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Defence Participation through Pre-Trial Disclosure: Issues and Implications

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Abstract

The Criminal Procedure and Investigations Act 1996 imposed, for the first time in the history of English criminal procedure, a general duty on the defence to disclose the details of its case ahead of trial. These disclosure requirements have been augmented by the case management provisions of the Criminal Procedure Rules and judicial responses to the perceived need to tackle ambush defences. The defence disclosure regime has changed the role of the defence as a participant in the criminal process. It raises issues of principle in terms of its effect on fair trial rights and has implications for the nature of English criminal procedure. This article examines these issues and implications; it reveals that the defence disclosure regime has caused a shift in the English criminal process further away from an adversarial style contest towards a participatory model of procedure.

Keywords

Defence disclosure, case management, criminal procedure

Introduction

Prior to the Criminal Procedure and Investigations Act 1996 (CPIA), the defendant was under no general duty to disclose his case before trial.[1] This position could 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.[2] Broad prosecution disclosure obligations are easy to justify: they are a means of ensuring fairness and redressing an inequality of arms.[3] However, the CPIA restricted prosecution disclosure obligations. When it was introduced, some saw the Act as responding to complaints by the police that prosecution disclosure had become too generous.[4] Under the common law, and subject to public interest immunity, the defence had access to all possibly relevant prosecution material.[5] The CPIA limits disclosure to material which might reasonably be capable of undermining the case for the prosecution or of assisting the case for the accused.[6] At the same time, the CPIA imposed new and radical duties on the defence.

The most significant element of the legislation, for the purposes of this article, is the requirement for the defence to provide a statement which sets out the details of its case. Failure to comply with the legislation is penalised at trial through provisions which permit adverse comment to be made and adverse inferences to be drawn against the defendant. These may contribute to a finding of guilt.

This article argues that the defence disclosure regime affects the nature of criminal procedure by contributing to the emergence of a participatory model; it raises also significant issues of principle. Although it has become increasingly recognised that England and Wales do not subscribe to a purely adversarial model of procedure,[7] the English system remains associated with adversarialism. The adversarial trial takes the form of a contest between two sides. The prosecution and defence control the case by defining the issues and gathering the evidence to be presented. The prosecution must prove guilt and the system is structured to promote reliability of evidence, fairness and equality between parties. The defendant is generally free to take a passive role whilst his counsel presents his case or tests the prosecution's case.[8] However, a lack of defendant participation is not conducive to efficiency, with regard to administration concerns. Nor is it consistent with a crime control perspective of criminal procedure 'based on the proposition that the repression of criminal conduct is by far the most important function to be performed by the criminal process.'[9] Over the past couple of decades in particular, there has been a good deal of 'tough on crime' and 'rebalancing the system' rhetoric,[10] along with concern over the use of efficient time and resources within the criminal justice system.[11] This has led to laws and practices which, in an attempt to increase efficiency and convictions, have affected the defendant's ability to choose whether or not to participate in the criminal process.[12]

The disclosure obligations placed on the defence under the CPIA are part of this wider procedural trend to secure the participation of the defendant as an individual and the defence as a party. These obligations have been augmented by the case management provisions of the Criminal Procedure Rules and a judicial disdain for ambush defences. By creating an expectation that the defence should participate constructively, the criminal process is shifting further away from an adversarial style contest towards what seems to be a new participatory model of procedure. However, the defence's new participatory role raises questions about the enforceability of certain fair trial rights. This article begins by examining the requirements placed on the defence to disclose its case ahead of trial under the CPIA, followed by the case management provisions of the Criminal Procedure Rules. The issues of principle arising from the defence disclosure regime are then discussed. Finally, it assesses its implications for the style of criminal procedure.

Defence disclosure under the Criminal Procedure and Investigations Act 1996

The defence's disclosure obligations can be found in sections 5 and 6 of the CPIA. Section 5 provides that the accused must give a defence statement to the court and the prosecutor. This must be done once the prosecution has purported to have complied with their initial disclosure obligations under s.3. Section3 requires the prosecution to disclose any 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. Section 7A puts the prosecution under a duty of continuous disclosure; they must keep under review whether there is any evidence capable of undermining the prosecution case or assisting the defence.

