chapter 1

Theoretical Approaches to Criminal Procedure

1.1 Introduction

In England and Wales, if a person reports a crime, the police may commence an official investigation into the alleged offence. This represents the formal start of the criminal justice process and may result in a citizen being arrested; detained; interrogated; charged; bailed; tried and convicted. The ramifications of an allegation of and conviction for criminal conduct are significant – they can have a life-changing impact on suspects and defendants, whether they are innocent or guilty. Accordingly, the criminal justice process requires a clear and robust framework of procedural rules that define acceptable practice by the police, the courts and lawyers. Without these rules, the process may be open to abuse and distortion, endangering the individual rights of those drawn into the system, as well as those victims of crime seeking justice for wrongs against them. For example, without the restraint of procedural rules, the police could arrest anyone they wished, and treat them in any way they desired, without the need to justify or moderate their behaviour. This would not only breach the individual rights of the accused person but lead to mistakes, such as miscarriages of justice (see **Chapter 16**). Any society claiming to respect the rule of law[1] would rightly condemn such conduct and recognise the necessity of rules of criminal procedure which restrain and regulate. In turn, this would prevent abuse of power by officials of the state, ensure each suspect and defendant is treated equally, fairly and proportionately, and ultimately achieve a just and accurate outcome.

This chapter considers:

- theoretical approaches to traditional models of criminal procedure;
- the purpose of the criminal trial; and
- the complex role the judiciary plays in adversarial and inquisitorial approaches.

This framework will be applied to later topics as a method of understanding theoretical approaches to criminal procedure.

1.2 An overview of legal traditions

These vital rules of criminal procedure have been developed by centuries of law and practice in the various legal systems of the world, and will have been shaped by the legal 'tradition' within which that jurisdiction falls. A legal 'tradition' is essentially a collective description for the structures, institutions and methods which characterise how a jurisdiction 'does' justice. It is widely accepted that the criminal justice process of a jurisdiction, and the rules governing it, will fall under one of two broad legal traditions: adversarialism or inquisitorialism. These are historic, ideological models

1 In its simplest form, the rule of law states that everyone is equal before and subject to the law. If everyone is treated with equality, the administration of law should be fair, effective and transparent.

that outline the general approach to administering criminal justice in any given jurisdiction. As a general rule, the adversarial tradition can be found in common law jurisdictions, which can be broadly described as systems in which laws are interpreted by judges and created by the legislature. Examples of common law jurisdictions include England and Wales, the United States of America, Australia, and many Commonwealth countries. The inquisitorial tradition is best represented by civil law systems, which generally have a comprehensive, constantly updated legal code. Here, the role of the judge is to establish the facts of the case and apply the appropriate section of the code. It has been said that the decision of the judge is less crucial in shaping the legal landscape. It is those who draft and interpret the code that carry the greater responsibility. Civil law jurisdictions vastly outnumber their common law counterparts, and examples of those who use the civil law approach include much of continental Europe, for example France and Italy. It must be emphasised that these are theoretical or ideal models and do not entirely reflect the reality of criminal procedure. As such, one is unlikely to find a completely adversarial or completely inquisitorial model operating anywhere in the world. This chapter aims to unpick and critique the various components and functions of these different approaches.

1.2.1 Adversarialism

Adversarialism might best be described as a battle: a competition between two sides, with the 'winner' judged by a neutral third party. This is governed by a set of regulations, ensuring that the process is fair and that neither side can 'cheat' each other or those deciding the outcome. Adversarial criminal procedure therefore represents the rules of the game. This is best exemplified in England and Wales; reporting in 1993, the Royal Commission on Criminal Justice described the adversarial legal system of England and Wales in the following terms:

> [A] system which has the judge as an umpire, who leaves the presentation of the case to the parties (prosecution and defence) on each side. They separately prepare their case and call, examine and cross-examine their witnesses.[2]

The adversarial process in England and Wales could therefore be characterised as 'legally regulated debate between [two] parties with the trial as its centrepiece'.[3] The two sides (usually referred to as 'parties') gather and select the evidence before orally presenting their case – their version of the facts – at trial. Traditional adversarial ideology is centred on the notion that 'the truth is best discovered by powerful statements on each side of the argument'.[4] By pitting contrasting arguments against each other and testing the supporting evidence, a more accurate picture of the truth can be obtained. In line with this 'competing truths' theory, the parties are responsible for gathering their evidence and presenting their case in a light that best favours their desired result – a conviction for the prosecution or an acquittal for the defence.[5] This of course raises questions about how likely it is that the truth (in short, an objective,

2 Royal Commission on Criminal Justice, *Report* (London: HMSO, 1993), para 10.

3 Hodgson, J, 'Conceptions of the Trial in Inquisitorial and Adversarial Procedure' in A Duff et al (eds), *The Trial on Trial Volume 1: Truth and Due Process*, 1st edn (Oxford: Hart, 2004), 224.

4 As per Lord Eldon LC in *ex parte Lloyd* (1822) Mont 70 at 72.

5 Although in certain instances, the defence will not seek an acquittal but a conviction on a lesser charge. For example, in the case of homicide, the defence may attempt to seek a conviction of involuntary manslaughter as opposed to murder.

factual account of reality) will be discovered in an adversarial process – and this will be discussed below.

In the adversarial tradition, those who decide on guilt and innocence (hereafter, decision-makers) are only responsible for adjudication and do not possess any investigative function. Professor Michael Zander described the traditional role of the adversarial judge as 'a passive umpire, as in a tennis match …',[6] who considers the evidence offered by both parties, ensures that the rules of the process are adhered to, and decides on the outcome. In order to maintain a passive and neutral stance, decision- makers should not conduct an active role in proceedings. If they were to become overtly active, they would run the risk of compromising the ability to 'neutrally evaluate the adversaries' presentations'.[7] Pre-trial preparation by the parties is at least partially motivated by self-interest rather than public interest, geared towards presenting favourable evidence in the best possible light in order to 'win' the contest. As such, decision-makers must guard against this by ensuring that the desire to win does not outstrip the search for the truth. The rules of the game – the procedural requirements for building and presenting a case – are designed to restrain each party's natural desire to achieve victory (whether by legitimate or illegitimate means). Therefore, decision- makers are charged with both enforcing the rules as well as judging the case.

