

ADVERSARIAL DEFICIT AND THE RIGHT TO SILENCE IN THE UK CRIMINAL JUSTICE AND PUBLIC ORDER ACT 1994

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ABSTRACT: *This review article examined the impact of the United Kingdom's Criminal Justice and Public Order Act 1994 (CJPOA) on the accused's right to silence. It specifically analyzed the provisions in sections 34 – 38 of the Act vis a vis inferences from accused's silence. The paper adopted descriptive and historical research methods in reviewing and investigating existing variables and systematically captured relevant past data that have bearing on the present. The main finding of the paper showed that the evidential significance of the accused silence in the CJPOA appears to have undermined the presumption of innocence and the privilege against self-incrimination further aggravating the deficit in the adversarial system. The paper recommended that steps be taken to mitigate the impact of adverse inference on the right to silence. These include but not limited to the 'reading down' of sections 34 – 37 and placement of the Woolmington's golden rule in a more predominant limelight.*

KEYWORDS: Adversarialism, the UK CJPOA, Criminal Justice, Adversarial Deficit, Right to Silence, Adverse Inference.

INTRODUCTION

The English Legal system has traditionally been referred to as adversarial, alternatively called the accusatory system. This stems from the fact that parties to a dispute are essentially perceived as 'adversaries' that require an impartial arbiter as mediator. As Jack, (1983) remarks, 'you have two adversaries in every civil dispute-someone asserting a right, someone denying it. Someone contending for one thing, someone contending against it.'¹

Advocacy appears to be a dominant feature of the adversarial system where each party asserts their rights in a contested issue with a relatively passive judge acting as an umpire. This is contrary to the inquisitorial system where functional divergence allow the courts to play a more active and interventionist role. Contributing in this regard, Choo, (2015) posits that;

*Adversarialism connotes a system of adjudication in which procedural action is controlled by the parties and the adjudicator remains essentially passive. By contrast, a pure inquisitorial model sees the judge playing a major role in the presentation of evidence by calling and examining witnesses to whom the parties may put supplementary questions.*²

¹ Jack, I. H. (1983). The Adversarial System of Civil Litigation. City of London Law Review 17, 18

² Choo, A. L. (2015). Evidence. London, Oxford University Press.

Seen in this way, the adversarial system appears to give more latitude to advocates to marshal out their case before an impartial arbiter. It is within this context that the '*principle of orality*' and the '*notion of a neutral judge*' have been posited as the two fundamental features of the adversarial model.

Underlying this model is the presumption that parties to a dispute are amidst others equal including the equality of arms between litigants. The extent to which this presumption holds true has been a subject of controversy especially within the criminal justice system. What is the impact of the CJPOA on the accused's right to silence? What is the evidential significance of silence of this right vis a vis the presumption of innocence and the privilege against self-incrimination? It is against the background of the foregoing that the notion of adversarial deficit shall be espoused.

This paper thus, seeks to assess the impact of the Criminal Justice and Public Order Act, 1994 (CJPOA) on the defendant's right to silence. Specifically, it highlights the provisions of sections 34 -38 vis a vis the drawing of adverse inference and the presumption of innocence.

This paper adopts the descriptive and historical research designs. While the descriptive method reviews existing conditions of investigating variables, the historical method systematically captures relevant past data that have bearing on the present.³

This paper holds that the elevated evidential significance of the accused silence in the CJPOA appear to have undermined the presumption of innocence and the privilege against self-incrimination further aggravating the deficit in the adversarial system.

Conceptual Issues

Adversarial Deficit in the English Legal System

Adversarial deficit is a term used to denote and or illuminate certain deficiencies associated with the English Legal System especially the criminal justice system. Popham and Carlson, (1977)⁴ highlighted the following six flaws associated with the adversarial system;

1. Disparity in adversary abilities
2. Fallible judges
3. Excessive confidence in the usefulness of the model
4. Difficulty in framing issues
5. Potential for the manipulation of results
6. Excessive cost

³ Leedy, P. D. ((1999). Practical Research: Planning and Design 6th ed. Englewood Cliffs, NJ: Merrill Prentice Hall.