The current statutory regime for the content of defence statements was inserted by the Criminal Justice Act 2003 (CJA) and can be found in s.6A. It provides that:

(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; 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.

The provision requires the accused to 'specify his defence with particularity.'[13] Where the defendant has no positive case to advance at trial, the defence statement must say that the defendant does not admit the offence and calls the Crown to prove it. It should also say that he advances no positive case.[14] If he is going to advance a positive case that must appear in the defence statement and notice must be given. 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. Section 6B creates a duty of updated defence disclosure where the accused has given a defence statement before prosecution disclosure. It requires the accused to provide an updated defence statement or a written statement that no changes have been made.

Section 6C provides for the disclosure of the names, addresses and dates of birth of all defence witnesses, and s.6D (which is not yet in force) requires disclosure of the names and addresses of experts consulted by the defence, but not used. Whilst the general requirement to produce a defence statement is only mandatory in the Crown Court, compliance with section 6C is compulsory in the magistrates' court. Section 6E, like sections 6C and 6D, was inserted by the CJA 2003. It provides that, unless the contrary is proved, defence statements will be deemed to have been given with the authority of the accused. 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. It 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.[15]

Where there is a dispute as to whether the defence statement has been given with the authority of the accused, the accused bears the responsibility and burden of showing that it is not 'his' statement. The burden will not be discharged by the fact that he has not signed the statement, and denies having seen it.[16] 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.[17] If the defendant cannot convince the court that it is not his statement, the prosecution may be able to use it against him and it may become difficult to escape adverse inferences being drawn. Thus, whilst section 6E is unlikely to change the fact that it is defence lawyers who generally take responsibility for disclosure, it has made it easier to penalise the defendant for disclosure failures. Section 6E has also increased the pressure on the defendant to participate in the criminal process, by either co-operating in the disclosure exercise prior to the trial or by actively proving that the statement is not his at the trial.

In comparison to the defendant's previous position of generally not being required to disclose any information before the trial, the CPIA has placed what are arguably vast and detailed participatory obligations upon him. An effect of this is to shift the roles of the parties away from adversarialism. It has become increasingly difficult for the defendant to take a passive role and for the defence, as a party, to test the prosecution's case, since they must now supply information which has the potential to assist the prosecution in building its case. The Court of Appeal has made it clear that it is not open to lawyers to advise their clients not to give a defence statement.[18] Furthermore, in the Review of Disclosure Obligations in Criminal Proceedings, undertaken by Lord Justice Gross for the Judiciary of England and Wales, it was suggested that, in appropriate cases, the court should press for involvement from the

defendant personally in the disclosure process.[19] The report also stated 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.'[20]

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.[21] These can be drawn in deciding whether the defendant is guilty and, thus, can contribute to a finding of guilt. In the case of *Essa,*[22] a claim that no defence statement had been given on the basis of legal advice did not prevent the prosecution from making comments and raising the issue in cross-examination. The jury had been entitled to take the absence of a defence statement into account in determining guilt. In *Rochford,*[23] a judge at a plea and case management hearing attempted to extend the penalties by imposing a 28-day sentence of imprisonment for contempt of court against a defendant who had submitted an uninformative defence statement. However, the Court of Appeal recognised that the sanctions for non-cooperation are confined to those in s.11 and it is not until the case has gone before a jury that the court can determine whether an uninformative statement breaches s.6A.

Whilst Lord Justice Gross's report has recommended scant tolerance of late or uninformative defence statements, in practice, judges have made little use of s.11. This is evidenced by the lack of reported cases dealing with the circumstances in which adverse inferences may be drawn from non-disclosure, when compared to that concerning adverse inferences drawn from silence under the Criminal Justice and Public Order Act 1994.[24] This is so even though the CPIA had been found to work poorly, with many defence statements lacking the required detail.[25] Judges seem most 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. However, the Lord Chief Justice has asked Lord Justice Gross and Mr Justice Treacy to conduct a review of sanctions for disclosure failures. The review will consider whether the current sanctions are adequate to secure compliance with disclosure duties, and whether there are options to strengthen those sanctions.[26] This may lead to a greater number of defendants becoming the subject of penalty for their non-participation in the near future.