A key feature of an archetypal adversarial system is the principle of equality of arms – that is, defendants are adequately equipped with tools to defend themselves from the 'oppressive state', an entity with significantly more power and influence than any single citizen, thus levelling the playing field. A primary example would be the right to refuse to testify or to cooperate (referred to as the right to silence).[8] Another would be the right to legal representation – a lawyer who can make sense of the accusations made by the state and help the accused to defend against them. Such tools inevitably hamper the ability of the prosecution to secure convictions – in effect, they present obstacles which must be overcome. In this sense, the adversarial model favours the sacrifice of a swift and efficient criminal process in order to safeguard the individual rights of an accused person. A key justification for this approach is the avoidance of mistakes and miscarriages of justice; if an accused is compelled to give evidence or tried without an advocate to protect them, innocent persons may be convicted. As such, equality of arms operates to enhance the integrity of the deliberations.[9] In summary, the adversarial model hinges on the concept of balance by ensuring that the parties are equally able to make their case, and that decision-makers are able to draw fair, accurate and objective conclusions.

1.2.2 Inquisitorialism

Both the adversarial and inquisitorial models seek to ascertain 'the truth', but employ vastly different mechanisms for deciding upon it. The inquisitorial model does not conceptualise the process in terms of 'sides' or 'competition'; as the name suggests, the central focus of the process is managed inquiry. The responsibility for investigating and adjudicating a criminal case lies not with any partisan prosecution or defence, but with

6 Zander, M, *Cases and Materials on the English Legal System*, 10th edn (Cambridge: Cambridge University Press, 2007).

7 Landsman, S, 'The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice has Affected Adjudication in American Courts' (1980) *Buffalo Law Review* 487–529 at 491.

8 See **Chapter 6**.

9 Fuller, L, 'The Forms and Limits of Adjudication' (1978) 92 *Harv LR* 353 at 501.

a central judicial authority whose role is to act in the wider public interest in the search for the truth.[10] The rationale behind this is that, in building and presenting a case, its integrity will inevitably be corrupted by the adversarial desire to win. For example, it may be in the best interests of each party to conceal the truth if it does not serve their goals. Bias and subjectivity are unavoidable in an adversarial contest; indeed, the adversarial model actively encourages this with its 'competing truths' paradigm. In contrast, inquisitorialism regards 'the truth' as an objective concept which will only be obscured by allowing parties to control the flow of evidence and information to decision-makers. Inquisitorial tradition does not share the trust placed in adversarial parties to investigate and present a case fairly, instead relying on 'the integrity and capacity of public officials to pursue "the truth", unprompted by party allegiances'.[11] The state, as represented by the judiciary, is therefore best equipped to carry out the investigation into an alleged offence. In theory, the person who conducts the pre-trial investigation is a member of the judiciary, and it is the judiciary that will investigate all evidence and information, both exculpatory and inculpatory, and build a case on this basis. Once completed, the dossier of evidence will be exposed to external scrutiny.

In general, pre-trial investigation of the most serious offences under an inquisitorial model will be the responsibility of an examining magistrate. However, in most other cases, the police, under the supervision of the prosecutor, will conduct the pre-trial investigation. This is therefore not dissimilar to adversarialism. A key point to remember here is that in the inquisitorial approach, the prosecutor and judge are an overlapping class of state official, and the prosecutor will often follow the orders of the judiciary when undertaking the pre-trial investigation. This is in contrast to the adversarial approach where the bodies are independent of one other and neither has any role to play in the pre-trial investigation.

Inquisitorial theory holds that the best person equipped to conduct the investigation is the benevolent state[12] and that judicial supervision is a safeguard from abuse of power by state officials. The pre-trial investigation by the judiciary culminates in the creation of a dossier of evidence; it is this dossier and pre-trial investigation that is the centrepiece of the inquisitorial model.[13] The dossier is passed to a judge in preparation for trial, and it will be for the judge to decide on which witnesses to call and to conduct any examination of the witnesses. The role of adversarial parties is minimal – as such, a converse hierarchy of power exists, in which both parties play a subsidiary role to the proactive judge. There is greater emphasis on the written dossier than on the oral competition of the trial. Writing in 1977, Goldstein and Marcus claimed that uncontested inquisitorial trials merely served as perfunctory proceedings, and often, in the French Correctional Court, not a single corroborating witness was called. The accused made his or her statement, the lawyers made their speeches and sentencing swiftly followed.[14] Essentially, the public trial element of the inquisitorial model is a summary or evaluation of the evidence in the dossier, rather than a forum for oral contest.[15]

10 See Ellison, L, 'The Protection of Vulnerable Witnesses in Court: An Anglo-Dutch Comparison' (1999) 3 *International Journal of Evidence and Proof* 29–43.

11 *Ibid*.

12 Simon, WH, 'The Ideology of Advocacy: Procedural Justice and Professional Ethics' (1978) *Wis LR* (29) at 43

13 Moohr, GS, 'Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model' (2004) *Buffalo Law Review*, Vol 8 at 193.

14 Goldstein, AS and Marcus, M, 'The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy and Germany', 87 *Yale Law Journal* 240 at 268.

1.2.3 A brief critique of ideological approaches to criminal justice

Duff believes that the models are over-simplified and that no legal system falls purely into the adversarial or inquisitorial bracket.[16] Most adversarial systems now impose limitations on 'ambush defences' (the ability to surprise the prosecution at trial), and most inquisitorial systems allow the defence to confront the prosecution witnesses in person, which traditionally would not occur. Both the adversarial and inquisitorial models reflect the ideology of their respective society's stance on the allocation of power. This is illustrated by the fact that the adversarial process attaches less weight to the goal of fact-finding.[17] This is not because adversarial ideology values fact-finding as unimportant but because it acknowledges the importance of other aims, such as the protection of the citizen from the over-zealous state.[18] Various safeguards are designed to prohibit the state from abusing its powers. The use of lay people (unqualified volunteers) in the criminal justice process and the neutral passivity of decision-makers are examples of the protections afforded to the accused against oppressive or abusive behaviour from state officials. This ethos is also evident in the investigative stage of an adversarial model; for example limitations on the duration of time the suspect can remain in police detention without charge, the right to silence and the right to legal representation. While the adversarial model is grounded in the belief that state power must be checked, the inquisitorial model believes that the state is best equipped to spearhead the investigation of allegations of criminal behaviour, with state officials granted primary responsibility for doing so and adversarial safeguards minimised. For example, legal representation plays a reduced role under the inquisitorial model, characterised as an obstacle to the discovery of truth. It is the duty of the inquisitorial defence lawyer merely to ensure that the state's representatives adhere to the procedural rules of investigation. The defence lawyer can suggest certain avenues of investigation that benefit the case of the accused, but cannot conduct any independent inquiry. In short, legal representation contributes but does not lead; parties to the case have little power in comparison to the judicial authority. The dossier might be described as a safeguard, in that 'it not only forms the basis of the trial, but also a coherent system of supervision and control'.[19] Yet, one might argue that the emphasis placed on this central document – which is not tested and scrutinised in the same manner as adversarial evidence – typifies the trust in the state to investigate fairly and thoroughly. As such, the location of power and control in the criminal justice process is quite different under each model.

