

# **THE RIGHT TO SILENCE – INTERNATIONAL NORMS AND DOMESTIC REALITIES**

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## I. INTRODUCTION

This paper is intended for presentation at the Sino Canadian conference on the ratification and implementation of Human Rights Covenants held in Beijing October 2001. With the signing of the *International Covenant on Civil and Political Rights* by the government of the People's Republic of China in 1998 there is a growing recognition of the rights of criminal suspects. The principle of the presumption of innocence was included in the significant reforms made by China to the Criminal Procedural Law of 1996. This places the burden of proof on the prosecution. The 1996 law also includes a provision regulating that the criminal suspect must answer all relevant inquiries concerning the charge. The debate on whether the presumption of innocence provides for an implicit right to remain silent is one that is ongoing in China and elsewhere. According to the Asian Human Rights Commission, the People's Procuratorate of Shuncheng District (in the city of Fushan in Liaoning Province) have promulgated the 'zero statement rule' when prosecutors handle cases.<sup>1</sup> According to this rule, criminal suspects are allowed to keep silent during their interrogation by prosecutors. The Asian Human Rights Commission notes that this is the first time in China that the right to silence is recognized in a "law", though it is only the rule of a district procuratorate.

With the growing debate of the relevance of the right to silence, this paper examines what it means according to international norms and reviews its practical implementation in various domestic jurisdictions. This examination reveals that in exercising this right, there are different issues and debates that arise about the right to silence during police investigations (pre-trial) and during the trial itself (at trial). Furthermore, the examination reveals that the debate about the nature of the right to silence appears to fall into two categories. One views the right as absolute and necessary to ensure a fair trial. The other views this right as subject to qualification in certain circumstances.

Part II of this paper explores the international and regional human rights instruments for an understanding of the norm of the right to silence, particularly with respect to the related principles of the presumption of innocence and the privilege against self-incrimination.

Part III describes the origin and history of these concepts. The remainder of the paper surveys how different domestic jurisdictions, particularly Canada, Australia, United States and the United Kingdom, have grappled with the issue of the right of silence, some through an analysis of case law; some through legislation reforms; some through empirical research.

## II. THE RIGHT OF SILENCE – THE NORM IN INTERNATIONAL HUMAN RIGHTS LAW

### A. International human rights norms

One sees fairly quickly from a review of the rights enumerated in the *International Covenant on Civil and Political Rights (ICCPR)* that the right to remain silent is not explicitly

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<sup>1</sup> Wong Kai-shing, "The Right to Silence: The Zero Statement Rule" found at [www.ahrchk.net/solidarity/200011/v1011\\_05.htm](http://www.ahrchk.net/solidarity/200011/v1011_05.htm)

guaranteed. The obvious questions arise – does this mean that States can compel suspects to answer questions during interrogations and testify at trial? Does this mean that if a suspect or accused person chooses to remain silent, this silence can be used against him in the determination of guilt? To assist in an understanding of State obligations under international law, it is necessary to look at other rights explicitly described in the *ICCPR*, namely the presumption of innocence and the right not to be compelled to testify against oneself and how those rights relate to the right to remain silent. Underlying all this are the broader rights of the protection of dignity and fairness in criminal due process. It is the right of every person charged with a criminal offence to be presumed innocent until and unless proved guilty according to law after a fair trial.<sup>2</sup> Being treated as innocent is fundamental to a fair trial and intrinsically related to the protection of human dignity. Above all, it guarantees against abuse of power by those in authority and ensures the preservation of the basic concepts of justice and fairness. The rules of evidence and the conduct of a trial must ensure that the prosecution bears the burden of proof throughout the trial. Intertwined with the presumption of innocence is the right not to be compelled to testify against oneself or confess guilt, which is expressly set out in the *ICCPR*.<sup>3</sup> This means that authorities are prohibited from engaging in any form of coercion, whether direct or indirect, physical or psychological. Furthermore, judicial sanctions cannot be imposed to compel the accused to testify.<sup>4</sup>

It has been said that the right to silence is not a single right but consists of a cluster of procedural rules that protect against self-incrimination.<sup>5</sup> The right to choose whether or not to respond to questioning or to testify is guaranteed by the right not to be compelled to testify against oneself or confess guilt. But there is a debate as to how this right should be protected in the context of a criminal trial where the consequences of exercising the right to remain silent may be determined by the judge or jury. Those who argue for permitting adverse inferences to be drawn suggest that this does not nullify the privilege against self-incrimination as it simply allows the court to make a common sense assessment of all the evidence before it. They argue that the question is whether the power to draw adverse inferences is sufficiently coercive that the accused is not actually protected against self-incrimination. The other side of the argument is that any inferences from silence operate as a means of compulsion, shifting the burden of proof from prosecution to the accused. Simply put, the argument suggests that, the law cannot grant a fundamental right and then penalize a person who chooses to exercise it.<sup>6</sup> In order to understand the extent of this right in international law, an examination of the jurisprudence from international and regional bodies is essential.

The Human Rights Committee is the treaty body established to monitor State Parties' compliance with the *ICCPR*. Through its jurisprudence, including General Comments, Concluding Observations on States' reports and decisions from individual petitions, the Committee has elaborated somewhat on the meaning of these rights and on States Parties obligations under the Covenant. The Committee, in General Comment 13, noted that in many

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<sup>2</sup> The *Universal Declaration on Human Rights*, Article 11: everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

*ICCPR*, Article 14(2): everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

<sup>3</sup> *ICCPR*, Article 14(3): in the determination of any criminal charges against him, everyone shall be entitled to the following minimum guarantees, in full equality... (g) not to be compelled to testify against himself or to confess guilt.

