. Contrarily, in practice, concessions are often made, in order to save time and money. What is most important is that these concessions do not significantly detract from the argument against requiring participation. Disclosure of the defendant's alibi, as well as the details of expert witnesses that will be relied on at trial, can reasonably be required only if they impose minimum participatory requirements on the accused. Because disclosure of an alibi defence may provide the prosecution with information that they can investigate (which might lead to incrimination), the detail required for disclosure should be minimal. If approached carefully,

¹⁵⁸ [2009] EWCA Crim 43.

¹⁵⁹ [2011] EWCA Crim 3281.

¹⁶⁰ Edwards 'Do the Defence Matter?' (n 154) 127.

¹⁶¹ Crown Prosecution Service Inspectorate *A Thematic Review of the Duties of Disclosure of Unused Material Undertaken by the CPS* (n 20) 6.

these exceptions may not affect the presumption of innocence, the burden of proof, or the privilege against self-incrimination.

Any exception to a defence non-disclosure norm must be constrained, and should not be extended purely for pragmatic reasons, where to do so compromises the state's obligation to prove guilt without the active assistance of the accused. For example, although the defence of duress can cause particular problems for the prosecution, making it an exception to a non-disclosure norm could go too far in requiring the defendant to assist the prosecution. It provides the prosecution with evidence of the *actus reus* which might effectively amount to the defendant incriminating himself and easing the burden of proof on the state. In the case of *Hasan*,¹⁶² Lord Bingham suggested that the conditions to be met before duress can be relied upon should be tightened. He went on to imply that it operates as a defence for those associated with criminal activity, beyond that for which they have been charged.¹⁶³ To approach the defence of duress from this standpoint, and to allow it as an exception to a non-disclosure norm, is incompatible with a broad interpretation of the presumption of innocence which requires the defendant to be treated as if he is innocent, until guilt is proven.

Exceptions to a non-disclosure norm should not be created on the assumption that the defendant is probably guilty and that his defence makes it difficult for the prosecution to prove it. When the system becomes less concerned with upholding principles, and more concerned with efficiency and convictions, there is greater leeway to open the defence up to cooperative requirements. Whilst an absolute defence non-disclosure norm would ensure that the state can account for its accusations and uphold the factors which underlie an argument against requiring participation, if concessions are to be made in practice they must be limited to those which have the least intrusion on the presumption of innocence, fair trial rights, and a conception of the relationship between citizen and state which limits state power and protects citizens' autonomy through freedom of choice. The disclosure obligations placed on the defence through the CPIA are at odds with these principles.

Although the Royal Commission believed it to be simply a matter of timing, there are important differences between imposing penalty-backed obligations on the defence to

¹⁶² [2005] UKHL 22.

¹⁶³ *Ibid* [22]. He later states that, 'The policy of the law must be to discourage association with known criminals, and it should be slow to excuse the criminal conduct of those who do so.' [38].

disclose the details of their case prior to trial and requiring them to disclose evidence, and discharge evidential burdens, in court. As explained in chapter 4, evidential burdens require the defendant to adduce sufficient evidence to raise an issue, but do not require the defendant to assume a risk of conviction, since the prosecution will carry the legal burden of disproving the issue. The evidential burden is simply a burden of adducing sufficient evidence to support a case. It does not tie the defence to a particular account pre-trial. In practice, the defendant may have to participate in order to discharge the evidential burden. However, it can also be discharged through the testimony of other witnesses, or by pointing to some evidence already adduced by the prosecution. Stumer believes the evidential burden to be an essential device for narrowing the issues in a criminal trial.¹⁶⁴

A key distinction between pre-trial disclosure requirements and the requirement to disclose the nature of a defence at trial is that the defendant has greater choice in whether to cooperate in the latter. If he fails to satisfy an evidential burden, the prosecution still bear the legal burden of proof in relation to the charge, and there are no provisions for adverse inferences stemming from the defendant's failure. The pressure to participate which the defendant may feel in order to discharge an evidential burden is not without consequence, but it places no formal requirements on him to participate. Furthermore, requirements to disclose the details of one's defence at trial will not assist the prosecution in the same way as pre-trial disclosure. It does not afford the prosecution with the time or opportunity to construct counter-arguments or gather new evidence. Nor does it allow them the opportunity to strengthen or significantly change their case. Hence, it does not have the same implications for the privilege against self-incrimination, the presumption of innocence, or the burden of proof. As such, it is more consistent with the idea that the defence should not have to assist the prosecution in proving its case.