Disclosure and case management

The Royal Commission on Criminal Justice, whose 1993 report formed the basis for the disclosure provisions of the CPIA, supported defence disclosure for largely pragmatic reasons.[27] Amongst other efficiency benefits, it was thought that defence disclosure would reduce the number of ambush defences.[28] The courts had also become increasingly concerned with the use of ambush defences and advocated a managerialist approach to criminal procedure which requires the early and active participation of the defence. In *Gleeson,*[29] a case in which 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.[30]

This new line of thinking, which affects the role of the defence, was reinforced by the Criminal Procedure Rules. The Rules first came into force in 2005 and have effected a 'sea change' in the way cases should be constructed.[31] One way in which they have effected this sea change is through the overriding objective that criminal cases be dealt with justly.[32] This is followed by a list of seven factors, including acquitting the innocent and convicting the guilty, and dealing with cases efficiently and expeditiously. Each participant in the case must prepare and conduct the case in accordance with the overriding objective.[33]

Prior to the CPIA and the rise of managerialism, there were fewer constraints on the defence's ability to pursue what was in the defendant's best interest, for example, by relying on a point of law in support of a submission of no case to answer at the close of the prosecution case. The Criminal Procedure Rules indicate that the defence's primary concern should not just be to win its own case, but also to ensure that the guilty are convicted and that the case is dealt with efficiently. This is inconsistent with a traditional adversarial role in which, subject to the ethical position of the defence lawyer, the defence serve to zealously represent the interests of the accused. As noted by McEwan, defence disclosure confronts lawyers with some challenging questions of professional ethics in terms of the competing interests of court and client, conflicting loyalties unknown in traditional adversarial settings.[34]

There is a link between the defence disclosure obligations under the CPIA and the case management provisions found in Part 3 of the Rules. Case management includes early identification of the issues,[35] and 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 mandatory only in the Crown Court, these case management provisions are equally applicable in the magistrates' court. The defence can, therefore, be required to reveal details of its case prior to summary trials. Rule 3.10(a) 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.' Rule 3.10 allows the court to place participatory requirements on the parties, including requirements to identify points of law the parties intend to raise and information about witnesses and the order of their evidence. The courts have tended to take their case management role seriously and, following *Gleeson,* have made much of the changing nature of the criminal process, particularly in regards to defence tactics designed to ambush the prosecution.[36] The court in *R (on the application of Firth) v Epping Magistrates' Court* confirmed that the Criminal Procedure 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.[37]

Despite the courts' seemingly relaxed approach to enforcement of the CPIA through adverse comment and inferences, they have been willing to penalise failures to comply with the Rules. In *Musone,*[38] a defendant's failure to give notice of intention to introduce evidence of a co-defendant's bad character under Rule 35.5 resulted in exclusion of the evidence. More recently, in *SVS Solicitors*,[39] a wasted costs order was upheld against a solicitors' firm who 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 flying a prosecution witness 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. No defence statement had been served in this case until the first day of trial and the numerous judges who conducted the pre-trial hearings had commented on this. This case provides an example of how lawyers may be confronted with challenging questions of professional ethics, in terms of the competing interests of court and client. It now seems that defence lawyers are expected to act in the interests of the administration of justice rather than the interests of their clients. Again, this is inconsistent with a traditional adversarial role.

The Judiciary's case management role has been described as 'of the first importance' for the proper operation of the disclosure regime.[40] Lord Justice Gross's Review of Disclosure in Criminal Proceedings advocates robust case management of disclosure matters by the judiciary, and believes there is undoubted room for improvement in judicial performance in this area.[41] 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.[42] As a result of the CPIA, the Criminal Procedure Rules, and the judicial approach to case management, it now seems that the defendant as an individual and the defence as a party are expected to participate constructively in the criminal process. They must disclose the nature of their case in terms of both facts they rely on and facts they take issue with, and points of law they rely on as well as points of law they take issue with. They may be penalised for surprising the prosecution with a defence at trial, and are no longer at liberty to take advantage of prosecution errors.