As theoretical models, adversarialism and inquisitorialism represent the most common ways of understanding and explaining ways of 'doing' criminal procedure, but these approaches are not universally accepted. Whilst this chapter will not examine alternative frameworks in great detail, it is appropriate here to briefly mention them. Damaska[20] does not reject the models, but believes that their intricate workings can be

15 Jorg, N, Field, S and Brants, C, 'Are Inquisitorial and Adversarial Systems Converging?' in *Criminal Justice in Europe: A Comparative Study* (Oxford: Clarendon Press, 1995), 50.

16 Duff, P, 'Changing Conceptions of the Scottish Criminal Trial: The Duty to Agree Uncontroversial Evidence' in A Duff et al (eds), *The Trial on Trial Volume 1: Truth and Due Process* (Oxford: Hart, 2004), 30.

17 Sanders, A and Young, R, *Criminal Justice*, 3rd edn (Oxford: Oxford University Press, 2007), 14.

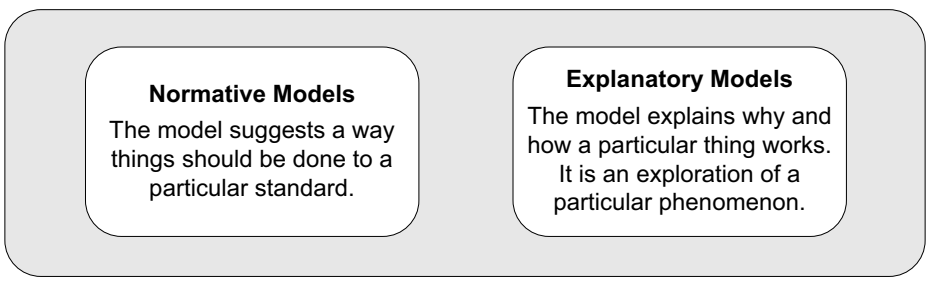
18 *Ibid* 48.

19 See further Hodgson (n 3).

20 For more on Damaska's approach to theoretical procedure, see Damaska, MR, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press, 1986).

better understood if they are explanatory rather than normative. The former model is a useful way to explain how a particular procedural method works. A normative approach – whilst useful for understanding the underlying principles and ideals that shape a system – may have less practical value because it is suggestive of how things *should* be done, rather than how they are *actually* done (see figure below).

We stated earlier that using the adversarial and inquisitorial lens to analyse procedure is not universally accepted. Summers challenges and rejects the established opinion that criminal procedure in Europe should be analysed through the dichotomy of adversarialism and inquisitorialism, arguing that, since the 19th century, criminal procedure in Europe can be described as a single tradition.[21] She suggests that one can 'identify a common European concept of criminal procedure',[22] and she details the 'emerging European discourse'[23] amongst jurists in the 19th century which describes the notion of the 'accusatorial trinity' (the defence, prosecution and impartial judge) as the dominant procedural model.[24] Summers argues that the European Court of Human Rights (ECtHR) has neglected this European tradition but that the jurisprudence of the Court has been influenced by developments stemming from the 19th century. She argues that by discarding the traditional adversarial and inquisitorial models and devoting more consideration to the European model, the ECtHR will develop a more coherent and consistent vision of the rights that are outlined in Article 6 of the European Convention on Human Rights (ECHR).[25]



Critique aside,[26] the two traditional models will be used as the primary lens for observing and examining the criminal justice process for the purposes of this book; we believe that the approaches offer the student the greatest clarity when dealing with complex, procedural models. Ultimately, the models represent a useful analytical tool with which to examine the historical development, current state and potential transformation of the criminal justice process in England and Wales. The models are advantageous in that they are easy to understand, and they remain relevant in contextualising any changes in broader patterns of reform; that is, instead of viewing

21 Summers, S, *Fair Trials and Procedural Tradition in Europe* (Oxford: Hart Publishing, 2007), 29.

22 *Ibid* xix.

23 *Ibid* 22.

24 *Ibid* 27.

25 See *ibid* 29, although Field believes that Summers' finding of a single European tradition is stimulating but flawed. He believes that it is difficult to bear a label of 'European' where there is very little mention of developments in legislation or intellectual thought in Southern Europe or Scandinavia. For an in-depth analysis of Field's rejection of Summers' model, see Field, S, 'Fair Trials and Procedural Tradition in Europe' (2009) *Oxford Journal of Legal Studies* 29(2), 365–87.

26 For further reading, see Duff, P, 'Disclosure in Scottish criminal procedure: another step in an inquisitorial direction?' (2007) *International Journal of Evidence and Proof* 11(3), 153–80.

changes as isolated incidents, they can be viewed as expressions of emerging trends. The models can also help identify any potential tension or conflict that changes create within the traditional ideology. Ultimately, the models can be used as a tool to examine the ways other jurisdictions 'do' criminal procedure.

