

## The Protection of Fundamental Human Rights in Criminal Proces: National Report on England and Wales

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### 1. INTRODUCTION

The criminal process in England and Wales<sup>2</sup> is subject to constant reform and amendment, and, in addition, the rules of the process are frequently challenged in the courts with a resulting complexity that such volatility produces. A further cause of complexity is the conflict behind the numerous different objectives that the rules are designed to achieve, such as the prosecution of crime, the protection of defendants' rights, and the giving of due weight to the needs of victims. Whilst these demands might all be met in an individual case, there is no doubt that such forces often pull in different directions, making a single theme difficult to discern. Nonetheless, the overarching rhetoric of the English criminal justice process reflects the due process model, particularly in the period immediately following the enactment of the Human Rights Act 1998 (HRA). Obvious examples include the presumption of innocence, reflected in the prosecution bearing the burden of proof in a criminal trial, and the fair trial guarantees of Art.6 of the European Convention on Human Rights (ECHR) and the impact these have on the interpretation of the domestic process. The impact of the HRA 1998 and the ECHR is particularly keenly felt in the criminal trial owing to the very broad guarantees in Art.6 and their expansive interpretation by the European Court. Whilst such pan European rules seek to produce a notion of consistency in outcome (fairness) the approach to satisfying the objective can take many forms. This chapter seeks to consider various pre-determined aspects of the criminal process of England and Wales with a view to enabling international comparisons to be drawn.

### 2. THE CRIMINAL PROCESS AND INTERNATIONAL LAW.

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<sup>2</sup> For detailed consideration of the increasingly complex procedures, see J. Sprack, *Criminal Procedure* (11<sup>th</sup> edn.), 2006; *Archbold*, 2009; *Blackstone's Criminal Practice*, 2009; S. Bailey, J. Ching, and N. Taylor, *Modern English Legal System* (5<sup>th</sup> edn.) 2007; A. Ashworth and M. Redmayne, *The Criminal Process* (3<sup>rd</sup> edn.), 2005; A. Sanders and R. Young, *Criminal Justice* (3<sup>rd</sup> edn.), 2008.

The criminal process is subject to a number of international treaties and conventions. The Universal Declaration of Human Rights was adopted and proclaimed in 1948. The European Convention on Human Rights and Fundamental Freedoms was ratified in 1951 and the right of individual petition was introduced in 1966. Following the Human Rights Act 1998 the Convention is now given effect in United Kingdom domestic law<sup>3</sup>. The International Covenant on Civil and Political Rights was ratified by the UK in May 1976. The UK submits reports every five years on the measures adopted to give effect to the rights protected by the ICCPR and on the progress made in the enjoyment of those rights. The International Convention on the Elimination of All Forms of Racial Discrimination was ratified by the UK in March 1969. The UK is obliged to ensure that there is no racial discrimination in the exercise and enjoyment of a broad range of civil, political, economic, social and cultural rights. The UK submits reports every two years on the legislative, judicial and administrative measures which it has adopted and which give effect to the provisions of the Convention. The UK ratified the Convention on the Rights of the Child in December 1991. The Committee on the Rights of the Child considers national reports and makes concluding observations. The Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment was ratified by the UK in December 1988. The Committee Against Torture monitors the implementation of the Convention. The UK submits reports every four years. The UK ratified the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in June 1988. The relevant committee has unlimited access to the UK to make visits to all places where persons are deprived of their liberty and submits a report on its visits which include detailed findings of fact and recommendations for action.

The most influential of these documents is the European Convention on Human Rights which is given effect within UK judgments through both consideration of decisions of the Strasbourg Court, which are seen as highly persuasive, and through the interpretation of domestic statutes to be, as far as possible, compatible with the Convention. There is no power to strike down legislation. If, despite all efforts, primary legislation cannot be interpreted compatibly with Convention rights, the courts may make a “declaration of incompatibility”. This does not affect the validity, continuing operation or enforcement of

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<sup>3</sup> The law throughout the United Kingdom is not uniform but where the term UK is used in this piece it can be taken that the law applies in that form in England and Wales.

the legislation concerned. Instead, the legislation continues to apply, but a Minister may decide to legislate to remove the incompatibility, with the possibility of using a “fast track” legislative procedure to do so. “Public authorities” must act in accordance with Convention rights, unless incompatible primary or subordinate legislation leaves them no choice. If they do not do so, a victim of the resulting breach of the HRA has a right of action against the public authority concerned, or may rely on the Convention right in other legal proceedings. A court may award damages or grant other relief to the victim. Citizens can still petition the European Court of Human Rights in Strasbourg after domestic remedies have been exhausted.

The UK has made one reservation to the First Protocol to the ECHR concerning education. Following *A v Secretary of State for the Home Department*,<sup>4</sup> a derogation to Article 5 was withdrawn and currently there are no further derogations. Other international treaties are enforceable in line with the principle of parliamentary sovereignty: the notion that Parliament is supreme and cannot bind its successors. Therefore, international treaties are used to aid the interpretation of domestic law where it appears ambiguous but cannot override it.

### 3. THE NATURE OF THE DOMESTIC CRIMINAL PROCESS

#### A. Introduction

The criminal process in England, which is governed by both statute law and common law, does not have a written constitution or a Bill of Rights. The HRA is not a Bill of Rights in the sense of having an overriding authority over all other law, but it does give “further effect” to the rights contained in the ECHR. The position before the HRA was stated by Lord Reid in *British Railways Board v Pickin*.<sup>5</sup>

“The idea that a court is entitled to disregard a provision in an Act of Parliament on any ground must seem strange and startling to anyone with any knowledge of the history and law of our constitution ... In earlier times many learned lawyers seem to have believed that an Act of Parliament could be disregarded in so far as it was contrary to the law of God or

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<sup>4</sup> [2004] UKHL 56.

<sup>5</sup> 1974] AC 765 at 765, 782, HL.

the law of nature or natural justice, but since the supremacy of Parliament was finally demonstrated by the Revolution of 1688 any such idea has become obsolete.”

Under the HRA it is unlawful for any public authority, including a court, to act in a manner which is incompatible with a Convention right (s.6). Convention rights take precedence over any rule of common law and over most delegated legislation. Primary legislation must be read and given effect in a manner which is compatible with Convention rights, “so far as it is possible to do so” (s.3(1)).

Political accountability for the operation of the criminal justice system rests ultimately with the Home Office and the Home Secretary. Their stated aim is to “put public protection very clearly at the heart of our work to counter terrorism, cut crime, provide effective policing, secure our borders and protect personal identity.”<sup>6</sup> Allied to the Home Office is the newly formed Ministry of Justice with responsibility for criminal law and sentencing, reducing re-offending, and prisons and probation.

The development of the modern British police force was predicated on the notion that they were “citizens in uniform” and would have no powers above those of any citizen to apprehend an offender. However, “in the past a large amount of police work has relied on the co-operation and consent of citizens together with a certain amount of “bluff” as to the extent of police powers. With cooperation and consent apparently diminishing and a greater awareness of people as to their “rights”, the need grows for a thorough review and reform of the law of police powers.”<sup>7</sup> This review subsequently led to the Police and Criminal Evidence Act 1984 which governs police powers and the rights of those suspected of crime. If a constable is acting in the purported exercise of specific legal powers or duties he must remain within the limits set by law to those powers or duties.

The coercive powers of criminal justice agencies are usually triggered by the presence of reasonable suspicion, cause or belief in the existence of a state of affairs. There is a spectrum with reasonable suspicion at the lower end.<sup>8</sup> It “arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof is the end ... *Prima facie* proof consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all.”<sup>9</sup> It does not presuppose that the police should have obtained

<sup>6</sup> <http://www.homeoffice.gov.uk/about-us/purpose-and-aims/>

<sup>7</sup> S. Bailey, *Civil Liberties: Cases and Materials*, 1980, p.33.

<sup>8</sup> On definitions of reasonable suspicion see *Shaaban Bin Hussein v. Hong Fook Kam* [1970] A.C. 942.

<sup>9</sup> *ibid.*, per Lord Devlin at 948.

sufficient evidence to bring charges.<sup>10</sup> The Strasbourg Court has confirmed that “reasonable suspicion presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed a criminal offence. What may be regarded as “reasonable” will however depend on all the circumstances.”<sup>11</sup> The English courts have adopted a compatible definition.<sup>12</sup>

Policing is increasingly “intelligence-led” in that specific areas or offenders might be targeted for police action on the basis of crime data or information received. Reasonable suspicion is still required though the influence of victims upon this judgment is waning. Some have argued that policing has shifted to providing security by predicting and managing risks rather than providing crime control.<sup>13</sup> In a risk society:

“the traditional police focus on deviance, control, and order is displaced in favour of a focus on risk, surveillance and security. The concern is less with the labelling of deviants as outsiders and more on developing a risk-profile knowledge of individuals to ascertain and manage their place in institutions. The concern is not so much control of deviants in a repressive sense as surveillance that constitutes populations of individuals, organisations and institutions in their respective risk categories.”<sup>14</sup>

Surveillance techniques are an obvious method of intelligence led policing and the accountability of these techniques is that they be both necessary and proportionate.

There are exceptions to the traditional trigger of reasonable suspicion. For example, the power to search under the Criminal Justice and Public Order Act 1994 s. 60 does not depend on any “reasonable suspicion” held by the officer conducting the stop-search. The Minister of State at the Home Office, David Maclean MP, stated<sup>15</sup> that the government was “persuaded that the need to meet the tests of reasonable suspicion seriously inhibits effective preventive action by the police when they believe that violence is likely to break

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<sup>10</sup> Research by Phillips and Brown (HORS No. 49, *Entry into the Criminal Justice System: a survey of arrests and their outcomes*, 1998) found that of the 4,250 arrests they examined, in 71% of cases the arresting officer claimed that the basis of his reasonable suspicion was from only one source of evidence. In 21% of cases there were two sources and in 8% of cases three or more. In 40% of all cases the main ground for the suspicion derived from ‘a police observation of the offence.

<sup>11</sup> ECtHR 30 August 1990, *Fox, Campbell and Hartley v UK*; ECtHR 6 November 1980, *Guzzardi v Italy*; ECtHR 29 November 1988, *Brogan and others v UK*.

<sup>12</sup> See *O'Hara v. Chief Constable of the RUC* [1997] A.C. 286 and *Castorina v. Chief Constable of Surrey*, (1998) N.L.J.R. 180.

<sup>13</sup> See R. V. Ericson and D. Haggerty *Policing the Risk Society*, 1997.

<sup>14</sup> *Ibid.*, p. 18.

<sup>15</sup> 241 HC Deb, 12 April 1994, col. 69.

out." The power would, for example, enable the police to search a group of people where there are grounds to believe that some although not all are carrying a weapon.<sup>16</sup>

## B. Actors in Criminal Process:

### a. Judiciary

Lords of Appeal in Ordinary are the most senior judges in England. In order to be qualified for appointment as a Lord of Appeal in Ordinary a person has to: (1) have been for 15 years a person who has a Supreme Court qualification in England (i.e. a person with a right of audience in relation to all proceedings in the Supreme Court) an advocate in Scotland or a solicitor entitled to appear in the Court of Session and the High Court of Justiciary, or a member of the Bar of Northern Ireland or a solicitor of the Supreme Court of Judicature of Northern Ireland; or (2) have held for two years one or more of the "high judicial offices" judge of the High Court, Court of Appeal, Court of Session or High Court or Court of Appeal in Northern Ireland. Lord Justices of Appeal are permanent members of the Court of Appeal. Qualification requires 10 years' High Court qualification or a High Court judge. High Court or "puisne" judges have jurisdiction to sit anywhere in the High Court and generally hear the most serious criminal cases. Qualification requires 10 years' High Court qualification (i.e. a person who has a right of audience in relation to all proceedings in the High Court: 1990 Act, s.71 (3)) or two years' standing as Circuit judge. Circuit judges carry out most of the work of the Crown Court (assisted on occasion by Recorders). Qualification to Circuit judge or recorder is the enjoyment of general rights of audience in the Crown Court or the county courts for 10 years.

The Constitutional Reform Act 2005 established an independent Judicial Appointments Commission which selects candidates for appointment as judicial office holders in England and Wales by The Queen or the Lord Chancellor. The Lord Chancellor may only appoint (or recommend for appointment) to judicial office those who meet the statutory qualifications. Beyond that, the guiding principle which underpins the Lord Chancellor's policies in selecting candidates for judicial appointment is that appointment is strictly on

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<sup>16</sup> Similar powers of stop-search are contained in the Terrorism Act 2000 s.44.

merit. In summary the generic competencies for appointment are<sup>17</sup>: judgement; investigating & analysing; professionalism; and people skills. The Judicial Studies Board is directly responsible for providing training to judges in the Crown Court. This includes initial training, continuing professional development and identifying training needs to support new legislation.

The traditional view was that there was no system of “promotion” of judges. The fear was that holders of judicial office might allow their promotion prospects to affect their decision-making; care might be taken to avoid offending the senior judges or the politicians responsible for making or influencing judicial appointments. Nevertheless, the trend seems to be for judges to be elevated from the Circuit Bench more regularly, and for appointments to the House of Lords and Court of Appeal to be made from the court below.

The role of the professional judge is essentially that of guardian of due process rather than an investigating judge. Serious criminal offences would be tried in the Crown Court which comprises a professional judge (usually puisne or circuit) and a jury of 12 laymen. Less serious offences are tried in the Magistrates’ Court which would comprise of, usually, three lay magistrates (of which there are 29,000) or full time paid magistrates or District Judges who sit alone (of whom there are 135).

### b. Prosecution

The Crown Prosecution Service was established under the Prosecution of Offences Act 1985, and is headed by the Director of Public Prosecutions (DPP) who is supervised by the Attorney General who in turn is accountable to Parliament. England and Wales are divided by the DPP into 42 areas based on police areas, with a “virtual” 43rd area known as CPS Direct which provides out-of-hours charging advice to the police. Staff are appointed by the DPP. Any member of the CPS who has a “general qualification” may be designated by him or her as a Crown Prosecutor. The DPP must designate a Chief Crown Prosecutor for each area, who is responsible to him or her for supervising the operation of the Service in that area.

The CPS employs around 8,184 people<sup>18</sup> including barristers and solicitors, and these members of the service are accorded the limited rights of audience enjoyed by solicitors

<sup>17</sup> See: <http://www.judicialappointments.gov.uk/>

<sup>18</sup> Figures correct for 2006. For updated information see [www.cps.gov.uk](http://www.cps.gov.uk)

holding practising certificates. A number of CPS lawyers are qualified to appear in Crown Court and other higher courts. This means that employed solicitors with Higher Rights qualifications are able to appear in some cases in the Crown Court, and other higher courts. The vast majority of criminal prosecutions are brought by the CPS. Section 3(2) of the 1985 Act lists the duties of the DPP, and includes the following:

- to take over the conduct of all criminal proceedings, other than specified proceedings, instituted on behalf of a police force;
- to institute and conduct criminal proceedings in any case where it appears to him that the importance or difficulty of the case makes it appropriate for him to do so, or it is otherwise appropriate for proceedings to be instituted by him;
- to take over the conduct of all binding over proceedings instituted on behalf of a police force;
- to give, to such extent as he considers appropriate, advice to police forces on all matters relating to criminal offences;

The 1985 Act preserves the right of private prosecution. The Act does not preclude any person from instituting any criminal proceedings, or conducting any proceedings which the DPP is not under a duty to take over. The DPP does, however, still have power to take over private prosecutions at any stage. The CPS will take over and discontinue a prosecution where, on the evidence, there is no case to answer, which involves a different test from that applied when deciding whether to initiate a prosecution.