⁴ Popham, W. J. & Carlson, D. (1977). Deep Dark Deficits of the Adversary Evaluation Model. *Educational Researcher*, 6 (6), 3-6.

It is important to note that these have been criticized by other scholars in various dimensions. To Jackson, (1977) the above criticisms do a 'gross injustice' to adversary evaluation. He argues that the only valid criticism amongst those listed is "difficulty in framing issues" stating that the other points are unfair, untrue or exaggerated.⁵

Thurston appear to argue in line with Jackson, but proposes two alternative criticisms of adversary evaluation. He states that issue definition and the use of the jury pose major problems for this approach.⁶

What appear deducible from the foregoing is that the adversarial system is not flawless. This appear more pronounced in the English Criminal Justice System. As Roberts and Zuckerman, (2010) observed,

*In criminal proceedings, however, the adversarial expectation of 'equality of arms' between the parties is hardly ever more than a transparent, and potentially pernicious, fiction.*⁷

They argue further that;

*In Criminal proceedings one 'party' is in reality the state (in England represented by the Crown, and hence denoted R v Accused), pressing charges against a private individual or, more rarely, a company or other corporate legal personality. A profound imbalance between the parties to criminal litigation is an inevitable corollary of the huge material and structural advantages available to the prosecution. We might think of this as 'the adversarial deficit'.*⁸

Choo, (2015) appear to corroborate the above when he opined that 'the might of a strong state is ranged against a weak individual.' Noting further that the 'investigative resources to which the prosecution has access are greatly superior to those to which the defence has access.'⁹ It is against this perceived backdrop that the provisions of the CJPOA will be examined in relation to the accused silence.

Adverse Inference From Accused Silence in The Criminal Justice and Public Order Act

Sections 34-37 of the CJPOA (1994) provides for the circumstances in which inference may be drawn from accused's silence in the face of police questioning and at trial respectively. As it relates to the accused's failure to mention facts when questioned or charged, section 34 (1) (a) (b), and (2) (d) provides that 'at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or (b) on being charged with the offence of officially informed that he might be

⁵ Jackson, G. (1977). Adversary Evaluation. Sentenced to Death without a Fair Trial. *Educational Researcher*, 6 (10), 2- 18.

⁶ Thurston, P. (1978). Revitalizing Adversary Evaluation: Deep Dark Deficits or Muddled Mistaken Musings. *Educational Researcher*, 7 (7), 3- 8.

⁷ Roberts, P. and Zuckerman, A (2010). Criminal Evidence. New York: Oxford University Press.

⁸ Ibid.

⁹ Choo, A. L. (2015). Evidence. London, Oxford University Press.

prosecuted for it failed to mention any such fact...(2) (d) the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure as appear proper.¹⁰

It is worth noting that reliance precedes inference. In other words, where there is no reliance on any fact, there may not be inference. In *R v Webber (2004)*, it was held that reliance is a sine qua non for inference.¹¹

With reference to a defendant's silence at trial, section 35 allows the court or jury to 'draw such inferences as appear proper from his failure to give evidence or his refusal, without good cause, to answer any question.'¹²

While section 36 allows for inference to be drawn for accused's failure or refusal to account for objects, substances or marks,¹³ section 37 allows for inference to be drawn for accused's failure or refusal to account for presence at a particular place.¹⁴

It is expedient to note that the above provisions amidst others aim to deter late invention of defences and to foster early disclosure of candid defences which ultimately aids the efficacy of the justice system.

The extent to which these values are juxtaposed with the defendant's right to fair trial remains a subject of objective analysis which this paper seeks to highlight.

Evidential Significance OF Silence in the CJPOA and the European Convention on Human Rights

Prior to the Criminal Justice and Public Order Act (1994), the right to silence was protected by or enshrined in the Criminal Evidence Act (1898) with no evidential significance. The 1898 Act provides that the 'failure of any person charged with an offence to give evidence could not be made the subject of any comment by the prosecution'. In *R v Gilbert (1977)*, it was held that the jury cannot draw any adverse inference of guilt from the silence of the defendant in the exercise of his right to silence.

