

Due process or crime control? An examination of the limits to the right to silence in criminal proceedings in Ghana

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Summary: *This article examines the extent of participation of accused persons in criminal proceedings in Ghana, particularly in the context of the procedural limits to the right to silence and its associated privilege against self-incrimination. Though normatively set along a libertarian theory that largely insulates the accused from matters of proof, the article finds that the legal regime of the right to silence not only admits of several procedural burden-shifting mechanisms that enjoin accused persons to speak and participate in the proof process, it also permits the drawing of adverse inferences against the accused's exercise of the right to silence in several instances. The analysis extends to a critical evaluation of the benefits of silence in the operational design of the adversarial trial. In that context, it discusses the extent of the accused's beneficial use of the right to silence and finds it an imprudent and legally-uninformed exercise that may deprive the accused person of their right to aggressively partake in the search of facts and evidence and thus of their right to adversarial trial. The article is relevant as it constitutes the first attempt at defining the criminal justice policies underlying the limitations*

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to the right to silence in Ghana. It adds to the existing knowledge on the right to silence in criminal proceedings as it delves into the philosophical underpinnings of the criminal procedure which is increasingly leaning towards a truth-finding and utilitarian ideology away from the core due process theory that generally defines the adversarial criminal procedure.

Key words: *right to silence; adversarial system; criminal proceedings; pre-trial; due process; crime control*

1 Introduction

The enforcement of criminal law in every society is crucial and the pursuit of this political objective is guided by certain procedural values that bar overzealous prosecutorial interferences with accused persons' autonomy. In that regard, the position of the accused person in criminal proceedings in Ghana, as in the case of many common law countries and liberal democracies, has been largely defined by the protection afforded under the due process right to silence and its associated privilege against self-incrimination.¹ The accused generally is protected from compulsion to either answer police interrogations during investigations or to testify in their own proceedings at trial.² It behooves the state to justify every decision to prosecute without compelling the accused to assist in establishing their guilt.³ Despite these procedural benefits of the right to silence, its application in the Ghanaian adversarial criminal proceedings is subject to several procedural limitations, which impose on the accused a number of participatory requirements in the criminal process, both at the trial and pre-trial stages of the proceedings.

This article examines the right to silence in criminal proceedings in Ghana and discusses the various burden-shifting mechanisms that enjoin accused persons' participation in the proof process and also justify the drawing of adverse inferences from the exercise of the right. It hints on the extent to which an unguarded exercise of the right to silence may result in the accused not only failing to zealously partake in the search of facts and evidence but also losing the full benefits of

1 In this article reference to the expression 'accused person' implies 'suspect of crime' in pre-trial proceedings unless otherwise specified in a particular context. Also, reference to the feminine gender implies the masculine.

2 Secs 96 & 97 Evidence Act, NRC 323 of 1975; art 19(10) Constitution of Ghana, 1992.

3 HH Lai 'Liberalism and the criminal trial' (2010) 1 *Singapore Journal of Legal Studies* at 89, quoting MP Zuckert 'The virtuous polity, the accountable polity: Liberty and responsibility in the federalist' (1992) 22 *Publius* 123 124.

their right to adversarial trial. After this introduction, part 2 examines the nature and substance of the right to silence as an expression of the privilege against self-incrimination, through an evaluation of its origins in English legal history and also in the human rights context. While part 3 is an analysis of the normative framework of the right to silence in Ghana, part 4 discusses the application of the right to silence at the pre-trial stage of criminal proceedings in Ghana. Part 5 presents the normative statement and application of the right to silence at trial and assesses the various burden-shifting mechanisms and scope of permissible adverse inferences that underlie the utilitarian character of the right at the trial. Part 6 provides a critical assessment of the beneficial use of the right to silence, particularly in the context of the partisan control of proceedings as a feature of the adversarial operational design. It emphasises the need to shift the focus of the accused from an overreliance on the right to silence towards a more aggressive involvement in the development of facts to enhance the truth-finding objective of the adversarial trial. Part 7 is a conclusion and presents a summary of the discussions.

2 Origins and nature of the right to silence in adversarial criminal proceedings

There is no clear conception of the nature and substantive value of the right to silence in Ghanaian criminal jurisprudence but most of its traits are moulded along its values as it pertains in the history of development of the adversarial criminal trial and influenced by modern human rights law.

Beginning from its common law roots, the right to silence evolved out of the concern that evidence of guilt should be obtained from sources other than the mouth of the accused.⁴ Its origins are embedded in the historical roots of the privilege against self-incrimination, and they are both treated together as guaranteeing the due process protection which insulates the accused or suspect from matters of proof.⁵ The privilege against self-incrimination developed in reaction to the inquisitorial methods of interrogation of accused persons that evolved in the continental system, and which were later

4 This is expressed in the Latin maxim *nemo tenetur prodere seipsum*, which provides that a person is not required to betray themselves.

5 These two procedural guarantees are the two faces of the same concept and are both concerned with the legal significance of silence. See generally S Leshem 'The benefits of a right to silence for the innocent' (2010) 41 *Rand Journal of Economics* 398. The right against self-incrimination is seen as affording the accused a right to silence. See AW Alschuler 'A peculiar privilege in historical perspective: The right to remain silent' (1995) 94 *Michigan Law Revue* 2625.

adopted into the English criminal procedure.⁶ Here, we refer to the *ex officio* oath procedure in continental Europe which served to compel accused persons, particularly political dissidents, to take an oath to answer all questions and to testify against themselves.⁷ The refusal to take the oath attracted a jail term for contempt. Alternatively, the accused could be found guilty *pro confesso* or could suffer an adverse inference of guilt.⁸ This oath procedure was subsequently introduced into the practices of the Star Chamber in England in 1236. However, with the abolition of the Chamber in 1641 following the English revolutions, the *ex officio* procedure fell into desuetude in England. A protectionist ideology arose which established the first principle of English liberty, namely, that no person shall be required to accuse themselves.⁹ Resulting therefrom, it has since behooved the state, in seeking to convict an accused person, to produce the evidence against them by its own independent efforts and without compelling it from their mouth.¹⁰

Today the right to silence is considered under human rights law an essential due process element in criminal proceedings. It must be noted that the criminal trial is the pinnacle of constitutional due process guaranteed through a human rights regime of fair trial rights under article 19 of the Ghanaian Constitution, and required to adjudicate the guilt or innocence of the accused. In that context, a dynamic relationship is established between human rights and criminal law. While the traditional role of human rights is to afford protection from an authoritarian use of the criminal law¹¹ by providing protections against abuses of state power in criminal proceedings which affect the life, liberty, and physical integrity of individuals,¹² criminal trials have progressively become the pivotal

6 CE Moylan & JO Sonsteng 'The privilege against compelled self-incrimination' (1990) 16 *William Mitchell Law Review* 249; FE Inbau 'Self-incrimination – What can an accused person be compelled to do?' (1937) 28 *Journal of Criminal Law and Criminology* 261.

7 See generally Moylan & Sonsteng (n 6); S Greer 'The right to silence: A review of the current debate' (1990) *Modern Law Review* 710; JH Langbein 'The historical origins of the privilege against self-incrimination at common law' (1993-1994) 92 *Michigan Law Review* 1047.

8 NH Alford 'The right to silence' (1970) 79 *Yale Law Journal* 1619-1620. It was a tool in the hands of Inquisitors to deal with heretics and root out religious dissidence.

9 Moylan & Sonsteng (n 6) 257.

10 *Miranda v Arizona* 384 US 460 (1966).