Decisions of the CPS to initiate a prosecution are open to challenge on an application for judicial review in limited circumstances. The possibility of judicial review of police decisions was recognised (as regards a decision not to prosecute) in *R. v. Metropolitan Police Commissioner, ex p. Blackburn* (No.1)<sup>19</sup> and (as regards a decision to prosecute and not caution a juvenile) in *R. v. Chief Constable of the Kent County Constabulary, ex p. L.*<sup>20</sup> The House of Lords has however subsequently held that in the absence of dishonesty, mala fides or some exceptional circumstance, a decision to prosecute cannot be challenged by way of judicial review.<sup>21</sup>

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<sup>19</sup> [1968] 2 Q.B. 118.

<sup>20</sup> [1993] 1 All E.R. 756.

<sup>21</sup> *R. v. DPP, ex p. Kebilene* [2000] 2 A.C. 326.

The decision to prosecute is approached in two stages: (1) the evidential test and (2) the public interest test. As to the first stage, Crown Prosecutors must be satisfied that there is enough evidence to provide a realistic prospect of conviction against each defendant on each charge, taking account of what the defence case may be. There is a realistic prospect of conviction where a properly directed jury or bench of magistrates is more likely than not to convict. Crown Prosecutors must consider whether the evidence can be used and is reliable. Relevant considerations are whether any evidence may be excluded by the court, for example, because of the way it was gathered, or whether it is likely that a confession is unreliable, for example, because of the defendant's age, intelligence or lack of understanding. If the evidential test is passed, Crown Prosecutors must then consider if a prosecution is needed in the public interest.<sup>22</sup> A prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour. These must be balanced carefully and fairly and those that can affect the decision to prosecute "usually depend on the seriousness of the offence or the circumstances of the offender".<sup>23</sup> The Code provides non-exhaustive lists of common public interest factors for and against prosecution.

Other factors that might be relevant in a decision not to prosecute a particular offence include the charge bargain, which is where a plea arrangement made between prosecution and defence counsel whereby a plea of guilty to a lesser charge on the indictment is accepted in return for the prosecution not proceeding with the more serious charge(s). The value of a guilty plea in the criminal process is that it reduces the time and money spent on achieving convictions, it obviates the need for a trial and the inherent difficulties of proof, it spares the witnesses an experience which can be both unpleasant and distressing,<sup>24</sup> and it is alleged to demonstrate an attitude of contrition and remorse on the part of the accused.<sup>25</sup> The advantages to the prosecution of offering concessions or inducements to persuade the accused to plead guilty are the certainty and economy thereby secured. These advantages must be balanced against the need to ensure that offenders are convicted of offences only when they are actually guilty and which properly represent the seriousness of their

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<sup>22</sup> The DPP, and now the CPS, are guided by a statement made by a former Attorney-General, Lord Shawcross, in the course of a House of Commons debate. "It has never been the rule in this country. I hope it never will be that suspected criminal offences must automatically be the subject of prosecution": H. C. Deb., Vol. 483, col. 681, January 29, 1951 (para. 6.1).

<sup>23</sup> Code, para. 5.8.

<sup>24</sup> See: Sentencing Guidelines Council (2004) para. 2.1.

<sup>25</sup> For example, see: *R. v. Karim* [2005] EWCA Crim 533 at para. 31. This rationale is doubted by Sanders and Young, 2007, p.387.

behaviour. The danger of the accused pleading guilty under pressure to obtain the maximum sentencing discount or failing to make a free informed decision about his plea should not be underestimated. For the truly guilty defendant and the prosecution, a charge bargain represents a mutually beneficial compromise. A guilty plea is obtained and so is a sentence concession. However, these concessions also operate as inducements and create enormous pressure on the accused who is at his/her most vulnerable in facing this most difficult of decisions in the criminal process.

The Code for Crown Prosecutors is to be applied by the CPS “so that it can make fair and consistent decisions about prosecutions” reflecting the duty of the CPS “to make sure that the right person is prosecuted for the right offence”. Crown Prosecutors must be “fair, independent and objective”. Their key task is to determine whether a case meets the tests set out in the Code and thus should proceed to court.

Under the 1985 reforms the role of the CPS was to take over a case once a person had been charged by the police. Significant changes have been made to this relationship as a result of the Criminal Justice Act 2003,<sup>26</sup> implementing recommendations contained in the Auld Report<sup>27</sup> that the CPS should be involved in the process of actually charging a suspect. The DPP has noted that statutory charging “is the single most significant development in the handling of criminal casework since the establishment of the CPS”.<sup>28</sup> The custody officer retains the decision as to whether there is sufficient evidence to charge but the decision to charge in all but routine cases (e.g. those under the Road Traffic Acts not involving dangerous driving etc) will be on the advice of the Crown Prosecutor. The decision as to whether the suspect should be released or charged, with or without bail, is that of the custody officer (subject to Police and Criminal Evidence Act 1984 s.41(7) which states that the suspect must be released with or without bail at the expiration of the detention limit) but in making that decision he must have regard to the DPP’s Guidance on Charging (s.37A(3)). Under s.37(7)(a) the custody officer may keep the suspect in police detention for the purpose of enabling the DPP (Crown Prosecutor in practice) to make a decision about whether there is sufficient evidence to charge and what those charges ought to be. As soon as is practicable the officer involved in the investigation must provide the Crown

<sup>26</sup> See: I. Brownlee, The Statutory Charging Scheme in England and Wales: Towards a Unified Prosecution System? *Crim. L.R.*, 2004, p. 896.

<sup>27</sup> *Auld Report. A Review of the Criminal Courts of England and Wales*, 2002, Chap. 10, para. 12. See: [www.criminal-courts-review.org.uk](http://www.criminal-courts-review.org.uk)

<sup>28</sup> *CPS Annual Report, 2005–2006* (2006) at p.2.

Prosecutor with as much information as is specified in the DPP's Guidance on Charging. Where the Crown Prosecutor is unable to make the charging decision on the information available at that time, the detainee may be released without charge and on bail.<sup>29</sup>

There is little doubt that police have greatest impact on the number of criminal prosecutions (even when road traffic cases are taken out of the equation). Despite this, and the greater symbolic significance of police role in investigation of crime, the non-police agencies play an important role in investigating a wide range of criminal offences. Government departments, local authorities, nationalised industries and other public bodies may all have cause to institute prosecutions within their particular field.

Where powers exist they tend to be less extensive than those given to the police. For example, covert surveillance techniques can be carried out by a large number of organisations though the most intrusive forms are reserved for police authorisation alone.

The powers of such organisations give rise to two distinct problems. First, there is the question to what extent they should be permitted to conduct both investigative and prosecutorial functions, given the importance of the separation of these functions in relation to the mainstream criminal process. Secondly, there is the question of maintaining consistent standards in the prosecution policies themselves. Commentators have drawn attention to the fact that the regulatory authorities are often more compliance orientated in their outlook.<sup>30</sup> With such a diverse range of authorities, each protecting their own interests, it is inevitable that different prosecution policies evolve. This is unobjectionable provided certain minimum criteria are met: the prosecution policy must not be capricious or arbitrary or discriminatory; it must be published and accessible to the public; and the courts must exercise the power of review of its execution and application. The Codes should strive to match the level of protection that is afforded to the criminal suspect investigated by the police and prosecuted by the CPS. Occasionally, prosecution policies have clashed.<sup>31</sup>

### c. The defence

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<sup>29</sup> *R (on the application of G) v Chief Constable of West Yorkshire Police* [2008] EWCA Civ 28

<sup>30</sup> On other agencies see A. Reiss, Styles of Regulatory Justice, in K. Hawkins and J. Thomas (eds), *Enforcing Regulation*, 1984; on prosecutions of regulatory offences see S. Antrobus and I. Cooper, S.I. June 8 2001, pp.520, 553, 574. See also G. Richardson, Strict Liability for Regulating Crime: the Empirical Research, *C.L.R.*, 1987, p. 295. The different policies of prosecution have also been highlighted by, e.g. the Grabiner Report into the Informal Economy, 1999.

<sup>31</sup> See, e.g. *R. v. W.* [1998] (CPS and Inland Revenue policies on tax evasion). But, see the written answer of the Attorney-General in *Hansard* April 8, 1998, col. 231, on the strengthened arrangements for liaison between the prosecuting authorities of the Inland Revenue and the CPS. See S. Lewis and R. Clutterbuck, *Crim.L.R.*, 1998, p. 139.

The legal profession in England and Wales is divided between barristers and solicitors. A barrister receives instructions from a solicitor to appear in court. A barrister must be a member of the Bar and qualification involves three stages: the *academic stage* (degree); the *Bar Vocational Course* involving the development of practical skills; and finally the *Call to the Bar*, though rights of audience can only be obtained after “Pupillage” (real life experience alongside a practising barrister). Solicitors also qualify via a three stage process: *academic stage; Vocational training; Traineeship*.

The Access to Justice Act 1999 s.36 provides that every barrister and every solicitor has rights of audience in all courts. Previously, solicitors had limited opportunities to acquire rights of audience in the higher criminal courts and the extra training necessary for solicitors to appear in the higher courts ensures that solicitor-advocates remain rather modest in number. The required training involves training in higher court procedure, ethics and advocacy skills, evidence, and 12 months litigation and advocacy experience with a mentor.

Barristers have to be a member of the Bar which requires that membership fees must be paid to the *Bar Council* and barristers must also have indemnity insurance and satisfy the Bar Standards

Board who grant a practising certificate each year. The *Criminal Bar Association* also exists and most criminal barristers are members but it is a purely voluntary scheme.

The Lord Chancellor's Department (now Ministry of Justice) in its Consultation Paper<sup>32</sup> developed the idea that was introduced in the White Paper *Modernising Justice*, in which the government claimed that properly funded salaried defenders can be more cost-effective and provide a better service than lawyers in private practice.<sup>33</sup> It was felt that a system with Public Defenders would be cheaper, easier to monitor, more flexible and because it lacked a profit motive would be more focused on securing justice. Criticisms of the public defenders scheme are that it lacks independence from the government and that it is perceived as such. There is also the danger that it will be overloaded with work and that it will fail to secure

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<sup>32</sup> See further the LCD Consultation Paper, *Establishing a Salaried Defence Service and Draft Code of Conduct for Salaried Defenders Employed by the LSC*, 2000; see also comment at 150 *N.L.J.*, 2000, p. 923.

<sup>33</sup> The Government reviewed schemes in USA, Canada, Australia and concluded that a mixed scheme with public defenders and private representatives available was the most effective solution. The Canadian research quoted refers to the high quality of the work provided with no effect on the outcomes of cases and the respect and confidence of the profession and the judiciary. See C. Frazer, 150 *N.L.J.*, 2000, p. 670 casting doubt on the claims about the Canadian experience.

high quality staff.<sup>34</sup> Furthermore, it could lead to less choice for the accused, by reducing access to the private sector, and this could reduce overall quality through lost competition. The service exists alongside the private providers, reflecting the governments' aim to optimise the balance between the public and private sectors. However, its performance to date has been mixed.<sup>35</sup>

Defence lawyers are subject to codes of conduct. The Code of Conduct for Barristers is: Code of Conduct for the Bar of England and Wales : Written Standards for the Conduct of Professional Work. For solicitors the relevant code is The Solicitors Regulation Authority: Solicitors Code of Conduct. Professional misconduct can lead to a solicitor being “struck off” the list and therefore unable to practice law. However, the Legal Complaints Service states that “It is very rare that as a result of a complaint, solicitors are disciplined or struck off.”<sup>36</sup>

It is the responsibility of the lawyer to provide the client with advice as to the issues involved in the case and the options available. The next move should be agreed with the client – the lawyer should not act on his own initiative. The client can end the relationship at any time whereas the solicitor requires good reason and must give a period of reasonable notice. The right to be legally represented does not give an accused an absolute right to determine how his defence will be conducted: an accused cannot require counsel to disregard basic principles of his professional duty in the presentation of the defence<sup>37</sup> According to the Solicitors' Code of Conduct Rule 1: “A modern just society needs a legal profession which adopts high standards of integrity and professionalism. As a solicitor...you serve both clients and society. In serving society, you uphold the rule of law and the proper administration of justice. In serving clients, you work in partnership with the client making the client's business your first concern.” Research suggests that defence lawyers are often compliant in the production of guilty pleas.<sup>38</sup>

Following *R. v McFadden*<sup>39</sup> the Chairman of the Bar Council stated that certain principles govern the conduct of defence counsel:

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<sup>34</sup> The difficulty of attracting and retaining high quality practitioners into low paid legal aid work has been a long standing one: R. Smith, Resolving the Legal Aid Crisis, *Law Soc. Gaz.*, 1991, p. 27.

<sup>35</sup> See the Report available at: [www.legalservices.gov.uk/criminal/pds/evaluation.asp](http://www.legalservices.gov.uk/criminal/pds/evaluation.asp)

<sup>36</sup> See the Legal Complaints Service at: [www.legalcomplaints.org.uk](http://www.legalcomplaints.org.uk)

<sup>37</sup> *X v UK* (1980) 21 DR 126 at [6].

<sup>38</sup> M. McConville, J. Hodgson, L. Bridges and A. Pavlovic, *Standing Accused*, 1994.

<sup>39</sup> 62 Cr.App.R. 187 at 193

“It is the duty of counsel when defending an accused on a criminal charge to present to the court, fearlessly and without regard to his personal interests, the defence of that accused. It is not his function to determine the truth or falsity of that defence, nor should he permit his personal opinion of that defence to influence his conduct of it. No counsel may refuse to defend because of his opinion of the character of the accused nor of the crime charged. That is a cardinal rule of the Bar. ... Counsel also has a duty to the court and to the public. This duty includes the clear presentation of the issues and the avoidance of waste of time, repetition and prolixity. In the conduct of every case counsel must be mindful of this public responsibility.”

#### C. The Investigation of the evidence

A criminal case is driven by the prosecution whose task it is to produce evidence that the defendant is guilty beyond reasonable doubt. The process is very much an adversarial as opposed to an inquisitorial system. The court determines both fact and law and does not take a proactive role in the case in advance of the hearing itself. The admissibility of evidence in the case will, if challenged, be determined by the judge at the voir dire (a trial within a trial). Evidence held to be inadmissible will not be placed before the court.

#### D. The Appeal Process

The system does not always allow for a retrial by a higher court on appeal with regard to the facts of the case. Leave is required for an appeal from the Magistrates’ Court to the Crown Court on a point of fact or law. The person convicted in the Crown Court may only appeal against conviction if either (a) a certificate from the trial judge that the case is fit for appeal<sup>40</sup> or (b) leave of the Court of Appeal (Criminal Division) is obtained.<sup>41</sup> Applications for leave to appeal are normally dealt with by a single judge who examines the papers and may grant leave, refuse it, or refer the case to the court.<sup>42</sup> If leave is refused an application may be renewed to the court within 14 days. Appeals from the Crown Court to the Court of Appeal will usually be based on law or the introduction of new evidence not considered by the lower court. The appeal in the Court of Appeal is not a retrial but a re-examination,

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<sup>40</sup> *The Consolidated Criminal Practice Direction* V.50.4; Crim. P.R., 2005, r.68.2.

<sup>41</sup> 1968 Act, s.1 (2), as substituted by the Criminal Appeal Act 1995, s.1. Prior to this change, the person convicted could appeal as of right on any ground which involved a question of law alone.

<sup>42</sup> On the difficulties in achieving this preparation see Auld Report, 2001, Chap.12, paras 79– 86.

though following its examination of the safety of the conviction a retrial might be ordered. The prosecution cannot appeal with regard to the facts of the case.

Where the Court of Appeal allows an appeal against conviction, it may order that the appellant be retried where it appears that this is required by the interests of justice.<sup>43</sup> The appellant may only be retried for the offence in respect of which the appeal was allowed, an offence of which he or she could have been convicted at the original trial on an indictment for that offence or an offence charged in an alternative count of the indictment at the trial on which the jury were discharged from giving a verdict.<sup>44</sup>

Following the Criminal Appeals Act 1995 the Criminal Cases Review Commission (CCRC) was established. Where a person has been convicted of an offence on indictment, the Commission may at any time refer the conviction back to the Court of Appeal and (whether or not they refer the conviction) any sentence (not fixed by law) imposed in relation to the conviction. In cases that are investigated, the CCRC gathers evidence, interviews witnesses, seeks expert advice, (particularly forensic advice), liaises with other agencies (especially the Court Service, Prison Service, CPS, police, Customs and Excise, etc). Once the investigation has occurred, a commissioner decides whether refer a case to the Court of Appeal or not.

The Court of Appeal can hear appeals based on law or fact. Its powers are contained in the Criminal Appeals Act 1995 s.2 which states that the Court of Appeal: (a) shall allow an appeal against conviction if they think that the conviction is unsafe; and (b) shall dismiss such an appeal in any other case. An appeal lies from the Court of Appeal (Criminal Division) to the House of Lords at the instance of either the defendant or the prosecutor.<sup>45</sup> The Court of Appeal must certify that a point of law of general public importance is involved.<sup>46</sup> In addition, leave must be obtained from either the Court of Appeal or the House of Lords and this can only be granted where it appears that the point is “one which ought to be considered by the House”.<sup>47</sup> The House in disposing of an appeal may exercise

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<sup>43</sup> 1968 Act, s.7(l), as amended by the Criminal Justice Act 1988, s.43(2). See Pattenden, 1990, pp. 366–370. For the procedure on retrial see s.8 and Sched. 1. Any sentence passed after a retrial may not be longer than the original one.

<sup>44</sup> *ibid.*, s.7(2). For the analogous power to award a *venire de novo*, see below, para. 18-020. This can only be done where the original trial is a nullity.

<sup>45</sup> Criminal Appeal Act 1968, s.33(1). Where a point of law is referred to the Court of Appeal by the Attorney-General under the Criminal Justice Act 1972, s.36 (see above) the court may thereafter refer the point to the House of Lords. If the Court of Appeal had certified a point but refused leave, and then failed to inform the prosecution — thereby rendering it impossible for the prosecution to petition the House of Lords for leave within 14 days—the Court of Appeal could relist the matter: *R. v. Cadman-Smith* [2001] Crim. L.R. 644.

<sup>46</sup> The recommended that this requirement be dropped: Cm. 2263, p. 178.

<sup>47</sup> 1968 Act, s.33(2).

any of the powers of the Court of Appeal or remit the case to that court.<sup>48</sup> Any sentence substituted by the House of Lords runs from the time when the other sentence would have begun to run, unless the House otherwise directs.<sup>49</sup> Any time spent on bail pending hearing of the appeal does not count towards the sentence.<sup>50</sup> Alleged breaches of human rights are considered in the normal course of a case or appeal. There is no dedicated “constitutional court”, though individuals may still take cases to the European Court of Human Rights.

Part 9 of the Criminal Justice Act 2003,<sup>51</sup> influenced by a number of reports,<sup>52</sup> extended the appeal rights of prosecutors to challenge points of law made by trial court judges in the Crown Court at any time up until the summing up.<sup>53</sup> The rights of appeal introduced under the Act apply only to trials on indictment<sup>54</sup> and allow for an appeal to the Criminal Division of the Court of Appeal.<sup>55</sup> The prosecution require the leave of the judge or the Court of Appeal. Two rights of appeal are introduced. Section 58 allows for appeals to be made against terminating rulings, whilst s.62 allows for appeals against evidentiary rulings.

#### 4. HUMAN RIGHTS IN THE DOMESTIC CRIMINAL PROCESS

This section seeks to provide some brief details as to how various human rights are given practical effect within the criminal process of England and Wales.

##### A. Fundamental Rights Independent of Fair Trial

###### a. Right to life and to humane treatment

The right to life is a right contained within the ECHR (and thus has effect in the UK) which is non-derogable in peacetime, though it is not absolute, allowing for the execution of a sentence of a court following conviction of a crime for which the penalty is provided by law. Furthermore, deprivation of life is not to be regarded as a contravention of Article 2, “when it results from the use of force which is no more than absolutely necessary (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to

<sup>48</sup> Criminal Appeal Act 1968, s.35(3). Where the House of Lords hears an appeal, but it turns out that points not disposed of by the Court of Appeal are relevant to whether a conviction should stand, the House may remit the matter to the Court of Appeal or itself exercise the powers of the Court of Appeal in relation to those points: *R. v. Mandair* [1995] 1 A.C. 208, H.L. The Court of Appeal may not otherwise itself re-list the case to consider the unresolved grounds: *R. v. Berry (No.2)* [1991] 1 W.L.R. 125 and *R. v. Berry (No.3)* [1995] 1 W.L.R. 7, CA.

<sup>49</sup> *ibid.* s.43(2).

<sup>50</sup> *ibid.* s.43(1).

<sup>51</sup> For an overview of the reforms see, I. Dennis, Prosecution Appeals and Retrial for Serious Offences, *Crim. L.R.*, 2004, p. 619.

<sup>52</sup> The Report of the Royal Commission on Criminal Justice, 1993, Ch. 10; Law Commission Consultation Paper No. 158 *Prosecution Appeals Against Judges' Rulings*, 2000; Law Commission Report No. 267, *Double Jeopardy and Prosecution Appeals*, 2002, Part VII; *The Criminal Courts Review*, 2001, Ch. 12; *Justice for All*, 2002, Cm. 5563.

<sup>53</sup> CJA 2003 s.58(13).

<sup>54</sup> CJA 2003 s.57(1).

<sup>55</sup> CJA 2003 s.57(3).

prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.” There is no longer a provision for capital punishment in the UK, the death penalty being removed from the statute book by the Murder (Abolition of Death Penalty) Act 1965. In 2003 the UK ratified the 13<sup>th</sup> protocol of the ECHR prohibiting the reintroduction of the death penalty whilst remaining a signatory to the Convention.

Article 2 of the ECHR contains a positive obligation to take preventative measures to protect an individual whose life is at risk from another where the state knows or ought to know that there is a real and immediate threat to the individual's life, as was determined in the case of *Osman v UK*.<sup>56</sup> The right to be protected against cruel and humiliating treatment is considered to be an absolute right. States, (and, under the HRA, public authorities), must “take those steps that could reasonably be expected of them to avoid a real and immediate risk of ill-treatment contrary to Article 3 of which they knew or ought to have had knowledge”.<sup>57</sup>

#### b. Deprivation of liberty

In terms of the deprivation of liberty, detailed provision is made in PACE 1984 Code C governing the questioning of persons in custody. This replaced the non-statutory Judges' Rules which had previously provided guidance as to the proper conduct of interrogations.<sup>58</sup> When introduced, the PACE scheme of regulating questioning represented a clear improvement on the previous procedures. Since then, its effectiveness in protecting the suspect has been undermined in a number of ways: successive parliamentary amendments to PACE have diluted the protections on offer, and, particularly in the case of the right to silence, have undermined the policy behind the scheme. In addition, the protection that PACE offered has been recognised to be defective, for example, in its failure to offer adequate remedies for the breaches of the protections and because some of the key protections are contained only in the Codes of Practice and not in the statute itself. Since

<sup>56</sup> ECtHR 28 October 1998, *Osman v United Kingdom*. See also, C. De Than, Positive Obligations Under The European Convention On Human Rights: Towards The Human Rights Of Victims And Vulnerable Witnesses?, *Journal of Criminal Law*, 2003, p. 165; See also; *Savage v South Essex Partnership NHS Foundation Trust* [2006] EWHC 3562 (QB), [2007] All ER (D) 148; On the police duty of care to witnesses, see: *Van Colle v Chief Constable of Hertfordshire Police* [2008] UKHL 50. See also *Woolgar v Chief Constable of Sussex Police* [1999] 3 All ER 604; *Carndub v Chief Constable of West Midlands Police* [2001] 1 WLR 1786; *Reeves v Metropolitan Police Comr* [1999] 3 All ER 897; *Kirkham v Chief Constable of Greater Manchester Police* [1990] 2 QB 283, CA.

<sup>57</sup> ECtHR , 2002. *Z v UK*.

<sup>58</sup> The Judges' Rules originated in 1906, with revised versions issued in 1964 and 1978 together with related Administrative Directions from the Home Office. Compliance with the Rules would tend to ensure that a confession was admissible. Breach of a particular Rule or Direction might, but in practice normally did not, render the confession inadmissible.

PACE, there has however also been an increased awareness of the dangers of false confessions from all suspects in custody not just those in specific categories of vulnerability. Although the HRA has in some areas led to strengthening of protections, the scheme still has the potential to allow miscarriages of justice.

PACE Code C also makes detailed provision for interpreters of foreign languages to be provided for suspects,<sup>59</sup> and for interpreters to be provided for suspects who are deaf or have a speech handicap.<sup>60</sup> All reasonable attempts should be made to make clear to the suspect that interpreters will be provided at public expense.<sup>61</sup> The “assistance” of an interpreter may include translations of documents, but need not include all items of written evidence or official documents, only those which are necessary to ensure a fair trial.<sup>62</sup>

Access to legal advice is provided for in PACE s.58 which states: “(1) A person arrested and held in custody in a police station or other premises shall be entitled, if he so requests, to consult a solicitor privately at any time.” This right can only be delayed in accordance with s. 58(8), and provided that the suspect “has not yet been charged with an offence”.<sup>63</sup> In *Samuel*<sup>64</sup> it was noted that instances in which an officer could “genuinely” believe that a solicitor *will* if allowed to consult with a suspect, commit an offence will be rare. Inadvertent or unwitting conduct apart, the police officer must believe that a solicitor *would*, if allowed to consult the person in police detention, commit a criminal offence. The grounds put forward would have to be by reference to a specific solicitor.<sup>65</sup> Legal counsel may be present during police interrogation subject to exceptions in PACE Code C para 6.6. It is clearly a safeguard for the defendant (and possibly the prosecution) that what occurs in the interview room is accurately recorded. Audio tapes of an interrogation are obligatory. They are regulated by PACE Code E. The defence has full access to the tape unless it is the subject of public interest immunity.<sup>66</sup> Video recordings can also be authorised but are not obligatory.<sup>67</sup>

An important feature of the arrangements for protection during detention is the division of function between the custody officer and the officers concerned with the investigation. One

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<sup>59</sup> PACE Code C para. 8.1 - 8.3.

<sup>60</sup> *Ibid.* paras. 8.4 – 8.6.

<sup>61</sup> *Ibid.* para. 8.7.

<sup>62</sup> ECtHR 19 December 1989, *Kamasinski v Austria*.

<sup>63</sup> Code C, Annex B.A. (a) 1.

<sup>64</sup> [1988] QB 615

<sup>65</sup> *R v Silcott, Braithwaite and Raghip* (1991) Times, 9 December, CA

<sup>66</sup> See, *R v. X Justices, ex p. J* [2000] 1 All ER 183.

<sup>67</sup> Criminal Justice and Public Order Act 2001 s.76.

or more custody officers (of at least the rank of sergeant) must be appointed for each designated police station<sup>68</sup> and a variety of duties are imposed directly on that officer once a person has been brought to the station. Custody officers have been very heavily criticised. McConville, Sanders and Leng describe officers in their research who were “complicitous in the creation of [an] off-the-record interview by permitting the case officer to visit the suspect in the cells or by authorising his release to the interview room without recording it”.<sup>69</sup> However, in research for the Home Office, Brown<sup>70</sup> found that “custody officers show considerable independence in the way they carry out their job although practical constraints limit their examination of the evidence against a suspect when considering whether to authorise detention.”<sup>71</sup> It is important that there is no detention without adequate justification, as Article 5(i)(c) of the ECHR requires.<sup>72</sup>

There are a range of important responsibilities falling on the custody officer (CO) including an evaluation of whether the person arrested was lawfully arrested. The CO is entitled to assume, in the absence of any evidence to the contrary, that the arrest is lawful.<sup>73</sup> The CO must determine, as soon as practicable, whether there is sufficient evidence to charge the person arrested (D).<sup>74</sup> If in the CO's view there is sufficient evidence to charge, D must be (i) charged or (ii) released without charge, either with or without bail.<sup>75</sup> Once D is charged with an offence, the CO must order his or her release (with or without bail<sup>76</sup>). The CO also has general responsibilities for the welfare of those in detention including ensuring that the requirements of the Act and the Code of Practice governing detention are observed.<sup>77</sup> The CO has a vital role in ensuring that D is informed of his rights from the moment of detention. Under Code C, where a person arrives at a police station under arrest, or is arrested there, the CO must tell him clearly of (1) his right to have someone informed of the arrest; (2) his right to consult privately with a solicitor, and the fact that independent legal advice is available free of charge; and (3) his right to consult the Codes of Practice.<sup>78</sup> He must be given a written notice setting out these rights, his right to a copy of the custody

<sup>68</sup> There is a *duty* to appoint one and a *discretion* (which must be exercised reasonably) to appoint more: *Vince v. Chief Constable of the Dorset Police* [1993] 2 All E.R. 321.

<sup>69</sup> *The Case for the Prosecution*, 1991, p. 58.

<sup>70</sup> *Pace Ten Years On*, 1997.

<sup>71</sup> *ibid.* p.2.

<sup>72</sup> ECtHR 25 April 2000, *Punzelt v Czech Republic*; ECtHR 31 July 2000, *Jecius v Lithuania*.

<sup>73</sup> *DPP v. L* [1999] Crim.L.R. 752.

<sup>74</sup> s. The custody officer must determine whether there is sufficient evidence on which to charge D and if there is the case must be passed to the Crown Prosecution Service for a charging decision to be made. See below.

<sup>75</sup> *ibid.* s.37.

<sup>76</sup> For analysis see J. Raine and M. Willson, *Police Bail with Conditions*, 37 *B.J. Criminol.*, 1997, p. 593.

<sup>77</sup> PACE, s.39. See the *Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers*, HMSO, 1995 (Code C).

<sup>78</sup> Code C.3.1.

record, the terms of the caution, and the arrangements for obtaining legal advice, and an additional notice setting out his entitlements while in custody.<sup>79</sup> Whether the provision of the information is of effective use to the suspect in such circumstances is debatable.<sup>80</sup> A custody record must be opened as soon as it is practicable for each person who is brought to a police station under arrest or who is arrested at the police station having attended there voluntarily.<sup>81</sup> The CO is responsible for the accuracy and completeness of the custody record and for ensuring that it accompanies the detained person on any transfer to another station.<sup>82</sup> Where the person leaves police detention, or is taken before a court, he or she, and their legal representative or appropriate adult is entitled, on request, to be given a copy of the record and, on giving reasonable notice, to inspect the original.<sup>83</sup> The custody record will prove crucial if a challenge is made to the detention of the suspect in an attempt to have evidence excluded. As elsewhere in PACE one of the main safeguards for the suspect is the provision of records of all police action.

Provision is made for there to be periodic reviews of a person's continued detention in custody. Thus a review officer must carry out a review not later than six hours after the detention was first authorised, and then at intervals not longer than nine hours, although these can in some circumstances be postponed.<sup>84</sup> Compliance with these time limit requirements can be important in subsequent false imprisonment actions. PACE Code C states (at para 9.2):

“If a complaint is made by, or on behalf of, a detainee about their treatment since their arrest, or it comes to notice that a detainee may have been treated improperly, a report must be made as soon as practicable to an officer of inspector rank or above not connected with the investigation. If the matter concerns a possible assault or the possibility of the unnecessary or unreasonable use of force, an appropriate health care professional must also be called as soon as practicable.”

Breaches of pre-trial detention rights can be raised during the trial. Of particular relevance would be the ability to exclude confession evidence under s.76 PACE and the general discretion to exclude any evidence under s.78 PACE.

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<sup>79</sup> Code C.3.2.

<sup>80</sup> See Sanders and Young, *Criminal Justice*, 2007, p. 170.

<sup>81</sup> Code C.2.1.

<sup>82</sup> Code C.2.3.

<sup>83</sup> Code C.2.4, C.2.5.

<sup>84</sup> S.40(4).

Those suspected of terrorist offences are subject to special procedures. PACE Code H: “Code of practice in connection with the detention, treatment and questioning by police officers of persons under section 41 of, and schedule 8 to, the Terrorism Act 2000” applies to, and only to, persons arrested under section 41 of the Terrorism Act 2000.

As to the periods of detention under PACE, a person could not be kept in police detention for more than 24 hours without being charged. The Criminal Justice Act 2003 extended the position to allow a further 12 hours to be approved by a superintendent in relation to any arrestable offence. The Serious Organized Crime and Police Act 2005 has further allowed detention up to 96 hours for any indictable offence. These represent significant extensions of the law. The detention clock normally starts when D arrives at the first police station to which he or she is taken after arrest, or, if D is arrested at a police station after attending voluntarily, at the time of arrest. There are special provisions governing persons brought from another police area or outside England and Wales. After the 24-hour period, a person who is not charged must be released, either with or without bail, unless the station superintendent authorizes a further 12 hours detention.<sup>85</sup> The superintendent or above must have reasonable grounds for believing that D's continued detention is necessary to secure or preserve evidence relating to the offence for which D is under arrest, or to obtain such evidence by questioning him or her; that the offence in question is an indictable offence; and that the investigation is being conducted diligently and expeditiously. Authorisation cannot be given by the superintendent after the expiry of the 24-hour period or before the second review.<sup>86</sup>

Detention can only be extended beyond the 36-hour period on the authority of a warrant of further detention granted by a magistrates' court.<sup>87</sup> The criteria for the grant of a warrant are the same as for authorisation of continued detention by a superintendent. D must be brought before the court and is entitled to legal representation. The application must be made within the 36-hour period, or, if it is not practicable for a court to sit at the expiry of 36 hours, within six hours thereafter.<sup>88</sup> The warrant may extend the detention for such period as the

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<sup>85</sup> PACE s.41.

<sup>86</sup> In 2004-05, 1,132 people were detained for more than 24 hours before being released without charge, taken from M. Ayres and L. Murray, *Arrests for Recorded Crime (Notifiable Offences) and the Operation of Certain Police Powers Under PACE*, Home Office Statistical Bulletin 21/05, 2005.

<sup>87</sup> i.e. a court of two or more justices sitting otherwise than in open court: section 45(1).

<sup>88</sup> If an application is made after the 36-hour period, the court will dismiss it if it appears that it would have been reasonable for the police to make it within that period: s.43(7); see *R. v. Slough Magistrates' Court, ex p. Stirling* (1987) 151 J.P. 603.

court thinks fit, up to a maximum of 36 hours.<sup>89</sup> Fresh applications may be made to the court, on the same basis, for the warrant to be extended for further periods not exceeding 36 hours, up to a maximum of 96 hours.<sup>90</sup> The application must be in writing and explain the progress of the investigation and the reason that an extension is sought. If an application for a warrant or an extension is refused, and in any event at the expiry of the 96 hour period, D must be charged or released, with or without bail.

If D is not released on bail he may be placed on remand. The large numbers of prisoners held on remand is problematic for a number of reasons. Firstly, it should be remembered that many prisoners held on remand have yet to be tried and thus are innocent until proven guilty yet they have had their liberty taken away. Secondly, statistically, most remand prisoners are ultimately given a custodial sentence by the court. This is not a surprise of itself as the reasons why the person has been given a custodial sentence will often be the same reasons that led to remand in custody in the first instance. However, the impact that the period on remand has on the ultimate sentence must be considered. For example, the presentation of mitigating factors before sentence is more difficult for an accused that has spent time on remand.<sup>91</sup> Thirdly, it has been recognised that remand prisoners suffer some of the worst conditions within the prison system. In 2005 figures revealed that of the 804 people who had committed suicide in prison in the preceding decade, 55 percent of those were on remand, despite remandees only comprising 19 percent of the total prison population.<sup>92</sup> The large number of remand prisoners has caused severe problems of overcrowding,<sup>93</sup> sometimes involving detention in police, rather than prison, custody.<sup>94</sup> By the end of 2006 over 13,000 people were being held on remand. Of these, over 8000 were untried prisoners, with the remaining being convicted but awaiting sentence.<sup>95</sup> The Criminal Statistics for England and Wales 2006/06 report that 55,000 people were remanded in custody by magistrates in 2006, this represented 10 per cent of all those remanded.<sup>97</sup> Thirty one per cent of those committed for trial at the Crown Court in 2006 were

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<sup>89</sup> PACE s.43.

<sup>90</sup> *ibid.* s.44.

<sup>91</sup> See, A. Ashworth, *Sentencing and Criminal Justice* (4<sup>th</sup> ed.), 2005, p.285.

<sup>92</sup> Howard League for Penal Reform, *Briefing Paper on Prison Overcrowding and Suicide*. 2005, p.4.

<sup>93</sup> For details on the effects of overcrowding see, Joint Committee on Human Rights, *Deaths in Custody*, Third Report of Session 2004-05, 2005, HC 137, Chap. 4. Prison overcrowding may be a relevant factor for the court to take into account where a case falls on the borderline between a non-custodial and a custodial sentence: *Attorney General's Reference (No. 11 of 2006) (R. v. Scarth)* [2006] Crim.L.R. 775.

<sup>94</sup> Authorised for periods not exceeding three clear days by the Magistrates' Courts Act 1980, s. 128(7), (8). See 151 J.P.N., 1987, p. 433.

<sup>95</sup> National Offender Management Service, *Population in Custody Monthly Tables: November 2006*, 2006, see Table 1. For updated statistics see [www.homeoffice.gov.uk](http://www.homeoffice.gov.uk)

<sup>96</sup> Home Office, *Criminal Statistics for England and Wales 2006*, 2007.

<sup>97</sup> *Ibid.* Table 4.4.

remanded.<sup>98</sup> Fifty nine per cent of those committed on bail to the Crown Court for trial and 72 per cent of those committed in custody eventually pleaded guilty.<sup>99</sup> Seventy-two per cent of those pleading guilty after having been committed in custody to the Crown Court for trial were sentenced to immediate custody.<sup>100</sup> Fifty per cent of those remanded in custody before trial at magistrates' courts or the Crown Court were sentenced to custody.<sup>101</sup>

It is clear that with the rises in prison population the conditions for the remand prisoner are unlikely to significantly improve in the short term. The Chief Inspector of Prisons has commented that at the same time as increases in the prison population, "there are resource constraints on public spending, which are likely to affect the quality of life in prisons both directly and indirectly. This is an alarming and potentially extremely damaging combination."<sup>102</sup>

The maximum period for which a magistrates' court may remand an accused in custody is eight clear days.<sup>103</sup> This is subject to a number of exceptions. In practice, there is virtually never an objection to whatever period of remand on bail appears necessary for the parties to be ready for the next effective stage in dealing with the case. There may be several remand hearings before the case is sent to the Crown Court or the commencement of summary trial. The only limitation on the number of remands is the general discretion of magistrates to refuse an adjournment if it would be against the interests of justice.

### c. Bail

If D is not placed on remand he may be released on bail. The Bail Act 1976 s.4 introduced a general right to bail for accused persons and certain others subject to exceptions specified in a Schedule to the Act. In fact, the exceptions are substantial and this has led commentators to speak of a "presumption in favour of bail" rather than a "right to bail". In addition, the Act focused attention upon the need for information about the accused to be available to the court so that the bail decision could be an informed one, and required reasons to be given to the accused where bail was not granted so that he or she might more effectively conduct an appeal against the decision. By virtue of section 25 of the Criminal

<sup>98</sup> *Ibid.* Table 4.7.

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

<sup>102</sup> *Annual Report 2005-2006*, HC 210, 2007, p.6.

<sup>103</sup> Magistrates' Courts Act 1980, s. 128(6).

Justice and Public Order Act 1994 bail will not be granted where a person is charged with murder, attempted murder or manslaughter or rape or attempted rape<sup>104</sup> after having previously been convicted of such an offence or culpable homicide unless there are exceptional circumstances to justify the grant of bail. The original form of section 25 was to prohibit bail in such cases, but the European Court confirmed that this breached Article 5.<sup>105</sup> The compatibility of s.25 with Article 5 was confirmed by the House of Lords in *R (O) v Harrow Crown Court*.<sup>106</sup>

In respect of the imprisonable offences the accused need not be granted bail if:

- (a) the court is satisfied that there are substantial grounds for believing<sup>107</sup> that the accused would, if released on bail:
  - (i) fail to surrender to custody,<sup>108</sup> or
  - (ii) commit an offence while on bail,<sup>109</sup> or
  - (iii) interfere with witnesses or otherwise obstruct the course of justice,<sup>110</sup> whether in relation to himself or any other person.

The accused also need not be granted bail if:

- (b) it appears to the court that he was on bail in criminal proceedings on the date of the offence;
- (c) the court is satisfied that he or she should be kept in custody for his or her own protection;
- (d) he or she is already serving a custodial sentence or has been bailed and arrested for absconding, or,
- (e) the court is satisfied that, owing to lack of time since the commencement of the proceedings, it has not been practical to obtain sufficient information for the purposes of taking the decisions required to be taken in relation to a-c above.

If bail is refused by the court or conditions are imposed on the grant of bail in respect of anyone to whom section 4 of the Act applies; the court must make a record and give reasons for withholding bail or imposing the conditions with a view to enabling the accused to

<sup>104</sup> See also the list of serious sexual offences added by the Sexual Offences Act 2003 Sch.6 para. 32.

<sup>105</sup> *Carballero v. U.K.* [2000] Crim.L.R. 587; *S.B.C. v. U.K.* (2002) 34 E.H.R.R. 619.

<sup>106</sup> *R. (O) v. Harrow Crown Court* [2006] UKHL 42. See, P. Tain, (2006) S.J. 1219.

<sup>107</sup> See *R. v. Mansfield J.J., ex p. Sharkey* [1985] Q.B. 613.

<sup>108</sup> On the fear of absconding and the ECHR see: ECtHR, 26 June 1991, *Lettellier v France*; ECtHR 12 December 1991, *Clooth v Belgium*.

<sup>109</sup> The fear of offending on bail is recognised as a relevant factor in granting bail in ECHR case law. For criticism of this as a legitimate ground for consideration see Sanders and Young, 2007, p. 467; Ashworth and Redmayne, 2005, p. 208-213. See also U. ni Raifeartaigh, Reconciling Bail Law with the Presumption of Innocence,) 17 O.J.L.S. 1, 1997, questioning why granting bail should be a significant problem given the realisation that there are many convicted criminals released from prison who may pose a threat.

<sup>110</sup> Sched. 1, Part I, para. 2.

make application to another court.<sup>111</sup> The court has a duty to inform an unrepresented accused of his right to challenge make further application to other courts.<sup>112</sup>

The imposition of conditions on the grant of bail can be a very serious matter.<sup>113</sup> It is not uncommon for the magistrates to require the accused to report regularly to a police station as a condition of bail, or to observe a curfew, or to reside<sup>114</sup> in or keep away from particular places. The most common conditions imposed are the requirement to be resident at a specified address, a prohibition on contacting a specified individual, and a requirement to report to a police station. In serious matters the accused may be required to surrender his or her passport.<sup>115</sup> It is arguable that the conditions attached ought to relate primarily to securing the attendance of the accused in court but they can also be used to curtail potentially criminal activities pending the trial of the alleged offence.

In 2005 around 12 per cent of those bailed at the magistrates' court or Crown Court failed to appear.<sup>116</sup> There were 157,000 prosecutions for failure to surrender to bail in 2005, a reduction of some 23,000 on the previous year.<sup>117</sup> Over the last decade the number of people remanded in custody by magistrates has fallen steadily.

## B. Fair Trial Rights

### a. The charge

As soon as the Custody Officer believes there is enough evidence on which to bring a charge, D must be charged. Under the Criminal Justice Act 2003 custody officers have been given the power to bail detained persons for the purpose of allowing time for the Crown Prosecution Service to decide whether they are to be charged.<sup>118</sup> When a detainee is charged they should be given a written notice showing particulars of the offence and, the officer's name and the case reference number. As far as possible the particulars of the charge should be stated in simple terms, but they should also show the precise offence in law with which the detainee is charged. If the detainee is a juvenile, mentally disordered or

<sup>111</sup> Bail Act 1976, s.5(3), as amended by the Criminal Justice and Police Act 2001 s. 129(1) inserting a new (2A) and (2B) in s.5. The European Court has explained the need for reasons to be provided: ECtHR 27 August 1992, Tomasi v France; ECtHR 27 June 1968, Neumeister v Austria; ECtHR 6 April 2000 Sabita v Italy.

<sup>112</sup> S.5(6).

<sup>113</sup> See J. Raine and M. Willson, *The Imposition of Conditions in Bail Decisions*, 35 *Howard Jnl.*, 1996, p. 256. Conditions might be suggested by the defence in the hope of securing bail.

<sup>114</sup> On the legitimacy of curfews on bail conditions see A. Gillespie, *Curfew and Bail*, 151 *N.L.J.*, 2001, p. 465.

<sup>115</sup> Raine and Willson, 1996. Guidance was given by the Home Office in Circular 206/1977 of November 18, 1977. Courts were, e.g. requested to be especially selective in requiring regular reporting to a police station as this can be burdensome for the police and also raise identification problems.

<sup>116</sup> *Criminal Statistics* (2006) Table 4.5.

<sup>117</sup> *Ibid.*

<sup>118</sup> PACE s.37(7).

otherwise mentally vulnerable, the notice should be given to the appropriate adult. The power to amend an indictment (the document detailing the charges against the accused at the arraignment), lies in the Indictments Act 1971, s. 5(1). As well as enabling amendments to be made to existing counts entirely new counts can be introduced.<sup>119</sup> An indictment may be amended at any stage of a trial, whether before or after arraignment.

#### b. Incentives to settle the case

The indication of sentence in return for a guilty plea is a considerable incentive for a defendant. Linked to this incentive is the knowledge that a guilty plea will attract a sentencing discount. However, the propriety of the application of the sentencing discount for early guilty pleas being applied in the magistrates' court has been called into question. Flood-Page and Mackie<sup>120</sup> found "attempts to predict sentences on the basis of case factors were not particularly successful", and that the average custodial sentence in the magistrates' court for those pleading guilty was 3.7 months as compared to a sentence of 3.8 months for those pleading not guilty. Henham<sup>121</sup> found that in 90 per cent of cases sentencers indicated that they had taken account of the early plea, but concluded that the discount scheme had "done little to regulate the pragmatic nature of decision making in sentence discounts". Plea bargaining rules ultimately encourage guilty pleas and whilst the defendant should be told that he must only plead guilty if he is so, it must be recognised that this does not always reflect reality.

In the context of incentives it is important to recognise that defendants are entitled to free legal assistance from the point of arrest. This right extends to the pre-trial stage, and generally to appeal proceedings, but not to remand proceedings.

#### c. The independent tribunal

The prosecutor will initiate the prosecution in the vast majority of instances. Where a private prosecution is initiated the Director of Public Prosecutions retains the power to take over the proceedings at any stage.<sup>122</sup> The more serious criminal cases will be taken to the Crown Court. In the Crown Court system judges are divided into six circuits. Each circuit is

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<sup>119</sup> *Johal* [1973] QB 475.

<sup>120</sup> C. Flood-Page and A. Mackie, *Sentencing Practice*, HORS No.180, 1998, p.34.

<sup>121</sup> R. Henham, *Reconciling Process and Policy: Sentence Discounts in the Magistrates' Court*, *Crim. L.R.* 2000, p. 436.

<sup>122</sup> *Prosecution of Offences Act 1986* s.6.

headed by a senior Presiding Judge. Within each circuit the courts are divided between first, second and third tier centres. Each centre has a Resident Judge who matches his case list with the expertise available.

For a successful challenge to the appointment of judges to particular cases it would need to be shown that the practice of appointment as a whole was unsatisfactory or that the establishment of the particular court deciding a case was an attempt to influence its outcome. As for guarantees against outside pressure, tribunal members should not be subject to instructions from the executive.<sup>123</sup> The appearance of independence entails an objective test.

The Constitutional Reform Act 2005 contained the “Guarantee of continued judicial independence” (s.3). This states that: “The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary.” The following particular duties are imposed for the purpose of upholding that independence:

- (1) The Lord Chancellor and other ministers must not seek to influence particular judicial decisions through any special access to the judiciary.
- (2) The Lord Chancellor must have regard to (a) the need to defend that independence; (b) the need for the judiciary to have the support necessary to enable them to exercise their functions; (c) the need for the public interest in regard to matters relating to the judiciary to be properly represented in decisions affecting those matters.

Judges have security of tenure; their generous salaries are not subject to parliamentary vote; and they cannot be sued whilst acting in their judicial capacity. The retirement age is 70 though this can be extended. However, a judge may be removed from office either (1) for breach of the requirement of good behaviour, or (2) by the Crown on an address by both Houses of Parliament, irrespective of whether he or she has been of good behaviour. The misbehaviour must either be connected with the performance or non-performance of official duties, or, if not so connected, must involve the commission of a criminal offence of moral turpitude. The mechanisms for disciplining judges who misbehave are more

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<sup>123</sup> Breaches of Article 6 have been found where a tribunal sought and accepted as binding Foreign Office advice on the meaning of a treaty which it had to apply; where a member of a tribunal was a civil servant whose immediate superior was representing the government as a party to the case; and where all members of a court-martial were subordinate in rank to its convening officer and fell within his chain of command.

significant in practice than the procedures for removal. Judges may be criticised in Parliament. Judges are from time to time rebuked in appellate courts. Censure may be coupled with the setting aside of a conviction or the reversal of a judgment. Thus, judges have been censured for excessive interruptions, threatening a jury, improper behaviour on the Bench, falling asleep, incompetence, lengthy delay (20 months) in giving judgment and disloyalty to the decisions of superior courts. Arrangements for handling complaints were remodelled in consequence of the Constitutional Reform Act 2005. This is now a joint responsibility of the Lord Chief Justice and the Lord Chief Justice, supported by the newly established Office for Judicial Complaints. The test to be applied when considering whether a judge should be excused is whether having regard to all the circumstances there appears to the court considering the matter to be a real danger of bias.<sup>124</sup>

d. Jury selection

To *qualify* for selection as a juror, a person must be aged between 18 and 70, registered as a parliamentary or local government elector, and have been ordinarily resident in the United Kingdom for any period of at least five years since the age of 13. A person selected will not be permitted to serve as a juror if he or she falls into the categories of people disqualified or ineligible under Sch.1 to the Juries Act 1974. The people *disqualified* are those who: (1) are on bail in criminal proceedings; or (2) at any time have been sentenced in the United Kingdom to life imprisonment or custody for life; (3) or have been sentenced to detention during Her Majesty's pleasure; or (4) have been imprisoned or detained for public protection; or (5) have been given an extended sentence; or (6) have been sentenced to imprisonment or detention for five years or more. The people selected for jury service receive a summons requiring them to attend at the Crown Court at a specified time. Accompanying the summons are a form, which is intended to identify those ineligible or disqualified, and a set of notes, which explains something of the procedure of jury service and the functions of the juror. A failure to attend the Crown Court can result in a fine, as can unfitness for service through drink or drugs after attendance.

e. Reasonable time requirements

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<sup>124</sup> *Porter v Magill* [2002] UKHL 67

The reasonable time guarantee runs from the time of the charge. In determining what constitutes a “reasonable time” for the purposes of Article 6(1), regard is had to the particular circumstances of each case including the complexity of the factual or legal issues raised by the case; the conduct of the applicant and of the competent administrative and judicial authorities; and what is “at stake” for the applicant. The state is not responsible for delay that is attributable to the conduct of the applicant. The fact of delay is not of itself enough to constitute a proper foundation for a stay of proceedings. What would constitute such a foundation would be delay plus consequential unfairness or prejudice to an accused, which could not be cured by exercise of a trial judge's discretion within the trial itself.

#### f. The right to silence

In general, the police may ask any person such questions as they think appropriate.<sup>125</sup> However, the person asked is normally under no duty to answer.<sup>126</sup> A mere refusal to answer cannot constitute the offence of obstructing a police officer in the exercise of his or her duty.<sup>127</sup> Upon arrest the suspect should be informed that:

“You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence.”

It will be noted that while this caution has to be administered on arrest,<sup>128</sup> the questioning of a suspect should normally only take place in a police station, where the safeguards of access to legal advice and recording requirements apply. If the caution is not given this may lead to the exclusion of evidence under PACE s.78.

Major changes to the right to silence were introduced by sections 34–38 of the Criminal Justice and Public Order Act 1994. The right to keep silent was not *abolished* but greater risks are now run by the accused who maintains that position, before or at trial.<sup>129</sup> Much has been written of the extremely controversial reforms though it remains unclear whether they

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<sup>125</sup> For the contrary historical position see Sanders and Young, 2007, Chap. 5.

<sup>126</sup> There are some exceptions where a refusal to give information is itself an offence: e.g. the Companies Act 1985, ss. 434–436 (investigation of the affairs of a company); and see the non-exhaustive list in Sched. 3 of the Youth Justice and Criminal Evidence Act 1999. The ECtHR has found convictions based on evidence secured by these compulsory powers to be contrary to Art. 6 of the ECHR: ECtHR 17 December 1996, *Saunders v UK*.

<sup>127</sup> If the refusal is combined with positive acts that obstruct the police, such as abuse, threats or misleading answers the position may be different: e.g. *Ricketts v. Cox* (1981) 74 Cr.App.R. 298.

<sup>128</sup> Code C. 10.4.

<sup>129</sup> It is important to note also that adverse inferences can be drawn against a defendant who fails adequately to disclose a defence later relied on at trial: Criminal Procedure and Investigation Act 1996, s.11. On the potential to draw adverse inferences from the failure to make adequate defence disclosure, see S. Thompson, Defence Statements — Weighting the Scales or Tipping the Balance on a Submission of No Case, *Crim. L.R.* 1998, p. 802.

have been successful in securing more convictions of defendants (particularly hardened criminals).<sup>130</sup>

Section 34 of the Criminal Justice and Public Order Act 1994<sup>131</sup> provides that where an accused, before charge, when questioned under caution or after charge, “failed to mention any fact relied on in his defence” in criminal proceedings and that fact was one “which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed” then the judge (or magistrates) may “draw such inferences from the failure as appear proper.”<sup>132</sup> There can be no conviction on silence alone,<sup>133</sup> and juries must be reminded of this in any case to which section 34 applies.<sup>134</sup> Section 34(2A) was added to bring English law into compliance with the Article 6.<sup>135</sup> As a result, no adverse inferences may now be drawn from the accused's silence unless he or she had an opportunity to consult with a legal adviser.<sup>136</sup>

This common law protection against incrimination from silence is supported by Article 6 of the ECHR which although it does not expressly provide a “right to silence” has been interpreted expansively by the European Court as implicitly providing a protection against self-incrimination and providing a right to silence as part of the fundamental guarantees of the fair trial.<sup>137</sup> In *Funke v. France*,<sup>138</sup> the ECtHR recognised: “the right of anyone charged with a criminal offence, within the autonomous meaning of the expression in Article 6, to remain silent and not to contribute to incriminating himself.” Particularly important are the ECHR guarantees against drawing adverse inferences where the accused has not had an opportunity to seek legal advice or from convicting a person exclusively on his silence.<sup>139</sup>

### g. Burden of proof

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<sup>130</sup> See D.J. Birch, Suffering in Silence; A Cost-Benefit Analysis of Section 34 of the Criminal Justice and Public Order Act 1994, *Crim. L.R.*, 1999, p. 769. T. Bucke, R. Street, and B. Brown, *The Right to Silence: The Impact of the Criminal Justice and Public Order Act 1994*, 2000, conclude that: “whatever philosophical standpoint is adopted, it seems clear that the change in the law has not led to undue practical disadvantages to the defendant” (p.73). See also the excellent review by I. Dennis, Silence in the Police Station: The Marginalisation of Section 34, *Crim. L.R.*, 2002, p. 25.

<sup>131</sup> Note also ss.36 and 37 are concerned with the failure to account for objects, substances, marks and presence.

<sup>132</sup> Criminal Justice and Public Order Act 1994, s.34(1) and (2).

<sup>133</sup> *ibid.* s.38.

<sup>134</sup> *R. v. Abdulla* [1999] 3 Arch. News 2.

<sup>135</sup> ECtHR 8 February 1996, *John Murray v UK*. See R. Munday, Inferences from Silence and European Human Rights Law, *Crim. L.R.*, 1996, p. 370, discussing the implications of *Murray*, which held that M's right to a fair trial had been violated because he did not have access to a lawyer in the first 48 hours of detention.

<sup>136</sup> On the need to have access to a legal adviser before adverse inferences can be drawn see also A. Jennings, Resounding Silence, 146 *N.L.J.*, 1996, p. 746, 821.

<sup>137</sup> See ECtHR 17 December 1996, *Saunders v UK*; ECtHR 8 February 1996, *John Murray v UK*; ECtHR 2 May 2000, *Condron v UK*.

<sup>138</sup> ECtHR 25 February 1993, *Funke v France*.

<sup>139</sup> See, e.g ECtHR 2 May 2000, *Condron v UK*; ECtHR 21 December 2000, *Heaney and McGuinness v Ireland*; see further Ashworth, *Crim. L.R.*, 2001, p. 866.

The burden of proof remains on the prosecution throughout.<sup>140</sup> Any reverse onus provision is open to challenge on the basis of incompatibility with the ECHR, Article 6(2), however, a reverse onus provision will not inevitably give rise to a finding of incompatibility. Lord Bingham in *Sheldrake v DPP*<sup>141</sup> stated:

“The overriding concern is that a trial should be fair, and the presumption of innocence is a fundamental right directed to that end. The Convention does not outlaw presumptions of fact or law but requires that these should be kept within reasonable limits and should not be arbitrary. It is open to states to define the constituent elements of a criminal offence, excluding the requirement of *mens rea*. But the substance and effect of any presumption adverse to a defendant must be examined, and must be reasonable. Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption. Security concerns do not absolve member states from their duty to observe basic standards of fairness. The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case.”

#### h. An adequate defence

The question whether the accused had been afforded effective representation would depend on the facts. Article 6(3)(b) guarantees the right to adequate time and facilities for the preparation of the defence. The adequacy of the time allowed will depend upon the complexity of the case. The requirement to afford adequate facilities for the preparation of the defence creates more than a negative obligation to refrain from interference. There is a positive obligation on the state to adopt appropriate measures to place the defence in a position of parity with the prosecution. Emphasis is placed upon the appearance of fairness, not on the defendant needing to prove actual prejudice. If the conduct of legal advisers has been such as to render the trial unfair for the purposes of Article 6, then the court may be compelled to intervene.

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<sup>140</sup> *R. v. Gowland-Wynn* [2002] 1 Cr. App. R. 569. See also, *R. v. Parchment* [2003] EWCA Crim 2428.

<sup>141</sup> [2005] 1 AC 264 at [21]

The suspect can dismiss his counsel and be appointed new counsel who must be given time to prepare the case. Article 6(3)(c) of the European Convention speaks of an accused's right to defend himself in person or through a legal representative of his choosing. However, the danger of a defendant rejecting counsel on spurious grounds in an attempt to prolong and frustrate the trial cannot be ignored. To prevent a trial being derailed may, on occasion, demand fairly robust control by the trial judge but that may be necessary to ensure fairness to all parties in the proceedings including other defendants.

The client-counsel relationship is a confidential one. During a search, the police do not have direct access to items subject to legal privilege (PACE s. 9(2)(a)). In *R v Derby Magistrates' Court ex parte B*<sup>142</sup> the House of Lords held that Legal Professional Privilege is absolute and a court is not to attempt a balancing exercise between the public interest in maintaining lawyer - client confidence and other public interests. Legal Professional Privilege attaches to communications and nothing but communications; therefore a lawyer can be forced to disclose the identity of a client. Communications between a lawyer and his client for the purpose of giving and obtaining legal advice attract privilege as was demonstrated in the case of *Grant*<sup>143</sup> where electronic surveillance of privileged conversations ought, in the opinion of the Court of Appeal, to have led to a stay of proceedings. A particular problem may arise where a solicitor advises the client to remain silent at interview as such reliance must be both genuine and reasonable. In order to establish genuineness and reasonableness the defendant may wish to give an explanation as to why his legal adviser advised silence (for example, the police have not disclosed the case yet etc.). In doing so, this may be treated as waiving privilege if he goes beyond a simple explanation that he refused to answer on legal advice.<sup>144</sup> PACE Code C provides that a client must be allowed to consult privately with a solicitor. The exercise of this right can be delayed but not denied.

In magistrates' courts, legal aid can be granted to defendants who could be imprisoned. Defendants need to pass a financial means test. Some people automatically pass this test: those who are under the age of 16  
people aged 16 or 17 with no income and living with their parent or guardian

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<sup>142</sup> [1995] 4 All ER 526

<sup>143</sup> [2005] EWCA Crim 1089.

<sup>144</sup> *R v Wishart* [2005] EWCA Crim 1337; see also *R v Loizou* [2006] EWCA Crim 1719.

people under 18 and in full-time education  
those on unemployment benefits.

There is no financial means test for cases heard in the Crown and higher courts. Legal aid can be granted to all defendants. The court can issue an order to recover legal aid costs if they believe a defendant could have paid for their own defence. It is commonly recognised that pro bono assistance is increasing and becoming embedded within legal practice though it is likely that demand will always outstrip supply.

#### i. Disclosure

It is a fundamental principle of a fair trial that the defendant must know the case against him and have an opportunity to prepare his defence. Clearly, the prosecution is under a duty to disclose to the defence the whole of the evidence on which they propose to rely.<sup>145</sup> What is more controversial is the extent to which the prosecution have to disclose to the defence any material that is not used for the prosecution case, where the unused material might undermine the prosecution case or assist the defence.<sup>146</sup> Provisions on disclosure are now contained in the Criminal Procedure and Investigations Act 1996 (as amended by the Criminal Justice Act 2003).<sup>147</sup> The scheme places obligations on both the prosecution and defence.

Recognising the significance of the need for a complete record of information to be maintained as a prerequisite to adequate disclosure, the Act places a statutory duty on those charged with investigating offences to record and retain information<sup>148</sup> and a Code of Practice provides further detail on the manner of the collation and recording.<sup>149</sup> The Code makes detailed provision for the retention<sup>150</sup> of crime reports, final versions of witness statements (draft versions if inconsistent), interview records and tapes and forensic and

<sup>145</sup> It may be necessary to have full disclosure at a very early stage so that a defendant can make an informed choice regarding his plea before venue (*R. v. Calderdale Magistrates' Court ex p. Donahue and Cutler* [2001] Crim. L.R. 141) and even earlier, so that he can make an informed choice about consenting to a caution. See J. Appozardi, Disclosure at the Police Station, *Crim.L.R.*, 2002, p. 295, discussing the decision in *DPP v. Ara* [2001] 4 All E.R. 559. See also *R. v. DPP, ex p. Lee* [1997] 2 All E.R. 737, considering the possible need to disclose early to assist with bail applications or motions to stay proceedings, or other material assisting the defendant's preparation for trial.

<sup>146</sup> Recall that the forensic capabilities of the defence are severely limited when compared to those of the State. In addition, the prosecution are not desperately seeking a conviction, they are acting as ministers of justice and should not abuse the process. See for further discussion the speech of Lord Hope in *R. v. Brown* [1998] A.C. 367, and the opinion of the committee in *H and C* [2004] UKHL 3 at para. 13.

<sup>147</sup> Part 1. On the implementation of the CPIA scheme for disclosure see J. Sprack, The Criminal Procedure Investigations Act 1996: The Duty of Disclosure, *Crim.L.R.*, 1997, p. 308; A. Edwards, The Procedural Aspects, *Crim.L.R.*, 1997, p. 321. For an analysis of the amendments made by the CJA 2003, see, M. Redmayne, Criminal Justice Act 2003: Disclosure and Its Discontents, *Crim.L.R.*, 2004, p. 441.

<sup>148</sup> Criminal Procedure and Investigations Act 1996, s.23.

<sup>149</sup> Criminal Procedure and Investigations Act 1996, s.26. Paragraph 5.1 of the Code makes the investigator responsible for ensuring that any information relevant to the investigation is recorded and retained, whether it is gathered in the course of the investigation (e.g., documents seized in the course of searching premises) or generated by the investigation (e.g., interview records). If there is any doubt about the relevance of material, the investigator should retain it. The *Attorney General's Guidelines*, 2005, suggest that the disclosure officer should not be someone whose role is likely to result in a conflict of interest (para.25).

<sup>150</sup> See P. Plowden and K. Kerrigan, Cards on the Table?, *N.L.J.*, 2001, p. 735 at 820, discussing cases in which evidence that might have been valuable to the defence was inadvertently destroyed. See also, S. Martin, Lost and Destroyed Evidence: The Search for a Principled Approach to Abuse of Process, *9 E. & P.*, 2005, p. 158.

expert evidence, as well as material calling into question the veracity of a witness. The officer has to prepare a schedule of relevant material and specify on it any “sensitive material”.<sup>151</sup> If there is a large volume of material which has not been examined because it is presumed to be irrelevant, the defence should be alerted to its existence. The investigator has a duty to alert the prosecutor to material which might undermine the case.<sup>152</sup>

The duty of disclosure arises as soon as is reasonably practicable.<sup>153</sup> The prosecutor has a duty to review disclosure schedules to ensure that they are accurate and complete. If the prosecutor considers that because of an omission or because certain material cannot be disclosed, it would be impossible for a fair trial to occur, he or she should discontinue the case.<sup>154</sup>

### Public Interest Immunity (PII)

Material which would be subject to primary disclosure but which is believed to be protected by Public Interest Immunity (PII) is subject to special procedures which have proved very controversial in a number of cases. The investigator will produce, in the course of the investigation, a schedule of sensitive material (e.g. relating to informers and covert human intelligence sources).<sup>155</sup> This information is passed to the prosecutor who must apply to the court for PII if he or she thinks that it is necessary to do so.<sup>156</sup> The procedure for a PII application has undergone some significant developments in recent years. The European Court has repeatedly emphasised the significance in the adversarial trial of the concept of equality of arms whereby the State has an obligation to “gather evidence against and for the accused and to allow access to all relevant material before trial”.<sup>157</sup>

In *R. v. Davis, Johnson and Rowe*, the Court of Appeal<sup>158</sup> adopted a tripartite model for PII applications. In most cases there would be a hearing for PII with the defence being notified of the hearing, the type of material involved, and the defence having an opportunity to

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<sup>151</sup> I.e. that which it is not in the public interest to disclose (para. 6.12 provides examples). The *Attorney-General's Guidelines*, 2005, emphasise that descriptions by disclosure officers in non-sensitive schedules should be detailed, clear and accurate.

<sup>152</sup> Code, para. 7.2.

<sup>153</sup> Criminal Procedure and Investigations Act 1996, s.13. Plotnikoff and Woolfson, 2001, p. 71, found that primary disclosure was served at, or just, after committal in most cases (90% according to the CPS; 60% according to the defence). Many respondents from all areas of the criminal justice system felt that non-sensitive unused material was often withheld from the accused (including 15% of judges being of this opinion).

<sup>154</sup> *Attorney-General's Guidelines*, 2005, para. 41.

<sup>155</sup> D. Corker, The Criminal Procedure Investigations Act 1996 Disclosure Regime; PII and Third Party Disclosure, The Defence Perspective, *Med. Sci. Law*, 2000, p. 116, noting that the effectiveness of the Act is dependant on the conscientiousness of the investigator.

<sup>156</sup> Prosecution counsel should also be meticulous in ensuring that all potential PII material has been reviewed: *R. v. Menga* [1998] Crim. L. R. 58.

<sup>157</sup> EcomHR 14 December 1981, *Jespers v Belgium*; EcHR 16 December 1992, *Edwards v United Kingdom*. On Edwards v. U.K. in the ECtHR see the comment by S. Field and J. Young, Disclosure, Appeals, and Procedural Traditions: *Edwards v. U.K.*, *Crim.L.R.*, 1994, p. 264.

<sup>158</sup> [1993] 1 W.L.R. 613.

make representations. In exceptional cases where even to reveal the application to the defence could be contrary to the public interest, the prosecution would not be obliged to disclose the category of material held and there would be an *ex parte* hearing. In the most extreme cases, the prosecution need not even alert the defence to the proposed *ex parte* hearing.<sup>159</sup>

In determining PII, the judge is not restricted to considering only admissible evidence.<sup>160</sup> The court has an obligation to review whether the level of secrecy from the defence remains necessary.<sup>161</sup> The court is also under a duty throughout the trial to keep under review the decisions made as to PII.<sup>162</sup> The obligations on trial judges with a PII application can be onerous; in one case it was reported that the judge spent 11 days reading material before being able to rule on disclosure.<sup>163</sup>

This tripartite PII scheme was examined by the ECtHR in *Rowe and Davis v. United Kingdom*<sup>164</sup> where the European Court held there was a legitimate need in some cases for public interest immunity certificates to attach to certain prosecution material, but that this category should be narrowly construed. The procedure must involve the judicial decision as to whether the material was strictly necessary as PII. In *Edwards and Lewis v United Kingdom*,<sup>165</sup> information was kept from the defence on PII grounds, but the trier of fact in the case was not a jury but the judge himself. It was held to be unfair that the judge was to determine the case whilst being in possession of information about which the defence were unaware and therefore had no ability to challenge. A possible answer to this problem was again the suggestion of the appointment of special counsel. The House of Lords considered the issue in *R v H and C*,<sup>166</sup> and stated that in appropriate cases the appointment of special counsel may be a necessary step to ensure that the contentions of the prosecution are tested and the interests of the defendant protected.

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<sup>159</sup> There is no need for an *ex parte* application where there was nothing to be said which could not be said in the presence of defence counsel: *R. v. Smith* [1998] 2 Cr.App.R. 1 (adequate records must always be kept of such *ex parte* application hearings).

<sup>160</sup> *R. v. Law, The Times*, August 15, 1996.

<sup>161</sup> The procedure was incorporated in the Crown Court (Criminal Procedure Investigations Act 1996) (Disclosure) Rules 1997 (S.I.1997, No. 698).

<sup>162</sup> s.15. On PII see Plotnikoff and Woolfson, 2001, Chap. 10 recognising that it is difficult to monitor PII work but that in general it was felt by practitioners that the number of applications for PII had risen since 1996. Approximately 36% of PII applications in the cases examined were successful.

<sup>163</sup> *R. v. W.* [1997] 1 Cr.App.R. 166 at 168. In *R. v. W.* the judge had relied on counsel to sift the disputed material and discard the irrelevant before the judge ruled on it. This practice was endorsed by the Court of Appeal.

<sup>164</sup> (2000) 30 E.H.R.R. 1, [2000] Crim.L.R. 584. In *Rowe and Davis v. U.K.*, the European Court did not address the fairness of the *ex parte* procedure under the Criminal Procedure and Investigations Act 1996 and Crown Court (Criminal Procedure and Investigation Act 1996) (Disclosure) Rules 1997. See the subsequent decisions of the English Court of Appeal: *R. v. Davis, Rowe and Johnson (No.2)*, *The Times*, April 24, 2000; (No. 3), 2001, 1 Cr.App.R. 8.

<sup>165</sup> ECtHR 22 July 2003, *Edwards and Lewis v United Kingdom*.

<sup>166</sup> *R v H and C* [2004] U.K.H.L 3.

#### j. Hearsay and anonymity

The admissibility of hearsay in criminal proceedings is governed by the Criminal Justice Act 2003 s 114(1) which enacts a basic rule that hearsay is inadmissible in criminal proceedings unless (a) it can be brought within a statutory exception, including (b) it is admissible under one of the common law exceptions preserved by section 118, (c) all parties to the proceedings agree to it being admissible, or (d) "the court is satisfied that it is in the interests of justice for it to be admissible".

In *Doorsen v Netherlands*<sup>167</sup> the European Court held that arrangements to preserve the anonymity of a witness could in principle be justified where there was an identifiable threat to the life or physical safety of the witness. Domestic courts have a common law power to allow witness anonymity. In *Davis*<sup>168</sup> the Court of Appeal held:

"In our judgment the discretion to permit evidence to be given by witnesses whose identity may not be known to the defendant is now beyond question. The potential disadvantages to the defendant require the court to examine the application for witness anonymity with scrupulous care, to ensure that it is necessary and that the witness is indeed in genuine and justified fear of serious consequences if his true identity became known to the defendant or the defendant's associates. It is in any event elementary that the court should be alert to potential or actual disadvantages faced by the defendant in consequence of any anonymity ruling, and ensure that necessary and appropriate precautions are taken to ensure that the trial itself will be fair. Provided that appropriate safeguards are applied, and the judge is satisfied that a fair trial can take place, it may proceed. If not, he should not permit anonymity. If he does so, and there is a conviction, it is not to be regarded as unsafe simply because the evidence of anonymous witnesses may have been decisive."

The Youth Justice and Criminal Evidence Act 1999 contains a series of special measures which the court can direct in respect of certain witnesses. The measures are: (a) screening the witness from the accused (s. 23); (b) giving evidence by live link (s. 24); (c) ordering the removal of wigs and gowns while the witness gives evidence (s. 25); (d) giving evidence in private, in a sexual case, or where there is a fear that the witness may be intimidated (s. 26); (e) video recording of evidence-in-chief (s. 27); (f) video recording of

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<sup>167</sup> (1996) 22 EHRR 330.

<sup>168</sup> [2006] 1 WLR 3130

cross-examination and re-examination where the evidence-in-chief of the witness has been video recorded (s. 28) (not yet in force); (g) examination through an intermediary in the case of a young or incapacitated witness (s. 29); and (h) provision of aids to communication for a young or incapacitated witness (s. 30).

#### k. The right to an interpreter

Everyone charged with a criminal offence has to have the free assistance of an interpreter if he cannot understand or speak the language used in court. This right is not subject to qualification, even if the accused is subsequently convicted; hence a convicted person cannot be ordered to pay the costs of an interpreter. The right to interpretation extends to all documentary material disclosed before trial; but this does not necessarily mean that all translations must be in written form; in limited circumstances, some oral translation is acceptable.

Every interpreter working in courts and police stations should be registered with the National Register of Public Service Interpreters or the Council for the Advancement of Communication with Deaf People because they offer a minimum and measurable standard of training and quality assurance. If it is not possible to select an interpreter from the National Register or CACDP Directory, the interpreter may be chosen from some other list, for example the Association of Police and Court Interpreters, the Institute of Translation and Interpreting, the British Deaf Association, the Royal National Institute for Deaf People or the Association of Sign Language Interpreters. It is essential that any interpreter selected from another list should meet standards at least equal to those required for registration with NRPSI or CACDP in terms of academic qualifications or proven experience of interpreting within the criminal justice system and professional accountability. The court has an obligation to ensure the quality of interpretation.

#### l. Privacy and surveillance

Part III of the Police Act provides limited regulation of surveillance involving entry on/interference with property, and provides immunity from civil and criminal liability for those acting under its terms of authorisation.<sup>169</sup> The Regulation of Investigatory Powers Act

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<sup>169</sup> Section 92. See generally ss. 91–108.

2000 (RIPA)<sup>170</sup> seeks to introduce a more comprehensive code of surveillance measures including surveillance of internet data, and the types of communication not dealt with in the Police Act 1997: pagers, e-mails, mobile phones, etc. All forms of covert surveillance other than those involving covert entry upon or interference with property or wireless telephony are now regulated by RIPA. The Act aims to ensure compliance with the HRA 1998, and this is apparent from its structure: each authorisation must be based on necessity and proportionality, and the list of specified aims reflects those in Article 8(2).<sup>171</sup>

Part I of the 2000 Act regulates surveillance over post and telecommunications.<sup>172</sup> The Secretary of State is responsible for authorising all intercepts (which can only be requested by senior officers).<sup>173</sup> Part II of RIPA provides a regulatory framework for the use of three types of covert surveillance,<sup>174</sup> namely, directed surveillance, intrusive surveillance and the use and conduct of covert human intelligence sources. The distinction between “directed”,<sup>175</sup> and “intrusive” surveillance<sup>176</sup> is crucial, but many argue that it is flawed. Greater protection is afforded against intrusive surveillance than in respect of directed surveillance; with intrusive surveillance requiring authorisation from the Home Secretary or specified senior officers.<sup>177</sup> Similarly, the purposes for which intrusive surveillance can be granted are more limited, and, in addition to the grounds of national security and economic well being of the country, include that the surveillance be necessary and proportionate.<sup>178</sup> The authorisation procedure for directed surveillance is much less rigorous, being satisfied by a designated person — in the police, a superintendent.

#### m. The role of the media in criminal process

The press are entitled to be present at a criminal trial as part of the cherished principle of open justice, though it does not follow that everything stated in court can be reported. The same rules do not apply to the audio visual media. The press have greater rights to access

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<sup>170</sup> See also the following comprehensive discussions of the provisions: Y. Akdeniz, N. Taylor, and C. Walker, *Regulation of Investigatory Powers Act 2000: Bigbrother.gov.uk: State Surveillance in the Age of Information and Rights*, *Crim LR*, 2001, p. 73; H. Fenwick, *Civil Liberties and Human Rights* (3<sup>rd</sup> ed.), 2002, p. 670-726; C. Harfield and K. Harfield, *Covert Investigation*, 2005.

<sup>171</sup> The supervision of covert police activities is governed by Part IV of RIPA which provides powers for the appointment of interception of communications commissioners. Provision is also made for the appointment of intelligence service commissioners and chief surveillance commissioners and a tribunal to consider complaints (see s.65). This is less satisfactory than a requirement of full judicial supervision in every case, and the prior authorisation of the Commissioners is not required for every act of surveillance.

<sup>172</sup> Prompted by ECtHR 25 June 1997, *Halford v UK*.

<sup>173</sup> RIPA s.6(2).

<sup>174</sup> For a discussion of the meaning of “covert”, see *R v Rosenburg* [2006] Crim LR 540.

<sup>175</sup> S.26(2).

<sup>176</sup> s.26(3)–(5).

<sup>177</sup> See RIPA 2000 (Prescription of Officers, Ranks and Positions) Order 2000 (S.I. 2000 No. 2417).

<sup>178</sup> s.81(3).

the court than the public. For the latter there is no necessity to make access available should the courtroom be full. A decision to sit *in camera* may be challenged (in the case of an inferior court or tribunal) on an application for judicial review or (in the case of a trial on indictment) an appeal to the Court of Appeal under the Criminal Justice Act 1988, s. 159. See, for example, *Re Crook*,<sup>179</sup> where the Court of Appeal gave guidance as to the circumstances in which applications in connection with trials on indictment could properly be heard in chambers. If the public are excluded from a hearing, the Press should be excluded as well.<sup>180</sup>

The Contempt of Court Act 1981 introduced the strict liability rule whereby conduct may be treated as a contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so. The strict liability rule applies only in relation to publications, and for this purpose “publication” includes any speech, writing, or other communication in whatever form, which is addressed to the public at large or any section of the public. The rule applies only to a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.

The media are at risk of falling foul of the strict liability rule once the proceedings become “active” (which includes, for example, the arrest of the suspect). However, in practice the influence of the HRA 1998 has meant that there have been very few instances of the strict liability rule being invoked for information published before the trial begins. During the trial s.4 of the Contempt of Court Act applies and states that a person is not guilty of contempt of court under the strict liability rule in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith.

Whilst the Act restricts publications which cause a “substantial risk of serious prejudice” to the proceedings, the publication of some matters in the trial may be postponed (s.4) or reporting prohibited (s.11). There are various statutory provisions which impose reporting restrictions disobedience to which constitutes a statutory offence.<sup>181</sup> See for example, the Magistrates’ Court Act 1980, s. 8C<sup>182</sup> (pre-trial hearings); *ibid.*, s. 71 (family proceedings);

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<sup>179</sup> (1989) 93 Cr App Rep 17.

<sup>180</sup> *Ibid.*

<sup>181</sup> See generally Borrie and Lowe, pp. 281–333; G. Robertson and A. Nicol, *Media Law* (5th ed.), 2007, Chap. 8; D. Brogarth and C. Walker, 138 *N.L.J.*, 1988, p. 909; *Reporting Restrictions in the Crown Court* (Guidelines endorsed by the Senior Presiding Judge, 30 August 2000); Miller, Chap. 10.

<sup>182</sup> Substituted by the Courts Act 2003, Sch. 3.

the Criminal Justice Act 1987, ss. 11, 11A (applications to the Crown Court for dismissal of charges and preparatory hearings in serious fraud cases); Children and Young Persons Act 1933, ss. 39<sup>183</sup> (children or young persons involved in court proceedings) and 49<sup>184</sup> (youth court and other proceedings<sup>185</sup>); Judicial Proceedings (Regulation of Reports) Act 1926 (indecent matter); Sexual Offences (Amendment) Act 1992<sup>186</sup> (victims of sexual offences); the Youth Justice and Criminal Evidence Act 1999, ss. 44–52 (restrictions on reporting alleged offences involving persons under 18; power to restrict reporting of criminal proceedings involving persons under 18; power to restrict reporting about vulnerable adult witnesses);<sup>187</sup> Criminal Justice Act 2003, s.82 (1),(3) (retry following operation of new power to quash an acquittal under s.76).<sup>188</sup> The position as to reporting proceedings properly held in private is governed by s. 12 of the Administration of Justice Act 1960.<sup>189</sup> If a journalist fails to comply with the various restrictions penalties can be as severe as to include imprisonment, though such instances would be rare.

In terms of what is said by counsel, no claim will lie against counsel in respect of words uttered in the course of any judicial proceedings,<sup>190</sup> even if it is alleged that the words were uttered maliciously and without justification or excuse and even if the words are irrelevant to every issue contested in the proceedings.<sup>191</sup>

#### n. Protection against discrimination

This is guaranteed by Article 14 of the ECHR: The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.<sup>192</sup>

<sup>183</sup> See *R v Tyne Tees Television* (1997) Times, 20 October, CA (Cr D) (fine of £10,000 for contempt of court for breach of s. 39 quashed; summary proceedings should have been taken under s. 39(2) where the maximum fine was £5,000); *R v Crown Court at Manchester, ex p H* [2000] 2 All ER 166 (decision to lift s. 39 order at the end of trial open to judicial review and held to be wrong as the judge had failed to take the possibility of a retry properly into account); cf. *R v Central Criminal Court, ex p W, B and C* [2001] 1 Cr App Rep 7 (discretion to lift restrictions not confined to rare and exceptional circumstances, unlike the position in the youth court). Section 39 is to be amended by the Youth Justice and Criminal Evidence Act 1999, Sch. 2, para. 2, to apply only to civil proceedings.

<sup>184</sup> Substituted by the Criminal Justice and Public Order Act 1994, s. 49 and to be amended by the Youth Justice and Criminal Evidence Act 1999, Sch. 2, para. 3.

<sup>185</sup> See *McKerry v Teesdale and Wear Valley Justices* [2000] Crim LR 594 (partial lifting of reporting restrictions upheld although no place for a 'naming and shaming' approach; the power to lift restrictions as regards proceedings in the youth court should be exercised rarely).

<sup>186</sup> As amended by the Youth Justice and Criminal Evidence Act 1999, Sch. 2, paras. 6–14.

<sup>187</sup> Not yet in force. See D. Birch and R. Leng, *Blackstone's Guide to the Youth Justice and Criminal Evidence Act 1999*, 2000, Chap. 8.

<sup>188</sup> See *Re D (acquitted person: retrial)* [2006] EWCA Crim 733, [2006] 1 WLR 1998.

<sup>189</sup> See *Re F (a minor) (Publication of Information)* [1977] Fam 58; *Re L (a minor) (wardship: freedom of publication)* [1988] 1 All ER 418; *Pickering v Liverpool Daily Post and Echo Newspapers plc* [1991] 2 AC 370, HL; *A-G v Pelling* [2005] EWHC 515, [2006] 1 FLR 93.

<sup>190</sup> *Munster v Lamb* (1883) 11 QBD 588.

<sup>191</sup> For a wider discussion, see, D.A. Ipp, *Lawyers' Duties to the Court*, LQR, 1998, p 63.

<sup>192</sup> In domestic law s.14 has been seen to have effect in sentencing (*R.M. v. U.K.*, 77 A.D.R. 98) and the retention of DNA profiles (*R. (S.) v. Chief Constable of South Yorkshire; R. (Marper) v. Same*[2004] 1 W.L.R. 2196).

### o. Protection against double jeopardy

A basic principle is that no person should be tried twice for the same offence. Consequently “the unwarranted harassment of the accused by multiple prosecutions” is avoided.<sup>193</sup> There are two major exceptions to this principle, namely, where a retrial is available following a “tainted acquittal” and the more recent reform to permit appeals in serious cases where new evidence has emerged. The first exception appears in the Criminal Procedure and Investigation Act 1996<sup>194</sup> which allows for a second prosecution of an acquitted person where the accused has been convicted of an offence of witness or juror intimidation, and the court convicting the accused of that intimidation offence specifies that in its opinion there is a real possibility that but for such intimidation there would not have been an acquittal on the principal trial. The second prosecution for the main offence can only take place when the High Court grants an order quashing the first acquittal if satisfied that it is likely that but for the interference or intimidation the accused would not have been acquitted, that it does not appear to be contrary to the interests of justice to take proceedings again, that the accused has had an opportunity to make representations to the High Court, and that the conviction for intimidation will still stand.

The second exception applies to new evidence retrials as was introduced under the CJA 2003.<sup>195</sup> Schedule 3 includes a list of qualifying offences, all of which are serious. Under s.76 a prosecutor can, with the written consent of the DPP, apply to the Court of Appeal for an order to quash an acquittal for a qualifying offence. The DPP must be satisfied that the evidence is new,<sup>196</sup> that it is in the public interest to proceed; and that the trial does not run counter to the UK’s obligations under the Treaty of the European Union and its equivalent double jeopardy rule.<sup>197</sup> The Court of Appeal will order the retrial if the evidence is new and compelling and that the retrial would be in the interests of justice. This includes a consideration of issues such as any prejudicial publicity about the accused and the length of time since the offence took place.<sup>198</sup>

<sup>193</sup> See M. L. Friedland, *Double Jeopardy*, 1969, p. 3–4.

<sup>194</sup> ss.54–57. For consideration of their compatibility with Protocol 7 see Emmerson and Ashworth, 2001, p.309.

<sup>195</sup> See, Law Commission Consultation Paper No. 156, *Double Jeopardy*, 1999; Law Commission Report No. 267, *Double Jeopardy and Prosecution Appeals*, 2001; I. Dennis, Rethinking Double Jeopardy: Justice and Finality in Criminal Process, *Crim. L.R.*, 2000, p. 933; B. Fitzpatrick, One Idea and Two Myths From The Criminal Justice Bill 2002, *Jo.Crim L.*, 2003, p. 149; P. Roberts, Double Jeopardy Law Reform: a Criminal Justice Commentary, 65 *M.L.R.*, 2002, p. 393;

<sup>196</sup> CJA 2003 s.78.

<sup>197</sup> CJA 2003 s.76(4).

<sup>198</sup> CJA 2003 s.79.

The prosecution can appeal unduly lenient sentences. The Court of Appeal's power has prompted questions about whether the courts will be unduly influenced by public opinion. Only cases from Crown Court may be referred, apart from exceptional other cases.<sup>199</sup> Shute<sup>200</sup> in his review of the power notes that sometimes sentences have been doubled in length by the Court of Appeal.<sup>201</sup>

A previous acquittal before a court of competent jurisdiction in a foreign country is a bar to a subsequent indictment in England and Wales.

### C. Abuse of power and infringement of fundamental rights

Where the strict rules of evidence might operate unfairlyly, a trial judge has various discretionary powers to exclude from the jury's consideration evidence that is both relevant and otherwise admissible.<sup>202</sup> The best known and most frequently exercised power is to be found in section 78 of the Police and Criminal Evidence Act 1984, which provides that the judge:

“may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.”

An example of the use of this power might be in respect of a confession, which, though it was not obtained in circumstances rendering it inadmissible under section 76 of the 1984 Act, was nevertheless procured in breach of the rules governing interrogation in such a way that it would be unfair to admit it.<sup>203</sup> Other examples of the exclusion of evidence under this discretion include evidence obtained in breach of the Codes relating to identification evidence and evidence obtained in breach of other Codes of Practice relating to search and seizure. In addition to the power conferred by section 78,<sup>204</sup> the trial judge may exclude

<sup>199</sup> e.g. indecent assault; s. 14, Offences Against the Person Act 1861.

<sup>200</sup> On the References see S. Shute, Who Passes Unduly Lenient Sentences? How Were They Listed?: A Survey of Attorney-General's Reference Cases, 1989–1997, *Crim. L.R.*, 1999, p. 603.

<sup>201</sup> See also S. Shute, Prosecution Appeals Against Sentence: The First Five Years, 57 *M.L.R.*, 1994, p. 745. Between 1989 and 1997 there were 367 reviews.

<sup>202</sup> See generally R. Pattenden, 1990, Chap. 7.

<sup>203</sup> See, e.g. *R. v. Samuel* [1988] Q.B. 615 in which the accused confessed to robbery after having been denied access to his solicitor in breach of s.58 of the Police and Criminal Evidence Act 1984. The court regarded this denial of “one of the most important and fundamental rights of a citizen” as sufficient justification for exclusion of the confession under s.78.

<sup>204</sup> The section is not applicable in committal proceedings: s.78(3), as inserted by the Criminal Procedure and Investigation Act 1996, s.47. Some confusion has arisen as to the applicability of the section in extradition proceedings, but it is clear that it should apply: *Re Proulx* [2000] Crim. L.R. 997 and commentary. Cf. the dictum of Lord Hoffmann in *R v. Governor of Brixton Prison, ex p. Levin* [1997] A.C. 714.

evidence by virtue of the discretion vested in him or her by the common law.<sup>205</sup> There is also the power to stay proceedings for abuse of process which is exercised in some situations in which the evidence has been obtained in a manner such that it is unfair to try the accused or where he cannot have a fair trial.<sup>206</sup> In *Latif & Shahzad*<sup>207</sup> Lord Steyn acknowledged a “considerable overlap” between the section 78 principles and those applicable to abuse of process.

In *R. v. P.*<sup>208</sup> Lord Hobhouse pointed out that a defendant is not entitled to have unlawfully obtained evidence excluded simply because it has been so obtained. Lord Hobhouse also emphasised that the English courts would not adopt a scheme of mandatory exclusion of evidence obtained in breach of a Convention right.<sup>209</sup> For example, there are numerous examples of evidence being obtained in breach of the right to respect for private life under Art. 8 ECHR but this does not of itself lead to exclusion, it being just one factor to consider in the judicial discretion to exclude evidence under s.78..

If confession evidence is gathered in a manner involving degrading or inhuman treatment to the suspect then PACE s.76 is central to the question of admissibility. Where it is proposed to rely upon a confession made by an accused person, the prosecution must, by virtue of section 76, be able to prove beyond reasonable doubt that it was not obtained either: (a) by oppression of the person who made it; or (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof.<sup>210</sup> The definition of “oppression” covers “inhuman and degrading treatment”.

If there is undue delay in bringing a case then there is a discretion not to proceed and stay the case as an abuse of process. In *S (SP)*<sup>211</sup> the Court of Appeal stated that even where delay is unjustifiable a permanent stay should be the exception rather than the rule and where there is no fault on the part of the prosecution of the complainant a stay will be rare.

#### D. State of emergency and derogation from obligations under human rights treaties

<sup>205</sup> The judge has power at common law to exclude evidence at his or her discretion where the prejudicial effect of prosecution evidence outweighs its probative value, and (in certain cases) where evidence has been improperly obtained, see *R. v. Sang* [1980] A.C. 402.

<sup>206</sup> For an excellent discussion of the narrow approach to s. 78 and comparisons with the abuse of process doctrine see A. Choo and S. Nash, *What's the Matter with Section 78*, *Crim. L.R.*, 1999, p. 729.

<sup>207</sup> [1996] 1 W.L.R. 104, p.109.

<sup>208</sup> [2001] 2 W.L.R. 463.

<sup>209</sup> See *R. v. Khan* [1997] A.C. 587; *Khan v. UK* [2000] Crim. L.R. 508; *P.G. v. UK* [2002] Crim. L.R. 308; *R. v. Button* [2005] EWCA Crim 516.

<sup>210</sup> Police and Criminal Evidence Act 1984, s.76(2).

<sup>211</sup> *R v. S (SP)* [2006] 2 Cr App R 341.

The HRA 1998 does provide for derogations. Designated derogations cease to have effect after five years, unless renewed (s. 16). A designated derogation came into force on 20 December 2001<sup>212</sup> but was repealed on 8 April 2005<sup>213</sup> following the decision of the House of Lords in *A v Secretary of State for the Home Department* (see below). The Prevention of Terrorism Act 2005 makes provision for derogating control orders, but no designated derogation has been brought into force. The appropriate minister (from the relevant Department of State) must review the designated reservation and each of the other designated reservations (if any) and must prepare a report on the result of the review and lay a copy of it before each House of Parliament.

## 5. RECENT LEGAL CHANGES AFFECTING HUMAN RIGHTS<sup>214</sup>

In light of the increasing domestic and global challenges to security and public safety, illustrated most vividly by the terrorist action in the United States in September 2001 and the London Underground Rail bombings in July 2005, a number of legislative changes have been made in the UK which inevitably impact upon human rights. Whilst the threat of terrorism demands a robust legal response it is essential in a democracy that such a response is both proportionate and fuelled by necessity rather than mere desirability or opportunism. The legislative response of the UK includes: the Terrorism Act 2000; the Anti Terrorism Crime and Security Act 2001; the Prevention of Terrorism Act 2005;<sup>215</sup> the Terrorism Act 2006; and the Counter-Terrorism Act 2008. These developments have both increased existing police powers and introduced new offences designed around a broad definition of “terrorism”,<sup>216</sup> which does little in terms of providing a high threshold for the use of somewhat draconian powers.

In general terms, these pieces of legislation have seen developments in the following areas: extended powers of arrest and detention to those suspects reasonably believed to be “terrorists”;<sup>217</sup> increased powers of stop and search which do not require reasonable suspicion;<sup>218</sup> the introduction of control orders;<sup>219</sup> offences directed towards the

<sup>212</sup> Human Rights Act (Amendment No. 2) Order 2001 (SI 2001 No. 4032).

<sup>213</sup> Human Rights Act 1998 (Amendment) Order 2005 (SI 2005 No. 1071).

<sup>214</sup> Generally, see C. Walker, *Terrorism and Criminal Justice: Past, Present and Future*, *Crim L.R.*, 2004, p. 311; C. Walker, *Blackstone's Guide to Anti Terrorism Legislation*, 2009.

<sup>215</sup> See, *Secretary of State for the Home Department v. JJ and others* [2007] UKHL 45 [2008] 1 AC 385.

<sup>216</sup> Terrorism Act 2000 s.1. See also, C. Walker, *The Anti-Terrorism Legislation* (Oxford University Press, 2002); C. Walker, *The Legal Definition of Terrorism in UK Law and Beyond*, *PL*, 2007, p. 331.

<sup>217</sup> Terrorism Act 2000 s.41.

<sup>218</sup> *Ibid* s.44.

encouragement of terrorism; dissemination of terrorist publications;<sup>220</sup> preparation of terrorist acts and terrorist training;<sup>221</sup> and post charge questioning.<sup>222</sup> In 2008 plans to introduce a pre charge detention limit for terrorist suspects of 42 days from the current maximum of 28 days were withdrawn by the Government from the Counter Terrorism Bill following considerable Parliamentary opposition.

Perhaps the most controversial of the terrorist related reforms introduced in recent years was the detention without trial of suspected international terrorists who could not be deported. Deportation was not an option where the suspect might be subjected to treatment contrary to Article 3 of the ECHR if removed to another state. In these cases, the Anti Terrorism Crime and Security Act 2001 provided for orders that such suspects be detained without trial, the legislation derogating from Article 5 on the grounds of national emergency. An appeal against such an order lay to the newly formed Special Immigration Appeal Tribunal which would hold hearings in camera, and where special advocates would appear for the defendant and his or her legal representatives. The legality of this regime was challenged in the landmark case *A v Secretary of State for the Home Department*.<sup>223</sup> The House of Lords accepted the need to derogate from the ECHR but found that the orders were not proportionate in that they did not apply to suspected terrorists other than foreign nationals, and indeed only applied to foreign nationals who did not have a safe country to return to. The decision saw the indefinite detention orders replaced with a system of control orders under the PTA 2005.

Control orders<sup>224</sup> are designed so as to impose necessary obligations on a person to protect members of the public from a risk of terrorism and can include, for example, restrictions on travel, curfews, and restrictions on visitors and on internet use. They usually last for a renewable period of 12 months. Control orders can be either derogating<sup>225</sup> (issued by a court following an application by the Secretary of State), or non-derogating (issued by the Secretary of State and subject to judicial supervision). Only that latter has been used to date. Such an order can be imposed where the Secretary of State considers it necessary to prevent or restrict the involvement of an individual in terrorist activity. The order must be

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<sup>219</sup> Prevention of Terrorism Act 2005 s.1.

<sup>220</sup> Terrorism Act 2006 s.1; See *R v Rahman; R v Mohammed* [2008] EWCA Civ 1465

<sup>221</sup> Terrorism Act 2006 s.5.

<sup>222</sup> Counter Terrorism Act 2008 s.22; C. Walker, Post Charge Questioning of Suspects, *Crim L.R.*, 2008, p. 509.

<sup>223</sup> [2004] UKHL 56; [2005] 2 AC 68.

<sup>224</sup> See, C. Forsyth, Control orders, conditions precedent and compliance with Article 6(1), *C.L.J.*, 2008, p. 1.

<sup>225</sup> *Secretary of State for the Home Department v JJ* [2007] UKHL 45.

permitted by the courts though they can only refuse where the decision taken was “obviously flawed”.<sup>226</sup> Unlike standard court proceedings, evidence may be presented in control order hearings in the absence of the defendant or his legal advisor, and evidence may thus be used which may not satisfy the normal rules on admissibility. In such instances the Attorney General may appoint special counsel to represent the defendant’s interests.<sup>227</sup> Despite representing an improvement upon indefinite detention, control orders are very far reaching in their effect, imposing sanctions upon those not convicted of any offence, and have been strongly criticised by the Parliamentary Joint Human Rights Committee.<sup>228</sup> In 2007, the Joint Committee further commented on the use of special advocates:

“We were concerned to find that the Special Advocates from whom we heard had a number of very serious reservations about the fairness of the system to the people whose interests they are appointed to represent. Indeed, we found their evidence most disquieting, as they portrayed a picture of a system in operation which is very far removed from what we would consider to be anything like a fair procedure. We were left in no doubt by their evidence that proceedings involving special advocates, as currently conducted, fail to afford a ‘substantial measure of procedural justice’”.<sup>229</sup>

There are numerous offences relating to “proscription”. For example, it is an offence to belong to (s.11), support, glorify or display support for (s.12) a proscribed organization.<sup>230</sup> The power to proscribe an organization is a decision of the executive in the hands of the Secretary of State, reviewable by the courts. The decision to proscribe can be based on confidential information, thus making an effective challenge very difficult. Appeals by organizations wishing to be de-proscribed must be made to the Proscribed Organizations Appeal Commission (POAC). The Commission sits in panels of three, one of whom must be a person who holds or has held high judicial office. Its members are appointed by the Lord Chancellor, who also determines its procedural rules which may include limits on the evidence disclosed to the organisation concerned and the exclusion of persons from its proceedings. Proscription places clear limits upon the right to free expression and assembly.

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<sup>226</sup> *Secretary of State for the Home Department v E* [2007] UKHL 47.

<sup>227</sup> *Secretary of State for the Home Department v MB* [2007] UKHL 46; J. Ip *The rise and spread of the Special Advocate*, *PL*, 2008, p. 717.

<sup>228</sup> Joint Human Rights Committee, Counter Terrorism Policy and Human Rights: *Prosecution and Pre Charge Detention*, 24<sup>th</sup> report, session 2005-6, HL 240.

<sup>229</sup> Joint Human Rights Committee, Counter Terrorism Policy and Human Rights: *Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning*, 19<sup>th</sup> report, session 2006-7, HL 157, at para. 192. See also, N. Blake, *Special Advocates in Criminal Trials*, *NLJ*, 2004, p. 233.

<sup>230</sup> On the scope of the list of proscribed organisations see: *R v Z* [2005] UKHL 35.

The Terrorism Act 2000 also introduces enhanced powers of stop and search, allowing the power to be exercised at random within a specified area for a specified period. The type of search that a police officer can carry out under the power is virtually without limit given that he or she is empowered to search for any articles which might be used in connection with terrorism. Given the low visibility of the use of stop and search there is little by way of judicial oversight in the use of the power. Since the introduction of the power its use has increased annually, and overall has seen an increase in use from 6,400 incidences in 2000-1 to 35,800 in 2004-5.

Extended arrest powers are also provided by virtue of s.41. Whilst replicating standard arrest powers where based on a police officer's reasonable suspicion of a crime having been committed, it is the broad interpretation of "terrorist" which is a cause some disquiet. For the purposes of s.41 a terrorist is a person who either (a) has committed an offence under the Act, or (b) has been concerned in the commission, preparation or instigation of acts of terrorism. The interpretation of "been concerned in" could be extraordinarily wide and represents a low threshold for the use of a power which triggers the extended pre trial detention for suspected terrorists. Statistics indicate that the vast majority of suspects arrested under s.41 are subsequently released without charge. Once arrested, the suspect retains the right to the advice of a lawyer and that his or her representative is present at the interview. Suspected terrorists may have access delayed for up to 48 hours.<sup>231</sup> PACE Code H provides a comprehensive set of guidance notes as to the detention conditions which are similar to those experienced by a criminal suspect.

The individual's right to respect for private life is interfered with by the state power to access communications data. The Regulation of Investigatory Powers Act 2000 ss. 49-56 regulate access by investigating authorities to encrypted electronic data. It covers the situation, for example where the police gain access to computer files by a lawful search but are unable to read them because they are encrypted. Where a "person with appropriate permission" within an investigating authority (the police, customs and excise, the intelligence services) has reasonable grounds to believe that "a key to the protected information is in the possession of any person", a disclosure notice may be issued under s. 49(2), requiring that the person in possession disclose the encrypted information or the key

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<sup>231</sup> PACE Code H, Annex B, para. 6.

to gain access to it. The notice may be issued only where disclosure is “necessary” in the interests of, *inter alia*, national security and the prevention or detection of crime.<sup>12</sup> A notice under s. 49 must be issued by a circuit court judge, except where access to the encrypted data has been obtained through the use of a lawful search, interception, surveillance or other warrant which grants the required permission to have access to encrypted electronic data. A person to whom a s. 49 notice has been given will be guilty of an offence (with a maximum penalty of two years’ imprisonment) if he knowingly fails, in accordance with the notice, to make the disclosure required by virtue of the giving of the notice under section 53(1). A person served with a section 49 notice, or every other person who becomes aware of it or of its contents is required to keep secret the giving of the notice, its contents and the things done in pursuance of it. The “tipping-off offence” carries a five year maximum penalty.

A number of terrorist offences potentially offend the principle of the presumption of innocence. These include the use of presumptions against a defendant and the lack of the need to establish mens rea. For certain offences the defendant has the burden of disproving knowledge or intent. For example under the Terrorism Act 2000 s.58(1) A person commits an offence if (a) he collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism, or (b) he possesses a document or record containing information of that kind. Under s.58(3) It is a defence for a person charged with an offence under this section to prove that he had a reasonable excuse for his action or possession. The accused is required to adduce sufficient evidence to raise the issue as a defence (an evidential burden). The defence is satisfied unless the prosecution disproves it to the criminal standard. A number of offences under the Act have similar features. In *Attorney-General's Reference (No.4 of 2002)*<sup>232</sup> the House of Lords read down the suggestion that a number of defences under the Terrorism Act required the defendant to discharge a legal burden and reiterated the usual position that it be an evidential burden only. Dennis has observed that “the law on reverse onuses and Article 6 is not yet settled and further clarification can be expected from both the courts and the legislature”.<sup>233</sup>

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<sup>12</sup> RIPA 2000, s. 49(3). There is also a ‘proportionality’ requirement: RIPA 2000, s. 49(2).

<sup>232</sup> [2005] 1 AC 264.

<sup>233</sup> I. Dennis, *Reverse Onuses and the Presumption of Innocence: In Search of Principle*, *Crim L.R.*, 2005, p. 901.

## 6. CONCLUSION

The Human Rights Act has had a considerable impact upon the criminal process in England and Wales giving rise to significant caselaw and legislation. It must also be recognised that the vast majority of the criminal process satisfies the minimum requirements of the European Convention on Human Rights. However, despite the overarching presence of Article 6 and the right to a fair trial, perhaps a disappointing aspect of the development of the law in recent years has been the appearance that the Government continues to define particular problems as “special” or “exceptional” thus justifying an approach which at best satisfies minimum standards of human rights and at worst fails to live up to international obligations. Examples of this can be clearly seen in the development of extended powers in terrorism legislation, bringing a wide category of individuals to the attention of the state,<sup>234</sup> and impacts upon procedural rights including the power to prevent the suspect’s presence to hear the case against them and the power to ensure that some of the evidence used by the state remains secret. Such detours from the standard criminal process serve to ensure increased complexity but also beg the question whether they are both necessary and proportionate. At this point, international comparisons can be invaluable.

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<sup>234</sup> See, for example, *R. v. Zafar and others* (2008) 2 WLR 1013.