Issues of principle and a 'no-assistance' approach

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.'[43] Having outlined the defence disclosure obligations, this article will now turn to some of the matters of principle that they raise. The requirements on the defence to disclose the details of its case, prior to trial, has the potential to hamper fair trial rights, namely the privilege against self-incrimination, the presumption of innocence, and the prosecution's burden of proof at trial. This is primarily a consequence of the assistance which obligatory disclosure can provide to the prosecution in establishing its case. However, the appropriate limit of fair trial rights is a contentious issue. Whilst the privilege against self-incrimination, presumption of innocence and burden of proof are all aspects of the right to a fair trial under Article 6 of the European Convention on Human Rights (ECHR), Article 6 is not absolute. The European Court of Human Rights has restricted the potentially broad applicability of certain fair trial rights,[44] sometimes on the basis of public interest factors.[45] This has occurred despite Article 6 being a 'strong' right, in that it is not subject to any explicit qualification on the face of the Convention.[46]

Given the European Court's approach, it is likely that the disclosure regime would be upheld as compliant with Article 6. However, this section takes a broad approach to fair trial rights which may go beyond that afforded to them under the ECHR. It is underpinned by the proposition that the state should account for the accusations of criminal wrongdoing that it brings against its citizens without the co-opted assistance of the accused. Whilst this proposition is not explored in detail here, it is grounded in the autonomy and dignity which should be afforded to citizens in a liberal democracy, and the need to regulate state power in order to prevent abuses of such power. It provides a basis for interpreting fair trial rights broadly, so as to prevent the defendant from being required to actively participate in a way which will assist the state in accounting for its accusations.

To assume that it is legitimate to require the defendant to provide the prosecution with information that may assist them in securing his conviction sits uneasily with the privilege against self-incrimination. 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.[47] Disclosure may lead to incrimination by establishing the *actus reus* through a defence, such as self-defence. This situation arose in *Firth*[48] which concerned a charge of 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. However, this decision has been complicated by the more recent case of *Newell*[49] in which it was held that, although a statement in a Plea and Case Management Hearing Form was admissible at trial against the defendant, the judge should have used his discretion under s.78 of the Police and Criminal Evidence Act 1984 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 the 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'.[50] 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.[51] This sanction was thought sufficient, and this was a case where there had been no disadvantage to the Crown. However, because this case concerned the use of case management forms rather than defence statements, it remains open for incriminating or inconsistent information contained in defence statements to be used against the defendant as part of the prosecution case; the defendant may face cross-examination on the content of the statement and become the subject of adverse comment and inferences.

The Royal Commission rejected the objection that defence disclosure infringes the privilege against self-incrimination, 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.[52] The Commission believed that the matter was simply one of timing.[53] However, even where disclosure does not directly incriminate the accused, it 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 defence witnesses disclosed under s.6C will provide material for investigation, and may lead to defence witnesses changing their evidence, or incriminating the defendant.[54] Section 6C came into force in 2010 and, whilst it is not likely to lead to routine interviewing of defence witnesses, Zander is of the opinion 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 convict the defendant.[55] To claim that the defendant is not being compelled to say anything incriminating has been described as 'naïve'. [56] To require the defendant to identify that which is in dispute inevitably involves his having to admit that which is not in dispute and can contribute directly to the discovery of incriminating information. A clear notion of the scope and rationale of the privilege against self-incrimination might help to determine how far the defence disclosure obligations interfere with it in practice. To embark on such a task is beyond the scope of this article.[57] Suffice it to point out that, since the privilege against self-incrimination provides the accused with a specific right not

to assist in the criminal process, it could be argued that a broad interpretation of its scope should be applied such that it is contrary to the privilege to require the defendant to disclose information which can result in incrimination.

Linked to the implications which the disclosure obligations may have for the privilege against self-incrimination are concerns for their impact on the presumption of innocence. While an examination of the limits and rationale of the presumption of innocence is also beyond the scope of this article,[58] a broad interpretation of the presumption should operate as a direction to treat the accused as if he were innocent throughout the criminal process, until guilt has been established. To treat him as innocent is to treat him as if he had nothing to account for. Rather, the state should account for the accusations of criminal wrongdoing which it has brought against him. The presumption of innocence allows the accused to challenge the state and hold it to account before it can exert its powers of condemnation and punishment.[59] The accused should not have to actively contribute in the discharge of the state's obligation to prove guilt, either expressly or in consequence of a procedural requirement. Requiring the defence to supply even potentially incriminating information is not in the spirit of this broad conception of the presumption of innocence. The defence disclosure obligations also compromise a narrower interpretation of the presumption of innocence, which simply reflects the prosecution's burden of proof.