11 F Tulken 'The paradoxical relationship between criminal law and human rights' (2011) 9 *Journal of International Criminal Justice* 579.

12 MC Bassiouni 'Human rights in the context of criminal justice: Identifying international procedural protections and equivalent protections in national constitutions' (1993) 3 *Duke Journal of Comparative and International Law* 326; CJM Safferling 'Can criminal prosecution be the answer to massive human rights violations?' (2004) 5 *German Law Journal* 1472.

place in which to protect human rights.¹³ In that balance, one fundamental principle of the modern criminal trial is to regulate and minimise the pervasive power of the state in prosecution and protect accused persons from abuses of that power through a host of due process guarantees.¹⁴ In that regard, the state's overriding powers of investigation, prosecution and punishment are gauged by the competing autonomy of the accused person through respect for their freedom of choice to participate in the trial especially in matters of proof. As a result, the right to silence becomes the backbone of the adversarial system and reinforces the central notion of a fair trial, not only by giving effect to the presumption of innocence of the accused but also by establishing a proper balance between the individual accused and the state-accuser in the adversarial trial model.¹⁵

Although not expressly set out under international human rights law and, in particular, the International Covenant on Civil and Political Rights (ICCPR),¹⁶ the right to silence is recognised as an expression of the right against self-incrimination which guarantees for every accused a right '[n]ot to be compelled to testify against himself or to confess guilt'.¹⁷ It aims at protecting the accused person against forced admissions and confessions induced by state investigative agencies.¹⁸ It also applies as an evidentiary rule aimed at preserving the truth-finding function of the criminal process.¹⁹ Under international law, it is the European Court of Human Rights that has significantly contributed to the consolidation of the jurisprudence on the modern right to silence.²⁰ Although the European Convention on Human Rights makes no explicit reference to the right to silence, the Court has drawn its distinctive characterisation and substance from the privilege against self-incrimination and set its standard of application under international law.²¹ The European Court has defined

13 Tulkens (n 11) 582; M Pinto 'Awakening the Leviathan through human rights law - How human rights bodies trigger the application of criminal law' (2018) 34 *Utrecht Journal of International and European Law* 164.

14 IH Dennis *The law of evidence* (2010) 198.

15 See, eg, C Theophilopoulos 'The so-called right to silence and the privilege against self-incrimination: Constitutional principle in search of cogent reasons' (2002) 18 *South African Journal on Human Rights* 505.

16 Resolution 2200A (XXI) of 1966.

17 Art 14(3)(g). It is also not expressly provided for under the African Charter on Human and Peoples' Rights but it is expressly set out in Guidelines 4(c) and 9(b) of the Guidelines on Conditions of Arrest, Police Custody and Pre-trial Detention in Africa (2016). See also para N(6)(d) of the Principles and Guidelines on the Right to Fair Trial in Africa on the right against self-incrimination (2003).

18 See General Comment 32 para 41.

19 C Theophilopoulos 'The evidentiary value of adverse inferences from the accused's right to silence' (2002) 15 *South African Journal of Criminal Justice* 321.

20 Its jurisprudence is of a supranational order and has provided authoritative statements on fair trial rights in the human rights context.

21 In the opinion of the Court the privilege against self-incrimination 'is primarily concerned with respecting the will of an accused person to remain silent'. See *Saunders v UK* ECHR (29 November 1996) 69.

the essence of the right as insulating the accused from abusive and coercive inquiries by state authorities and also as defending their choice to decide whether to speak or remain silent during police questioning.²² In a much broader scope than its common law antecedents, the right has been described as consisting of a 'bundle of rights' available to a person being questioned or prosecuted for an alleged crime. It is framed in the nature of immunities from interference with the accused's autonomy both at the trial and pre-trial stages.²³ At pre-trial the right to silence implies that a suspect or a person accused of criminal wrongdoing is under no obligation to account for allegations or respond to police questioning.²⁴ At trial the right to silence shields the accused from all obligations to testify on their own account and prevents the prosecution from having adverse comments made against them for refusing to answer questions and testifying at the trial.²⁵ It reinforces the accused's ability to choose whether to participate in the criminal process and underlies the principle that the suspect or accused has no direct duty to speak.²⁶

The Human Rights Council has recommended the enforcement of this right through the exclusion of evidence improperly or unlawfully obtained in violation of the silence protection.²⁷ Overall, the right to silence as a fair trial guarantee has assumed a critical status as a strategic shield that generally insulates accused persons from all primary obligations of proof.²⁸ It is for the state to secure all relevant evidence by its independent efforts rather than through a forced process of eliciting it from an unwilling accused.²⁹ Within a libertarian ideology that recognises the personal autonomy of citizens and protects them from unjustified interference with their rights by the state,³⁰ the right to remain silent resists any logic that makes 'state control of prosecution synonymous with reliance on the accused as the principal source of the evidence against himself'.³¹

22 *Allan v UK* ECHR (5 February 2003) 44.

23 Lord Mustill in *R v Director of the Serious Fraud Office; Ex Parte Smith* [1993] AC 30. Note that prior to this legal innovation, the United States Supreme Court, USA blazed the trail in its seminal Supreme Court decision in *Miranda v Arizona* (n 10) which held that the 5th amendment privilege against self-incrimination applied to both trial and pre-trial proceedings. Before then, the exclusionary rules for failure to comply with interrogation procedures had not been applied.

24 *Ex Parte Smith* (n 23) 30-32.

25 As above.

26 *Murray v UK* [1996] 22 EHRR 29 [48], *Condon v UK* (2001) 31 EHRR 31 EHRR 1 [59].

27 General Comment 32 para 41.

28 See, eg, T van der Walt 'The right to pre-trial silence as part of the right to a free and fair trial. An overview' (2005) 5 *African Human Rights Law Journal* 71; See *Murray v UK* (n 26) 29.

29 *Miranda* (n 10) 460; *Chambers v Florida* 309 US 235-238 (1940).

30 Lai (n 3) 89.

31 A Goldstein 'The state and the accused: Balance of advantage in criminal procedure' (1960) 69 *Yale Law Journal* 1150.

In this context, it accords with and reinforces the accused's right to be presumed innocent.³² This is the nature of the right to silence as recognised and applied in criminal proceedings in Ghana.

3 Normative framework of the accused's silence rights in Ghana

In Ghana the accused's right to remain silent is a binary proposition of law that combines a right against forced testimony and a privilege not to self-incriminate. The Constitution guarantees for every accused person a right not to be compelled to give evidence at the trial, whether incriminating or not, and thus to remain silent unless they otherwise decide.³³ This constitutional right is further re-enacted as an evidentiary rule governing the procedure of the trial.³⁴ The privilege not to self-incriminate, on the other hand, remains an evidentiary rule that in its normative context guarantees for an accused a right to refuse to disclose any matter or to produce any object or writing capable of incriminating them in any offence, in respect of any proceedings whether criminal or civil.³⁵ The jurisprudential distinction between these two guarantees often is blurred due to the overlapping nature of their operations.³⁶ They have been construed as establishing the two sides of the principle of silence as a procedural right of the accused. They strike at testimonial compulsion by reinforcing the criminal justice system's aversion to processes that either expressly or insidiously compel suspects and accused persons to speak to facts intended to be used against them in the course of the proceedings.³⁷ They provide a distancing mechanism that allows suspects and accused persons to disassociate themselves from prosecution.³⁸ Along a largely normative libertarian ideology, the combined effect of the right to silence and its attendant privilege against self-incrimination is that the prosecution is chiefly obligated to account for the conviction and punishment of the accused who, on the contrary, is shielded from all obligations to assist the state in justifying its allegations or proving guilt against

32 *Woolmington v DPP* (1935) AC 462 481, stating that it is 'like a golden thread through the fabric of the criminal law'.