1.3 The purpose(s) of the criminal trial

As the apex of the theoretical criminal process, it is useful to examine why exactly we use this method of examining and judging criminal behaviour. Identifying a single purpose of the criminal trial has proven to be quite troublesome. It is commonly assumed to be the determination of the guilt or innocence of defendants.[27] However, if the nature of the trial is deconstructed, it becomes clear that it aims to attain several goals, including:

- truth;
- argument;
- catharsis; and
- finality

1.3.1 Truth

Adversarial ideology and practice arguably suggest that the adversarial trial is less committed to the discovery of the truth than its inquisitorial counterpart.[28] Each party scrutinises the facets of their counterpart's account, exposing any weaknesses discovered during the public forum of the trial. Advocates endeavour to 'reveal to the tribunal which witnesses can be relied upon and which can be cast aside'.[29] Whilst the search for the truth is central to the adversarial criminal justice process, this is balanced against other considerations, for example maintaining the integrity of the system. In England and Wales, the prosecution will only succeed if it can present a case which convinces decision-makers (normally, magistrates or a jury) that the defendant is guilty of the alleged offence to the requisite standard (in the criminal trial, beyond all reasonable doubt). Procedural safeguards (referred to at the outset of this chapter) not only protect the defendant but also help maintain the integrity of the system. However, these safeguards may also inhibit the search for the truth; for example, if evidence was obtained inappropriately, it should be excluded from trial. This protects the defendant from any abuse of state power and seeks to ensure that evidence is legitimate and reliable. Nonetheless, this may also render a truthful confession inadmissible due to the method by which it was extracted from the defendant. As such, the search for the truth, as a purpose of the trial, is subjugated to another consideration (protection of individual fair trial rights).

Other factors may come into play. The quality of the advocate may indirectly hamper the search for the truth. The prosecution and defence lawyers present their version of an alleged incident, attempting to persuade the jury or the magistrate that their version is the 'truth'. The success of the parties may be as dependent on the skill, knowledge and experience of the advocate presenting the case as it is on the strength of the evidence. The art of advocacy is 'a highly refined one whose very best practitioners may

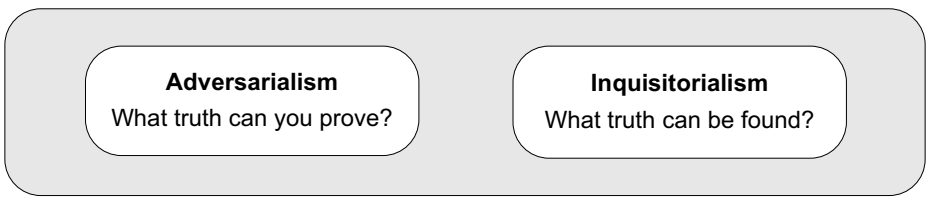
27 See, for example, the overriding objective of the Criminal Procedure Rules.

28 Because the model insists that both inculpatory and exculpatory evidence are included in the dossier.

29 Solley, S, 'The Role of the Advocate' in M McConville and G Wilson (eds), *The Handbook of the Criminal Justice Process* (Oxford: Oxford University Press, 2002), 312.

manage to persuade in the face of facts',[30] whereas a more inexperienced, less eloquent practitioner may fail to convince that his or her version of events is the truth – even if the facts suggest this is so. Furthermore, the quality and temperament of the witnesses may affect the search for the truth. If the witness is inarticulate or unwilling to answer questions, it may mean that a case founders despite its merits.[31]

At the risk of over-simplifying each model, the relationship with truth-seeking can be broadly defined by the following:



1.3.2 Argument

The adversarial criminal court is, in essence, a civilised combat zone in which only one side can win. If the defence wins, the defendant is exonerated and the prosecution fails. A victory for the prosecution means defeat for the defendant, who will then be subject to the various punishments the court can administer. This description of the trial conveys images of a gladiatorial battle where defeat is fatal to one side. It has been observed that

> trials involve adversaries and adversity, defeats and victories, winners and losers. They pivot around serious allegations presented by their champions as wholly true and their opponents as wholly false. At stake are very grave matters of liberty and confinement, accusation and vindication, reputation and veracity, matters which passionately concern defendants and defence witnesses, victims and prosecution witnesses.[32]

The trial process is emotive, with the most serious issues considered and the most grave consequences possible. In many cases, a fine margin separates winning and losing. These emotions are often most evident during the most confrontational aspect of the trial: the cross-examination. The object of cross-examination is to call into question the moral probity of the other side.[33] Cross-examination seeks to convince the jury or magistrate that a witness cannot be trusted, that their account may be knowingly fabricated or simply unreliable, and by extension that the case of the opposition is therefore not credible. The object and nature of cross-examination therefore means it is not only the facts of the case that are on trial, but the moral character of those involved. This applies to both parties; Zedner comments that the role of the prosecutor is not only to call into the question the veracity of the defendant's claim to innocence but also to debase his very character.[34] This debasement of one's character has led to the trial being termed as a degradation ceremony,[35] one in which both sides must participate. If the defendant is exonerated, he is cleared of all wrongdoing. However, this runs the risk of the witnesses for the prosecution being

30 Zedner, L, *Criminal Justice* (Oxford: Oxford University Press, 2004), 169.
31 Sanders, A, *Victims with Learning Disabilities* (Oxford: Centre for Criminological Research, 1997), 312.
32 Rock, P, 'Witnesses and Space in a Crown Court' (1991) 31 *British Journal of Criminology* 266 at 267.
33 *Ibid*.
34 *Ibid*.
35 Garfinkel, H, 'Conditions of Successful Degradation Ceremonies' (1956) *American Journal of Sociology*, Vol 61, 420.

subjected to humiliation by having their character impugned; under cross-examination they may appear to be spiteful, muddled or greedy, with the implication that their word cannot be relied upon.[36]

The legitimacy of the conflict-airing process is bolstered by the open nature of proceedings. Allowing the public to witness proceedings demonstrates the principle of justice both being done and being visible. It thereby reduces the risk of abuse of power, exemplified by 'show' trials or the pursuit of 'enemies' by the state through the medium of the justice process. Zedner claims that in the Family Court – in which proceedings are not open and are less formalised – authority and legitimacy could, at times, break down.[37] The public nature of the criminal trial therefore ensures that the conduct of the trial complies with the legitimate expectation that the rule of law will be upheld and imposes the social order of the outside world on the court room, as much as it imposes order on the defendant.

1.3.3 Catharsis

As well as the negative connotations of the trial, there are possible positive outcomes. It can provide an opportunity for the accused to publicly air his or her account – the classic idea of 'having your day in court'. For the victim, the trial may provide closure, catharsis or vindication. During the trial of Peter Sutcliffe, the 'Yorkshire Ripper,' the prosecution was willing to accept a plea of guilty to manslaughter by way of diminished responsibility. The prosecution was acutely aware that psychiatrists who had examined Sutcliffe agreed that he suffered from severe mental illness. When this plea was offered to the trial judge, it was rejected; Boreham J insisted that the prosecution ignore its own medical experts and pursue the charge of murder as if Sutcliffe was of sound mind. McEwan doubts that the trial judge disagreed with any of the expert testimony concerning Sutcliffe's mental health, but instead thought that 'a contested criminal trial [was] necessary to provide some kind of healing process following the fear and distress that Sutcliffe's terrible killings had engendered'.[38] McEwan concludes that even those members of society who are used to disposing of criminal cases by way of a guilty plea feel that matters would not be sufficiently brought to a proper close without a fully contested case where all the gruesome evidence is placed before the public.

