A Defence of the Status Quo

M F Adams QC defends an accused person's "right to silence".

Most will be aware that Mr Kevin Waller, erstwhile coroner and magistrate, is now a columnist on legal matters for *The Sydney Morning Herald*, almost invariably espousing a conservative line, spiced with the odd bit of lawyer-bashing. In August, he attacked the rights to silence and to make a statement from the dock. Such attacks have become more frequent and from more eminent sources. Unfortunately, they frequently reflect not so much a concern with justice as merely a desire for efficiency.

In the *Herald* of 13 August 1992, Mr Waller, asserting concern about delays in trials, advocated the abolition of the right to silence and the imposition of an obligation to answer questions posed by a police officer investigating a crime. There seemed to be no consciousness at all of the extent to which such a change constituted an attack on some of our most valued conceptions of justice.

One of the most obvious results of his proposal would be that trial in a police station by police officers would, in effect, be substituted for trial by judge and jury in open court. We can all see that a great deal of time would be saved. But even in an apathetic democracy such as ours, with a Government largely controlled by a burgeoning bureaucracy, Parliament almost completely emasculated by party discipline, the media dominated by a few businessmen and most journalists seemingly combining cynicism, ignorance and self-importance in fairly equal proportions, I do not believe that we have yet reached the stage where most people would accept this as consistent with justice.

It is, of course, not a question of whether the police are honest, but whether we are committed to the rule of law as a fundamental value of our social order. Nor is it so much a question of what the individual in the dock deserves (although that is important) but what we must do in order to maintain our own self-espect as a moral (I hesitate to say Judao-Christian) civilisation.

At all events, of course, it is not true that in every case a lawyer would or should advise a client to remain silent. But, even if it were, is it not perfectly reasonable that a citizen might wish to give his account, not in a police cell, but to a jury of his or her fellow-citizens? Just as real a problem is that, very often, at the time a suspect is questioned, not all the relevant facts are known and false assumptions, mistakes of description, of chronology, of ambiguity and of expression may well lead to a quite unjustified firming or even "proof" of wrong suspicions. Even where a trial follows it is sometimes difficult, if not impossible, to correct this and the terrible consequence of the conviction of an innocent person may result. But I suppose that those who support Mr Waller would regard such a result, if it happened rarely (and how would we know?), as just one of those unfortunate incidents that any efficient administrator would just have to put up with. One recalls, with a chill, Lord Denning's advocacy of capital punishment upon the ground that it renders later inquiry about innocence unlikely.

I find myself quite baffled by attacks on the statement from the dock. One must accept that its existence depends, like many valuable social facts, upon an accident of history. But surely it is simply right that a person who is charged with a serious criminal offence should be able to tell her or his side of the case by whatever means, consistent with the due and dignified administration of justice, she or he thinks proper. I have no doubt that juries are quite capable of assessing the weight of such an account as contrasted with evidence that has been tested, and the fact that it is not tested is pointed out to them. I oppose comment on the opportunity to give evidence upon the ground, chiefly, that it deflects attention from the critical issue, which is whether the prosecution has proved its case beyond reasonable doubt. After all, people completely innocent might well doubt their ability to survive a cross-examination and fear quite justifiably that he may not be able to do their case justice. The practical problems involved in attempting to show a jury why, in the particular case, no adverse inference should be drawn against the accused for having chosen to make a statement are, I think, too great to allow comment to be made.

The suggestion, at all events, that abolition of the right to make a statement would shorten trials is self-evidently absurd. What really underlies this proposal is a distrust of juries and a refusal to take seriously the presumption of innocence. ❑