33 Art 19(10) Constitution of Ghana: 'No person who is tried for a criminal offence shall be compelled to give evidence at the trial.'

34 See Evidence Act sec 96(1): 'The accused in a criminal action shall not be called as a witness and shall not be compelled to testify except on the application of the accused.'

35 Sec 97(1) Evidence Act.

36 Theophilopoulos (n 15) 507.

37 ANE Amissah 'Police and the courts' (1969) *Review of Ghana Law* 31.

38 M Redmayne 'Rethinking the privilege against self-incrimination' (2007) 7 *Oxford Journal of Legal Studies* 209; ANE Amissah *Criminal procedure in Ghana* (1982) 31.

them.³⁹ They have no legal obligation to answer any interrogatories or give any statement to the police or prosecuting authority or to make a particular statement in court that will attest to their guilt.⁴⁰

Despite these procedural benefits for the accused, the protectionary value of silence is not absolute and is balanced against other competing interests of the criminal proceedings, including truth discovery. In that regard, it admits of several penalties and negative inferences that chip away at the intended protection guaranteed for accused persons who exercise their right to silence. In balancing the competing public interests of the criminal proceedings against the due process rights of the accused at trial, the country has adopted standards for determining the extent of a beneficial invocation of the right to silence during the trial. Generally, the jurisprudential value of the right to silence exhibits a mixed ideological approach that fundamentally is dependent on the stage of the criminal proceedings, moving from a full and absolute protection at the pre-trial stage to a limited protection during the trial.

4 Right to silence at the pre-trial stage of the criminal proceedings

The pre-trial stage of criminal proceedings in Ghana follows a largely libertarian philosophy and insulates the accused from all obligations to prove facts and evidence and to cooperate with state agencies in an investigative procedure.⁴¹ Unlike in Nigeria and South Africa, where the right to silence is constitutionally guaranteed in express terms, there are no statutory or constitutional provisions on the pre-trial right to silence in Ghana and there been no clear conception of its sources.⁴² The situation in effect is no different under international

39 See *Phillip Assibit Akpeena v The Republic* [2020] H2/23/2018 (13 February 2020); *Republic v Derrick Armah Kwantreng & Others* [2011] DLHC 7954; *Republic v Appiah Yaw & 2 Others* [17/10/2012] Suit B IND 1/2010, stating that it 'must here be noted that under our law, an accused person is not obliged to testify in his defence. He has the option to remain silent. Now, since the standard of proof required of the prosecution is beyond reasonable doubt, the accused is not supposed to assist the prosecution by filling in the missing gaps in the evidence led by the prosecution.' *Gyabaah v The Republic* [1984-1986] 2 GLR 461; *Patterson Ahenkang & 2 Others v The Republic* [2014] DLCA 4949.

40 See Evidence Act secs 96(3) & 97(2).

41 *R v Derrick Armah Kwantreng & Others* (n 39) referring to *Gyabaah v Republic* (n 39); *R v Iddrisu Iddi v Mbadugu & Others* [2011] DLHC 7951; *Nyarko v the State* [1963] 2 GLR 59.

42 Constitution of the Republic of South Africa, 1996, sec 35(1)(a) expressly provides among the scope of procedural protection that 'everyone who is arrested for allegedly committing an offence has the right to remain silent'. Again, the Constitution of the Federal Republic of Nigeria, 1999, sec 35(2): 'Any person who is arrested or detained shall have the right to remain silent and avoid answering any question until after consultation with a legal practitioner or any person of his choice.'

law where the right to silence is conspicuously missing from the scope of pre-trial protections of the accused. The United Nations (UN) Human Rights Committee, however, has affirmed the application of the right to silence at the pre-trial stage, particularly during police interrogations.⁴³ The Committee in that regard has called on member states of the UN to enact the right to do so among the scope of due process guarantees and ensure that it is respected in practice.⁴⁴

However, in Ghana the process of the recognition of the right is consolidated from a number of judicial and interpretational sources. The first roots of the pre-trial right to silence are traceable to the 'Judges' Rules' of England. These were juridical practices that sought to protect suspects and accused persons from incriminating themselves in the hands of state investigators in pre-trial proceedings at common law. Its 1964 version was adopted and applied by the Ghanaian courts. According to Amissah, there is no legal basis for the practice of these rules in Ghana, '[b]ut they seem to have been accepted by our judges as applicable without much question'.⁴⁵ These rules in essence are a set of guiding principles relating to the admissibility of investigative statements of suspects and accused persons at trial. They allow police interrogation in custody to the extent that the procedure for questioning is devoid of the use of force or inducement by way of oppression, threat, fear of prejudice or hope of advantage as a means to obtain a confession from a suspect or accused person.⁴⁶ The rules more specifically direct the procedure of pre-trial police interrogations and specify the manner of conduct that would cause judges to exercise their discretion to exclude otherwise relevant evidence in the interests of a fair trial.⁴⁷ They primarily stand

43 Concluding Observations: France, UN Doc CCPR/C/FRA/CO/4, Human Rights Committee (2008) para 14; Guideline 5 on Conditions of Arrest, Police Custody and Pre-trial Detention in Africa (2016); Principle 8, para 29 of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2012); in *Imbrioscia v Switzerland* ECHR (24 November 1993) (No 13972/88) para 36. Note, however, that scholars are careful not to announce that the full panoply of right applies to pre-trial proceedings. See W Wu 'Interrogational fairness under the European Convention on Human Rights' (2011) 39 *International Journal of Law, Crime and Justice* 37, referring to SJ Summers *Fair trials: The European criminal procedural tradition and the European Court of Human Rights* (2007); J Jackson 'Reconceptualizing the right to silence as an effective fair trial standard' (2009) 58 *International and Comparative Law Quarterly* 835.

44 Concluding Observations: Algeria, UN Doc CCPR/C/DZA/CO/3, Human Rights Committee (2007) para 18; Concluding Observations: Nepal, UN Doc CCPR/C/NPL/CO/2, Human Rights Committee (2014) para 16.

45 Amissah (n 37). See also Taylor JSC in *Bilson v Apaloo* (1981) GLR 89. This may be contrasted with the position in South Africa that expressly transplanted the Judges' Rules from England into the South African legal system. See LH Hoffman & DT Zeffert *South African law of evidence* (1988) 221.

46 D McBarnet 'The Royal Commission and the judges' rules' (1981) 8 *British Journal of Law and Society* 109.

47 See, eg, TE St Johnson 'Judges' rules and police interrogation in England today' (1966) 57 *Journal of Criminal Law and Criminology and Police Science* 85. See also

for the position that a statement extracted from an accused person by the police may only be admissible at trial if voluntarily given by the accused, without inducement, threat, tricks or force.⁴⁸ They essentially protect suspects and accused persons, in their dealings with state investigative agencies, from forced confessions and from being used as an 'informational resource'. In the manner in which they apply in Ghana, the rules operate on the principle that where a police officer or state investigative agent has reasonable cause or evidence that would justify the arrest and subsequent charging of a suspect with an offence for purposes of prosecution, the accusatory process begins. In that regard, the officer is automatically mandated to caution the suspect that they have an absolute right to remain silent and that they are 'not obliged to say anything in answer to the charge' before questioning them.⁴⁹

Aside its root in English juridical practices, it is the American jurisprudence that has been relied upon to shape the content and application of the pre-trial right to silence in Ghana. The Court of Appeal, then operating as the highest court of the land,⁵⁰ in the landmark case of *Okorie alias Ozuzu v the Republic*⁵¹ persuasively relied on the American case of *Miranda v Arizona*⁵² to consolidate the parameters of the exercise of the pre-trial right to silence in Ghanaian law. The courts in Ghana have since adopted the *Miranda* rules, rights and warnings in the domestic operations of the criminal law.⁵³ Like the Judges' Rules, the *Miranda* rules also prescribe the requirements for custodial interrogation of suspects. They mandate, among others, the issuance of a caution to the suspect at the time of arrest, which informs them of their right to silence and to refuse to answer any questions put during interrogation.⁵⁴

Today the pre-trial right to silence in Ghana has been given constitutional imprimatur as it has been judicially inferred from the

Amissah (n 37). The Rules are directly incorporated into the guidelines for police interrogation in Ghana. See, eg, Rule 2(1)(C) of the *Ghana Police Handbook* (2010).