1.3.4 Finality

The trial is the ultimate arbiter of guilt or innocence. The general assumption is that once a decision has been made about innocence or guilt, this cannot be further challenged and punishment can be allocated accordingly. This guarantees certainty for victims of crime and society, ensures that justice cannot be frustrated by never-ending appeals or prosecution and, of course, prevents a drain on the finances of the state. Most criminal justice systems have an appellate system; this allows parties in criminal proceedings to question the decision made by a court, but this will normally be limited. This ensures finality. The concept of finality had particular importance during the era of capital punishment in England and Wales, primarily because the punishment of death was obviously irreversible. In the second half of the 18th century, there was a growing aversion to capital punishment. Langbein states that it was over-prescribed; in terms of the criminal justice process, he argues that 'too much truth meant too much

36 See Damaska (n 20) at 57–62.

37 Zedner, L, *Criminal Justice* (Oxford: OUP, 2004), Chs 4 and 5.

38 McEwan, JA, *Evidence and the Adversarial Process* (Oxford: Hart, 1998), 171.

death'.[39] As such, the function of the trial became to 'winnow down the number of persons actually executed from the much larger cohort of culprits whom the "Bloody Code" threatened with death'.[40] This objective illustrates not only that the trial could be truth-defeating, but that it was and continues to operate as a dynamic rather than static platform – that is, it flexibly adapts to the needs of the era.

This desire for 'finality' not only applies to victims and witnesses but also to the defendant. Article 6 of the ECHR states that when charged with the commission of a criminal offence, the accused is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal.[41] This requirement ensures that the fate of the defendant does not remain uncertain for too long a period and that the alleged incident is fresh in the memory of witnesses, minimising the potential for mistakes.

To some degree, the notion of finality conflicts with the notion of the trial as a search for the truth. If the latter were the primary aim of the trial, the quest for the truth would not be restricted by the concept of finality. Furthermore, to reach the truth, the system should have the capacity to retrospectively correct mistakes by allowing wrongful convictions to be quashed or new prosecutions sought against those acquitted of offences. In England and Wales, the post-appellate system (which will be discussed in **Chapter 11**) exemplifies this idea.

1.4 Adversarial and inquisitorial trials: a different purpose?

According to Duff, the aim of the criminal trial is 'not merely [to] reach an accurate judgement on the defendant's past conduct; it is to communicate and justify that judgement – to demonstrate its justice – to him and others'.[42] In short, it is to deter others from breaking the law. The trial may also be seen as part of the rehabilitation of the convicted person, to influence their future behaviour in a positive way. In this sense, it is not enough to merely punish an offender; he or she must learn what society thinks justice ought to be. In a study of the French inquisitorial criminal process, Field identified an interesting contrast between adversarial and inquisitorial criminal trials. A French judge spent a vast amount of time questioning the accused about his private life, education, history, sexual relationships and hobbies.[43] Field noted that French criminal proceedings were not only designed to discover if the particular individual committed the particular offence; they aimed to ascertain in detail who did what, when, how and why, within the context of a set of general norms about the life of the ordinary French citizen. One might describe this as a form of character mapping, which was considered important because '[t]hese assumptions seemed to be part of a set of reciprocal expectations between the individual on the one hand and the state and community on the other'.[44]

By conducting this examination of the accused's educational and social weaknesses or failings, Field remarked that he had the impression that it was not only the offence in question that was being judged, but also that of the life of the defendant, according to a

39 Langbein, JH, *The Origins of Adversary Criminal Trial* (Oxford: Oxford University Press, 2005), 6.
40 *Ibid*.
41 European Convention on Human Rights, Article 6(1).
42 Duff, R, *Trials and Punishments* (Cambridge, Cambridge University Press, 1986).
43 Field, S, 'State Citizen and Character in French Criminal Process' (2006) *Journal of Law and Society* 33(4) at 523.
44 *Ibid* 523–24.

positive and fairly developed notion of what a French citizen ought to be.[45] Ultimately, the inquisitorial approach could be viewed to take a less retributive stance and a more rehabilitative one as programmes could be provided to match the needs of the defendant. This is a view that is shared by Field; he believes that the criminal trial in France is explicitly part of the process of the accused's rehabilitation and his or her re-entry to society as a reformed citizen of the state. The trial portrays the citizen in a positive manner against which it is deemed appropriate to judge the character and life of the accused.[46] Furthermore, the 'dominance in France of the fact-finding by the professional judiciary changes the attitudes to the social prejudice generated by character evidence'.[47] The adversarial criminal trial presents a far narrower image of the relationship between state and citizens than its inquisitorial counterpart; as such the adversarial criminal law is more distanced from social expectations of the citizen.[48] It should also be borne in mind that much of the fact-finding in inquisitorial procedure has occurred prior to the trial stage, which is in a theoretical sense a formality.

The inquisitorial trial places great emphasis on character evidence. Evidence of both good and bad character is heard prior to pronouncing judgment. In the adversarial trial in England and Wales, the use of character evidence is less significant in determining the culpability of the defendant. It is acceptable for character evidence to be considered at the sentencing stage, but at the trial stage the adversarial process does not permit the use of character evidence to the same extent as its inquisitorial counterpart. This is to ensure that the guilt of the defendant relates to the particular offence in question and its facts, rather than to a broad judgement about the standing of the accused in the community.[49] However, this stance toward character evidence has not always been the norm in England and Wales. Prior to the emergence of the adversarial trial in the last quarter of the 18th century,[50] the trial and sentencing stages were less distinct. The sentencing stage, a clear form of moral judgement about the defendant, would immediately follow the conclusion of the trial, and it was during the sentencing proceedings that juries would sometimes return a partial verdict (where an individual is convicted on a lesser charge that carries a more lenient penalty).[51] This therefore blurs the line between pure consideration of the facts of an allegation and judgement of the accused's character.