<sup>4</sup> Amnesty International, "*Fair Trials Manual*" (December 1998), found at [www.amnesty.org/ailib/intcam/fairtrial/fairtria.htm](http://www.amnesty.org/ailib/intcam/fairtrial/fairtria.htm)

<sup>5</sup> Michael, J. and Emmerson, B. "*Current Topic: The Right to Silence*" (1995) 1 *European Human Rights Law Review* 4 at 6.

<sup>6</sup> These arguments are summarized in the article by Michael and Emmerson, *ibid.* at 6.

countries, the presumption of innocence has been expressed in very ambiguous terms or entails conditions which render it ineffective.<sup>7</sup> They have clearly stated that “by reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of the doubt. No guilt can be presumed until the charge has been proved beyond a reasonable doubt.”<sup>8</sup> It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial. The Committee calls on States to pass legislation to ensure that evidence elicited by means of such methods that compel the accused to confess or to testify against himself or any other form of compulsion is wholly unacceptable.<sup>9</sup> In 1995, the Human Rights Committee reviewed the fourth periodic report of the United Kingdom and found that the modification of the right to remain silent in allowing the judge and jury to draw adverse inferences in certain situations “violate various provisions of Article 14 of the Covenant [fair trial], despite a range of safeguards built into the legislation and the rules enacted thereunder”.<sup>10</sup>

In 1989, the Sub-Commission on Prevention of Discrimination and Protection of Minorities (a sub-commission of the United Nations Human Rights Commission) decided to appoint two of its members as rapporteurs to prepare a report on existing international norms and standards pertaining to the right to a fair trial. In preparing a Third Optional Protocol to the *ICCPR* aimed at guaranteeing under all circumstances the right to fair trial, they also developed a *Draft Body of Principles on the Right to a Fair Trial and a Remedy*.<sup>11</sup> This body of principles, in elaborating on the accused’s right not to be compelled to testify against him or herself or to confess guilt, specifically sets out that ‘silence by the accused may not be used as evidence to prove guilt and no adverse consequences may be drawn from the exercise of the right to remain silent’. Furthermore, any confession or other evidence obtained by any form of coercion or force may not be admitted into evidence or considered as probative of any fact at trial or in sentencing. Elaborating on the presumption of innocence, the *Draft Principles* reiterate that this places the burden of proof during trial on the prosecution and that all public officials shall maintain a presumption of innocence, including judges, prosecutors and the police.<sup>12</sup>

More recent international documents have explicitly included the right to remain silent. Both the Rules of Procedure and Evidence adopted by the criminal tribunals established by the United Nations Security Council for the Former Yugoslavia and Rwanda provide for an explicit right to silence during investigation stage.<sup>13</sup> The Rome Statute of the International Criminal Court not only confers a right to silence, but also provides that silence cannot be used as “a consideration in the determination of guilt or innocence”.<sup>14</sup> This explicit expression of the right to remain silent in the most recent articulations of criminal justice in international instruments indicates the movement of the position that any procedural measures which may have the effect

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<sup>7</sup> Human Rights Committee, *General Comment 13, Article 14 (Twenty-first session, 1984)* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 14 (1994)

<sup>8</sup> *General Comment 13, ibid.*

<sup>9</sup> *General Comment 13, supra* note 7.

<sup>10</sup> CCPR/C/79/Add 55, July 27, 1995 at para. 17.

<sup>11</sup> *The Draft Body of Principles on the Right to a Fair Trial and a Remedy*, Annex II of the “*The Administration of Justice and the Human Rights of Detainees – The right to a fair trial: Current recognition and measures necessary for its strengthening - Final Report prepared by Mr. Stanislav Chernichenko and Mr. William Treat*”, E/CN.4/Sub.2/1994/24, 3 June 1994.

<sup>12</sup> *ibid.*

<sup>13</sup> International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, adopted on 29 June 1995 and amended thereafter, consolidated text dated 31 May 2000, Rule 42 (found at [www.icttr.org](http://www.icttr.org)) and International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, last amended 12 April 2001, Rule 42 (found at [www.un.org/icty/basic.htm](http://www.un.org/icty/basic.htm).)

<sup>14</sup> Rome Statute of the International Criminal Court (UN Doc A/CONF.183/9) Article 66 (presumption of innocence) and Article 67 (to remain silent, without such silence being a consideration in the determination of guilt or innocence) (found at [www.un.org/law/icc/statute/rome.htm](http://www.un.org/law/icc/statute/rome.htm).)

of pressuring suspects and defendants into speaking against their will violates international human rights standards.

## B. Regional interpretation

It is useful to explore the discussion surrounding the right to silence at the regional level. The regional human rights instruments mirror, to a certain extent, the norms as set out in the *ICCPR* and therefore provide a further opportunity to examine this issue.<sup>15</sup> It is the jurisprudence of the European Court on Human Rights, covering more than 50 years, that provides us with insight not only with respect to how the issue of the right to remain silent is understood but also how the Court has interpreted State Parties' obligations under a human rights instrument. There have been more applications regarding Article 6 – the right to a fair trial - to the European Court than any other provision in the *European Convention*. The court has often referred to the “prominent place which the right to a fair trial holds in a democratic society” and therefore has held that there is no justification for interpreting Article 6 restrictively.<sup>16</sup> The European Court does not, in practice, question the merits of the decisions on the facts taken at the national level. There is a wide margin of appreciation as to the manner of the national level court's operation. Given the wide variations in the criminal administration process in different European legal systems, it is not surprising that national courts are allowed to follow whatever particular rule they choose so long as the end result can be seen to be a fair trial.