48 See St Johnson (n 47) 85.

49 See Rules 2 & 3, Judges' Rules (1964). See also Rule 1 of the Police Standing Order 184, Voluntary Statement: Procedure.

50 The Court (Amendment) Decree, NRCD 101 of 1972 abolished the Supreme Court established under the 1969 Constitution. The Supreme Court was only restored as the highest court of the land with the entry into force of the Constitution of Ghana, 1979. See Amissah (n 37) 7.

51 (1974) 2 GLR 278.

52 *Miranda v Arizona* (n 10). This American case largely influenced the position of the Ghanaian law on the right to silence at pre-trial. See *Okorie alias Ozuzu v The Republic* (n 51).

53 *Republic v Akosa* (1975) 2 GLR 406.

54 See *Okorie* (n 51) 278, referring to Chief Justice Warren in *Miranda v Arizona* (n 10) 444 445.

provision of article 19(10) of the Constitution which guarantees for every person undergoing a criminal trial a right not to 'be compelled to give evidence at the trial' whether incriminating or non-incriminating. Though couched in a language that particularly refers to the trial stage of the proceedings, this right against forced testimony has been judicially interpreted to apply during pre-trial custodial interrogation. In *Edmund Addo v The Attorney-General and Inspector-General of Police*⁵⁵ the Court defines the pretrial protection of suspects in police interrogation as follows:

In other words, the presumption of innocence enjoyed by a suspect or accused person coupled with the right not to testify or self-incriminate are some of the essential foundations of fair trial ... in other words, if the suspect or accused would be presumed innocent at trial, then she must equally be presumed innocent at the criminal investigation, if the suspect of accused cannot be compelled to testify at the trial, then she ought not to be compelled to give any statement or information at the criminal investigation (and this is what the caution that is administered to a suspect or accused is about) and if the suspect or accused is not compelled to self-incriminate, then she should not be compelled to disclose any information that she does not voluntarily wish or consent to disclose. It follows in my respectful view that any conduct of the police investigator that has the tendency to undermine the intended and constitutionally required fair trial of the suspect or accused ought not to be countenanced as it amounts to inchoate infringement of the right to fair trial, particularly the presumption of innocence and the right not to self-incriminate.

It is also important to state that the pre-trial right to silence admits of no adverse inference whatsoever from a suspect's failure or refusal to answer questions.⁵⁶ Thus, where a person is suspected of having committed an offence, silence in the face of accusations cannot warrant an imputation of guilt or adverse inference. This position is in line with the legal position advocated by the African Commission on Human and Peoples' Rights (African Commission) on an accused's fair trial rights.⁵⁷ The Ghanaian position, as affirmed by Amissah along the line of this international standard also is to the effect that '[n]o man, innocent or guilty, need reproach himself for keeping silent, for that is what the police have just told him he may do'.⁵⁸ In the terms of this right, it has therefore been held that 'a statement

55 Suit HR/0080/2017 [2017] DLHC 3835 delivered on 30 March 2017 per Anthony K Yeboah J.

56 This common law rule adopted in Ghana originates from the English decision in *R v Leakey* (1943) All ER 665, Tindall JA. See also Viscount Caldecote CJ in *R v Leakey* (1944) KB 86; *Commissioner of Police v Donkor* (1961) GLR 6, per Van Lare JSC.

57 Sec N(6)(d)(ii) of the Principles on the Right to Fair Trial and Legal Assistance in Africa (2003).

58 Amissah (n 37).

made in the presence of an accused person, even upon an occasion which should be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated'.⁵⁹ A number of court decisions have sought to protect this benefit of the aforementioned right to suspects and accused persons at the pre-trial stage. In *Teye alias Bardjo v The Republic*,⁶⁰ where an accused person in a joint criminal venture refused to give a statement when charged with conspiracy to commit murder, the Court of Appeal did not hesitate to set aside his conviction and sentence for invoking his right to silence. The Court reiterated the legal principle that the silence of an accused cannot be regarded and considered a fact inconsistent with their innocence.⁶¹ The only instance in which an adverse inference may be drawn from the accused's silence is where, after the close of the case of the prosecution, a *prima facie* case has been established against the accused. In such a case the conviction of the accused will be grounded on the unrebutted evidence of the prosecution which establishes the guilt of the accused beyond reasonable doubt.⁶²

In *Moro v The Republic*⁶³ the accused was charged with possession of Indian hemp contrary to section 47(1) of the Pharmacy and Drugs Act.⁶⁴ In an appeal following his conviction by the trial court for failure to give his statement to the police, Korsah J emphasised the principle that it is not the law that an accused person ought to put his version of the case to the police during interrogation. Where the accused is not represented by counsel, the exercise of the right to silence rather triggers a procedural obligation for the trial judge to thoroughly investigate the matters and allegations raised against the accused at trial. Again, in *Nsor Ayine v The Republic*⁶⁵ the accused person was charged with the offences of unlawful entry, unlawful damage and stealing contrary to sections 152, 172(1) and 124(1) respectively of the Criminal Offences Act.⁶⁶ The accused gave no incriminating or confession statements and no responses to the charges against him both during police interrogation and in court. On appeal from his conviction by the trial court, Richardson J held that no presumption of guilt could be deduced from the accused's silence. The judge developed the proposition that where the self-represented accused

59 *R v Christie* (1914) AC 545 554 (House of Lords), cited in *Moro v The Republic* (1979) GLR 256 258.

60 1974 2 GLR 438-444.

61 *Teje* (n 60) 444.

62 *Moro* (n 59) 261.

63 As above.

64 Act 64 of 1961.

65 [7/05/2010] Case D15/10/2010, High Court, Richardson J (unreported).