7.6 Implications for English criminal procedure

By imposing vast and detailed disclosure obligations on the defence and penalising non-cooperation, the CPIA has significantly influenced the nature of English criminal procedure. It is aimed at those who exploit due process concerns to escape conviction, and it forms a

¹⁶⁴ A Stumer *The Presumption of Innocence: Evidential and Human Rights Perspectives* (Hart: Oxford, 2010) 18.

major part of the general move towards increasing defendant participation. Defence disclosure's twin-purpose of efficiently increasing convictions fits into Packer's Crime Control model of criminal procedure.¹⁶⁵ As defined in chapter 3, this model is underlined by values 'based on the proposition that the repression of criminal conduct is by far the most important function to be performed by the criminal process.'¹⁶⁶ A high rate of apprehension and conviction must be achieved with a premium on speed and finality. By attaching greater weight to these values than to due process concerns, the CPIA has helped push English procedure away from adversarialism. A major tool used to facilitate this shift is the case management provisions of the Criminal Procedure Rules. These provisions, together with the disclosure regime and the perceived need to combat ambush defences, place burdens on the defence to cooperate, and have a significant influence over the style of criminal procedure and the defendant's role as a participant.

The Criminal Procedure Rules consolidate the Court's case management powers and furnish a guide to the underlying culture intended to govern the conduct of criminal trials.¹⁶⁷ This culture emphasises convictions and efficiency, and seems to imply that the defence should constructively participate. As explained in chapter 3, under the Rules, the Court must further the overriding objective of dealing with cases justly by actively managing the case. This includes early identification of the issues.¹⁶⁸ Each participant in the case must prepare and conduct the case in accordance with the overriding objective.¹⁶⁹ The Rules thus indicate that the defence's concern should not just be to win its own case, but to ensure that the case is dealt with justly, which includes efficiency and conviction of the guilty.¹⁷⁰ It seems that these two aspects of the overriding objective are being emphasised, with less regard being given to dealing with the prosecution and the defence fairly, and recognising the rights of the defendant.¹⁷¹ The increasing emphasis on case management and efficiency driven by the Rules and the disclosure regime clearly militates against adversarialism.

Rule 3.3 requires the parties to actively assist the court in fulfilling its case management duties. Although most disclosure obligations under the CPIA are only mandatory in the Crown Court, these case management provisions are equally applicable in the magistrates'

¹⁶⁵ H Packer *The Limits of the Criminal Sanction* (Stanford University Press: Stanford, 1968).

¹⁶⁶ *Ibid* 158.

¹⁶⁷ Lord Justice Gross (n 49) 20.

¹⁶⁸ Rule 3.2(2)(a).

¹⁶⁹ Rule 1.2(1)(a).

¹⁷⁰ Ashworth and Redmayne (n 51) 266.

¹⁷¹ Rule 1.1 and chapter 2.

court. The defence may therefore be required to reveal details of its case prior to summary trials. Pre-trial case management forms similar to those requiring completion at plea and case management hearings in the Crown Court are also to be completed at first hearings in the magistrates' court.¹⁷² The content of such forms may be admitted in evidence against the defendant under the retained common law hearsay rules, or as part of the court record.¹⁷³ Linking the case management provisions within the Rules and the disclosure regime is Rule 3.10(a) which provides that, in order to manage a trial or appeal, 'the court must establish, with the active assistance of the parties, what are the disputed issues.' This Rule permits the court to place participatory requirements on the parties, including identifying points of law the parties intend to raise, and identifying information about witnesses and the order of their evidence.

Despite the courts somewhat relaxed approach to enforcement of the CPIA through the use of s.11, they have made much of the changing nature of the criminal process, particularly in regards to defence tactics designed to ambush the prosecution. In *Gleeson*,¹⁷⁴ which was decided shortly before the Criminal Procedure Rules were introduced, the defence had waited until the end of the prosecution case to raise a point of law in support of a submission of no case to answer. The Court of Appeal stated that:

[A] prosecution should not be frustrated by errors of the prosecutor, unless such errors have immediately rendered a fair trial for the defendant impossible. For the defence advocates to seek to take advantage of such errors by deliberately delaying identification of an issue of fact or law in the case until the last possible moment is, in our view, no longer acceptable, given the legislative and procedural changes to our criminal justice process in recent years.¹⁷⁵

The CJA 2003 amendments make defence obligations clearer than they were at the time of *Gleeson*. The CPIA now specifies that the defence should disclose any points of law to be relied on. Furthermore, Rule 3.10 allows the court to require a party to identify any points of law intended to be raised that could affect the conduct of the trial. However, the case shows that the courts' have tended to use the term 'ambush' quite loosely to cover a failure to correct prosecution mistakes. As noted in chapter 4, from an adversarial standpoint, in which the trial takes the form of a competition between two equal sides, a failure to mention or rectify a mistake made by the opposing party is not ordinarily objectionable.

¹⁷² Edwards 'Case Management Forms' (n 105) 547.