While the right to remain silent is not explicit in the *European Convention*, the Court held in *Murray v UK* that an individual's right to remain silent under police questioning and the privilege against self-incrimination are “generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6”.<sup>17</sup> However, the Court accepted that the right to silence was not an absolute right. It acknowledged the argument that international standards were silent on the precise implications an accused's silence would have when the trial judge or jury weighed the evidence. However, the court, stating that a violation was a matter to be determined in light of all the circumstances of the case, did set some clear limits to the inferences that could be properly drawn. One such limit is that it would be incompatible with the *Convention* for a court to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or testify. Inferences could be made in the *Murray* case, because the court found that the circumstances “clearly” called for an explanation and that the inferences were “reasonable”. In these situations, an adverse inference could be drawn if certain safeguards were in place, including the right to counsel, providing a caution in clear terms and ensuring that the accused understood the possible consequences of their decision. In *Condron v UK*, the European Court found a violation when balancing between the

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<sup>15</sup> The *European Convention on Human Rights* (1956) Article 6 ensures that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. While this article further elaborates on the minimum due process rights, it does not explicitly provide for the right to remain silent nor the right not to be compelled to testify against himself or to confess guilt.

The *American Convention on Human Rights* (1978) Article 8 provides that every person accused of a criminal offence has the right to be presumed innocent so long as his guilt has not been proven according to law; the right not to be compelled to be a witness against himself or to plead guilty; and that a confession of guilt by the accused shall be valid only if it is made without coercion of any kind.

The *African (Banjul) Charter on Human and Peoples' Rights* (1981) guarantees in Article 7 the right to be presumed innocent until proved guilty by a competent court or tribunal.

The *Cairo Declaration on Human Rights in Islam* (1990) Article 19 provides that a defendant is innocent until guilt is proven in a fast trial in which he shall be given all the guarantees of defence.

<sup>16</sup> Harris, D.J., O'Boyle, M. and Warbick, C., *Law of the European Convention on Human Rights* (1995)

<sup>17</sup> *Murray v UK* (1996) 22 E.H.R.R. 29 (ECHR) (this case and those cited below can be found at [www.echr.coe.int/](http://www.echr.coe.int/))

right to silence and the circumstances in which an adverse inference could be drawn.<sup>18</sup> The court held that, as a matter of fairness, the jury should have been directed that if it was satisfied the applicant's silence at the police station could not sensibly be attributed to their having no answer or none that would stand up to cross-examination, it should not draw an adverse inference.

In *R v Saunders*, the European Court noted the close link between the presumption of innocence and the freedom from self-incrimination.<sup>19</sup> The presumption reflecting "the expectation that the state bear the general burden of establishing the guilt of an accused, in which process the accused is entitled not to be required to furnish any involuntary assistance by way of confession". This case followed the decision in *Funke v France*, where the court held that fairness embraced the right of anyone charged with a criminal offence "to remain silent and not to contribute to incriminating himself".<sup>20</sup> Therefore, from the European jurisprudence, we see that the court has interpreted an implicit right of silence. However, this right is not absolute and can be limited in certain circumstances.

### III. ORIGINS OF THE RIGHT TO SILENCE

#### A. The history of the evolution of the right

A review of the history of the right to remain silent and the privilege against self-incrimination provides some understanding to the various perspectives and positions regarding the right to silence in different jurisdictions. As Wendell Oliver Holmes has said "a page of history is worth a volume of logic".<sup>21</sup>

The Latin phrase '*nemo tenetur prodere seipsum*', meaning that no person should be compelled to betray himself in public, dates back to Roman times. It appears that at that time, the privilege was a check on overzealous officials rather than a subjective right of anyone who was accused of a crime. This principle guaranteed that only when there was good reason for suspecting that a particular person had violated the law would it be permissible to require that person to answer incriminating questions. In England, it was not until the late 16<sup>th</sup> Century and early 17<sup>th</sup> Century that we see clear statements of the principle being developed. This occurred around the controversial ecclesiastic courts, the Star Chamber and the High Commission, which were highly unpopular because they were used to suppress religious and political dissent and their procedures were seen as oppressive. The judges had power to interrogate an accused under oath. The suspect could be punished for refusing to testify and it was said that these courts endorsed the practice of torture during interrogation. Furthermore, the interrogation often took place before charges were laid and without the person being informed of what they had alleged

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<sup>18</sup> *Condrón v UK* (2000) 8 B.H.R.C. 290 (ECHR)

<sup>19</sup> *Saunders v UK* (1997) 23 E.H.R.R. 313 (ECHR)

<sup>20</sup> *Funke v France* (1993) 16 E.H.R.R. 297 (ECHR)

<sup>21</sup> This review of the history of the origins of the right to silence and the privilege against self-incrimination is from a number of sources, including Helmholz, R.H., Gray, C.M., Langbein, J.H., Moglen, E., Smith, H.E., and Alschuler, A.W., **The Privilege Against Self-Incrimination: Its Origins and Developments** (The University of Chicago Press); Scrutiny of Acts and Regulations Committee, "*The Right to Silence: An Examination of the Issues*" Chapter 2 – The Origins of the Right to Silence (found at [www.parliament.vic.gov.au](http://www.parliament.vic.gov.au)); New South Wales Law Reform Commission "*Discussion Paper 41: The Right to Silence*" (May 1998); and Wolchover, D. and Heaton-Armstrong, A. **Wolchover and Heaton-Armstrong on Confession Evidence** (1996 – London, Sweet Maxwell).

to have done. In 1640, a statute brought an end to the practice of interrogating defendants under oath. The next year, in 1641, these courts were abolished.