Although guilt was rarely contested in early adversarial trials,[52] a defendant was unlikely to plead guilty. A guilty plea would deprive the defendant of the opportunity to give his or her account of events. Furthermore, the accused could call witnesses of his or her own and these witnesses would testify to the good character of the individual. It has been argued that the shift from the pre-adversarial to fully adversarial trial involved a partial shift in the definition of criminal responsibility. Prior to the evolution of the modern adversarial trial, the conviction of the accused was sometimes influenced by his or her character and reputation. Over the last century, great effort has been made to

45 *Ibid* 524.
46 Duff (n 42), 545.
47 *Ibid* 544.
48 *Ibid*.
49 *Ibid*.
50 Beattie, J, *Crime and the Courts in England 1660–1800* (Princeton University Press, 1986), 253.
51 *Ibid* 58.
52 Langbein states that only a small fraction of 18th century criminal trials were genuinely contested inquiries.

ensure that the character of the accused is less influential and that the trial (and any subsequent conviction) are focused on the notion of individual choice and capacity.[53]

It is clear that one single purpose of the criminal trial does not exist, and there is no set definition of the trial in either the adversarial or inquisitorial jurisdictions. What can be said is that the criminal trial is a dynamic mode of justice, which is constantly evolving. This is particularly so in the modern adversarial trial of England and Wales, something that will be discussed later in this book.

1.5 The role of the judiciary in different legal traditions

The classic adversarial judge is both passive and impartial.[54] In the case of *Jones v National Coal Board*,[55] Lord Denning gave what is generally accepted as the classic statement of the modern position of the judge:

> The judge's part … is to hearken to the evidence, only … asking questions of witnesses when it is necessary to clear up any point that has been overlooked … to see that advocates behave themselves seemly and keep to rules laid down by law … to discourage repetition … If he goes beyond this, he drops the mantle of a judge and assumes the [role] of an advocate …[56]

Lord Greene in *Yuill v Yuill*[57] stated that if a judge were to speak 'he … is liable to have his vision clouded by the dust of conflict'. Both Lord Greene and Lord Denning appear to strike at the distinction between the partisan lawyers who represent each side in an adversarial contest, clarifying that a judge should be an objective figure above the conflict.

1.5.1 The adversarial judiciary

The common law tradition in England and Wales states that it is the duty of the prosecution and defence to conduct the examination of all witnesses. The judge does not engage in this activity, except where supplementary questions may clarify a point. This tradition of passivity dates from the Middle Ages and was once the original method of conducting criminal trials in all European countries. However, this procedure was abandoned in the 12th century in favour of the inquisitorial procedure in many countries.[58] This impartial and passive judicial model was designed to ensure freedom from bias, prevent premature judgement, and provide a balanced view of the case:

> The duty most appropriate … is to attentively listen to all that is said on both sides. After performing the duty patiently and fully he is in a position to give a jury the full benefit of his thoughts on the subject …[59]

With that being said, it should be noted that it is well within the right of the adversarial judge to question a witness. Lord Goddard stated, 'if a judge thinks the case has not been thoroughly explored he is entitled to put as many questions as he likes.'[60]

53 For a further account of this theory, see Lacey, N, 'In Search of the Responsible Subject' (2001) *MLR* 350.
54 Langbein, J, 'The Criminal Trial Before Lawyers' (1978) 45 *U Ch LR* 263 at 314.
55 [1957] 2 QB 55.
56 *Ibid* para 64.
57 [1945] 1 All ER 183, 61 TLR 176.
58 Williams, G, *The Proof of Guilt* (London: Stevens and Sons, 1963), 24.
59 Stephen, Sir JF, *History of the Criminal Law* (Kessinger Publishing, 1883) as cited in *ibid* 26.
60 *Per* Lord Goddard CJ in *Williams* (1955) *The Times*, 26 April.

Traditionally, this power was little used, and although Goddard LJ intimated that a judge can put as many questions as he or she likes, that is not entirely the case and there are limits to this power. Where a judge intervenes too frequently, the traditional adversarial role is threatened and the system cannot operate effectively. The Court of Appeal has moved to quash convictions to preserve the notion of judicial impartiality and passivity. In *Gunning*,[61] the defendant's conviction was quashed after counsel asked 172 questions and the judge asked 165 – in essence, usurping the role of the lawyers. The judge also has the authority to call a witness when its purpose is to assist the defence,[62] although this power is rarely used. If the calling of a witness will, in effect, mean that the judge assumes the role of the prosecution then this may lead to a quashed conviction. For example, in *Grafton*,[63] the Court of Appeal emphasised that the judge had to remain impartial and that his or her role was to direct the jury on points of law. By calling the witness, the judge had acted as if he had assumed the mantle of the prosecution. Preventing judges doing so again raises questions about the truth-seeking aspect of the trial. For example, in a 1993 Crown Court Study,[64] nearly 19% of judges questioned were aware of important witnesses who were not called by either side. The Philips Commission recommended that when judges are aware that an important witness has not been called, they should seek counsel to explain the absence of the witness, and, if deemed necessary, the judge should urge counsel to rectify the situation. As a last resort, judges should be prepared to exercise their power to call witnesses.[65] Although, as Zander notes, there is no evidence to suggest that either recommendation has been adopted in practice.[66]

An overly interventional judge risks appearance bias. In *Sharp*,[67] the Court of Appeal held that the judge

> … may be in danger of seeming to enter the arena in the sense that he may appear partial to one side or the other. This may arise from a hostile tone of questioning or implied criticism of counsel who is conducting the examination or cross-examination.

The power to intervene should therefore only be used to satisfy the minimal case management responsibilities of the judge. Proper interventions manage the criminal trial, rather than control it. The traditional adversarial judge should generally do no more than ensure that proceedings are orderly and that the rules of evidence and procedure are followed. When intervening, the judge should ensure that the truth-finding process is not distorted, as in *Sharp*. Above all, interventions should not interfere with the right to a fair trial, the guiding principle behind the judicial role.

1.5.2 The myth of the impartial adversarial umpire?

As alluded to above, the role of the adversarial judge can be likened to an umpire in a cricket match, impartially interpreting information and applying the pre-established standards in the game of law. He or she is simply 'hearkening to the evidence'.[68]

61 [1980] Crim LR 592.

62 See *Haringey Justices, ex parte DPP* [1996] 1 All ER 828 and *Oliva* [1965] 1 WLR 1028.

63 [1992] Crim LR 826.