66 Act 29 of 1960.

invokes their right to silence, the duty arose for the trial judge to construe the pre-trial silence as a non-admission of facts. It then behooved the trial judge to rather enquire about the material facts and matters in respect of which the accused person remained silent and to prise the accused's position out of them during the trial.⁶⁷

Again, as far as pre-trial investigations are concerned, police questioning as an aid to law enforcement is considered with critical interest because this is the stage of the proceedings where the suspect is most vulnerable.⁶⁸ Obviously, the passiveness of a suspect in adversarial police questioning fully excludes the possibility of confessions altogether. However, where the suspect offers to speak up, as they commonly do, questions about the adequacy of the procedural safeguards in pre-trial interrogation arise, particularly where claims of involuntary confessions are made. So far, the admissibility of confession statements made by suspects in custodial police interrogations is determined by a 'voluntariness' test which simply validates a confession by reference to the attestation of an independent witness appointed to be present at the time of the confession.⁶⁹ However, the dimensions of a voluntary confession are always difficult to assess especially in an inherently coercive custodial environment. For a lay accused person, an uncoerced interrogation may still be burdensome, mentally exhausting, intimidating and even without the needed understanding of its purpose. Generally, these suspects in an adversarial context are under pressure to speak out of concern that their silence may be considered an act of non-cooperation with state investigative authorities.⁷⁰ In such cases, the use of an independent witness as a means to ascertain the voluntariness or otherwise of a confession appears problematic, and this approach in Ghana needs to be reconsidered. There is no doubt that in this vulnerable state, it is only with the assistance of a lawyer that a suspect can properly assess the consequences of a decision whether or not to answer police interrogation questions. This is the standard approach adopted under the jurisprudence of the European Court of Human Rights, which relies on the presence of a lawyer to ensure not only that the suspect is not coerced into making a confession, but also that their choice to either speak or

67 [7/05/2010] Case D15/10/2010, High Court, Richardson J (unreported).

68 See a similar observation under international law in *Salduz v Turkey* (2008) ECHR 54.

69 Sec 120 (2) Evidence Act. She must be someone who understands the language of the accused and read and understand the language in which the statement is made.

70 This is particularly characteristic in most adversarial jurisdictions. See, eg, D Dixon 'Politics, research and symbolism in criminal justice: The right of silence and the Police and Criminal Evidence Act 1984' (1991) 20 *Anglo-American Law Review* 27; Jackson (n 45).

remain silent is legally and reasonably informed by the advice of counsel.⁷¹

Legal assistance during pre-trial interrogation in this regard may not be mandatory. However, a suspect who desires to voluntarily relinquish the benefit of this guarantee must do so through a knowing and intelligent waiver. Thus, the records must show that the suspect was informed of the dangers and disadvantages of refusing counsel's assistance before proceeding to waive their right to remain silent.⁷² However, in all cases where the suspect invokes their right to counsel before responding to questions, they should not be subject to further questioning until they have been provided with counsel or unless they voluntarily initiate further communication, exchanges, or conversations with the police.⁷³

It is important to also note that despite its protective attributes, the right to silence at the pre-trial stage is subject to one key constitutional limitation informed by the need to protect the overarching public interest.⁷⁴ Parliament has vested the Attorney-General with authority to withdraw suspects' right to silence by subjecting them to forced interrogation in regard to offences affecting the security of the state, such as treason, misprision of treason, treason felony.⁷⁵ Here, the failure to disclose information or produce documents becomes a separate offence, a misdemeanour punishable by a term of imprisonment of up to three years.⁷⁶ The imposition of this requirement upon a suspect aims at obtaining from them information and evidence which for all intents and purposes are intended to be used against them. The constitutional validity as well as the limits of application of this provision in criminal proceedings have not been judicially tested. There is no doubt that this legal provision vests wide inquisitorial powers in the state against the accused throughout the course of the proceedings. Its effects, however, are worrying, and the provision needs to be reconsidered to avoid exposing suspects to unlawful state interference with their rights and autonomy in a liberal state.

71 See *Murray v UK* (n 26) 23; *Salduz v Turkey* (n 68) 54; *Pishchalnikov v Russia* (2009) ECHR 84.

72 This is the standard of waiver of procedural rights as adopted in *Faretta v California* 422 US 835.

73 *Edwards v Arizona* 451 US 477 (1981); *Arizona v Roberson* 486 US 675 (1988).

74 Art 12(2) Constitution of Ghana.

75 Sec 50 Criminal and Other Offences (Procedure) Act 30 of 1960 (COPA).

76 Act 30 sec 53.

5 Silence at the trial stage: Burden-shifting mechanisms and adverse inference

The trial stage of the criminal proceedings is where the constitutional right to silence under article 19(10) asserts its full import as a guarantor of the accused's right not to be compelled to participate in the proceedings or to give evidence at the trial, whether incriminating or not. Even though insulating the accused from the obligation to assist the state in proving guilt in the courtroom,⁷⁷ the procedural model at the trial stage is not purely libertarian. There are a number of procedural burden-shifting mechanisms that require the accused to provide explanations or answers to questions, or to participate in matters of proof and disclose primary facts, either towards assisting the court to discover the factual truth or in a manner that relies on the accused's side of the story or to displace guilt.⁷⁸ The law in that regard expressly permits potentially adverse inferences and comments to be drawn from an accused's refusal to testify.⁷⁹ A fair and objective evaluation of the limits of silence at the trial stage requires a deeper appreciation of these limitations to the right to silence, which largely aim at enhancing the truth-finding objective of the criminal process.

5.1 Limit to silence upon prosecution's establishment of a *prima facie* case

As far the trial stage is concerned, the accused enjoys a full privilege to refuse to disclose a matter or to produce any object or writing that will incriminate them in any offence.⁸⁰ They also have a privilege not to be compelled to testify at the trial unless they voluntarily wish to do so.⁸¹ From a libertarian perspective, there is no law that mandates the accused person to make a defence and give evidence. Section 171 of the Criminal and Other Offences (Procedure) Act (COPA)⁸² mandates the trial judge to call upon the accused to open their defence if at the close of the prosecution a case is made against them

77 *Republic v Appiah Yaw & 2 Others* [17/10/2012] Suit B IND 1/2010. See also *Patterson Ahenkang & 2 Others v The Republic* (n 9): '[T]he accused is not obliged to prove his innocence and naturally he will not assist the prosecution to prove his guilt.' See also *Gyabaah v The Republic* (n 39).

78 See *Commissioner of Police v Antwi* [1961] GLR 408, adopted in line with *Woolmington v DPP* (n 32).

79 Sec 96(4) Evidence Act.

80 Sec 97(1) Evidence Act. Sec 97(4): 'A matter, object or writing will incriminate a person within the meaning of this Decree if it (a) constitutes or (b) forms an essential part of or (c) is taken in connection with other matters already disclosed is a basis for a reasonable inference of a violation of the criminal laws of Ghana.'

81 Sec 96(1) Evidence Act.

82 Act 30 of 1960.

sufficiently to require them to make a defence. The opening of a defence, however, is not obligatory in summary trials as the accused may give evidence or make a statement from the dock only if they so desire.⁸³ This procedure certainly exhibits the extent and significance of the accused's right to silence. In trials on indictment, the right to silence is differently implied. Where the prosecution establishes a case against the accused person to answer, the judge is mandated to inform the accused of their right to give evidence on their own behalf or to make an unsworn statement and to call witnesses in their defence.⁸⁴ Where the accused opts not to call witnesses, the court is directed to call upon them to either give evidence on oath from the witness box or make a statement from the dock, or to simply remain silent.⁸⁵

The right to silence in these cases may entice an accused person into a false sense of security. The evidentiary and procedural regimes of the criminal proceeding allow the court and the prosecution to comment on and draw an adverse inference from an accused's refusal to testify in their own trial,⁸⁶ particularly in instances where the prosecution establishes a *prima facie* case against them. In such cases the accused faces a potential conviction if they fail to open and make a defence to the prosecution's case.⁸⁷ The precise ambit of legitimate judicial comments and adverse inferences from the accused's refusal to testify at trial has not been generally determined. Suffice it to note that an adverse comment is not a gratuitous judicial statement and mere silence is not evidence of culpability.⁸⁸ Guilt is built on the strength of the incriminating evidence on record and on the quality and persuasiveness of the prosecution's arguments. It has thus been judicially held that where an accused in their answer fails to raise a reasonable doubt as to prosecution's case, which is all that the law required of them, or where they exercise their right to remain silent for fear of self-incrimination, the court can go ahead and convict them on the evidence on the basis of the convincing

83 Sec 171(1).

84 Sec 272.

85 Sec 273(1).

86 As above.

87 COPA secs 174(1) & 271 as applicable to summary trials and trials on indictment respectively. At the close of the evidence in support of the charge, if it appears to the court that a case has been made out against the accused sufficiently to require the accused to make a defence, the court shall call on the accused to make a defence and shall remind the accused of the charge and inform the accused of the right of the accused to give evidence personally on oath or to make a statement. See also *State v Ali Kassena* [1962] 1 GLR 148; *Moshie v The Republic* [1977] 1 GLR 290; *Asamoah & Another v Republic* Suit J3/4/2017 (unreported).