It was held that to invite a jury to form an adverse opinion against an accused on account of his exercise of his right to silence is a misdirection.¹⁵

The above tends to be in tandem with the common law presumption of innocence and privilege against self-incrimination also contemplated in the European Convention On Human Rights, ECHR. These rights amidst others are intended to uphold civil liberties, protect the individual from undue interference from the state and sometimes administrative tyranny.

Contributing in this regard, Gearey, et al (2009) contend that;

This principle could be presented as the right of the innocent not to suffer criminal conviction and punishment. This clearly states a due

¹⁰ Criminal Justice and Public Order Act 1994 (CJPOA) s. 34

¹¹ *R v Webber*, (2004) 1 WLR 404

¹² CJPOA, 1994. s. 35

¹³ CJPOA, 1994. s. 36

¹⁴ CJPOA, 1994. s. 37

¹⁵ *R v Gilbert* (1977) 66 Cr App R 237

process value. Building this argument means understanding that at least at common law, the presumption of innocence makes most sense as a body of rules of evidence relating to the burden and standard of proof. This point is clearly made in the celebrated speech of Viscount Sankey in Woolmington v DPP.¹⁶

This principle appears elaborated in **Mancini v DPP (1942)**:

Woolmington's case is concerned with explaining and reinforcing the rule that the prosecution must prove the charge it makes beyond reasonable doubt, and, consequently, that if, on the material before the jury, there is reasonable doubt, the prisoner should have the benefit of it. The rule is of general application in all charges under the criminal law.¹⁷

Furthermore, the privilege against self-incrimination 'confers a freedom to refuse to answer questions when the reply might incriminate the person to whom the question is addressed.'¹⁸

These principles appear to buttress the view that 'one person should so far as possible be entitled to tell another person to mind his own business, which may be intrinsically related to the legal notions of privacy and hence due process.'¹⁹

However, it does appear that the CJPOA may have significantly eroded the protection hitherto accorded the accused in this regards. This position appears corroborated by the decision in **R v Bowden (1999)** where the court of appeal referring to ss. 34 – 37 held that;

The object of these sections was to weaken the protection which criminal defendants had previously enjoyed against drawing of inference adverse to them from such failures and refusal in the circumstances specified. Proper effect must of course be given to these provisions. But since they restrict rights recognized at common law as appropriate to protect defendants against the risk of injustice, they should not be construed more widely than the statutory language requires.²⁰

There appear to be a clash between defence and prosecution oriented values. These are values and principles that tend to favour the defendants and those that suit the prosecution.

The balance appears to be in favour of prosecution which this paper holds aggravates the conundrum of adversarial deficit enunciated above. Gearey A. et al (2009) tend to lend credence to this view when they noted thus:

¹⁶ Gearey, A. Morrison, W. and Jago, R. (2009). The Politics of The Common Law, Perspectives, Rights, Processes and Institutions. New York: Routledge-Cavendish, p.363

¹⁷ Mancini v DPP (1942) AC 1 369.

¹⁸ Roberts, P. and Zuckerman, A. (1994). Criminal Evidence. Oxford: Oxford University Press, p. 392

¹⁹ C.f. Gearey, A. Morrison, W. and Jago, R. (2009). The Politics of The Common Law, Perspectives, Rights, Processes and Institutions. New York: Routledge-Cavendish, p.367

²⁰ R v Bowden (1999) 2 Cr App R 176, 181.

*Although there is a rhetorical commitment to due process values, commentators have often pointed out that English criminal process operates in favour of the prosecution.*²¹

In **R v Howell (2003)**, it was held that a defendant's silence in interview had to weigh in the balance against clear public interest in an account being given by the suspect to the police. In this case, it was held that there had been no good reason for the defendant's silence.

The European Convention on Human Rights provides for a fair trial including but not limited to the rights enshrined in Article 6 wherein 'everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.'²²

The ensuing case law tends to uphold that the CJPOA curtailment of the immunity to defendant's silence are not incompatible with the ECHR provisions.

In **Murray v UK (1996)** it was held that the reductions to the right to silence and the drawing of adverse from silence were not in breach of article 6 of the ECHR. It held that the right was not absolute.

The privilege against self-incrimination is not an absolute right.²³

Similarly, in **Condron v UK (2000)** it was held that;

*Even though the right of silence lay at the heart of a right to a fair trial and the fact that the applicant exercised the right to silence at the police station is relevant to the determination of the fairness issue, that fact does not itself preclude the drawing of an adverse inference....the issue that the applicant's silence was left to the jury cannot itself be considered incompatible with requirements of a fair trial.*²⁴

It is worthy of note that the CJPOA provides for certain safeguards which could play a significant part in ensuring a fair trial and upholding the integrity of the English Justice System. The CJPOA (s.34) provides for reliance and reasonability consideration prior to drawing any inference. Thus, any fact that was not relied on may not be subject to inference. **R v B (MT) (2000)** shows that no inference can be made where there is no proof of reliance.²⁵

Similarly, where the physical or mental condition of the accused makes it undesirable for him to give evidence at trial, no inference can be drawn.²⁶ **R v Cowan (1996)** sets out the five steps that a court must take prior to a section 35 adverse inference.²⁷

²¹ Gearey, A. Morrison, W. and Jago, R. (2009). The Politics of The Common Law, Perspectives, Rights, Processes and Institutions. New York: Routledge-Cavendish, p.354

²² ECHR Article 6

²³ Murray v UK (1996) 22 EHRR 29

²⁴ Condron v UK (2000) Crim LR 679

²⁵ R v B (MT) (2000) Crim LR 181

²⁶ CJPOA, 1994. s. 35 (1)

²⁷ R v Cowan (1996) 1 Crim App R 1.

In the same vein, the CJPOA provides in section 38 (3) that a person shall not be 'convicted of an offence solely on an inference drawn from such failure or refusal as is mentioned in section 34 (2), 35 (3), 36 (2) or 37 (2).

In R v Bristow and Jones (2002), the trial judge had omitted to direct the jury that silence alone could not prove guilt. The court of appeal quashed the conviction on the ground that the jury may have convicted on a basis which did not give effect to the qualified protection to the right of silence provided by the law.²⁸

These safeguards, in addition to the provision in the Police and Criminal Evidence Act (1984) ss. 78; 82 (3) appear to offer some protection to the accused's right to silence as the courts, having regard to all the circumstances and the fairness of the proceedings may refuse to allow the prosecution's evidence.²⁹

To what extent have the courts articulated a fair balance between defence oriented and prosecution oriented values? As can be seen from the foregoing, the CJPOA appear to have diminished the protection granted to accused's right to silence. The safeguards notwithstanding, adverse inference may appropriately be drawn from the accused's silence. This is amidst the backdrop of institutional disparities in adversarial abilities and the inherent risk of abuse of state power and adjudicative error.

CONCLUSION AND RECOMMENDATION

The English Legal system is characteristically adversarial which underscores advocacy and the notion of a neutral judge. The presumption of equality of arms appear rebutted amidst the profound imbalance between parties to criminal litigation where the might of a strong state is ranged against a weak individual. The huge investigative resources at the disposal of the prosecution inter alia expresses the deficit in the adversarial system.

The safeguards in the CJPOA notwithstanding, the accused right to silence, presumption of innocence and privilege against self-incrimination appear diminished. Unlike the Criminal Evidence Act of 1898, the evidential significance of the accused silence in sections 34 – 38 of the CJPOA appear elevated.

This paper concludes that the CJPOA appear to have further aggravated the conundrum of adversarial deficit. Owusu-Bempah, (2014) tends to corroborate this research finding when he observed that the CJPOA has decreased the protection which the right to silence can provide against wrongful convictions, and increased the potential for abuse of power.³⁰ It is in this light that this paper recommends that steps be taken to mitigate the impact of adverse inference on the right to silence. These include but not limited to the reading down of sections 34 – 37 and placement of the Woolmington's golden rule in a more predominant state. This connotes a true and firm commitment to defence-oriented values in order to minimize the risk of wrongful conviction as well as protection from the abuse of state power and bureaucratic tyranny.

²⁸ R v Bristow and Jones (2002) EWCA Crim 1571

²⁹ Police and Criminal Evidence Act (1984) s78; 82 (3)

³⁰ Owusu-Bempah, A. (2014). Silence in Suspicious Circumstances. Criminal Law Review, 2014(2)

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