¹⁷³ *R (on the application of Firth) v Epping Magistrates' Court* [2011] EWHC 388; *R v Newell* [2012] EWCA Crim 650.

¹⁷⁴ [2003] EWCA Crim 3357.

¹⁷⁵ *Ibid* [35].

In the *Chorley Justices*¹⁷⁶ case, the Divisional Court stated that:

If a defendant refuses to identify what the issues are, one thing is clear: he can derive no advantage from that or seek...to attempt to ambush at trial. The days of ambushing and taking last-minute technical points are gone. They are not consistent with the overriding objective of deciding cases justly, acquitting the innocent and convicting the guilty.

This statement has been influential in later decisions.¹⁷⁷ It was felt that the Criminal Procedure Rules effected a 'sea change' in the way cases should be constructed.¹⁷⁸ In *Penner*,¹⁷⁹ the Court of Appeal reaffirmed the position by stating that, 'It is no longer possible to have cases...where points occur to someone and then an attempt is made to ambush the prosecution by a submission of no case to answer.'¹⁸⁰ In *Malcolm*,¹⁸¹ it was explained that, 'It is the duty of the defence to make its defence and issues that it raises clear to both the prosecution and the court at an early stage'.¹⁸² The case of *Firth* confirmed that the Rules reflect a new approach to the administration of criminal justice in which both sides, rather than the prosecution alone, are required to disclose the nature of their case well before trial.¹⁸³ Support for this approach was thought to be those reasons advocated by Lord Justice Auld in *Gleeson*; namely that a criminal trial is a search for truth and not a game under which a guilty defendant should be provided with a sporting chance.¹⁸⁴ More recently, in the case of *R (on the application of Santos) v Stratford Magistrates' Court*,¹⁸⁵ it was held that a technical point should not avail the applicant for judicial review of a refusal to state a case following conviction since he had failed to raise the matter at his trial before the magistrates' court.

The majority of these cases are not directly concerned with the CPIA, but they do demonstrate the general change in attitude which has occurred as a result. McEwan notes that an inevitable consequence of the changes brought about by the Rules, together with the ever-increasing rigour of defence disclosure requirements, is that elements of party

¹⁷⁶ [2006] EWHC 1795 (Admin).

¹⁷⁷ See for example, *Brett v DPP* [2009] EWHC 440 (Admin) [20]; *Writtle v DPP* [2009] EWHC 236 (Admin).

¹⁷⁸ *R (on the application of DPP) v Chorley Justices and Andrew Forrest* [2006] EWHC 1795 (Admin) [24].

¹⁷⁹ [2010] EWCA Crim 1155.

¹⁸⁰ *Ibid* [19].

¹⁸¹ [2007] EWHC 363 (Admin).

¹⁸² *Ibid* [31].

¹⁸³ *R (on the application of Firth) v Epping Magistrates' Court* [2011] EWHC 388 [5].

¹⁸⁴ *Ibid* [5].

¹⁸⁵ [2012] EWHC 752 (Admin).

control over the conduct of the case are transferred to the court.¹⁸⁶ The Judiciary's case management role has been described as 'of the first importance' for the proper operation of the present disclosure regime.¹⁸⁷ The 2011 Review of Disclosure in Criminal Proceedings advocates robust case management of disclosure matters by the judiciary, and believes that there is undoubted room for improvement in judicial performance in this area.¹⁸⁸ The judge should take advantage of the provisions for case management, and the Review envisages the judge insisting on responsible engagement from the defence in the disclosure exercise, including the early identification of the principal disputed issues in the proceedings.¹⁸⁹ Being more vigorous with case management would see a demand for even greater defence participation and cooperation throughout the criminal process.

It now seems that the defendant is expected to participate constructively in his cooperation with the criminal process. This has the effect of further shifting the procedural arena away from an adversarial style contest in which the prosecution can be put to proof without the assistance of the defendant. The objective of securing the defendant's constructive cooperation is highlighted by the fact that the trend of judicial rhetoric, which expresses such strong aversion for ambushing with new defences or technical and opportunistic points, has occurred despite the lack of evidence to show that they are a significant problem. Ironically, the majority of cases in which ambush defences are attempted end in conviction.¹⁹⁰ The courts, like the government, appear to be relying on the 'go to' rationale of ambush defences in order to justify a requirement of defence cooperation, even if doing so results in marginalising defence rights and autonomy.

Because it was long the general principle that the defence did not have to disclose its case before trial, it is understandable that some see a defence non-disclosure norm as being an intrinsic part of the adversarial system. As such, it has been stated that, 'the disclosure rules under the [CPIA] represent a step away from adversarial justice.'¹⁹¹ However, Redmayne notes that adversarialism varies through time and between jurisdictions, making it difficult

¹⁸⁶ J McEwan 'From Adversarialism to Managerialism: Criminal Justice in Transition' (2011) 31 *Legal Studies* 519, 530.