88 See *Teye alias Bardjo v The Republic* (n 60).

arguments and evidence of the prosecution only.⁸⁹ It is also worth noting in this regard that silence is never the sole decisive factor. The prosecution's case should be strong enough to meet the statutory evidentiary and persuasive requirements for the finding of guilt so as to call for an answer from the accused.⁹⁰ To that end, even in the silence of the accused, the court is bound to raise and consider all possible defences in favour of the silent accused person before convicting them.⁹¹

5.2 Limit to silence in committal proceedings

The right of the accused person to remain silent bears a distinct connotation in pre-trial committal proceedings in the criminal justice system. A committal proceeding is in the nature of a preliminary hearing before the district magistrate's court and constitutes the first stage of the adjudicatory process in respect of all serious felony trials before the High Court or Circuit Court in Ghana.⁹² The process involves the production of the accused person before the district magistrate whose duty is to conduct an initial factual and evidentiary inquiry into the case.⁹³ The magistrate's role is to determine whether or not the prosecution has a case for which the accused must be made to stand trial before a higher court, particularly the High Court.⁹⁴ The procedure for committal proceedings primarily focuses on a waiver of the accused person's right to silence by getting them to disclose material information and facts in support of their actual and potential defences in a statutory statement. Before taking the statement, the magistrate is enjoined under section 187 of COPA to administer a caution to the accused directed at persuading them to speak up, disclose facts and put forward their version of the story.⁹⁵ The provision underscores the need for the accused person to waive their right to silence and infers potentially negative comments and adverse findings where the accused person opts to remain silent.⁹⁶ It

89 *Moro v The Republic* (n 59) 261; *Republic v Iddrisu Iddi v Mbadugu & 14 Others* (n 41).

90 *R v Petkar and Farquhar* [2003] EWCA Crim 2668; *Murray v DPP* [1994] 1 WLR 1; K Greenawalt 'Silence as a moral and constitutional right' (1981) 23 *William and Mary Law Review* 15 43.

91 See *Lutterodt v Commissioner of Police* [1963] 2 GLR 429 439.

92 See COPA secs 181 & 44(1); MK Amidu 'The right to state-appointed counsel in criminal justice under the Constitution' (1992) *Review of Ghana Law* 166. See COPA sec 2(2).

93 Secs 181 & 44(1) COPA; see Amissah (n 37) 98.

94 Sec 184(4) COPA.

95 COPA Sixth Schedule, Rule 3 (Rules as to Taking of Statement of Accused Person); COPA sec 187.

96 The provision states in material part that 'you are not obliged to say anything but if you have an explanation, it may be in your interest to give it now ... If you do not give an explanation your failure to do so may be the subject of comment by the judge, the prosecution or the defence'.

must also be noted that silence at the committal proceedings removes the consideration of possible defences before the magistrate.

The precise extent of legitimate adverse comment or inference by the judge is unclear. Be that as it may, there may be a procedural advantage in this form of defence disclosure in committal proceedings for the accused. Where in this preliminary hearing the statements or defences of the accused person water down the substance of the prosecution's case as to make it weak in the eyes of the magistrate, they may call for a reconsideration of the decision to prosecute or even simply discharge the accused as there being no case to answer.⁹⁷ In any case, this limit to the right to silence also targets a more utilitarian approach to crime control where the public interest in promoting greater accountability for serious crimes trumps the individual's right to autonomy. Thus, a pre-trial disclosure of all potential defences appears to be a more useful and beneficial requirement for the accused in assessing the overall need for a fair trial.

5.3 Limit to silence in proof of an alibi

By the accused's right to silence and privilege against self-incrimination, they are under no legal obligation to cooperate with or assist the prosecution by announcing any special defence. However, the accused has little option where their defence rests on a plea of alibi. Where an accused relies on an alibi defence, they seek to raise a reasonable doubt on the basis that they were not present at the crime scene when the crime was committed and, therefore, could not have committed the crime. Where an alibi is accepted, the accused is acquitted. It is not the duty of the accused to prove their alibi. It is the prosecution that bears the burden to disprove same when advanced by the accused. However, before the prosecution can be called upon to disprove a defence of alibi, that defence must be properly brought to the notice of the prosecution or there must be evidence of it before the trial court.⁹⁸ The failure to disclose an alibi defence in the prescribed nature and in a timely manner may affect the validity and weight of the defence. The notice should contain such particulars as would enable the prosecution to conduct a proper investigation into the movements of the accused.⁹⁹ These disclosures, however, exclude the full statements that the witnesses

97 COPA Sixth Schedule, Rule 4 (Rules as to Taking of Statement of Accused Person).

98 *Bediako v The Republic* [1976] 1 GLR 43. See COPA sec 131.

99 As above.

are to give.¹⁰⁰ The silence of the accused on a defence of alibi simply translates into its forfeiture. An accused who opts to remain silent and fails to furnish the particulars in the manner required by law stands to lose the benefits of the defence and shall be prevented from adducing evidence thereon at trial.¹⁰¹ Since by its very nature a defence of alibi is especially easy to fabricate, section 131 of COPA requires an accused person to give notice of the defence at the earliest opportunity. It is the accepted position in Ghana that the credibility of an alibi was greatly enhanced or strengthened if it was set up at the moment the accusation was made, and if it was consistently maintained throughout the subsequent proceedings, but if it was raised belatedly during the trial, that was a potential circumstance to lessen the weight and force of the defence.¹⁰² In that regard, the court may draw an adverse inference from the accused's pre-trial silence. A delay in serving the required notice and the inadequate particulars belatedly given are circumstances that are capable of denying the alibi evidence of any reliability or cogency.¹⁰³

5.4 Limit to silence in reverse burden of proof

The common law fiercely resists a burden of proof being placed on the accused person.¹⁰⁴ The citizen is entitled to be presumed innocent until their guilt is proved beyond reasonable doubt by the prosecution.¹⁰⁵ The right to the presumption of innocence remains an inherent part of the rule of law and lies at the heart of the Ghanaian criminal jurisprudence.¹⁰⁶ It reflects society's faith in its people by assuming that they are upright citizens unless proven to be otherwise.¹⁰⁷ It places the burden of proving the guilt of the accused person primarily on the prosecution giving due consideration to all elements of defence.¹⁰⁸ It is worth noting that the presumption of

100 See *Republic v Eugene Baffoe-Bonni & Others* [2018] DLSC 73.

101 Sec. 131(4) COPA; see *Christian Asem Darkeh Alias Sheriff v The Republic* [2019] DLCA 8831.

102 *Forkuo & Others v The Republic* [1997-98] 1 GLR 3.

103 *Forkuo* (n 102) 13.