After the abolition of these courts, the accused was not required or even allowed to take the oath. However, the practice of that time did not allow the accused to be represented by a lawyer. The accused had to speak for himself. Consequently, it was only when the practice of being represented by lawyers and the emergence of the law of evidence, was the privilege against self-incrimination developed as a protection of criminal defendants in the common law. It was in 1898 in England that the Criminal Evidence Act was adopted making the accused a competent but not compellable witness. This meant that the accused had the right to testify under oath but not a duty. This Act allowed judges (but not prosecutors) to comment to the jury where the accused chose to remain silent. In practice, the comment was usually restricted to a direction to the jury not to assume that the accused was guilty on the basis of the accused's silence at trial.

With respect to the right to silence during police interrogation, this principle developed along with the establishment of the professional police force in England in 1829. The development of this principle has been attributed to the suspicious ways confessions were taken. The right of a suspect to refuse to answer official questions was clearly accepted by 1912 with the inclusion of a rule in the *Judges' Rules* which was designed to provide guidelines for police interrogations of suspects. A decision of the English courts in 1914, *Ibrahim v R*, further established that an admission or confession made by the accused to the police would only be admissible in evidence if the prosecution could establish that it had been voluntary, made in the exercise of a free choice about whether to speak or remain silent. Most former English colonies adopted the right to remain silent during pre-trial interviews and at trial as part of their system of criminal procedure. Almost all continue to adhere to it, though subject to some modification.

## **B. The history of debate between abolition and retention**

The right to silence has been the subject of controversy from the time it became an effective part of the law. Jeremy Bentham published his well-known critique in 1827. His most famous comment: "Innocence never takes advantage of it. Innocence claims to the right of speaking, as guilt invokes the privilege of silence". He suggested that the right against self-incrimination had the inevitable effect of excluding the most reliable evidence of the truth, that which is available only from the accused person. This necessarily caused greater weight to be given to hearsay and other inferior sorts of evidence. He said this privilege confused sport with a search for truth. He claimed that the argument in favor of the privilege for the reason that it protected defendants against judicial torture and ideological persecution was misleading from history. In his day, by the 1800s, England had other, more effective and less harmful means of protecting freedoms of thought and belief. He further argued that this privilege had the inevitable effect of hindering courts from discovering the truth and formed no part of a rationale legal system. While his criticisms did not prevent the privilege from assuming its modern form at that time, his criticism has had long-term effects as forming the basis for current arguments supporting restrictions on the right in many jurisdictions.<sup>22</sup>

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<sup>22</sup> The details of Jeremy Bentham's critique is described in Helmholtz, R.H et al, *supra* note 21.



There have been other calls for the abolition of the privilege. An American judge's survey of the relevant law in 1968 (H.J. Friendly) argued that the lengths of the privilege in the United States were not rationale. He followed similar arguments to Bentham but also looked at the right to privacy issue. Since the introduction of the Fifth Amendment, the protection of personal privacy became a central purpose of the privilege against self-incrimination. Friendly found the privacy-based arguments unconvincing since the privilege goes beyond conduct falling under privacy.<sup>23</sup>

Judge Zupancic, Judge of the European Court of Human Rights, analyses Bentham's argument that the right against self-incrimination had the inevitable effect of excluding the most reliable evidence of the truth.<sup>24</sup> Judge Zupancic actually turns this argument around suggesting that it is absurd to justify forms of self-incrimination as necessary in the name of truth finding. The relative nature of truth changes according to the definition of the all-powerful State. He argues that legal procedures have never been designed for truth finding. In fact, he is of the opinion that legal procedures, both adversarial and inquisitorial ones, are not well adapted to fact finding. In his view, the reason for the prominence of truth finding in criminal procedures has to do with moral indignation into a legal process.

The right to remain silent and the privilege against self-incrimination have held different meanings at various periods of history. However, the right has always existed in some form. However, there is debate about how effective the privilege was as a safeguard for people accused of criminal activities. When it was first introduced in England, the privilege was only available for those under oath. But accused persons were not allowed to give evidence under oath and therefore could be subjected to incriminating questioning. When it did gather more strength in the 19<sup>th</sup> Century, it became the subject to heated debates that still exist in various domestic jurisdictions. The remainder of this paper will review the debate as it has unfolded in four jurisdictions.

#### **IV. THE CANADIAN CASE LAW**

##### **A. Common law, legislation and the *Charter***

In Canada, the right to silence and the right against self-incrimination exist as a combination of the common law, statute and the *Canadian Charter and Rights and Freedoms* (the "*Charter*"). Unlike many commonwealth jurisdictions, Australia and the United Kingdom in particular, Canada is a jurisdiction that has constitutionally entrenched fundamental rights affecting the relationship of the state and individuals accused of a crime in the *Charter*.

Any discussion of the right to silence requires reference to the presumption of innocence, a cornerstone of the Canadian and British criminal justice systems which has now been entrenched in section 11(d) of the *Charter*.<sup>25</sup> The significance of the presumption of innocence to the right to silence is that the presumption of innocence places the burden of proving guilt

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<sup>23</sup> *ibid.*

<sup>24</sup> Zupancic, Bostjan, "*The Privilege Against Self-Incrimination as a Human Right*" paper delivered in Vancouver, Canada (Fall, 1999)

<sup>25</sup> *Charter*, section 11 – Any person charged with an offence has the right ....(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

beyond a reasonable doubt on the prosecution alone. The accused cannot be forced to assist the prosecution in proving its case against him by providing testimonial evidence either at the investigation stage or at the trial. Thus, the prosecution is required to make out the case on evidence, other than the accused's testimony, before the accused is required to respond by calling other non-testimonial evidence.