Although the prosecution must prove its case at trial beyond a reasonable doubt, the disclosure regime has an impact on the burden of proof, through its potential to assist the prosecution in discharging that 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.[60] The defendant should not be co-opted into easing the prosecution's burden, or helping to discharge it. This may not always be the case in practice. Nevertheless, early indication of the proposed defence case 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.[61] Furthermore, since the defence statement is deemed to be given by the defendant, he can be cross-examined on it. Arguably, this assistance, even if inadvertent, undermines the presumption of innocence and the burden of proof.[62] It also takes defence disclosure beyond its original efficiency-driven purposes by allowing the prosecution to use it in support of their case.

It is significant that the disclosure regime has less regard for these rights than might be expected in an adversarial system. 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.'[63] This critique of defence disclosure reflects a 'no-assistance' approach to the defendant's role in the criminal process, within which he must not be required to actively participate in a way that may assist the prosecution in establishing their case. A strict 'no-assistance' approach, based on a broad interpretation of the presumption of innocence and the burden of proof, would ensure that the state can account for the accusations of criminal wrongdoing that it makes against the accused. It would remove the requirement for the defendant to disclose any details of his defence, including alibi and expert evidence. If the state cannot make a case without the defence's help, it should not bring a case to trial. Likewise, if the prosecution cannot anticipate a defence, its case deserves to fail. Although this claim may appear brazen, it is not necessarily unreasonable. Prior to the CPIA, in the vast majority of cases, the prosecution were able to anticipate the defence and were seldom successfully ambushed.[64] However, it has been argued that this absolutist position goes too far by permitting defence tactics specifically designed to throw the prosecution off balance.[65] 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.[66] He contends that the absolutist 'no-assistance' position can be modified to make it more attractive, by distinguishing two different ways in which the defence can assist the prosecution. 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, then, the principle is that the defence should not have to assist the prosecution to make its *prima facie* case, there would be no objection to disclosure of alibis and the like.[67]

However, as Redmayne recognises, there is no guarantee that disclosure will not assist the prosecution in establishing its case.[68] 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. 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.[69] 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 afford prosecution witnesses with an opportunity to tailor their evidence to the defence disclosed. Whilst the possibility of tailored evidence is an important issue in itself, it is presented here only as an example of how even a modified 'no-assistance' approach to disclosure can assist the prosecution. On the possibility of tailored evidence, 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 the Police and Criminal Evidence Act 1984, will allow the officer to ensure that he mentions this fact in his evidence.[70]

In practice, the courts have not made a clear distinction between using information disclosed by the defence to anticipate attacks on the prosecution's case and using it to establish a *prima facie* case against the defendant. As a result of *Firth*[71] and *Newell,*[72] 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 disclosure can be used as evidence to establish a *prima facie* case. Moreover, such cases as *Essa*[73] and *Haynes*[74] show that the prosecution are able to cross-examine the defendant on disclosure failures pursuant to the CPIA, even where the defendant denies responsibility for the failure. Although concessions to a 'no-assistance' approach will always be made, it is important that, in requiring the defendant's participation, procedural rights designed to ensure fairness are not compromised. Whilst the defence disclosure regime is unlikely to be found to be in breach of Article 6 of the ECHR, the protective force of the privilege against self-incrimination, the presumption of innocence and the prosecution's burden of proof has been reduced. These allow the state to be held to account for the accusations of criminal wrongdoing that it brings against its citizens before subjecting them to official condemnation and punishment. They are also important elements of an adversarial system and give the defendant the freedom to choose whether or not to participate. The defence disclosure regime undermines this freedom.

Implications for criminal procedure

Owing to the long-standing general principle which placed no obligation upon the defence 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.[75] However, even in the height of English adversarialism in the nineteenth

and twentieth centuries, although prosecution disclosure became important,[76] defence non-disclosure was not in itself essential. Nonetheless, in the light of the wider impact of requiring defence participation, imposing obligations on the defence to provide the prosecution with the details of their case 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. They allow the prosecution to be put to proof and the prosecution's case to be tested. Emphasising the defendant's new participatory role through the assumption that defence statements have been given with his authority,[77] and through suggestions that the court should press for his involvement personally,[78] also has an impact on adversarialism, by focussing on the defendant as an individual and detracting from the defence's role as a party.[79] Consequently, although defence non-disclosure is not an essential aspect of adversarialism, in terms of the increased participatory requirements on the defendant and the defence, the current regime has undoubtedly contributed to a shift away from an adversarial system.