104 Lord Woolf CJ in *R v Ali & Others* *The Times* 5 September 2000.

105 See Constitution of Ghana art 19(2)(c). See the English principle in *Woolmington v DPP* (n 32) as adopted and applied in Ghana, per Viscount Sankey LC: 'It is the duty of the prosecution to prove the prisoner's guilt ... If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given ... the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained. It is adopted in Ghana.' See *COP v Antwi* (n 78).

106 See Constitution of Ghana art 19(2)(c).

107 *Daniel Boateng v The Republic* [2017] referring to *Okeke v The Republic* (2012) 41 MLRG 61-62. It is generally said that the presumption reflects a society's faith in its citizens that it should assume that they were decent and law-abiding citizens, unless proven to be otherwise. See *R v Oakes* [1986] 11 SR 119-120.

108 Eg *COP v Antwi* (n 78).

innocence does not imply an absolute duty of the prosecution to prove all matters at all times. Parliament's assessment of the need for heightened factual inquiry for the purpose of effective law enforcement accounts for an imposition of a persuasive burden of proof on the accused to adduce evidence and disclose facts in proof of certain legal issues in respect of a number of criminal offences.¹⁰⁹ In such cases, rather than the prosecution proving guilt beyond reasonable doubt, a reverse persuasive burden applies and requires the accused to prove their innocence on the balance of probabilities.¹¹⁰

The reverse burden of proof has received constitutional imprimatur in Ghana under article 19(16) of the Constitution and validates proceedings where the burden to prove particular facts is on the accused. The general principle is that where information or a fact is specifically within the knowledge of the accused person, a negative averment is not to be proved by the prosecution but, on the contrary, the affirmative must be proved by the accused as a matter of defence.¹¹¹ In such instances a paradigmatic shift occurs which moves the accused from their protective shield to a more utilitarian objective enjoining them to disclose their facts or the version of the case as known to them. The scope of application of the reverse burden of proof is not clearly delimited. However, in connection with serious crimes that pose an exigent threat to the state, such as money laundering, the state emphatically puts the burden on the accused to justify the legitimacy of the sources of income and wealth.¹¹²

109 See, eg, Criminal Offences Act 29 of 1960 sec 148(1) on the offence of dishonestly receiving under the doctrine of recent possession. It provides as follows: 'A person is charged with dishonest receiving and is proved to have had in his possession or under his control, anything which is reasonably suspected of having been stolen or unlawfully obtained and he does not give an account, to the satisfaction of the Court, as to how he came by it the property may be presumed to have been stolen or unlawfully obtained and the accused may be presumed guilty of dishonest receiving in the absence of evidence to the contrary.'

110 D Hamer 'The presumption of innocence and reverse burdens: A balancing act' (2007) 66 *Cambridge Law Journal* 142. See also G Williams 'The logic of exceptions' (1988) 47 *Cambridge Law Journal* 264-265; secs 11 & 12 Evidence Act.

111 See also *Salifu & Another v Republic* [1974] 2 GLR 291, quoted by Tank J in *Philip Assibit Akpeena v The Republic* (n 39); *Boakye v Asamoah & Another* [1974] 1 GLR 38; P Huxley 'Reverse proof burdens in criminal proceedings' (2000) 9 *Nottingham Law Journal* 69.

112 Sec 46(2) Anti-Money Laundering Act 749 of 2007: 'In a trial for an offence under this Act, the accused person may be presumed to have unlawfully obtained pecuniary resources or property in the absence of evidence to the contrary if the accused person (a) is in possession of pecuniary resources or a property for which the accused cannot account and which is disproportionate to the accused person's known sources of income; or (b) had at the time of the alleged offence obtained access to personal pecuniary resources or property for which the accused cannot satisfactorily account.'

It is beyond a doubt that the reverse burden is a direct affront to the procedural safeguards of presumption of innocence and privilege against self-incrimination.¹¹³ However, in this case the greater focus lies in promoting the overarching objective of the criminal trial, notably, the need to achieve a fair balance of prosecution between the general interests of the community and the personal rights of the accused.¹¹⁴ Unfortunately, the essence of this principle has been largely misunderstood and the court has been swayed by the due process argument to declare the reverse burden of proof as being unlawful and in violation of the presumption of innocence and attendant burden of proof.¹¹⁵

A fair consideration of the competing interests at the trial between the general public interest and the due process protection of the accused requires a reconsideration of the true value of the reverse burden of proof. Be that as it may, the effect of the reverse burden of proof on the accused in practice is mitigated by the standard of proof, which is lighter than the prosecution's burden¹¹⁶ and requires the accused to establish the key facts of defence on the balance of probabilities by advancing a probable explanation as to their actions in order to establish doubt and escape conviction.¹¹⁷ The validity of the reverse burden in this sense is supported by the primary obligation to prove the ingredients of the offence which continue to fall on the prosecution.¹¹⁸

5.5 The 2018 Practice Direction on disclosures and its effect on the right to silence

In 2018 the then chief Justice of the Republic of Ghana, Sophia Akuffo, introduced a practice direction which for the first time instituted a case management practice in criminal cases for the purpose of achieving trial efficiency.¹¹⁹ While its purpose is to guide the adjudication of criminal cases, with a more active involvement of the judge in managing the pretrial stage of the proceedings, the Practice

113 Hamer (n 110) 142.

114 Hamer (n 110) 147, quoting *Brown v Stott* [2003] 1 AC 704.

115 *The Republic v John Cobbina & Another* (2018) GMJ 127. The judge accepted a submission that the burden cast unto the accused infringed upon the right to the presumed innocent.

116 Sec 11(2) Evidence Act. The prosecution must prove guilt beyond all reasonable doubt.

117 *Asare v The Republic* [1978] GLR 193; *Osae v The Republic* [1980] GLR 446.

118 *R v Lambert Ali and Jordan* *The Times* 5 September 2000.

119 Practice Direction (Disclosure and Case Management in Criminal Proceedings) (2018). It took effect on 1 November 2018. See Judicial Secretary Circular SCR/209 dated 30 October 2018. It must be noted that this Practice Direction is a stopgap measure introduced by the judiciary to last until a more formal prescription is made by the legislature on the matter.

Direction ushered in a requirement for mutual pretrial disclosures that essentially wears down the core foundation of the accused's right to silence. In addition to saddling the prosecution with the burden to disclose to the accused, it enjoins the accused to participate in the construction of the case against them in furtherance of a wider goal of trial efficiency. More specifically, it requires the accused person to make certain reciprocal pretrial disclosures to the prosecution in a manner that dips the effect of the conventional due rights of the accused, particularly the right to silence. First, the accused person assumes the obligation to disclose, before the commencement of the trial, material information about the witnesses they intend to call by providing their names and addresses for the purposes of case management. This is a mere pre-emptive exercise aimed at putting the court in readiness to proceed with the trial at any time, should the court call upon the accused to open their defence at the close of the prosecution's case.¹²⁰

The accused person in principle stands to be convicted of the offences charged if they fail to disclose the required particulars to the prosecution in furtherance of their right to silence. Even more profoundly, the accused person is enjoined to file their witness statements and disclose all documents or materials in their possession and within their knowledge which they intend to use for their defence. These disclosures in respect of the defence are to be made and served on the prosecution before the commencement of trial, at least two clear days before the date fixed for the case management conference.¹²¹ All courts across the country have been mandated by the Chief Justice, under whose hand this direction is issued, to duly comply with the Practice Direction.¹²²

However, it must be noted that the implementation of the defence disclosure requirement under the Practice Direction has not been without controversy. While the move towards an accused's pre-trial disclosure obligation essentially aligns with a policy change from a core adversarial and due process theory to a managerialist ideology, in practice it is denounced as being at odds with the procedural due process values that guarantee total insulation of the accused from matters of proof and the right to silence. Many legal practitioners and members of the bench have pointed to the unconstitutionality of this new policy on an accused's pre-trial disclosure obligations as cutting through the basic constitutional protection rights, particularly

120 Practice Direction (n 119) part 2(3)(b).

121 Practice Direction (n 119) 6.

122 See Circular SCR/209 dated 30 October 2018 from the office of the judicial secretary to all judges and magistrates.

the presumption against self-incrimination, the presumption of innocence and the burden of the prosecution to prove the guilt of the accused beyond all reasonable doubt. It is evident that the new policy on an accused's disclosure was implanted in the Ghanaian criminal procedural regime without the necessary policy foundation. Consequently, the legal effect of the Practice Direction in respect of the defence disclosure has been attenuated in favour of the conventional procedural policy that guarantees the due process rights of the accused, in particular, their right to silence.