64 Zander, M and Henderson, P, 'The Crown Court Study' (Royal Commission on Criminal Justice, Research Study No 19, 1993), section 4.3.12.

65 *Ibid*.

66 Zander (n 6) at 383.

67 [1993] 3 All ER 225, 235.

68 [1957] 2 QB 55.

However, it could be argued that this is an idealistic conception. Judges often become actively involved in proceedings, well illustrated by a *voir dire* ('a trial within a trial') in the Crown Court. During a *voir dire*, the jury will be temporarily discharged and the judge will decide on the admissibility of a piece of evidence. Arguably, the judge enters the realm of the jury: that of the trier of facts. In contrast to the jury in the Crown Court, a magistrate cannot be discharged to alleviate the possibility of prejudice. McEwan believes that when adjudicating on the admissibility of evidence, it is difficult to proceed without the nature of the evidence becoming obvious. If the magistrate feels that, by hearing the disputed evidence, his or her opinion may be prejudiced then there is no remedy – after all, once evidence has been heard it cannot be 'unheard'. Recusal would not be practical for a magistrate, as a later bench would not be bound by the decision, and the new bench would also have to go through the *voir dire*. Ironically, lay magistrates – volunteers with no formal legal training or qualifications – are deemed capable of hearing inadmissible evidence and proceeding to trial with excluded evidence somehow erased from memory. In contrast, professional judges in the 'Diplock Court'[69] are permitted to excuse themselves from a case if they reject evidence that may affect their neutral stance. This example demonstrates the 'myth' of the neutral umpire: the idea that a judge will be unaffected by evidence and will always remain above the fray. In this sense, there is some distance between adversarial theory and the reality of practice.

1.5.3 The inquisitorial judiciary

The traditional concept of judge in the inquisitorial model is vastly different. The inquisitorial judiciary is viewed as the guarantor of individual liberties.[70] This contrasts to adversarialism, which posits that liberties are best defended by equipping each side with the tools to defend themselves. As such, the inquisitorial judiciary is more paternal. To fulfil this function, the judge has a broad range of responsibilities, including the investigation of an offence, adjudication to determine the culpability of the accused, and the authorisation of coercive measures that directly impinge on individual liberty. These measures can include telephone tapping or extending the period for which the suspect is remanded in custody without charge. Historically, the functions of investigation, prosecution and trial were all the responsibility of a single individual,[71] and in theory this remains the case today. As mentioned earlier, this shows a distinctly different approach to the allocation of power within the criminal justice process to that of traditional adversarialism.

This is well exemplified by the French model. In determining the culpability of the accused, the function of the judiciary is not merely to pass judgement on the evidence presented, but to conduct independent enquiries to determine the guilt or innocence of the defendant. This investigation may be conducted via direct questioning of the defendant or by insisting that the police carry out further investigations. The judiciary is also responsible for the discovery of the truth and must therefore seek out evidence that points to the innocence of the defendant (exculpatory) as well as to his or her guilt (inculpatory). The inquisitorial model holds that the truth is best discovered through

69 In a Diplock Court, a professional judge sits without a jury and has to decide on questions of law and fact. For further information on Diplock Courts, see Jackson, J, *Judge Without Jury: Diplock Trials and the Adversary System* (Oxford: Clarendon, 1995).

70 Salas, D, 'The Role of the Judge' in M Delmas-Marty and JR Spencer (eds), *European Criminal Procedures* (Cambridge: Cambridge University Press, 2002), 534.

71 Hodgson (n 3), 230.

unilateral investigation by the judiciary, rather than via the 'check and balance' model of the adversarial partisan contest. Inquisitorialism is therefore defined by

> a concentration of power in the hands of one person, who represents neither the narrow interests of the defence or prosecution but what are claimed to be the wider interests of society.[72]

Therefore, all other interests, including that of the accused, are subordinate to the supremacy of the judge. However, Hodgson found that the judiciary is not as impartial in practice as it is in theory:

> The guilt of the suspect is presumed and denials are rejected. Evidence of violence committed against the suspect by the police was ignored and left for the defence to raise … the word of the victim or of the police was consistently preferred to that of the suspect; serious cases mean an almost automatic request for a remand in custody, even where evidence is thin.[73]

Despite many jurisdictions utilising an investigating judge, there is a danger that corruption or bias may infiltrate the judiciary – a serious problem when such significant power is vested in one figure. Jackson states that, over time, some officials may come to favour certain kinds of litigants over others. Psychological insight suggests that it is difficult for active investigators to suspend judgement and weigh up evidence dispassionately, creating a risk that a particular hypothesis about a case will be pursued to the exclusion of others – in short, a form of judicial tunnel vision.[74] This is often cited as a problem with police officers in adversarial systems, determined to secure a conviction. One *juge* interviewed by Hodgson was very proud of his record that only two cases sent to him in 10 years had resulted in acquittals.[75] This raises concerns about how genuinely impartial he was – that personal statistics may have been more important to the *juge* than uncovering the truth in each case. Despite the supposed efficiency of the *juge* interviewed by Hodgson, other jurisdictions have ceased to embrace this inquisitorial figurehead. In 1975, Germany abolished the role of examining magistrate over doubts about the role, and Italy abolished the role after a corruption scandal in 1988.[76]

Despite sharing the same title, the theoretical role and the position of the inquisitorial judiciary are quite different to those of their adversarial counterpart. The inquisitorial judiciary is deeply interwoven into the criminal proceedings, possessing more investigative power and greater responsibility for case building. All evidence is given equal weight, and, in theory, no particular result is sought. Of course, this model is somewhat different in reality.

1.6 Critical analysis of criminal justice: Packer's models

Like any academic subject, we should take a critical view when examining criminal procedure and punishment – that is, go beyond merely describing the structure and form of criminal justice, but question what it does, how it does it, and why it does it.

72 *Ibid* 356.

73 Hodgson, J, 'The Police, the Prosecutor and the Juge D'Instruction: Judicial Supervision in France, Theory and Practice' (2001) *British Journal of Criminology*, 41, 342–61 at 357.

74 Jackson, J and Doran, S, *Judge Without Jury* (Oxford: Clarendon Press, 1995),68.

75 Hodgson (n 73),347.

76 For an in-depth discussion of the rationale behind the abolition of the examining magistrate in Germany and Italy, see Vogler, R, *A World View of Criminal Justice* (Ashgate Publishing, 2005), 166.