The leading Supreme Court of Canada case that sets out the purpose of the presumption of innocence is *R v. Oakes* in which Chief Justice Dickson (as he then was), at page 15, states:

The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the state of criminal conduct. ... It ensures that, until the state proves an accused's guilt beyond all reasonable doubt, he or she is innocent. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.<sup>26</sup>

The corollary of the presumption of innocence is that the accused has the right to remain silent both before and during his trial. Prior to the *Charter*, the rights of an accused to remain silent applied in a narrow set of circumstances. However, through the interplay of sections 7, 10(b), 11(c) and 13 of the *Charter*, Canadian jurisprudence has developed a broad framework of principles aimed at protecting against the use of coercion by authorities in the conscription of the accused as a testimonial source.

The *Charter* does not explicitly articulate the right to silence. However, the Supreme Court has found the right protected as a principle of fundamental justice in accordance with section 7.<sup>27</sup> The right to silence conferred by section 7 is rooted in two common law concepts. First, the confessions rule, which makes a confession which the authorities improperly obtained from a detained person inadmissible in evidence and second, the privilege against self-incrimination, which precludes a person from being required to testify against himself at trial. Underlying both is the concern with the repute and integrity of the justice system. Therefore, the suspect, although detained under the State's "superior" power, maintains the right to choose whether or not to answer the State's questions. If he chooses not to, the State is not entitled to use its "superior" power to negate the suspect's choice.

One Canadian commentator describes the right to remain silent as general and abstract, "concealing a bundle of more specific legal relationships". It is only when examining the surrounding legal rules that this right can be more precisely identified.<sup>28</sup> These surrounding rules include the common law confession rule, the privilege against self-incrimination and the right to counsel. Section 10(b) provides that once detained, the accused is entitled to consult counsel and to be informed of that right.<sup>29</sup> The significance of this section is that it ensures that an accused is made aware of his right to remain silent at a time when that knowledge is most crucial to an informed choice. Sections 11(c) protects the right of an accused not to be

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<sup>26</sup> *R v. Oakes* (1986) 50 C.R. (3<sup>rd</sup>) 1(S.C.C.)

<sup>27</sup> *Charter*, section 7 – Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice and *R v. Hebert* [1990] 2 S.C.R. 151.

<sup>28</sup> Galligan, D.J. "The Right to Silence Reconsidered" paper discussed in *R v Hebert*, *supra* note 27.

<sup>29</sup> *Charter*, section 10 – Everyone has the right upon arrest or detention... (b) to retain and instruct counsel without delay and to be informed of that right.

compelled to testify against himself in criminal proceeding unless he so chooses.<sup>30</sup> Section 13 protects against the use of testimony by a person in one proceeding from being used against him in a subsequent proceeding.<sup>31</sup>

The right to silence has been expanded upon in recent decisions of the Supreme Court of Canada. These are two aspects to this right in the area of criminal procedure. The first is the pre-trial stage. The second is the criminal trial itself.

### **B. Pre-trial silence**

It has always been a basic feature of the common law that an accused person has a right to remain silent before his or her accusers. Viewed another way, it is a restriction on the police investigative power. That is to say, the police do not have a legal right to compel an accused person to provide them with answers to their questions. If an accused person does decide to speak to a "person in authority" during the course of an investigation then the common law places an onus on the prosecution to establish that the statement was given freely and voluntarily, without fear or the promise of favour. There is now the additional consideration of the rights of an accused person under section 7 of the *Charter* in which the accused may not be deprived of his right to life, liberty and security except in accordance with the principles of "fundamental justice."

In 1990 the Supreme Court of Canada, in *R v. Hebert*, recognized and interpreted section 7 of the *Charter* as providing a guarantee to an accused person of a right to silence before trial.<sup>32</sup> The decision specifically dealt with the rights of a suspect during the course of the investigation of an alleged criminal offence. The facts in *Hebert* were that the suspect had insisted on his right to remain silent and had stated to the police that he did not wish to speak to them. Notwithstanding the suspect's assertion of his right to remain silent, the police placed an undercover police officer in the accused's prison cell and obtained a statement from the accused that was incriminating. Madame Justice McLachlin writing the decision for a majority of the Supreme Court articulated the legal principle in this way:

"[T]he person whose freedom is placed in question by the judicial process must be given the choice of whether to speak to the authorities or not." (at page 182)

In the view of the Supreme Court of Canada in this case, to permit the authorities to do indirectly through trickery what the *Charter* does not permit them to do directly would be contrary to the purposes of the *Charter*. This reflects a concern to protect both individual freedom and the integrity of the judicial process through the exclusion of evidence that is offensive to those values as defined in section 7 of the *Charter*. Thus, the Supreme Court has justified the right of a suspect to remain silent at the pre-trial or investigative stage of the criminal process while more clearly defining the scope of the right.

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<sup>30</sup> *Charter*, section 11 – Any person charged with an offence has the right...(c) not to be compelled to be a witness in proceedings against that person in respect of the offence.

<sup>31</sup> *Charter*, section 13 – A witness who testifies in any proceeding has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

<sup>32</sup> *R v. Hebert* [1990] 2 S.C.R. 151

However, the Supreme Court of Canada always attempts to achieve, in its criminal law decisions, a balance between the rights of the accused person and the rights of the State. Thus, in this case the court set out four limitations on the newly articulated pre-trial right to silence. These limitations arise from the practical circumstances of criminal investigations. Therefore, in the first instance this pre-trial right to silence does not prohibit the police from questioning the accused in the absence of his or her lawyer even after the accused has exercised his right to counsel, as long as the police do not deny the accused his or her right to choose whether or not to speak to them. Secondly, the right to pre-trial silence only applies after the accused person has been detained by the police. The theory for this is that essentially the accused person is not under state control until he or she has been detained and therefore the need to protect an accused from the greater power of the state has not arise. Thirdly, if the accused makes a voluntary statement to a cellmate who is not an undercover police officer or police informant, that statement may be used against the accused at his or her criminal trial. Fourthly, if the undercover police officer or agent does not actively set out to intentionally elicit incriminating statements from the accused, then those statements may also be admissible at the criminal trial against the accused.

In *Hebert*, the Supreme Court provided limited guidance regarding the distinction between active elicitation and passive undercover work. More recently however, the Court seems to have expanded the scope of what is permissible questioning by an undercover officer. In *Lieu*, the Supreme Court found that an undercover agent asking a cellmate, "What happened?" and saying, "Yeah. They got my fingerprints on the dope" was not, in fact, the equivalent of interrogation.<sup>33</sup>

Based on the foregoing analysis it is clear that the purpose of the right to silence is to prevent the state from subverting the right of a suspect to choose whether or not to speak to the authorities. However, it also appears that the right to silence at the pre-trial stage could be better and more clearly protected than this analysis suggests. For example, in contrast with the Miranda warning in the United States, in Canada there is no legal requirement on the police to warn an accused person that he or she has a right to remain silent. There also appears to be no requirement that the accused understand the right to silence. In addition, there is a fine distinction between what may be viewed as either the passive or the active behaviours of an undercover police officer in obtaining an incriminating statement from a suspect.

Recent cases at the Court of Appeal level have proposed that the right to silence should be more meaningful to ensure the purpose of the right – “to prevent the use of state power to subvert the right of an accused to choose whether or not to speak to authorities”.<sup>34</sup> Therefore where the police continued to question the suspect after being told four times that he choose to remain silent, the court found a violation of section 7. The court found that the actions by the police “totally disregarded the accused’s desire and undermined his choice to remain silent.”<sup>35</sup>

Young persons (persons under 18 years of age at the time of commission of an offence) are accorded additional rights to those provided by the common law and the *Charter* based on their

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<sup>33</sup> *Lieu* (1999), 27 C.R. (5<sup>th</sup>) 29 (S.C.C.)

<sup>34</sup> The purpose is set out in *R v Hebert*, *supra* note and the recent Court of Appeal cases are discussed in Stuart, D. **Charter Justice in Canadian Criminal Law** (3<sup>rd</sup> Ed.) 2000 at p115-116.

<sup>35</sup> *Ois v R* (2000), 37 C.R. (5<sup>th</sup>) 320 (Que CA)

vulnerability to the coercive nature of police interrogation. Section 56 of *The Young Offenders Act* provides preconditions to the admissibility of a statement.<sup>36</sup> First, the statement must be proven to be voluntary. Second, the police must provide certain information to the youth in language that is appropriate to his level of maturity. This information includes cautions that he is not obliged to give a statement and that, if he does, it may be used in evidence against him. A youth must also be informed that he has the right to counsel and the right to have a parent present while a statement is being taken. Third, the youth must be provided with a reasonable opportunity to exercise the right to have counsel and parents present.

The further, and logical, extension of the pre-trial right to silence is that the mere exercise of that right by an accused person should not result in any adverse inference as to the accused's guilt being drawn in any subsequent criminal trial. In *R v. Chambers*, the Court said that it would be a "snare and a delusion" to offer a suspect the right of silence during investigation only to later turn his silence against him at trial.<sup>37</sup> However, this is not an absolute right and there may be particular circumstances in rare cases when such evidence may be relevant and admissible. The reason for this is that, in the view of the Supreme Court, different considerations apply at trial such as the disclosure of the case that has to be met, legal representation of the accused and the enforcement of rules of admissibility of evidence by a legally trained judiciary.

### **C. At-trial silence**

In Canada, an accused cannot be compelled to testify at trial. However, the issue of whether the judge or jury could draw an adverse inference against an accused for not testifying has been the discussion by the Supreme Court of Canada in numerous cases. Back in 1994, in *R v. P. (M.B.)*, the Court found that the accused must answer the case against him or her when it is clear that there is a case to be met by the accused.<sup>38</sup> In the words of Chief Justice Lamer (as he then was) in *P. (M.B.)*, at pages 227-228, once a *prima facie* case has been presented that could not be non-suited by a motion for a directed verdict of acquittal, "... the accused can no longer remain a passive participant in the process and becomes - in the broad sense - compellable. That is, the accused must answer the case against him or her, or face the possibility of conviction." However, the Court did not suggest that the prosecution could use the accused's silence as a piece of inculpatory evidence or as a means to shore up an otherwise incomplete case against the accused.

Any ambiguity in the case law relating to the use to be made by a judge or jury of the accused's failure to testify was clarified by the Supreme Court in *R v. Noble*<sup>39</sup>. The majority of the Supreme Court (a 5 to 4 decision) established that any use of the accused's silence in order to establish his guilt beyond a reasonable doubt was impermissible even in the case of overwhelming evidence. The majority and the dissenting opinions articulate the debate amongst jurists in Canada. Writing for the dissenting opinion, the Chief Justice Lamer (as he then was) poses one side of the debate:

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<sup>36</sup> *The Young Offenders Act* R.S.C. 1985, c. Y-1, S.56 am. R.S.C. 1985, c. 24 (2<sup>nd</sup> Supp.), s.38; 1995, c.19, s.35

<sup>37</sup> *R v. Chambers* (1990), 80 C.R. (3<sup>rd</sup>) 235 (S.C.C.)

<sup>38</sup> *R v. P. (M.B.)* (1994), 29 C.R. (4<sup>th</sup>) 209 (S.C.C.)

<sup>39</sup> *R v. Noble* (1997), 6 C.R. (5<sup>th</sup>) 1 (S.C.C.)