6 Rethinking the use of silence in adversarial pre-trial proceedings

It must be noted that despite the protective character of the right to silence to the accused, its value in the context of the procedural safeguards at the pre-trial investigation stage remains somewhat doubtful, particularly when analysed within the operational design of the adversarial criminal trial. It is recalled that as part of its operational assumption, the adversarial system relies on partisan control of investigations and presentation of evidence before a neutral adjudicator.¹²³ Its underlining theory is that truth is best determined, and justice best delivered, through a clash of opposing arguments by the prosecution and the defence.¹²⁴ The prosecution and the accused are equally responsible for the development the facts and for giving shape to their evidence.¹²⁵ Each party also is required to vigorously defend its position from their assumed equal positions.¹²⁶ They are both expected to make their own statements, protect their procedural rights, freedoms and pre-trial legitimate interests. The essence of this right must be properly contextualised as a default makeshift rather than a cure to a gap in procedure. It must be noted that unlike the trial stage that involves a structured procedure dominated by a bundle of fair trial rights, the pre-trial stage

123 Secs 11(3) & 13(2) Evidence Act. See, eg, A Goldstein 'Reflections on two models: Inquisitorial themes in American criminal procedure' (1974) 26 *Stanford Law Review* 1009; WV Caenegem 'Advantages and disadvantages of the adversarial system in criminal proceedings' (1999) 69-70. On the contrary, the inquisitorial system places more emphasis on the pre-trial phase than on the trial and vests the responsibility for the investigations in a neutral figure, usually a judge. See JS Hodgson 'The future of adversarial criminal justice in 21st century Britain' (2009) 35 *North Carolina Journal of International and Commercial Regulation* 321.

124 EE Sward 'Values, ideologies and evolution of the adversary system' (1989) 64 *Indiana Law Journal* 311, noting that this is opposed to the 'communitarian ideal' which is built on the theory of 'cooperation rather than confrontation in resolving society's problems, including disputes among its members'.

125 C Roodt 'A historical perspective on the accusatory and inquisitorial systems' (2004) 10 *Fundamina* 139; Hodgson (n 123) 320.

126 Caenegem (n 123) 79.

of the criminal investigations remains largely under-regulated.¹²⁷ This situation has accounted for the trial system's reliance on the right to silence as the most reliable alternative to avoiding not only the need to develop a full regulatory structure for the investigative phase, but also to police every step of the investigative process to ensure compliance with pre-trial administrative safeguards, particularly the prohibition of the use of force or torture to secure unlawful confessions.¹²⁸ To that end, the tendency of the law has been to balance the rights of the accused against the adverse interests of the investigations led by the prosecution by relieving the accused of any obligations to assist the prosecution in the development of the facts and evidence at the pre-trial stage.¹²⁹ This approach, however, shifts the focus of the investigation from affording the accused a true adversarial role in also developing their own facts and evidence and challenging the prosecution at the pre-trial stage to permitting the accused to remain silent and allowing the prosecution to dominantly marshal all forms of evidence at the trial against them. Securing the accused's silence at the pre-trial stage not only weakens the institutional position of the defence during the investigative stage of the proceedings, which becomes merely reactive at the trial, but also deprives the court of the benefits of a balanced preliminary assessment of the facts at the pre-trial. It is this defect of silence in the adversarial process that today justifies the imposition under the Practice Direction (Disclosures and Case Management in Criminal Proceedings) of an obligation on the accused person to investigate and disclose its facts and evidence during case management conference in a manner that puts all the facts of the case before the court prior to the commencement of the trial.¹³⁰ This new development in the Ghanaian criminal process underlies a call to a zealous participation of the accused in the fact-finding process. The common law development that the prosecution can no longer use the accused as an informational resource imposes an adversarial obligation on the latter to also investigate for themselves the facts of the case in order to enhance their chances of raising doubts in the case of the prosecution. Again, doubt, as far as the burden of the accused in criminal trials is concerned, is not always raised through mere

127 The only pre-trial guarantees relate to the right to be informed of the reason of arrest and of the right to a lawyer of choice (art 14(2)); the right to be brought before court within 48 hours when not released (art 14(3)); and the right to bail when trial cannot be conducted within reasonable time (art 14(4)). The trial stage applies the full scope of art 19.

128 Sec 120 Evidence Act.

129 See similar comments under international criminal courts, S Summers *The European criminal procedural tradition and the European Court of Human Rights* (2007) 161.

130 Practice Direction (n 119) 6.

cross-examination by way of punching holes in prosecution's case.¹³¹ It sometimes requires the accused to investigate the case to discover adverse evidence to the prosecution's case. It thus is paradoxical to insist on the importance of adversarial proceedings and boast of its application while at the same time eulogising the benefits of the right to silence in a way that undermines the participatory role of the accused in an adversarial setting.¹³² In so far as the principle of fair trial is based on institutional adversity between the prosecution and the accused, strict insistence of the right to silence and privilege against self-incrimination inevitably undermines the truth-finding objective and fairness of the proceedings. In as much as the procedural safeguard of silence should not be eliminated to place the accused in a vulnerable position, it is equally important to redress the balance of adversariness in the pre-trial proceedings through the postulation of procedural rules to guide the investigative phase of the proceedings beginning from the stages of arrest and detention until the start of the trial.

7 Conclusion

The right to silence and its corollary privilege against self-incrimination guarantee a good measure of protection for accused persons, as they play a crucial role in protecting the accused from the manipulative hands of an overzealous prosecution. Jointly, these guarantees isolate the accused from all primary obligations to assist the prosecution in establishing guilt and from any form of compulsion seeking to induce to speak or give any type of evidence at the trial, whether incriminating or not. However, the protection afforded under the right to silence is not absolute and, at the trial stage, leans towards a more utilitarian approach which justifies a number of limitations on the scope of application of the right. Despite these benefits of the right for accused persons, the intriguing question remains as to how to align the right to silence with the foundational values of the Ghanaian adversarial system, which primarily relies on aggressive partisan development and control of the facts. The spirit of the adversarial trial right deserves a practical engagement of the accused in the pre-trial stage of investigations and the new approach to managerialism in criminal proceedings which requires an early disclosure of facts and a pre-trial confrontation of evidence as between the accused and the prosecution is a welcome approach. Today, the need to enhance the truth-finding values of the adversarial trial requires a more participatory approach of the accused in fact-

131 Sec 11(3) NRCDC 323.

132 Summers (n 129) 163 citing J Vargha *Die Verteidigung in Strafsachen* (1879) 395.

finding and evidence establishment and, thus, a reconsideration of the operational framework of the right to silence.