This is important and useful as it allows us to assess the implications the process has for those affected by it and what this might mean for the future direction of criminal justice in England and Wales. Ultimately, it is important to know *how* the criminal justice system works as well as *why* it works in the way it does – and whether it is, in fact, just. One of the most useful ways to analyse criminal procedure in any particular jurisdiction is through the lens of a theoretical model. Theoretical models regarding criminal procedure represent a useful tool for both understanding and explaining how and why criminal justice works in a particular manner. They help us to comment on what has happened or is happening, and why this is relevant. We can, for example, look for patterns in the way criminal procedure has developed; or we can predict what sort of changes may be on the horizon by reference to a consistent philosophy underlying previous reform. Throughout this book, we will refer to Packer's two models of criminal justice. In 1964, Stanford Law Professor, Herbert Packer, created arguably the most influential theoretical models in relation to modern criminal procedure: *Due Process* and *Crime Control*. These models are still taught on law degrees across the world and continue to assist scholars in interpreting the function and development of criminal justice. Each model represents an extreme point of view on a spectrum. The *Due Process* model is concerned with the fairness of the proceedings and prioritises the individual rights of the citizen over that of the state. Unsurprisingly, the *Crime Control* model is the polar opposite – the model holds that the repression of criminal activity is the single most important function played by the criminal justice system and that very little should hinder this. The models identify the competing goals that exist within the system, and each model is a possible way of 'doing' criminal justice.[77]

The *Crime Control* model can be summarised as follows:

- The repression of crime is the most important function of the criminal justice system.[78]
- Failure to adhere to this will lead to the breakdown of public order.
- This is because the criminal justice system is a positive guarantor of social freedom and rules need to be quickly enforced.
- There is full trust in those who investigate and prosecute crime and there is a presumption of guilt. The police can be relied on to identify the correct culprit.
- The model needs a high rate of detection and conviction.
- The process needs to be fast – time is a premium that cannot be wasted.
- There is a focus on speed and efficiency; the process should resemble a 'conveyor belt'.
- The conveyor belt moves an endless stream of cases, never stopping; each stage in a case moves toward the end goal – a finding of guilt. Acquittals should be a rare exception.
- The procedures are based on informality and uniformity; therefore there should be limited exposure to challenge and all decisions are seen as final.
- The model emphasises fact-finding during the pre-trial investigation. Therefore this stage is more valuable than the actual trial when time can be wasted.

Since the models directly contrast, the exact opposite is found in the *Due Process* model:[79]

77 Welsh, L, Skinns, L and Sanders, A, *Sanders & Young's Criminal Justice* (OUP, 2021).

78 Packer, HL, *The Limits of the Criminal Sanction* (California: Stanford University Press, 1968), 158–63.

79 *Ibid* 163–70.

- If the *Crime Control* model represents a conveyor belt, the *Due Process* model is an obstacle course.
- Every successive stage should represent a formidable impediment to carrying the suspect any further along the criminal justice process. There is no presumption of guilt.
- The model rejects the importance of the pre-trial investigation as humans are fallible and poor observers; the possibility of error is high.
- Confessions to the police could be induced by physical or psychological coercion and are treated with extreme caution.
- Therefore the model insists on a formal, adjudicative, adversarial fact-finding process.
- This process needs to be heard by an impartial tribunal, and the defendant has the opportunity to refute and discredit the allegations made against him or her.
- Because of the possibility of human error, the demand for finality in the model is low.

The utility of Packer's models

Neither model is designed to be taken entirely literally; in reality, a fusion of both approaches is useful for measuring the changing attitudes and agendas driving criminal justice policy. Arguably, England and Wales has developed a piecemeal crime control agenda over the course of the last three decades. In 1986, the Police and Criminal Evidence Act (PACE) 1984 came into force and represented the high-water mark of a due process revolution. The provisions contained within the Act will be explored in further depth later, but the Act significantly strengthened the rights of the suspect in the police station, with the advent of the custody officer, right to a defence lawyer, time limits on detention. Clearly, if we place this Act on our spectrum, it will be placed more toward the *Due Process* end.[80] However, various pieces of legislation have subsequently been created that dilute the due process spirit of the Act and employ a discreet crime control agenda, for example the curtailment of the right to silence provisions in the Criminal Justice and Public Order Act (CJPOA) 1994. The goal here was to stop the guilty hiding behind the shield of silence and evading justice – a clear attempt at repressing crime. This agenda was accelerated by the Criminal Procedure and Investigations Act (CPIA) 1996, which fundamentally altered the adversarial nature of the procedure and attempted to cultivate an environment of cooperation and early disclosure by the defence (see **Chapter 8**). Questionable motives may exist here – for if you know your opponent's hand, it should be easier to win the game and, ultimately, repress criminal activity. Finally, the Criminal Procedure Rules ensured that the stance of early disclosure cooperation, which was compulsory in the Crown Court but voluntary in the magistrates' court, would now be compulsory in the magistrates' court. Without using Packer's models to analyse these changes, it might be difficult for students to understand the gravity and importance of each successive change. The changes could be viewed in isolation, but by using theoretical models, one can scratch beneath the surface and potentially identify agendas and goals that are not immediately visible. Despite critique of Packer's models, we believe that an understanding of them represents the best way of analysing changes in the criminal process.

80 Although it should be noted that PACE 1984 also expanded police powers significantly.

1.7 Conclusion

This chapter has sought to provide a clear picture of the key differences between adversarialism and inquisitorialism. It is important to reiterate that no single jurisdiction will operate a purely adversarial or inquisitorial system. There is significant crossover between the differing approaches in practice. However, each approach provides a useful and contrasting perspective on how individual jurisdictions tackle the investigation and trial of criminal offences, and what is an appropriate way to allocate power and responsibility within the criminal justice process. Equally, Packer's models provide us with idealised but contrasting versions of 'doing' criminal justice, when the reality is arguably a hybrid of crime control and due process. These concepts will provide an analytical foundation for the rest of this book, enabling you to examine different elements of criminal procedure and punishment through the lens of adversarialism and inquisitorialism. This will hopefully prompt you to question both how and why the systems operate as they do, as well as to explore where the future of the criminal justice process may lie. It is important to remember the key components of each approach, summarised as follows: