

**Defendant Participation in the Criminal Process**, by Abenaa Owusu-Bempah (Abingdon: Routledge, 2017), 200pp., hardback, £75.00, 9781138019577.

A classic cornerstone of adversarial criminal justice in England and Wales is that the defendant is protected by the presumption of innocence. The burden of proof rests with the prosecution and it is their responsibility to establish the guilt of the defendant, rather than the defendant having to establish his innocence. Theoretically, the adversarial defendant should not be compelled to co-operate with or assist the State to achieve their goal of securing a conviction. In reality, this position no longer exists in England and Wales. Erosions to the privilege of self-incrimination (*Saunders v UK* (1997) 23 EHRR 313) and the modifications to the right of silence (ss.34-39 of the Criminal Justice and Public Order Act (CJPOA) 1994) have seen a general shift toward a duty of defendant co-operation. Arguably, this growing notion of co-operation has been underpinned and accelerated by the increasing level of defence disclosure obligations placed upon the defendant. The origins of these obligations are relatively non-contentious, such as notice of alibi evidence (s.11 of the Criminal Justice Act 1967) and expert evidence (s.81 of the Police and Criminal Evidence Act 1984). That said, disclosure obligations shifted in intensity in the mid-1990s with the creation of the Defence Case Statement (s.5-6D of the Criminal Procedure and Investigations Act 1996) and the Case Management Provisions of the Criminal Procedure Rules 2015 (hereafter, CrimPR 2015).

Abenaa Owusu-Bempah's book, *Defendant Participation in the Criminal Process*, argues that the growing obligation for the defendant to participate in the criminal process lacks justification. The first half of the book creates a normative theory that the defendant should not be compelled to actively assist the State in its pursuit of a conviction. The second half applies this theory to criminal procedure of England and Wales by examining the defence disclosure obligations, the right of silence and the privilege against self-incrimination. The book is only concerned with what Owusu-Bempah calls 'active participation.' Therefore, the book centres on something "that involves mental effort or voluntary physical movements on the part of the defendant, which results in the production of information" (p.2). Passive participation, such as submitting to arrest, search or detention in custody, is not the focus of the book (p.2). The rationale for this exclusion centres on the idea that the increase in requirements to 'actively participate' is a relatively new creation, which has far-reaching consequences for both the defendant and the adversarial landscape of England and Wales.

Depriving the defendant of the choice of whether they wish to co-operate in the criminal process means that England and Wales cannot be characterised as 'adversarial' (p.3). Owusu-Bempah points out that whilst it is natural for systems to transform over time, it is concerning there has been a departure from legal norms and rights which form a component part of adversarialism. Owusu-Bempah outlines her normative theory of "calling the State to Account"(p.9). The book uses Hock Lai Ho's argument that the central feature of adversarialism is to hold the executive arm of government to account in its quest to uphold and enforce the criminal law (see fn.29). Ultimately, the State can account for its accusations against the defendant by proving guilt of the accused. Owusu-Bempah's theory of the criminal process is one of an 'absolutist position' and takes the point that the defendant should be under no requirement to actively participate by answering questions or providing information during the pre-trial stage.

Early on, the author recognises a limitation to her study; namely, the theory has developed within the cultural context of the English criminal procedure and has been designed to address a specific issue – the increasing demand for defendants to actively participate in the

criminal process. The author points out that a more ambitious project could seek to apply it to passive participation as well. Nevertheless, despite the narrow remit of the book, it is an engaging and stimulating read.

Chapter Two examines the aims of the criminal process. Firstly, the chapter uses the Overriding Objective of the CrimPR 2015 as its lens. The Overriding Objective is to “deal with cases justly” and this is broadly defined in Rule 1.1(2) CrimPR 2015. The aims of the process can be viewed as accurate fact-finding and conflict resolution (pp.18-21), whereas the values are “fairness and respect for the rights of the defendant and respecting the interests of witnesses and victims” (pp.21-28). The chapter concludes with the proposition that the “emphasis has shifted away from the values of fairness and respect for defence rights” (p.29). This departure has permitted the growth of the defendant’s obligation to participate in the process.

Chapter Three uses classic analytical approaches to examine the way England and Wales ‘do’ criminal procedure – i.e. adversarialism/inquisitorialism and Herbert Packer’s models of Due Process and Crime Control. The chapter reaches an interesting conclusion by stating that adversarialism, a mix of adversarialism/inquisitorialism, or a new form of process centring on managerialist goals do not adequately reflect the participatory nature of the modern criminal process in England and Wales. Owusu-Bempah suggests that the role the defendant plays in the process informs us of the extent to which fairness and respect of defence rights are valued. She draws an early conclusion that the pursuit of efficient fact-finding has taken precedence over fairness and respect for voluntary participation in the criminal process (p.49).

Chapter 4 contrasts Owusu-Bempah’s ‘calling to account’ theory with an alternative idea that the defendant *should* participate in the criminal process, a concept advanced by Duff et al in their *Trial on Trial* series. This idea centres on the notion that the defendant should be called to account for his criminal wrongdoing (p.51). By offering a brief overview of the origins of the adversarial criminal trial, the author outlines why the defendant should not be compelled to participate in an adversarial criminal justice process. She argues that an adversarial process, which is predicated on testing and probing the case of the prosecution cannot easily be reconciled with the compelled participation of the defendant. Whilst the tracing of the origins of the adversarial trial does not unearth a normative theoretical process, the participation of the defendant in the criminal process must be a choice, rather than a compulsion.

With the completion of the normative work at the conclusion of Chapter Four, the remaining chapters examine the privilege against self-incrimination (Chapter Five), the right to silence (Chapter Six) and disclosure (Chapter Seven). It is of no surprise that Owusu-Bempah calls for an overhaul of the law regarding the privilege against self-incrimination. The author notes that the privilege would be difficult to extend to all situations, so calls for the creation of a ‘regulatory regime’ concerning motor vehicle offences. This regime would notify drivers that they may be required to incriminate themselves only in the following circumstances:

1. The individual made a voluntary decision to enter into a particular regulated authority;
2. The regulation of the activity is enforced through criminal offences which would be impractical to prosecute without the individual’s co-operation (i.e. she gives the example of driving under the influence of alcohol);

3. Before making their decision to enter into the activity the individual was expressly informed that, as part of the regulatory regime, he or she may be required to incriminate him or herself later (p.99).

This interesting approach allows the chapter to reconsider the privilege against self-incrimination and forcibly reinforce the proposition that the accused should not be compelled to supply information to the prosecution, save in very limited circumstances.

Chapter Six examines the right to silence at both the investigative stage and the trial stage. The chapter analyses the legislative changes under the CJPOA 1994 and considers the empirical work that has tracked the changes (p.132). The chapter highlights the tenuous link that exists when conflating silence with guilt. Furthermore, this link runs counter to a system that allows the defence to test the prosecution's case, whilst continuing to respect defence rights and ensure fairness (p.139). Owusu-Bempah argues that the current position on silence is inconsistent with notion of adversarialism.

Chapter 7 charts the origins of the defence disclosure regime and highlights the enforcement mechanisms for non-compliance. The chapter then offers a case law analysis in the post-*Auld Review* era and the difficulties encountered in the post-CrimPR cases of both *Firth* [2011] EWHC 388 Admin and *Newell* [2012] EWCA Crim 650, which bought into the mantra of efficiency, but arguably forgot about fairness. Owusu-Bempah suggests that the courts have not made a clear distinction between using the information disclosed by the defence to anticipate attacks on prosecution's case and using it to establish a *prima facie* case against the defendant. *Newell* suggests that, where the defence have not followed the letter and spirit of the CrimPR, the fruits of disclosure can establish a *prima facie* case (p.169). As such, the freedom of the defendant to *choose* whether to respond to the accusations against him, and thus to provide information or to assist the State in establishing guilt, has been severely attenuated by the penalties for non-compliance with the disclosure regime. (p.172)

The final chapter looks at the future of the criminal process and calls into question the legitimacy of emphasising defendant participation and imposing sanctions should they refuse to co-operate. The chapter calls for an implementation of the normative theory that was advanced through chapters 2-4 and was founded on the presumption of innocence, the right to a fair trial and the relationship between citizen and State. The conclusion states that 'adversarialism' can no longer be used to describe the criminal justice process of England and Wales, and cannot be characterised by the obligatory nature of defendant participation (p.183).

This is a quintessential book on modern criminal procedure for legal scholars and proceduralists alike. It is well presented and argued in a compelling and persuasive manner. Whilst certain elements of defence disclosure are arguably non-contentious (e.g. alibi and expert evidence), the tenor and tone of the Case Management provisions of the CrimPR have stark ramifications. These provisions are the enabling factors to compel the defendant to participate in the criminal process. With the growing desire for an 'efficient and effective' criminal justice system, Owusu-Bempah's book is a timely reminder that the maxim could be viewed as an antithesis of itself. The book persuasively calls for a halt to the notion of defendant participation and seeks a return to the classic adversarial approach that is focused on the protection of fundamental defence rights, such as the privilege against self-incrimination and allowing the prosecution to discharge the burden of proof, without the assistance of the defendant.

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