Requiring the defence to disclose its case prior to trial might indicate a move towards a truth-oriented, or inquisitorial, model of criminal procedure. However, whilst defence disclosure has been conceived of as a means of improving truth-finding, prosecution non-disclosure presents a greater threat to truth-finding than defence non-disclosure. Because the CPIA reduced the prosecution's disclosure obligations, it is in some conflict with the idea of inquisitorialism. 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.[80] The CPIA is not consistent with common practice in continental systems which often rely on a written dossier of all evidence discovered during the judicial investigation, accessible to both the prosecution and defence.[81] If England is not moving towards an inquisitorial model, then the disclosure regime might seem to be indicative of a move towards a managerial model of criminal procedure which prioritises efficiency at the expense of fairness and due process.[82] The focus on case management and eliminating surprise at trial suggests the new approach to criminal procedure is efficiency driven.

However, the result of the defence disclosure regime, along with other participatory requirements now placed on the defendant, is a participation-focused model of criminal procedure, because it relies on the participation of the defence and emphasises the defendant's participatory role. The focus of the participatory model is on the perceived benefits of participation. In the case of disclosure, these benefits relate to both efficiency and truth-finding. This is a significant consequence of the disclosure regime

since the new participatory model of procedure has less regard for rights often considered essential to ensure a fair trial. When the system becomes less concerned with upholding principles and more concerned with efficiency and convictions, there is greater leeway to open the defendant up to participatory requirements. The defence disclosure regime has, therefore, affected both the role of the defendant and the defence as participants in the criminal process, as well as the nature of criminal procedure. In spite of its shortcomings, it seems that the participatory model of criminal procedure will continue to develop. For example, the Review of Disclosure in Criminal Proceedings has proposed that a constructive defence approach to disclosure issues should be seen and encouraged as professional 'best practice'. [83]

Conclusion

It is clear how requirements for the defence to disclose the nature of their case, prior to trial, fit into and contribute to the changing nature of criminal procedure and the participatory role of the defendant and the defence. In practice, the defence disclosure obligations are not always complied with, and defendants are not always penalised as a result. However, the CPIA has had a significant impact on criminal procedure. It has imposed upon the defendant new participatory requirements and, together with the Criminal Procedure Rules, has created expectations of constructive participation. In so doing, it has the potential to hamper fair trial rights, such as the privilege against self-incrimination, the presumption of innocence, and the burden of proof. The problem with the disclosure regime is not so much that it is moving us on from adversarialism, but that it is also moving us away from these procedural rights and fairness norms which work as part of an adversarial system. Once we recognise the significance which the defence disclosure obligations have had for the nature of criminal procedure, we must decide whether to abandon them or change how we define and understand our system. This includes recognising the emergence of a participatory model of procedure which lacks procedural protection for the accused.

[1] The limited exceptions were disclosure of alibi defences and alibi witnesses in trials on indictment under the Criminal Justice Act 1967, s.11; disclosure of expert evidence in trials on indictment under the Police and Criminal Evidence Act 1984, s.81; and a more general requirement to disclose a defence in some serious or complex cases of fraud under the Criminal Justice Act 1987, s.9(5).

[2] R. Leng, 'Losing Sight of the Defendant: the Government's Proposals on Pre-Trial Disclosure' [1995] *Crim LR* 704 at 704.

[3] It has become a fundamental principle that a defendant should not be tried without knowing the nature of the case against him. See Article 6(3) of the European Convention on Human Rights; *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. Furthermore, Article 6(1) of the European Convention on Human Rights requires that 'the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused.' See *Rowe and Davis v UK* (2000) 30 EHRR 1 at 60.

[4] R. Morgan, 'The Process is the Rule and the Punishment is the Process' (1996) 59 *MLR* 306.

[5] *R v Keane* [1994] 1 WLR 746.