¹⁸⁷ Lord Justice Gross (n 49) 42.

¹⁸⁸ *Ibid* 74.

¹⁸⁹ *Ibid* 76.

¹⁹⁰ In Leng's study, of the 2% to 5% of trials in which ambush defences were raised, all ended in conviction. Leng *The Right to Silence in Police Interrogation: A Study of Some of the Issues Underlying the Debate* (n 11) chapter 5.

¹⁹¹ Edwards 'Do the Defence Matter?' (n 154) 126.

to say which elements are essential to it in practice.¹⁹² As defined in chapter 3, it does not incorporate a defence non-disclosure norm. Even in the height of adversarialism, although prosecution disclosure became important, defence non-disclosure was not seen in itself as essential. Nonetheless, in the light of the wider impact of requiring defence participation, it is clear that imposing obligations on the defence to provide the prosecution with their case, and penalising their non-cooperation, interferes with norms which are associated with adversarialism. These norms tend to allow the defendant to take a passive role and enable him to choose whether or not to participate. Emphasising the defendant's new participatory role through the assumption that defence statements have been given with his authority,¹⁹³ and through suggestions that in appropriate cases the court should press for involvement from him personally,¹⁹⁴ has also had an impact on adversarialism by focussing on the defendant as a participant and detracting from the defence's role as a party.

Redmayne contends that the defence disclosure obligations achieve a subtle change in the nature of the criminal process: when the defence must disclose its case prior to trial, criminal procedure moves further towards a truth-oriented model.¹⁹⁵ This may be an indication of a shift towards inquisitorialism. For example, Jorg *et al.* have noted that the logic of the English 'adversarial' type trial has been substantially qualified by duties of disclosure of evidence between parties. The disclosure obligations on the prosecution may be seen as redressing the inequality of arms during the pre-trial stage of the process and promoting fairness, but the duties imposed on the defence suggest a move towards the inquisitorial fact finding tradition.¹⁹⁶ However, whilst the truth-finding aspect of disclosure may seem appealing, prosecution non-disclosure presents a greater threat to justice than defence non-disclosure. By limiting prosecution disclosure, the CPIA may be in some conflict with the aim of accurate fact finding. Furthermore, modern 'inquisitorial' type jurisdictions, such as France, neither require defence disclosure, nor do they attach penalties for the defence's failure to disclose evidence.¹⁹⁷ The CPIA is not consistent with common practice in continental systems which often rely on a written dossier that is accessible to both the

¹⁹² Redmayne 'Criminal Justice Act 2003: (1) Disclosure and its Discontents' (n 1) 449.

¹⁹³ CPIA, s.6E.

¹⁹⁴ Lord Justice Gross (n 49) 73.

¹⁹⁵ Redmayne 'Process Gains and Process Values: The Criminal Procedure and Investigations Act 1996' (n 13) 85.

¹⁹⁶ N Jorg, S Field and C Brants 'Are Inquisitorial and Adversarial Systems Converging?' in Harding, C, P Fennell, N Jorg and B Swart (eds) *Criminal Justice in Europe: A Comparative Study* (Clarendon Press: Oxford, 1995) 53.

¹⁹⁷ J Hodgson 'The Future of Adversarial Criminal Justice in 21st Century Britain' (2010) 35 *North Carolina Journal of International Law and Commercial Regulation* 319, 330.

prosecution and defence.¹⁹⁸ Despite a drive towards truth finding through early identification of the issues and rejection of ambush defences, the disclosure regime under the CPIA cannot accurately be described as moving England towards inquisitorialism. The weight attached to case management and efficiency, and the role imposed on the defence in achieving this through their cooperation, suggests a participatory model.

7.7 Conclusion

The CPIA has, undoubtedly, had an impact on English criminal procedure. Apart from limiting the prosecution's disclosure obligations, it has imposed upon the defence new participatory requirements which, together with the Criminal Procedure Rules, have created expectations of constructive cooperation. Defence failure to comply with the disclosure provisions is penalised by way of adverse inferences, by equating non-cooperation with guilt. Leng notes that, for those familiar with the traditional model of adversarial criminal justice in which prosecution is something which happens to a non-volunteer, who is fully entitled to devote his energies to defending himself, the theme of the defendant as a participant with responsibilities in connection with the efficient running of the system is disturbing.¹⁹⁹ McEwan sees the disclosure requirements as part of a shift in English criminal justice away from adversarialism towards a managerial model which prioritises efficiency over fairness and due process.²⁰⁰ The focus on case management and eliminating surprise suggests that the new approach to criminal procedure is efficiency-driven. The desire for efficiency has contributed to the pursuit of defence cooperation. However, the result is a participation-focused model of criminal procedure which relies on the cooperation of the defence to achieve its aims.

Given the impact which compulsory defence disclosure has on established procedural norms, such as the burden of proof and the privilege against self-incrimination, and given the lack of evidence confirming the mischief which the CPIA was intended to address, the existence of a legitimate interest in locking the defendant to a particular defence before trial seems questionable. However, an unfortunate consequence of the changes to both the right

¹⁹⁸ In the Netherlands, for example, all exculpatory material found by the prosecution must be included in the dossier. See Lord Justice Gross (n 49) 58.

¹⁹⁹ Leng 'Losing Sight of the Defendant: the Government's Proposals on Pre-Trial Disclosure' (n 4) 711.

²⁰⁰ McEwan (n 186).

to silence and defence disclosure is that it has become increasingly difficult for a defendant to alter his defence prior to trial. Safeguards in s.11(8) of the CPIA which allow the court to consider the justifications for changes in defence before adverse comment or inferences can be made go some way to recognising this problem, as does the judicial reluctance to enforce the provisions. Yet, it seems that the current drive for efficiency in accurate fact finding will see the participatory model of criminal procedure continue to develop. The recent review of disclosure has proposed that a constructive defence approach to disclosure issues should be seen and encouraged as professional 'best practice'.²⁰¹

²⁰¹ Lord Justice Gross (n 49) 76.

Conclusion

This thesis has explored the changing nature of English criminal procedure which has occurred as a result of increasing participatory requirements on the defendant and the imposition of penalties for non-cooperation with these requirements. This has been challenged on the basis of a normative theory of the criminal process in which the state should be called to account for the accusations it makes against the accused and its request for his condemnation and punishment. The normative theory is founded on a broad interpretation of the presumption of innocence, the right to a fair trial, and a conception of the relationship between citizen and state in a liberal democracy in which autonomy must be protected. The state should not use its potentially oppressive powers to enforce the criminal law against its citizens without first proving and justifying its allegations against them. This should be done without resource from the accused. When the onus is on the state to account for its accusations, and defendant participation is seen as a choice rather than a requirement, there should be no penalty for failure to cooperate.

Chapters 2 through to 4 set out the theoretical foundation from which the three specific examples of penalising defendant non-cooperation were explored. Chapter 2 identified the aims of the criminal process as accurate fact finding and conflict resolution. Although the nature of legal systems means that conflict resolution will always be an integral feature, and accurate fact finding has instrumental value in achieving this aim, a conflict can be resolved without the active participation of the accused and without discovering the objective truth as to the state's accusations. However, the greater emphasis put on accurate fact finding detracts from the conflict resolution goal by any other means. Whilst pursuit of the process aims have led to participatory requirements being placed on the defence, it has been argued that the aims should be subject to the constraints which ensuring legitimacy, fairness and respect for rights can impose. These constraints can prevent the defendant from being obliged to participate.

Chapter 3 set out several models of criminal procedure. The way in which the aims and values of the criminal process are pursued is fundamental to its successful operation and, so, the process itself must be structured in a way best equipped to fulfil them. Although most

legal systems cannot easily be placed within one particular procedural model, identifying these models assists in placing a system on the procedural spectrum. This is useful in determining its priorities and whether participatory requirements can be easily accommodated. England correlates most closely to adversarialism in form, but may be more appropriately labelled as a hybrid. While many reforms have intended to increase accurate fact finding, English criminal procedure lacks the integral features of inquisitorialism such as, the investigative judge, the broad judicial role of the prosecutor, and the written dossier. The quest for efficiency has played an important role in reshaping proceedings, in particular through the case management provisions of the Criminal Procedure Rules. However, due to the pressure to participate which the defendant now faces in the pursuit of both efficiency and accurate fact finding, and as a result of the penalties that non-cooperation entails, English criminal procedure now resembles a participatory model which relies on the participation of the defence; it requires the defendant's participation in order to achieve its aims.

Chapter 4 explored the issue of defendant participation more generally. It further developed the normative theory of criminal procedure, by contrasting it with Duff *et al.*'s communicative theory of the criminal trial.¹ It argued that, as a result of many important rights and procedural norms that emerged during the rise of adversarialism in the eighteenth and nineteenth centuries, defendant participation should be a choice rather than a requirement. Unfortunately, because the modern criminal process now stresses the defendant's participatory role, the defendant can face detrimental consequences if he refuses or fails to comply. One particular implication of this is to devalue the principle of the presumption of innocence, which should be seen as both a reflection of the prosecution's burden of proof and a direction to officials to treat the accused as if he is innocent, until guilt is proven. The current emphasis on participation, and the availability of penalties for non-cooperation, is a key indication of the participatory model of procedure which has emerged.

Chapters 5 through to 7 explored three examples of the increasing participatory requirements and penalties for non-cooperation. These were: limitations placed on the privilege against self-incrimination through restrictive jurisprudence and specific offences of non-compliance; statutory provisions allowing adverse inferences to be drawn from silence; and defence disclosure obligations reinforced by an adverse inference regime. By analysing

¹ A Duff, L Farmer, S Marshall and V Tadros (eds) *The Trial on Trial Volume 3* (Hart: Oxford, 2007).

these specific areas of law, it becomes clear that criminal procedure has shifted away from due process concerns. Rather than allowing considerations of legitimacy and fairness to act as a potential constraint on the ability to reach accurate verdicts, reforms and developments in these areas have concentrated on attaining efficiency and accurate fact finding. This has led to significant interference with the rights of the accused. As well as eroding the right to silence and the privilege against self-incrimination, all three examples affect the presumption of innocence, the right to a fair trial and the state-citizen relationship. This is not acceptable within the normative conception of the criminal process in which the state must account for its accusations against the accused.

8.1 The participatory model

Aside from the clear normative implications which come from penalising non-cooperation, the current laws regarding the right to silence, the privilege against self-incrimination and defence disclosure carry implications for the nature of English criminal procedure in practice. What is often referred to as an adversarial system (usually in the knowledge that it is more of a hybrid between adversarialism and inquisitorialism, and is influenced by other factors, such as efficiency), can no longer be viewed as such. It is now a participatory model of criminal procedure in which the participation and cooperation of the defendant as an individual and the defence as a party are required. Dennis has noted that in recent years criminal proceedings have increasingly been taking on the flavour of a dialogue in which the defendant is being obliged to participate.² The participatory model is, thus, a new style of procedure. It is reminiscent of the pre-adversarial altercation trial in which the accused's participation was essential. Although what we see now is different in form, both rely on a lack of procedural protection for the accused in order to secure his participation in pursuance of the process aims.

The thesis has made no specific attempt to define or describe the participatory model of criminal procedure in a detailed way. The participatory model is not intended to be a normative, theoretical or ideal construct which can be used to compare and contrast existing legal systems in the way which many models of procedure are. Instead, it is a way of identifying the current state of English criminal procedure which has arisen out of the trend

² I Dennis *The Law of Evidence* 4th edn (Sweet & Maxwell: London, 2010), 453.

in criminal justice reforms to secure the active participation and cooperation of the defendant and the defence party. Defence participation seems to be seen as the key to accurate fact finding and efficiency, despite its implications for established rights and procedural norms. It is quite far removed from England's adversarial history and, although retaining some of the form of the adversarial system, no longer reflects adversarialism in terms of its priorities and values.

The participatory model does not directly correspond to any of the other models identified in chapter 3. It shares a focus on truth finding with inquisitorialism, but does not employ a similar form or structure. The culture of cooperation and participation which is apparent in the inquisitorial model (without the use of specific obligations and penalties) is not present in the participatory model. The participatory model can also be differentiated from a European model. That is, English criminal procedure does not mirror common practice on the continent. Furthermore, many of the participatory requirements have raised issues concerning Article 6 of the European Convention on Human Rights. Although efficiency is a key concern, and managerialism is used as one way to attain it, the participatory model is not an efficiency model. There may be an overlap between the two, but the focus of the participatory model is on the perceived benefits of participation, one of which is efficiency.

The participatory model has not been created by design. Instead, it is the consequence of procedural reforms and developments aimed at increasing accurate fact finding and efficiency in the criminal process through the participation of the defence. This has occurred with little regard for the issues of principle which legitimise the system. For example, in furthering the overriding objective of the Criminal Procedure Rules, convicting the guilty and dealing with cases efficiently and expeditiously have taken precedence over dealing with the prosecution and the defence fairly and recognising the rights of the defendant.³ Furthermore, developments in defence disclosure obligations, such as requiring the details of witnesses to be disclosed, have been taken forward, despite concern over their impact on the rights of the defendant.⁴ Other examples include limiting the scope of the privilege against self-incrimination even beyond the arguably restrictive interpretation given by the

³ *R (on the application of Firth) v Epping Magistrates' Court* [2011] EWHC 388; *R v SVS Solicitors* [2012] EWCA Crim 319.

⁴ Royal Commission on Criminal Justice *Report* (HMSO: London, 1993) 99.

European Court of Human Rights in *Saunders*,⁵ and labelling adverse inferences from silence as ‘common sense’ without giving due regard to innocent explanations for silence.⁶ In brief, it would not be unreasonable to suggest that the shift from adversarialism to a participatory model has gone largely unchecked by any serious consideration for due process concerns.

8.2 Beyond efficiency

Commentators who have recognised the recent shifts in English criminal procedure away from adversarialism view it predominantly as a move towards managerialism and efficiency, rather than participation. Richardson contends that since 1993, and at an accelerating pace, the perspective that has informed all reforms to the rules of criminal evidence and procedure has been that the great majority of those accused of crime are guilty of what is alleged or something similar to what is alleged, that too many of them are getting away with it, and that the rules need to be changed with a view to securing a higher conviction rate.⁷ He states that, ‘Principle and justice have been sacrificed at the altar of expediency.’⁸ He also believes that the senior judiciary, on the whole, have endorsed this trend enthusiastically, and that the primary casualty has been the principle that it is for the prosecution to prove guilt unaided by the defendant.⁹ McEwan argues that criminal procedure is becoming dominated by managerialist concerns and has transformed into a managerial system.¹⁰ The ad hoc reforms which she points to as being responsible for this include plea and case management hearings and the greater inclusion of hearsay and written evidence, as well as the disclosure provisions and the Criminal Procedure Rules. She argues that there has been a transfer of power from parties to the court effected by the Rules.¹¹ However, the essential structure remains what Damaska has labelled coordinate rather than hierarchical.¹² McEwan believes that the shift away from adversarialism matters if the adversarial features we are

⁵ *Saunders v UK* (1997) 23 EHRR 313. See the later cases of *Brown v Stott* [2001] 2 All ER 97 and *O’Halloran and Francis v UK* (2008) 46 EHRR 21.

⁶ *R v Webber* [2004] UKHL 1.

⁷ J Richardson ‘A “Just” Outcome: Losing Sight of the Purpose of Criminal Procedure’ (2011) *Journal of Commonwealth Criminal Law* Inaugural Issue 105, 106.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ J McEwan ‘From Adversarialism to Managerialism: Criminal Justice in Transition’ (2011) 31 *Legal Studies* 519.

¹¹ *Ibid.* 544.

¹² M Damaska *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press: New Haven, 1986).

losing reflect an ideology containing important values, and if those values are not effectively protected by the system that is emerging to replace it.¹³ Although the essential principles of due process are not exclusive to adversarial proceedings, the participatory model has tended not to retain them.

Hodgson also points to managerialist efficiency as the primary driver behind legislative reforms over the last twenty years.¹⁴ She notes that criminal justice has moved away from adversarialism because it is costly in terms of time and money, at a time when government wants to be tough on crime. The result has been the attenuation of defence rights and new pressures on the defence to cooperate in the investigation and assembly of evidence against them.¹⁵ Drawing on the legal response to counter-terrorism, the role of the Criminal Cases Review Commission as a form of post-conviction review, and the increasingly interdependent relationship between the police and the prosecution, she finds that the change is not driven by a desire to move to a new procedural model, such as the inquisitorial process, but simply by efficiency and managerialism. Hodgson also recognises the role of reforms to the right to silence and the disclosure regime as part of this shift. She argues that the danger is that criminal justice has many inter-linked parts and piecemeal change without regard to the overall consequences or wider structural model will weaken established procedural guarantees.¹⁶ This thesis differs from the accounts given by others because it looks specifically at those reforms intended to secure the participation and cooperation of the accused. However, whilst it is submitted that the shift in English criminal procedure is to a participatory model, rather than one of efficiency, there are similarities between all of these conclusions; they all recognise a shift away from adversarialism and a change in procedural style at the expense of important issues of principle.

This thesis is also distinctive because of the normative stance that it adopts. Other academic commentators have taken a rights based approach to criminal procedure,¹⁷ and Ho has presented a theory of the adversarial model of the criminal trial as primarily a process of holding the executive to account on its request for conviction and punishment.¹⁸ This work,

¹³ McEwan (n 10) 523.

¹⁴ J Hodgson 'The Future of Adversarial Criminal Justice in 21st Century Britain' (2010) 35 *North Carolina Journal of International Law and Commercial Regulation* 319.

¹⁵ *Ibid* 360.

¹⁶ *Ibid* 361.

¹⁷ A Ashworth and M Redmayne *The Criminal Process* 4th edn (Oxford University Press: Oxford, 2010).

¹⁸ HL Ho 'Liberalism and the Criminal Trial' (2010) *Singapore Journal of Legal Studies* 87.

on the other hand, has used the normative stance to argue against participatory requirements being placed on the defence throughout the criminal process to the extent that there should be no obligation or expectation to actively participate in a way that will aid the state in accounting for its accusations against the accused. Instead of directing the jury that they may draw adverse inferences from a defendant's silence, the normative approach requires the judge to direct the jury that innocent reasons for silence do exist and that silence is not synonymous with guilt and so should not be used as evidence of guilt. It can also accommodate a broad interpretation of the privilege against self-incrimination which does not distinguish between evidence dependent or independent of the will of the accused; and it can prevent the defendant from having to disclose the nature of his defence prior to trial even if this may lead to particular problems for the prosecution.