‘Why has this Court commented so frequently on the effect of the accused’s silence? Why has it arisen so often as an issue before this court? The reason is simple: silence can be very probative.... Under the right circumstances... silence can be probative, and form the basis for natural, reasonable and fair inferences.’<sup>40</sup>

Sopinka J, writing for the majority puts forth the other side:

“If silence may be used against the accused in establishing guilt, part of the burden of proof has shifted to the accused. In a situation where the accused exercises his or her right to silence at trial, the Crown need only prove the case to some point short of beyond a reasonable doubt, and the failure to testify takes it over the threshold. The presumption of innocence, however, indicates that it is not incumbent on the accused to present any evidence at all, rather it is for the Crown to prove him or her guilty. Thus, in order for the burden of proof to remain with the Crown... the silence of the accused should not be used against him or her in building the case for guilt.”<sup>41</sup>

This concept of right to silence rests in the notion of protecting human dignity.

Where the accused raises a defence of alibi, the Court in *Noble* held that this failure to testify was an exception to the general rule that his silence may not be used against him. Where an accused relies on an alibi, the judge or jury may draw an adverse inference against him for his failure to testify. *Noble* raises the concern that while no adverse inferences can be drawn from the accused’s silence at trial, the *Canada Evidence Act* bars a trial judge from advising the jury not to do so.<sup>42</sup>

Over the years, the Supreme Court of Canada has refined the meaning and scope of the right to silence both at the pre-trial and trial stage. It now appears that the law in Canada is that the right to silence is foundational and of broad application.

## V. THE AUSTRALIAN REVIEWS

### A. Legislation and case law

I now turn to an examination of the right to silence in two Australian states, New South Wales and Victoria, where recent reviews of the right to silence have been conducted by the relevant Law Reform Commissions. In New South Wales and Victoria, as in other Australian jurisdictions, the accused is a competent but not a compellable witness, thereby expressly preserving the accused’s right to remain silent at trial.<sup>43</sup> In Australia, the common law position is that if the accused remains silent at trial, the jury is then entitled to use the silence as the basis for drawing adverse inferences and the judge is permitted to comment on the accused’s silence and to instruct the jury on how that silence may be used in its deliberation. In New

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<sup>40</sup> *Noble*, *supra* note 39 at p 887.

<sup>41</sup> *Noble*, *supra* note 39 at p 828.

<sup>42</sup> *Canada Evidence Act* R.S.C. 1985, c. C-5 – section 4(6) The failure of the person charged, or the wife or husband of such person, to testify shall not be made the subject of comment by the judge or by counsel for the prosecution.

<sup>43</sup> *Criminal Law and Evidence Act 1891* (NSW) and *Crimes Acts 1958* (Vic) s. 339.

South Wales, legislation makes provision for a judge to comment on the accused's silence.<sup>44</sup> However, in Victoria, legislation provides that neither the judge nor the prosecutor may comment on the accused's failure to testify.<sup>45</sup>

Regarding the right to remain silence prior to trial, there is no law in any Australian jurisdiction that makes it an offence to remain silent in response to police questioning. The position at common law is that the trial judge and prosecutor are prohibited from commenting at trial on pre-trial silence.<sup>46</sup> The right to silence when questioned by police has been modified in different ways by numerous statutes. For example, in New South Wales, the Traffic Act requires drivers to produce their licence and provide their names and addresses when requested by police. Non-compliance is an offence.<sup>47</sup>

Two major decisions of the Australian High Court on the right to silence have raised questions as to the extent the Australian courts will protect that right. In the first case, *Petty v The Queen*, the court strongly upheld the suspect's right to silence whereas in the second, *Weissensteiner v The Queen*, the court appeared to back down from the statements made in *Petty* and recognised some limits on the right. The *Petty* decision (see Appendix) seemed to confirm the position that no adverse inference could be drawn from the exercise of the right to silence pre-trial, primarily because doing so would undermine the right to silence which was held to be a "fundamental rule of the common law". The court rejected a line of authorities that distinguished between inferences adverse to guilt and those adverse to credibility. The majority of the Court in *Weissensteiner* (see Appendix) distinguished *Petty* on the basis that the court was dealing with silence *at trial* rather than silence *before trial*. They held that an inference of guilt could not be drawn from silence, but that, if an inference of guilt was otherwise available on the evidence, that inference could more safely be drawn where the accused failed to provide an innocent explanation. Although both cases illustrate the importance not only of a right itself, but also as a protection of the suspect or accused, *Weissensteiner* shows that the right to silence may be limited. Although the right is not to be lightly disregarded, it is balanced against the desire not to exclude evidence which can rationally support a finding of guilt. It is not so clear in *Weissensteiner* as to when this balance will be struck.<sup>48</sup>

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<sup>44</sup> *Evidence Act 1995* (NSW) s.89.1 In a criminal proceeding, an inference unfavorable to a party must not be drawn from evidence that the party or another person failed or refused: (a) to answer one or more questions, or (b) to respond to a representation, put or made to the party or other party in the course of official questioning.

89.2 Evidence of that kind is not admissible if it can only be used to draw such an inference.

89.3 Subsection 1 does not prevent use of the evidence to prove that the party or other person failed or refused to answer the question or to respond to the representation if the failure or refusal is a fact in issue in the proceeding.

Prior to the 1995 Act, the state of the law on this issue has changed from time to time: in 1893, case law permitted the trial judge to direct the jury to draw adverse inferences from an accused failure to testify at trial. However, in 1900, this was modified by legislation in which judicial comment on the exercise of the right to silence at trial was prohibited.