[6] Section 3, as amended by the Criminal Justice Act 2003. This provision is broader and more objective than the original s.3, which provided for disclosure of material 'which in the prosecutor's opinion might undermine the case for the prosecution against the accused.'

[7] See, for example, S. Summers, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights* (Hart: Oxford, 2007); J. Hodgson, 'The Future of Adversarial Criminal Justice in 21st Century Britain' (2010) 35 *North Carolina Journal of International Law and Commercial Regulation* 319; J. McEwan, 'From Adversarialism to Managerialism: Criminal Justice in Transition' (2011) 31 *Legal Studies* 519.

[8] For further discussion on the nature of the adversarial system, see S. Landsman, *The Adversary System: A Description and Defence* (American Institute for Public Policy Research: Washington, 1984); M. Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press: New Haven, 1986); J.H. 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).

[9] H. Packer, *The Limits of the Criminal Sanction* (Stanford University Press: Stanford, 1968) 158.

[10] See, for example, Royal Commission on Criminal Justice, *Report* (HMSO: London, 1993); Home Office, *Justice for All* CM5563 (HMSO: London, 2002).

[11] See Royal Commission on Criminal Justice, above n. 10; Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (The Stationary Office: London, 2001).

[12] See, for example, the Criminal Justice and Public Order Act 1994, ss.34-39. These provisions limit the accused's right to silence by allowing adverse inferences to be drawn in certain situations.

[13] I. Dennis, *The Law of Evidence* 4th edn (Sweet & Maxwell: London, 2010) 365.

[14] *R v Rochford* [2010] EWCA Crim 1928.

[15] See Dennis, above n. 13 at 365; *R v Haynes* [2011] EWCA Crim 3281.

[16] *R v Haynes* [2011] EWCA Crim 3281.

[17] Ibid. at 4.

[18] *R v Essa* [2009] EWCA Crim 43.

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

[20] Ibid. at 75.

[21] See s.11(2) and s.11(5).

[22] [2009] EWCA Crim 43.

[23] [2010] EWCA Crim 1928.

[24] M. Redmayne, 'Criminal Justice Act 2003: (1) Disclosure and its Discontents' [2004] *Crim LR* 441 at 445. For two recent cases concerning the applicability of s.11, see *R v Gregory* [2011] EWCA Crim 3276 and *R v Haynes* [2011] EWCA Crim 3281.

[25] Plontikoff and Woolfson found that 41% of defence statements contained a bare denial of guilt, and a further 13% fell short of the requirements set out for them. J. Plotnikoff and R. Woolfson, *A Fair Balance? Evaluation of the Operation of Disclosure Law* (Home Office Research, Development and Statistics Directorate: London, 2001) 55.

[26] Judicial Office News Release, *Review of Sanctions for Disclosure Failures in Criminal Trials*, 26th April 2012. Available at http://www.judiciary.gov.uk/media/media-releases/2012/judicial-office-media-release-review-sanctions-disclosure-failures-criminal-trials-26042012. Last accessed 20th September 2012.

[27] See Royal Commission on Criminal Justice, above n. 10 at ch.6

[28] Ibid. at 22.

[29] [2003] EWCA Crim 3357.
[30] Ibid. at 35.
[31] *R (on the application of DPP v Chorley Justices) and Andrew Forrest* [2006] EWHC 1795 (Admin) at 24.
[32] Rule 1.1.
[33] Rule 1.2(1)(a).
[34] McEwan, above n. 7 at 532. See also, F. Garland and J. McEwan, 'Embracing the Overriding Objective: Difficulties and Dilemmas in the New Criminal Climate' (2012) 16 *E and P* 233.
[35] Rule 3.2(2)(a).
[36] See, for example, *R (on the application of DPP) v Chorley Justices and Andrew Forrest* [2006] EWHC 1795 (Admin); *Malcolm v DPP* [2007] EWHC 363 (Admin); *Brett v DPP* [2009] EWHC 440 (Admin); *Writtle v DPP* [2009] EWHC 236 (Admin); *R v Penner* [2010] EWCA Crim 1155; *R (on the application of Santos) v Stratford Magistrates' Court* [2012] EWHC 752.
[37] *R (on the application of Firth) v Epping Magistrates' Court* [2011] EWHC 388 at 5.
[38] [2007] EWCA Crim 1237.
[39] [2012] EWCA Crim 319.
[40] See Lord Justice Gross, above n. 19 at 44.
[41] Ibid. at 76.
[42] Ibid. at 78.
[43] Royal Commission on Criminal Justice, above n. 10 at 221.
[44] See, for example, *Salabiaku v France* (1988) 13 EHRR 379; *Murray v UK* (1996) 22 EHRR 29; *Saunders v UK* (1997) 23 EHRR 313.
[45] See, for example, *Jalloh v Germany* (2007) 44 EHRR 32; *O'Halloran and Francis v UK* (2008) 46 EHRR 21.
[46] A Ashworth, 'The Exclusion of Evidence Obtained by Violating a Fundamental Right: Pragmatism Before Principle in the Strasbourg Jurisprudence' in Roberts, P. and J. Hunter *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Hart: Oxford, 2012) at 147.
[47] M. Redmayne, 'Rethinking the Privilege Against Self-Incrimination' (2007) 7 *Oxford Journal of Legal Studies* 209 at 209. The case law on the scope of the privilege against self-incrimination is inconsistent. However, subject to certain exceptions, it applies to the use in criminal proceedings of material which has an existence dependent on the will of the suspect. See *Saunders v UK* (1997) 23 EHRR 313; *Jalloh v Germany* (2007) 44 EHRR 32; *O'Halloran and Francis v UK* (2008) 46 EHRR 21.
[48] [2011] EWHC 388.
[49] [2012] EWCA Crim 650.
[50] Ibid. at 36.
[51] Ibid. at 37.
[52] Royal Commission on Criminal Justice, above n. 10 at 84.
[53] Ibid. at 98.
[54] M. Zander, *Consultation on Proposals for Advance Disclosure of Defence Witness Lists and Unused Defence Expert Witness Reports,* 2002 at 2; P. Hungerford-Welch, 'Prosecution Interviews of Defence Witnesses' [2010] *Crim LR* 690.
[55] See Zander, above n. 54 at 2.
[56] J. Richardson, 'A "Just" Outcome: Losing Sight of the Purpose of Criminal Procedure' (2011) *Journal of Commonwealth Criminal Law* Inaugural Issue 105 at 117.
[57] See D. Dolinko, 'Is There a Rationale for the Privilege Against Self-Incrimination?' (1986) 33 *UCLA Law Review* 1063; Redmayne, above n. 47; A.L-T. Choo, '"Give Us What You Have" – Information, Compulsion and the Privilege Against Self-Incrimination as a Human Right' in Roberts, P. and J. Hunter *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Hart: Oxford, 2012).
[58] See A. Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10 *E and P* 241; H.L. Ho, 'The Presumption of Innocence as a Human Right' in Roberts, P. and J. Hunter *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Hart: Oxford, 2012).
[59] Ho, above n. 58 at 279.
[60] Above n. 56 at 117.

[61] A. Edwards, 'Do the Defence Matter?' (2010) 14 *E and P* 119 at 127.
[62] Ibid. at 127.
[63] Royal Commission on Criminal Justice, above n. 10 at 221.
[64] 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).
[65] See Redmayne, above n. 24 at 451.
[66] Ibid. at 451.
[67] Ibid. at 451.
[68] Ibid. at 451.
[69] Ibid. at 451.
[70] Above, n.61 at 126.
[71] [2011] EWHC 388.
[72] [2012] EWCA Crim 650.
[73] [2009] EWCA Crim 43.
[74] [2011] EWCA Crim 3281.
[75] See Redmayne, above n. 24 at 449.
[76] The important position which prosecution disclosure holds can be traced back to the seventeenth century, 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.
[77] CPIA, s.6E.
[78] See Lord Justice Gross, above n. 19 at 75.
[79] Recognition of the defence as a party was an important aspect of adversarial development which allowed the defendant as an individual to take a more passive role. See Langbein, above n. 8.
[80] See Hodgson, above n. 7 at 330.
[81] In the Netherlands, for example, all exculpatory material found by the prosecution must be included in the dossier. See Lord Justice Gross, above n. 19 at 58.
[82] See McEwan, above n. 7.
[83] See Lord Justice Gross, above n. 19 at 95.