Through the normative theory employed, this thesis has taken an absolutist stance against requiring the defendant to actively participate in the criminal process. It has not recognised any principled exceptions to this, particularly in regards to the privilege against self-incrimination, the right to silence and defence disclosure. This is because it should be for the state alone to prove, and justify, the charges brought against the accused.

Where procedural rights and norms are weak or non-existent, it becomes possible to require the defendant to cooperate in order to efficiently pursue factually accurate outcomes. Conversely, granting the accused the freedom to choose whether or not to cooperate with or assist the state in pursuance of its aims is reflective of a normative understanding of the criminal process as a process of calling and holding the state to account in its enforcement of the criminal law. A criminal conviction makes a public condemnatory statement about the defendant, and can have far-reaching and enduring consequences. For this reason, it is essential that the state account for the accusations it makes against a citizen.

8.3 What happens next?

If the normative theory advanced in this thesis were to be put into practice, with the defendant facing no detrimental consequences for choosing not to participate in the criminal process, it is likely that some would see it as a step backwards. However, taking a step backwards would not be a bad thing. The old common law positions on the right to

silence and defence disclosure are more favorable, and most post-*Funke*¹⁹ cases concerning the privilege against self-incrimination would be better off reversed. Following this path would lead to greater respect and concern for a broad interpretation of the presumption of innocence, the right to a fair trial, and a conception of the relationship between citizen and state in which state power is controlled, and liberty and autonomy are protected. However, it may be that, rather than go backwards, the system can only evolve. If this is the case, then the theory still has a place in the evolving system. It can be used to prevent the pursuit of efficient fact finding from further advancing the participatory model at the expense of legitimacy, fairness and respect for rights. Unfortunately, there is currently a real threat of this happening. For example, the increasingly limited scope of the privilege against self-incrimination could become even more restricted, with the use of criminal sanctions against those who refuse to incriminate themselves (or others) being extended. Taken to the extreme, this could completely jeopardise the right to silence in the police station and at trial, and lead to a greater risk of defendants being coerced into offering unreliable evidence; of their being convicted on the basis of their true, but unconvincing, testimony; or being convicted for offences of failing to answer questions. Whilst this would obviously raise Article 6 issues, it could be achieved on proportionality and public interest grounds.

There should also be concern regarding the judicial approach to defence participation and defence rights. The case of *Rochford*²⁰ shows that there are judges who feel the need to treat non-cooperation as a contempt of court, even before it can be established that the defendant has failed to comply with his participatory obligations. Furthermore, the case law in relation to legal advice to remain silent in the police station has effectively undermined the right to such advice, by requiring the defendant to second guess whether it is reasonable to rely upon it.²¹ The judicial approach to reverse burdens of proof is also concerning; the continued, and inconsistent use of proportionality arguments to justify an imposition of legal burdens on the defence does not sit well with the presumption of innocence. Fortunately, some judges do appear mindful of the consequences of this new participatory model, as is demonstrated by the decision in *Newell*²² that information disclosed in case management forms should ordinarily be excluded as evidence against the defendant.²³ Nevertheless, at the very least, we can use the normative theory presented in this thesis as a reminder that

¹⁹ (1993) 16 EHRR 297.

²⁰ [2010] EWCA Crim 1928.

²¹ *R v Howell* [2005] 1 Cr App R 1; *R v Hoare* [2004] EWCA Crim 784.

²² [2012] EWCA Crim 650.

²³ However, this decision is qualified. See chapter 7.

the system needs underlying principles to restrain how the state acts in relation to its obligation to prove guilt. A legitimate system must have regard for fairness and respect for rights. These values should operate to prevent, for instance, reforms which require defendant participation and penalise non-cooperation. Given the potential for things to go further, it seems that we need this reminder.

The intrusions on defence rights, which have occurred as a result of reforms that have taken place over the past couple of decades, are not glaringly obvious, and sometimes depend on broad interpretations of rights beyond that which the courts have been willing to give them. Until we encounter the kind of obvious injustice to innocent defendants which leads to, and necessitates, the strengthening of due process rights,²⁴ the participatory model is likely to continue to develop, with defendants being penalised for their non-cooperation. Before we accept the imposition of participatory requirements and penalties against those who fail to comply, we must take cognizance of the negative impact this has on: procedural norms such as the presumption of innocence; fair trial guarantees, including the privilege against self-incrimination and the right to silence; and the relationship between citizen and state. Once we recognise the magnitude of the participatory model, our next task is to decide whether to abandon it or change how we define and understand our system.

²⁴ Such as the miscarriages of justice which contributed to the development of the adversarial system, particularly the Treason Trials Act of 1696 and, more recently, to the Police and Criminal Evidence Act 1984.

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