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List of Abbreviations

Abbreviation	Full title
CJA	Criminal Justice Act 2003
CJPOA	Criminal Justice and Public Order Act 1994
CPIA	Criminal Procedure and Investigations Act 1996
Crim LR	Criminal Law Review
CrimPR	Criminal Procedure Rules 2015
E & P	International Journal of Evidence and Proof
ECHR	European Convention on Human Rights
MLR	Modern Law Review
PACE	Police and Criminal Evidence Act 1984

Introduction: Participatory Requirements and Rights

*'In England, the defendant acts no kind of part: his hat stuck on a pole might without inconvenience be his substitute at the trial.'*¹

The above statement was made by a French observer of the English criminal trial in the early nineteenth century. It reflects a long-standing perception that, within England and Wales, those accused of criminal wrongdoing are free to sit back and wait for the state to prove their guilt. Accordingly, the defendant need not play an active role in pre-trial proceedings, nor is he obliged to speak on his own behalf at trial. However, times have changed. A hat stand is no longer an accurate descriptor of the defendant in court, nor is it a convincing symbol of his or her role during criminal investigations and pre-trial proceedings. Active and cooperative defendants can provide information which can assist the police and prosecution in building and presenting a case. Active and cooperative defendants can also prevent unnecessary delay by, for example, ensuring early identification of the issues in the case. Over the past two decades in particular, there has been an increase in demand from government and some criminal justice professionals for accused persons to actively participate throughout the criminal process. The increase in demand for participation has accompanied an increase in demand for convictions and efficiency in criminal proceedings.

The increase in demand for participation has resulted in the imposition of requirements on defendants to actively participate, backed by penalties for non-cooperation. These requirements derive from legislation and have been given effect by the courts. The purpose of this book is to critically examine the participatory role of the defendant during the pre-trial and trial stages of the criminal process, from charge to verdict,² and to assess the impact which requiring active participation has had on the nature of criminal procedure. The position taken is that it is wrong to require defendants to actively participate in proceedings against themselves. This argument is based on a broad approach to fair trial rights and a normative position, or theory, which holds that the criminal process should operate as a mechanism for

¹ C Cottu, *On the Administration of Criminal Justice in England; and the Spirit of the English Government* (anon tr, London, Richard Stevens, 1822) 105.

² The term 'charge' is used in the autonomous sense, as provided for by Article 6(1) of the European Convention on Human Rights (ECHR), which includes pending or anticipated criminal proceedings. See, for example, *Deweere v Belgium* (1980) 2 EHRR 439 [42], where the term 'charge' is said to be 'very wide in scope'.

calling the state to account for its accusations and request for official condemnation and punishment of the accused. When fair trial rights are interpreted broadly, as they ought to be, they allow defendants to take a passive role, while challenging the state and holding it to account for its accusations of criminal wrongdoing. Moreover, if defendants are to be treated as free and dignified citizens of a liberal democracy, as they ought to be, they must be at liberty to choose whether or not to actively participate in criminal proceedings. This normative theory of the criminal process not only provides a basis for the argument against requiring active participation, but also provides a framework, or yardstick, from which to approach and examine wider developments in criminal procedure and the law of evidence.

Before outlining the participatory requirements at issue, and further explaining the normative position, a distinction must be made between active and passive participation. The focus of this book is active participation. The defendant is an active participant when he is actively involved in the criminal process, as an individual, through means such as answering questions beyond statements of ‘no comment’,³ providing material evidence, and testifying in court. Active participation involves mental effort or voluntary physical movement on the part of the defendant, which results in the production of information. Passive participation, on the other hand, requires no direct action on the part of the defendant, beyond submission. Arrest, searches, detention in police custody, being subjected to police questioning without answering, and being presented to and being present in court, are all forms of passive participation in the criminal process. As Leng notes, they are events ‘which happen to the suspect rather than requiring action by her.’⁴

The focus of this book is on active participation rather than passive participation because the increase in requirements to actively participate is relatively recent and far-reaching. It has, therefore, become necessary to consider the consequences of the defendant’s new participatory role. Requirements of active participation have implications for the enforceability of fair trial rights, even when they are interpreted narrowly.⁵ These rights can

³ In practice, where an accused responds to police questioning by stating ‘no comment’, the response is treated in the same way as silence, and adverse inferences may be drawn against the accused under the Criminal Justice and Public Order Act 1994 (CJPOA 1994).

⁴ R Leng, ‘The Right to Silence Reformed: A Re-appraisal of the Royal Commission’s Influence’ (2001) 6 *Journal of Civil Liberties* 107, 128.

⁵ See, for example, the scope of the privilege against self-incrimination, which has been interpreted narrowly and has also been set aside in pursuit of the public interest. See ch 5. See also *Brown v Stott* [2003] 1 AC 681 (PC); *O’Halloran and Francis v UK* (2008) 46 EHRR 21.

provide the defendant with a choice of whether or not to cooperate in the criminal process. Depriving the defendant of that choice has significant implications for the nature of criminal procedure. England and Wales can no longer be characterised as ‘adversarial’ in any strict sense of the term, such as Mirjan Damaska’s core meaning of it: ‘a contest or a dispute [which] unfolds as an engagement of two adversaries before a relatively passive decision maker whose principal duty is to reach a verdict.’⁶ While it is natural for systems to transform over time, it is of concern that there has been a departure from legal norms and rights which became workable as part of an adversarial system.⁷

1.1 Participatory requirements

In order to demonstrate the way in which an increase in demand for participation has transformed the role of the defendant and the nature of criminal procedure, three areas of the law of evidence and criminal procedure are examined in chapters 5 through 7. These are: the privilege against self-incrimination; the right to silence; and pre-trial disclosure. As a result of an increasingly restrictive notion of the privilege against self-incrimination, and legislative reforms to the law concerning the right to silence and disclosure, defendants can be required to participate. It is appropriate to use the term ‘required’ because the defendant is subject to compulsion to participate. The compulsion stems from the penalties attached to non-cooperation.

In relation to the privilege against self-incrimination, defendants can face a direct compulsion to provide self-incriminating information, where non-compliance is a criminal offence, provided for by statute.⁸ It is not a criminal offence or contempt of court to remain silent or refuse to disclose details of one’s case before trial. Nonetheless, defendants are subject to indirect compulsion to participate; a failure to answer police questions, give evidence in court, or comply with disclosure obligations can result in an adverse inference being drawn against the defendant.⁹ The inference may be one of guilt and can contribute to a conviction. The defendant is, thus, subject to a penalty because a failure to participate can result in a

⁶ M Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven, Yale University Press, 1986) 3.

⁷ While the shift away from adversarialism is a key theme of this book, this is not a historical study. However, aspects of the development of adversarialism and participatory rights are examined in ch 4.2. See also JM Beattie, *Crime and the Courts in England 1660-1800* (Oxford, Clarendon Press, 1986); JH Langbein, *The Origins of the Adversary Criminal Trial* (Oxford, Oxford University Press, 2003).

⁸ See, for example, Road Traffic Act 1988, s 172, discussed in ch 5.3.3.

⁹ As provided for by the CJPOA 1994, ss 34-37, and the Criminal Procedure and Investigations Act 1996, s 11.

detriment that would not otherwise be endured. That detriment is provided for by law and associates non-participation with guilt. To penalise the defendant is to treat him as though he had done something wrong. By subjecting defendants to compulsion to actively participate, and then using the law to put them in a disadvantaged position if they do not comply, the message that is conveyed by the practices examined in this book is that it is wrong for defendants not to participate.

The privilege against self-incrimination, the right to silence, and disclosure have been selected for analysis on the basis that these three areas of law provide the clearest and most striking examples of requirements to actively participate. In addition, these areas of law have long been the subject of controversy and debate. This book provides an important opportunity to not only consider the impact of reform on the defendant, but also the development and rationales of the privilege against self-incrimination, the right to silence, and pre-trial disclosure.

There are, however, a number of other practices and rules through which defendants can be subject to compulsion to participate and penalised for non-compliance. The penalties include the loss of a sentence discount for those who do not plead guilty but are found guilty following a contested trial, as discussed in chapter 3. In addition to a loss of sentence discount, a mandatory Criminal Courts Charge was introduced in 2015.¹⁰ While the financial charge was imposed on all convicted adults, those who were found guilty following a contested trial faced a higher fixed-sum charge than those who pleaded guilty. The Criminal Courts Charge was met with heavy criticism from criminal justice professionals, in part due to the increased pressure on the innocent to plead guilty.¹¹ It has since been abolished.¹²

Ongoing concern over the pressure faced by defendants to plead guilty may, at times, overshadow the changing role of the defendant in contested cases. However, while the vast majority of criminal cases end in a guilty plea, the prospect of a trial shapes the pre-trial stages of the criminal process, and there continue to be a significant number of contested

¹⁰ The Criminal Courts Charge was introduced by Statutory Instrument in April 2015, just before Parliament was dissolved, allowing little or no opportunity for parliamentary debate. Prosecution of Offences Act 1985 (Criminal Courts Charge) Regulations 2015/796; Prosecution of Offences Act 1985, ss 21A-21F.

¹¹ For a summary of the criticism and concerns, see House of Commons Justice Committee, *Criminal Courts Charge Second Report of Session 2015-16* HC586 (London, The Stationery Office, 2015)

¹² Prosecution of Offences Act 1985 (Criminal Courts Charge) (Amendment) Regulations 2015/1970.

trials in England and Wales each year.¹³ Most of the participatory requirements explored in this study are imposed on the defendant before the trial, while the penalty for non-cooperation is implemented during, or after, the trial stage of the criminal process.

The defendant can also be penalised through sanctions for failure to comply with case management directions under the Criminal Procedure Rules, as examined in chapters 3 and 7. In addition, where a reverse burden of proof is imposed on the defence at trial, it will often be necessary for the defendant to participate in order to discharge the burden. A failure to discharge the burden will result in the conviction of the defendant. Consideration is given to reverse burdens of proof as a participatory requirement in the final chapter. Many other situations in which non-participation can result in a detriment that would not otherwise be endured concern the passive participation of the accused, rather than his active participation. For example, a refusal to submit to a police stop and search could result in arrest, and a refusal to be subjected to police questioning could result in a longer period of detention. However, for the reasons outlined above, this study is concerned only with requirements to *actively* participate during the pre-trial and trial stages of the criminal process.

By omitting to consider coerced passive participation, it is by no means assumed that such coercion is unobjectionable.¹⁴ For example, being subjected to a compulsory search, having bodily samples forcibly taken, or being detained in police custody or on remand prior to trial can amount to intrusions of the right to privacy, the right to be free from inhuman and degrading treatment,¹⁵ and the right to liberty. These forms of passive participation must be regulated, and they require justification, such as being necessary in the interests of crime prevention or public safety.¹⁶ Once the consequences of coerced active participation have been examined, and the case against requiring active participation has been established, a

¹³ In 2014, there were 71,969 effective trials and 28,092 ineffective trials in the magistrates' courts of England and Wales. In the same year, 27,953 defendants were dealt with in the Crown Court following a plea of not-guilty. See Ministry of Justice, *Criminal Court Statistics: April-June 2015 (Main Tables)* (Ministry of Justice, September 2015) Tables M2 and C5.

¹⁴ Passive participation is coerced in so far as the accused has no choice but to participate and can be physically compelled to do so.

¹⁵ See, for example, *Jalloh v Germany* (2007) 44 EHRR 32, in which the forcible administration of emetics in order to obtain evidence of a drugs offence was contrary to Article 3 of the ECHR.

¹⁶ See, for example, Article 8(2) of the ECHR, which provides that the right to respect for private and family life can be interfered with by a public authority in accordance with the law and where necessary in a democratic society 'in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

standard can be identified, and perhaps later applied, to assess whether the various forms of coerced passive participation are justifiable.

It should be noted that, along with the defendant as an individual, the defence as a party has faced an increase in expectations of participation.¹⁷ The defence party consists of the defendant as well as his legal representatives. The defence party actively participates when it goes beyond simply putting the prosecution to proof by, for example, providing information about the defence case ahead of trial, raising a positive defence, and adducing evidence in support of that defence at trial. As will be shown, defence representatives can face penalties for non-compliance with participatory requirements, and can be placed in the difficult position of having to choose between their conflicting duties to the defendant and to the court. However, the main focus is the participatory requirements placed on the defendant as an individual, as the existence of the defence party should enable the defendant to take a passive role in the criminal process, without sacrificing the opportunity to test the prosecution's case.

1.2 Rights and participation

While the defendant's participation may prove useful to the pursuit of efficient fact-finding, it should be a choice and not a requirement. This position can be justified on the basis that the coerced participation of the accused undermines the right to put the prosecution to proof and to defend oneself. The defendant's right to see that the prosecution can prove the case against him is expressed through the presumption of innocence. As part of the right to a fair trial, the defendant must be presumed innocent. The presumption of innocence is an ancient and fundamental principle.¹⁸ Its value lies in its role as a procedural protection against wrongful conviction, and also in the effect it gives to a claim to fair treatment by the state.¹⁹

¹⁷ See, for example, pt 3 of the Criminal Procedure Rules 2015, discussed in chs 3 and 7.

¹⁸ The presumption of innocence has been traced back to Roman times. It now has a place in every international human rights document, including Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, European Convention on Human Rights, and African Charter on Human and Peoples' Rights. On the history of the presumption, see A Stumer, *The Presumption of Innocence: Evidential and Human Rights Perspectives* (Oxford, Hart Publishing, 2010) 1-8. See also *Coffin v United States*, 156 US 432 (1895).

¹⁹ On the presumption of innocence, see generally A Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10 *E & P* 241; V Tadros, 'Rethinking the Presumption of Innocence' (2007) 1 *Criminal Law and Philosophy* 193; A Stumer, *The Presumption of Innocence: Evidential and Human Rights Perspectives* (Oxford, Hart Publishing, 2010); HL Ho, 'The Presumption of Innocence as a Human Right' in P Roberts and J Hunter (eds), *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Oxford, Hart Publishing, 2012); P Roberts, 'Loss of Innocence in Common Law Presumptions' (2014) 8 *Criminal Law and*

The presumption of innocence requires the prosecution to bear the burden of proving the defendant's guilt at the criminal trial. In other words, it is a reflection of the prosecution's burden of proof. It ordinarily requires the prosecution to both prove that the defendant committed the offence for which he has been charged and to disprove any defence which is advanced by him or on his behalf.²⁰ This conception of the presumption of innocence was endorsed by Viscount Sankey LC 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.²¹ However, placing the burden of proof on the prosecution at trial does not in itself reveal much about the role which the defendant should play throughout the criminal process. Nor does it reveal much about how and where the prosecution can ascertain the evidence on which it relies to prove guilt.

On a broader scale, the presumption of innocence operates throughout the criminal process, as a direction to officials to treat the accused as if he were innocent, until guilt is proved. This is not to say that state officials must believe that the accused is in fact innocent. However, the state has a duty to recognise the defendant's legal status of innocence at all stages prior to conviction and after acquittal.²² 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.²³ These, in part, correspond to what Ashworth has labelled the 'narrow' and 'wide' concepts of the

Philosophy 317; H Stewart, 'The Right to be Presumed Innocent' (2014) 8 *Criminal Law and Philosophy* 407; V Tadros, 'The Ideal of the Presumption of Innocence' (2014) 8 *Criminal Law and Philosophy* 449.

²⁰ There are, however, many instances in which the burden is reversed, and the defence is required to prove or disprove an issue at the trial. See ch 8.1. On reverse burdens of proof generally, see A Ashworth and M Blake, 'The Presumption of Innocence in English Criminal Law' [1996] *Crim LR* 306; P Roberts, 'The Presumption of Innocence Brought Home? *Kebilene* Deconstructed' (2002) 118 *Law Quarterly Review* 41; V Tadros and S Tierney, 'The Presumption of Innocence and the Human Rights Act' (2004) 67 *MLR* 402; I Dennis, 'Reverse Onuses and the Presumption of Innocence: In Search of Principle' [2005] *Crim LR* 901; D Hamer, 'The Presumption of Innocence and Reverse Burdens: A Balancing Act' (2007) 66 *Cambridge Law Journal* 142; A Stumer, *The Presumption of Innocence: Evidential and Human Rights Perspectives* (Oxford, Hart Publishing, 2010); F Picinali, 'Innocence and Burdens of Proof in English Criminal Law' (2014) 13 *Law, Probability & Risk* 243.

²¹ *Woolmington v DPP* [1935] AC 462 (HL) 481.

²² European human rights law supports a wide approach to the presumption of innocence in so far as Article 6 of the ECHR applies to both the pre-trial and trial stages of the criminal process. For example, the presumption of innocence should be taken into consideration when determining whether to grant bail or remand the defendant in custody pending trial. See *Caballero v UK* (2000) 30 EHRR 643. The European Court of Human Rights has also recognised what Trechsel identifies as a 'reputation-related' aspect of the presumption; 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. See S Trechsel, *Human Rights in Criminal Proceedings* (Oxford, Oxford University Press, 2005) 164; *Allenet de Ribemont v France* (1995) 20 EHRR 557.

²³ HL Ho, 'The Presumption of Innocence as a Human Right' in P Roberts and J Hunter (eds), *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Oxford, Hart Publishing, 2012).

presumption of innocence.²⁴ Precisely what a wide conception of the presumption should entail is contestable, and a comprehensive exploration of the meaning, nature and implications of the presumption of innocence is outside of the scope of this work. However, a wide conception places more restrictions on what can be required of the defendant than the narrow conception, which simply reflects the prosecution's burden of proof at trial. Under a wide conception, the presumption can, and arguably should, act as a restraint on the various compulsory measures that may be taken against suspects in the period before trial.²⁵ These measures include requirements to cooperate with the police and prosecution by answering questions or providing evidence. To demand that the accused account for the allegations made against them, or provide information which may assist in their prosecution, is not to treat them as innocent.

The defendant'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 perspective, underpins the case against requiring active defendant participation and penalising non-cooperation. When the emphasis is on the defendant's participation, the presumption of innocence becomes much less pronounced, as the focus shifts from the prosecution to the defence. In many circumstances, to require the defendant to actively participate is to ease the prosecution's burden of proof and is also contrary to treating him as if he were innocent. This occurs where, for example, the defendant's failure to participate can be used by the prosecution as evidence of guilt, notwithstanding that the correlation between non-participation and guilt may be extremely tenuous.²⁶ This book advocates a wide interpretation of the presumption of innocence which is both a reflection of the prosecution's burden of proof at the trial and a direction to officials to treat the defendant as if he were innocent, until guilt is proved. To treat the defendant as innocent should mean that he be under no obligation to actively assist in the discharge of the state's obligation to prove guilt, either expressly or in consequence of a procedural requirement.

Requiring defendant participation and penalising non-cooperation also raises issues of compatibility with other fair trial rights. Article 6 of the European Convention on Human Rights, which guarantees the right to a fair trial, sets out the minimum conditions of fairness.

²⁴ A Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10 *E & P* 241.

²⁵ *ibid* 243.

²⁶ See the discussion on inferences from silence and non-disclosure in chs 6 and 7.

It has been influential in many cases in which the imposition of penalties for non-cooperation have been challenged. In addition to the presumption of innocence,²⁷ Article 6 provides for the privilege against self-incrimination and the right to silence.²⁸ These rights are discussed in detail in chapters 5 and 6, so it is sufficient to mention here that they provide the defendant with specific rights not to actively participate in the criminal process. Consequently, requiring defendant participation, and penalising non-compliance, undermines the rights which guarantee defendants a fair trial, and, by extension, undermines the legitimacy of the criminal process as a whole. As contended in the following chapter, it is adherence to principles of fairness and respect for rights which legitimises the process and the outcome of criminal cases.

It will become clear throughout the following chapters that the rationale, definition and scope of the various rights under consideration are debatable. The broad interpretation of fair trial rights which is promoted in this book is sometimes contrary to the narrow way in which the rights have been interpreted and applied by the courts. As mentioned above, a broad interpretation of fair trial rights is linked to a normative theory of the criminal process as a mechanism for calling the state to account. The basis for this theory is explained in the following section. It is further developed and applied throughout the book.

1.3 A theory of the criminal process

Once the state has exercised the power to accuse and charge an individual for a criminal offence, it is for the state to prove those accusations. As previously argued, the criminal process should be conceived of as a process of calling the state to account for the accusations which it has brought against the individual, before that individual can be subjected to official condemnation or punishment.²⁹ The state can account for the accusations by proving the guilt of the accused, using its police and prosecuting agencies. Guilt can be proved by way of the

²⁷ ECHR, Article 6(2).

²⁸ *Murray v UK* (1996) 22 EHRR 29.

²⁹ The theory of calling the state to account is inspired by Hock Lai Ho's argument that a central purpose of the adversarial criminal trial is to hold the executive arm of government to account in its quest to enforce the criminal law. The language of calling, or holding, the state to account has been adopted and applied to pre-trial procedures as well as the trial. However, it is not assumed that Ho would subscribe to the substance or grounding of the theory set out in this book, or the absolutist position which is taken. See HL Ho, 'Liberalism and the Criminal Trial' [2010] *Singapore Journal of Legal Studies* 87; HL Ho, 'The Presumption of Innocence as a Human Right' in P Roberts and J Hunter (eds), *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Oxford, Hart Publishing, 2012).

accused's plea of guilty,³⁰ or by way of a verdict of guilty following a contested trial, at which due respect is paid to the rights of the defendant. The state is accountable to the defendant, who must have an opportunity to understand and challenge the basis for the accusations against him. The state is also accountable to the wider community, as the individuals within the community are subject to state power and have an interest in the state acting within its powers.

This theory of the criminal process takes an absolutist position as to the defendant's role. The defendant should be under no requirement to actively participate by answering questions or providing information during the pre-trial and trial stages, not least because to do so may assist the state in accounting for its accusations. It is, therefore, appropriate to take an absolutist 'no-assistance' approach. The state should justify and account for the accusations of wrongdoing which it has brought against the defendant, without the defendant's co-opted assistance.³¹

The theory, and its absolutist approach, is grounded in political liberal theory and in the values of dignity, autonomy, and freedom. The importance of these values, in relation to the contemporary liberal state, can be traced back to the emphasis placed on individualism during the age of enlightenment, and to social contract theory. The meaning of dignity is often context specific, but at its core is a requirement that the intrinsic worth of every human being be recognised and respected.³² As part of our intrinsic worth, we have the authority to demand respect for our autonomy. To be treated with dignity thus includes being treated as an autonomous individual; as self-governing and able to make choices for oneself.³³ Autonomy is freedom, and freedom, or liberty, is an inherent good. Kant, for example, conceived of freedom as an *a priori* principle on which the civil state is based; it is not afforded by the

³⁰ A guilty plea does not necessarily mean that the defendant is in fact guilty. However, where the defendant has made a free and informed decision to plead guilty, he has forfeited the right to test the case against him at a trial. Conversely, if a guilty plea was coerced through, for example, the threat of a harsher sentence following conviction, the state cannot truly be said to have accounted for the accusations. On sentence reductions for guilty pleas, see ch 3.2.2.

³¹ Assistance, in this context, refers only to assistance obtained through the active participation of the accused.

³² C McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 *European Journal of International Law* 655, 679. On the meaning and legal application of dignity, see also LR Barroso, 'Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse' (2012) 35 *Boston College International and Comparative Law Review* 331.

³³ C McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 *European Journal of International Law* 655, 659-660. Kant in particular has become closely affiliated with the idea of dignity as autonomy. See I Kant, *Groundwork of the Metaphysics of Morals* (New York, Cambridge University Press, 1996).

state.³⁴ Kant had a notable influence on Rawls. In the *original position*, as conceived by Rawls, citizens are free and equal rational persons, before the basic structures of society are determined.³⁵ As inherently autonomous beings, we should be at liberty to conduct our affairs, and make our choices, free from external interference. The conception of liberty advanced here is negative; we should be left to do as we would like to do, rather than our actions being controlled by an external source.³⁶

However, our liberty is restricted by the laws of the state in the interests of other values, particularly the interests of freedom itself. As Isaiah Berlin wrote, ‘the liberty of some must depend on the restraint of others.’³⁷ In particular, the criminal law can prohibit us from conducting ourselves in a way that interferes with the liberty of other people. Certain behaviour may thus be criminalised in order to maximise liberty for everyone, and to protect individuals from encroachment on their freedom from other individuals.³⁸ The normative theory of calling the state to account accepts this role of the criminal law; it does not advocate absolute freedom.³⁹ There is, however, an inherent good in free behaviours, and freedom must not be interfered with lightly or without very good reason.

The basis for allowing the law to restrict our freedom is the social contract, from which the state is brought into being. Social contract theorists differ in their conceptions of the social contract. In accordance with the theories of Locke and Rawls, the individual agrees to obey the laws of the state and, in so doing, sacrifices a portion of their freedom in order to preserve the greatest possible liberty overall. The individual should only need to sacrifice the smallest possible portion of liberty necessary to enjoy what remains in security and calm.⁴⁰ Precisely what the smallest portion amounts to is open to debate. For the reasons expressed in the following paragraphs, it should not extend to the freedom to choose whether or not to actively participate in the criminal process. The criminal process is the process by which liability for a

³⁴ I Kant, *Political Writings* (HS Reiss ed, HB Nisbet tr, Cambridge, Cambridge University Press, 1991) 74.

³⁵ J Rawls, *A Theory of Justice*, rev edn (Massachusetts, The Belknap Press of Harvard University Press, 1999).

³⁶ On positive and negative liberty, see I Berlin, ‘Two Concepts of Liberty’ in I Berlin, *Four Essays on Liberty* (Oxford, Oxford University Press, 1969).

³⁷ *ibid* 124.

³⁸ C Beccaria, *On Crimes and Punishments and Other Writings* (R Bellamy ed, R Davies tr, Cambridge, Cambridge University Press, 1995) 10.

³⁹ In developing a theory of the criminal process, no attempt is made to adopt or create an overarching theory of substantive criminal law. The basis for allowing particular criminal laws to interfere with individual liberty falls outside of the scope of this work.

⁴⁰ C Beccaria, *On Crimes and Punishments and Other Writings* (R Bellamy ed, R Davies tr, Cambridge, Cambridge University Press, 1995) 9-11.

criminal offence is determined. It is the state's means of enforcing the criminal law through denunciation and punishment of those who are found to have breached it. It is submitted here that, to best realise, within the criminal process, that we are free and dignified human beings, we must be at liberty to choose whether or not to actively participate.

Freedom of choice is important in the criminal process because there is a structural imbalance between the state and those accused of breaching the criminal law, in terms of both power and resources. This imbalance is present throughout the process. The state has immense powers of investigation, prosecution, trial, and sentencing. In a liberal society, the state's far-reaching powers should be exercised according to certain standards that show respect for the dignity and autonomy of each individual.⁴¹ In terms of resources, the accused and the state are in divergent positions. Ordinarily, the accused, and the defence as a party, lack the independent investigatory and coercive powers of the prosecution party, 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. Of course, a disparity in resources will not always favour the state. Some defendants, such as major corporations or those involved in large scale organised crime, may have ample resources which could be used to fabricate a defence or cast doubt on the prosecution's case.⁴² However, where a disparity favours the accused, it results from the initial decision as to the distribution of state resources to the prosecution authorities. As well as deciding how to distribute its resources, the state also chooses who to pursue for alleged criminal behaviour, and how to dispose of individuals once convicted.

Following conviction, the state has the power and resources to interfere substantially with one's liberty. It may exercise this power to remove liberty completely. Even in the absence of official punishment, the public condemnatory statement of blameworthiness can have damaging consequences through, for example, an inability to gain employment. As noted by Barkow, 'the state poses no greater threat to individual liberty than when it proceeds in a

⁴¹ A Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10 *E & P* 241, 249. See also HL Ho, 'Liberalism and the Criminal Trial' [2010] *Singapore Journal of Legal Studies* 87.

⁴² This forms an element of what Langbein refers to as the 'wealth effect' of the adversarial system. Adversary procedure bestows an advantage 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. See JH Langbein, *The Origins of the Adversary Criminal Trial* (Oxford, Oxford University Press, 2003) 2. While the availability of state funded legal representation in many modern systems undermines this criticism of the adversarial system, the defendant's wealth can affect certain aspects of the case, such as the ability to conduct investigations or commission expert witnesses.

criminal action.⁴³ Since liberty is an inherent good, the onus must be on the state to justify its accusations wherever it seeks to curtail the liberty of its citizens.⁴⁴ As part of the social contract, individuals should be protected not only from the freedom-restricting conduct of other individuals, but also from the arbitrary use of state power, including punishment for breach of the criminal law where this is not justified.⁴⁵ There is, thus, a need to create fairness within a system of imbalance. This requires that guilt is proved by the state, that the accused is treated fairly, and that the accused is protected from the potential for arbitrary and oppressive use of state power, as well as from the oppressive use of power itself.

To achieve fairness within a system of imbalance, the procedures used to determine allegations of criminal conduct must be consistent with the freedom of the persons whose conduct is in issue.⁴⁶ As is explained in chapter 4, the protections afforded to defendants by fair trial rights developed historically as a means of ensuring fairness within a structurally imbalanced system. Many fair trial rights give effect to the freedom of the accused in the criminal process. They afford the defendant the freedom to choose whether or not to actively participate. Freedom of choice is exhibited, for example, 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.⁴⁷

The freedom to choose whether or not to actively participate also gives effect to a further aspect of human dignity; recognition that the state exists for the sake of the individual human being, and not vice versa.⁴⁸ In the context of the criminal process, this should mean that the process exists in order for the state to establish the guilt of the accused, and justify its findings, rather than the accused being required to establish his innocence or actively contribute to his own conviction. In accordance with Kantian principles, each individual must be treated as dignified and autonomous; as an end in themselves and not simply as a means to

⁴³ RE Barkow, 'Separation of Powers and the Criminal Law' (2006) 58 *Stanford Law Review* 989, 995.

⁴⁴ HL Ho, 'Liberalism and the Criminal Trial' [2010] *Singapore Journal of Legal Studies* 87, 89. See also RL Lippke, 'Justifying the Proof Structure of Criminal Trials' (2013) 17 *E & P* 323.

⁴⁵ See J Jackson and S Summers, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (Cambridge, Cambridge University Press, 2012) 203. For a further assessment of the influence of social contract theory on the development of modern principles of criminal justice, see J Jackson and S Summers, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (Cambridge, Cambridge University Press, 2012) ch 1.

⁴⁶ H Stewart, 'The Right to be Presumed Innocent' (2014) 8 *Criminal Law and Philosophy* 407, 408.

⁴⁷ HL Ho, 'Liberalism and the Criminal Trial' [2010] *Singapore Journal of Legal Studies* 87, 99.

⁴⁸ C McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 *European Journal of International Law* 655, 679.

an end.⁴⁹ Thus, one should not be treated as an object from which the state can extract information for use in criminal proceedings, as is often a purpose of requiring the defendant to actively participate.

The basic premise of the theory of the criminal process as a process of calling the state to account can be summarised as follows: Because we, as individuals, agree to abide by the criminal laws of the state which prohibit certain behaviours, and, in so doing, give up some of our freedom, the state should account for any allegation that we have breached those laws, before subjecting us to condemnation and punishment. The respect for our freedom, which is owed to us as individual citizens of society, and the maximum value which should be accorded to individual autonomy, mean that we should be at liberty to choose whether we actively respond to those allegations. The criminal process is itself a coercive process in which individuals may be required to passively participate by, for example, being searched, arrested or subjected to questioning. However, the principles of dignity, autonomy, and freedom, dictate that accused persons should, at least, be able to choose whether to actively participate in the criminal process, and how to conduct their defence.⁵⁰ To be required by the state to actively participate is to unjustifiably destroy our freedom at a time when it warrants maximum protection.

The theory has been developed within the cultural context of English criminal procedure, and primarily as a means of assessing a specific issue, namely the increase in requirements for the defendant to actively participate in the criminal process. A more ambitious project could seek to apply it to requirements of passive participation, and to assess the appropriate limits of state pressure on defendants to participate, short of penalising a failure to do so.⁵¹ It could also be possible to take the theoretical grounding further, and apply it outside of the realm of criminal procedure, to consider, for example, whether and how it can provide a basis for determining the legitimacy of the substantive criminal law. However, within this book, the theory is limited to providing a tool for analysing developments in particular areas of criminal procedure and the law of evidence, and to act as a normative yardstick against which such developments can be measured.

⁴⁹ See I Kant, *Groundwork of the Metaphysics of Morals* (New York, Cambridge University Press, 1996).

⁵⁰ J Jackson and S Summers, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (Cambridge, Cambridge University Press, 2012) 103.

⁵¹ This could include, for example, an analysis of the law in relation to obtaining confessions and consideration of the extent to which the police can, or should, pressure accused persons into answering questions.

Before moving on, it is worth noting the position of the complainant and the public in relation to the normative theory. Complainants of crime, witnesses, and the wider community will inevitably play an important role in the criminal process by reporting crimes and providing information. However, once the state, through the police and prosecuting agencies, initiates a criminal investigation or brings criminal charges against an individual, it becomes a matter between the state and the accused, not the complainant and the accused or the complainant and the state.⁵² Because crimes are conceived of as public wrongs, and because the state has the power to prosecute and punish those who commit criminal offences, it is appropriate to frame a theory of the criminal process around the state's obligations in relation to establishing the guilt of the accused. Nonetheless, protecting the interests of complainants and other witnesses, and providing them with necessary support and information, has become a priority for criminal justice agencies.⁵³ The increasing emphasis on the interests of complainants and witnesses raises interesting questions about whether they should play a more central role in the criminal process, and whether they should have procedural rights.⁵⁴ The issue of the interests of complainants is revisited briefly in the following chapter, where it is argued that such interests do not provide a basis for requiring defendant participation. The issue, however, remains a matter which, for the most part, falls outside of the scope of this book.⁵⁵

⁵² Individuals have a right to bring private prosecutions. However, the Crown Prosecution Service retains the power to take over such prosecutions and either continue them or stop them. See Prosecution of Offences Act 1985, s 6.

⁵³ See, for example, Crown Prosecution Service, *The Prosecutors' Pledge* <www.cps.gov.uk/publications/prosecution/prosecutor_pledge.html> accessed 1 April 2016; Ministry of Justice, *Code of Practice for Victims of Crime* (London, The Stationery Office, 2015). The 2015 Code of Practice implements relevant provisions of the EU Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime. See also D Lawrence, P Neyroud and K Starmer, *Recommendations on a Victims' Law: Report for the Labour Party by the Victims' Taskforce* (The Labour Party, February 2015); Criminal Justice Joint Inspection, *Meeting the Needs of Victims in the Criminal Justice System* (CCJI, 2015).

⁵⁴ See, for example, the Victims' Right to Review Scheme, launched in 2013, which grants complainants the right to request a review of any decision taken by the Crown Prosecution Service to not charge a suspect or to stop a prosecution. See Crown Prosecution Service, *Victims' Right to Review Scheme* <www.cps.gov.uk/victims_witnesses/victims_right_to_review/> accessed 1 April 2016. This scheme gives effect to the principles laid out in *R v Killick* [2011] EWCA Crim 1608, [2012] 1 Cr App R 10. See also K Starmer, 'Finality in Criminal Justice: When Should the CPS Reopen a Case?' [2012] *Crim LR* 526.

⁵⁵ See I Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision Making' (2004) 44 *British Journal of Criminology* 967; J Doak, *Victims' Rights, Human Rights and Criminal Justice* (Oxford, Hart Publishing, 2008); M Hall, 'The Relationship Between Victim and Prosecutors: Defending Victims Rights?' [2010] *Crim LR* 31; A Ashworth and M Redmayne, *The Criminal Process*, 4th edn (Oxford, Oxford University Press, 2010) 51-55; K Starmer, 'Human Rights and Victims: the Untold Story of the Human Rights Act' [2014] *European Human Rights Law Review* 215; K Starmer, 'Human Rights, Victims and the Prosecution of Crime in the 21st Century' [2014] *Crim LR* 777.

The public play an important role within the English criminal process and within the process of calling the state to account. The public nature of the criminal trial helps to ensure that the state can account for the accusations made against the defendant, and that it does so in a legitimate manner.⁵⁶ As noted above, the state is accountable not only to the defendant, but also to the wider community. Moreover, it is often members of the public, in the form of a jury or lay magistrate, that determine whether or not the state has accounted for the accusations made against the defendant. However, again, because the state takes responsibility for the prosecution of criminal wrongs, and because the wider public possess little control over the decision to prosecute or the way in which a case is dealt with, the theory does not directly address the role of the public as participants in the criminal process.⁵⁷

1.4 Structure of the book

Having introduced the subject matter of this book, and outlined the arguments against requiring active defendant participation, the following chapters will proceed to evaluate the role of the defendant as a participant in the criminal process and the implications of participatory requirements. Chapter 2 sets out the aims and values of the criminal process. It considers which aims must necessarily be emphasised in order to justify requiring defendant participation, and why the values of the criminal process should prevent the imposition of participatory requirements. Chapter 3 examines the way in which the participatory role of the defendant can shape the nature of criminal procedure, and how criminal procedure can be characterised according to the defendant's role. Chapter 4 further develops the normative theory of calling the state to account by contrasting it with an alternative communicative theory of the criminal trial. Chapter 4 also examines the historical development of defence rights which can facilitate a lack of participation, and assesses the defendant's current position as a participant in the English criminal process, particularly at trial.

⁵⁶ See the discussion on public trials in ch 4.1.

⁵⁷ Other commentators assign a greater participatory role to the public. For example, Hoyano has developed a conception of a fair trial which accommodates a quadrangulation between defendant, the alleged victim, other witnesses, and the public interest, all of whom are participants and can lay claim to the right to a fair trial. L. Hoyano, 'What is Balanced in the Scales of Justice? In Search of the Essence of the Right to a Fair Trial' [2014] *Crim LR* 4, 25. See also R Vogler, *A World View of Criminal Justice* (Hants, Ashgate Publishing, 2005). Moreover, alternative methods of criminal justice, such as restorative justice, entail much greater involvement of the victim and the community. However, in order to be successful, restorative justice requires admission of guilt on the part of the accused as well as the accused's willingness to be actively involved in the process. On the role of state, community, and victim in restorative justice, see A Ashworth, 'Responsibilities, Rights and Restorative Justice' (2002) 42 *British Journal of Criminology* 578.

Chapters 5 through 7 present three specific examples of the way in which defendants can be required to actively participate and penalised for not doing so. Chapter 5 critically evaluates how the modern understanding of the privilege against self-incrimination has been limited through requirements of defendant participation. Reliance on the privilege can now, in some circumstances, lead to the direct penalty of criminal prosecution for non-cooperation. In chapter 6, the law in relation to the right to silence is considered. 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 inferences of guilt from a defendant's silence. Chapter 7 examines the pre-trial disclosure obligations placed on the defendant by the Criminal Procedure and Investigations Act 1996, and the provisions for drawing adverse inferences where the defendant fails to comply with the obligations. Chapter 7 also considers the procedural implications of the case management provisions in the Criminal Procedure Rules, which augment the statutory disclosure provisions. The final chapter presents a means of characterising English criminal procedure in the light of the current participatory role of the defendant, and considers the future of the defendant as a participant in the criminal process.