<sup>45</sup> *Crimes Act 1958* (Vic) s. 339

<sup>46</sup> The common law position was articulated in *Petty v The Queen* (1991) 173 CLR 95

<sup>47</sup> New South Wales Law Reform Commission, *supra* note 21.

<sup>48</sup> The information contained in this paragraph is from *Petty v The Queen* (1991) 173 CLR 95 F.C. 91/029 and *Weissensteiner v The Queen* (1993) 178 CLR 217 F.C. 93/051 (1993) 68 A Crim R 251 (both found at [www.austlii.edu.au/cgi-bin/](http://www.austlii.edu.au/cgi-bin/)) and Stone, E. "Calling a Spade a Spade: The Embarrassing Truth About the Right to Silence" (1998) 22 Criminal Law Journal 17.

## B. Recent reviews and empirical research

A number of Australian states have conducted extensive reviews of the law relating to the right to silence.<sup>49</sup> These reviews generally do not consider whether the right to silence should be abolished. They define the right as meaning that a suspect should be compelled to answer police questions or should be compelled to testify at trial. Rather, the focus of the reviews relates to whether it should be permissible for the exercise of this right to be used in any way against a suspect. Two of the most recent reviews will be examined, in particular for the Commissions' use of empirical research in reaching their recommendations. In a report in July 2000, the New South Wales Law Reform Commission considered whether a right to silence should exist and if so, what ought to be the nature of any inference drawn from the exercise of that right<sup>50</sup>. In Victoria, a committee was formed to examine the right to silence at trial and pre-trial and the consequences that flowed in exercising these rights. Their report was distributed in 1998.<sup>51</sup> Both reviews provide details of the arguments for and against reform of the right to silence (both pre-trial and at trial). The main focus of the reform is permitting judicial comment on the inferences which the jury is entitled to draw.

One of the arguments for reform dates back to Jeremy Bentham's claim of the likelihood of misuse of the right by guilty suspects. The argument suggests that common sense demands that an innocent person would naturally deny an accusation leveled by police and offer an explanation for the circumstances or conduct which created suspicion. Others go further and argue that the right to silence is exploited by guilty suspects, particularly "hardened or professional" criminals, and that this impedes police investigations, prosecutions and ultimately convictions. It is noteworthy that both Australian reviews report that, in reviewing the empirical research, there appears to be no evidence to support these claims. In fact, the research indicates that very few suspects actually exercise the right to silence, which suggests that modifying the right would not significantly increase prosecutions or convictions. Moreover, the empirical evidence indicates that a suspect's reliance on the right to silence does not reduce the likelihood of charges being laid or the likelihood of the suspect pleading guilty or the likelihood of an acquittal at trial. Some Australian research suggests that the likelihood of a suspect being charged and convicted increases where the suspect exercises the right to silence. The data was inconclusive with respect to whether the right is exploited by suspects in relation to serious offences or exploited by professional or hardened offenders. The question raised is: if this is truly a right, can its mere exercise by a suspect ever be considered to be exploitation or abuse of the right?<sup>52</sup>

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<sup>49</sup> In 1974, the Criminal Law and Penal Methods Reform Committee of South Australia recommended that in deciding guilt, the tribunal of fact be entitled to draw such inferences as seems to it to be proper from the accused silence when questioned by police. In 1975, the Australian Law Reform Commission recommended retaining the existing law in relation to silence when questioned by police. In 1987, the same Commission recommended codification of the existing law and also permitting judicial comment on the exercise of this right at trial. In New South Wales in 1990, the Law Reform Commission recommended that no adverse inference be permitted from a refusal to answer police questions or participate in police investigations. In 1997, the New South Wales Police Commission called for a review to the right to silence. At the same time, the Director of Public Prosecutions also supported some relaxation of this right. Summaries of these reviews contained in New South Wales Law Reform Commission, *supra* note 21.

<sup>50</sup> New South Wales Law Reform Commission, *supra* note 21 (also found at [www.lawlink.nsw.gov.au/lrc.nsf/](http://www.lawlink.nsw.gov.au/lrc.nsf/))

<sup>51</sup> Scrutiny of Acts and Regulations Committee, "*The Right to Silence, Final Report*" (March 1999: Parliament of Victoria) (found at [www.parliament.vic.gov.au/sarc/RTS%20Report/rts99.html](http://www.parliament.vic.gov.au/sarc/RTS%20Report/rts99.html).)

<sup>52</sup> This section summarizes the empirical research done in England which is referred to in the New South Wales and Victoria reviews. Also the New South Wales Law Reform Commission conducted their own research, the results of which are contained in NSW Law Reform Commission Research Report 10 "*The Right to Silence and Pre-trial Disclosure in NSW*" (July 2000). The list of research is contained in the select bibliography annexed to the NSW Law Reform Commission report.



Another argument for reform relates to the concern of whether the criminal justice system is able to cope with complex trials and “ambush defenses”.<sup>53</sup> This position claims that reform would improve the efficiency of criminal investigation by police. However, there is no evidence that the right to silence leads to excessively high rate of unjustified acquittals. Actually, in Victoria the conviction rate is 95% (or 98% with guilty pleas taken into account). The data shows that ambush defenses only occur in 1.5% and 5% of the cases and that those who raise them are more likely to be convicted than acquitted. One English study found that every defendant who relied on an ambush defence was convicted.<sup>54</sup> The classic example of an ambush defence is an alibi which now has statutory rules in both states where the defence must disclose details before the trial. The other side of this argument is that the creation of an adverse inference from the right to silence may actually create a positive incentive for the police to concoct silence.

It has also been argued that the right to silence during interrogation by police can be offset by other safeguards which provide adequate protection for suspects and address the power imbalance between suspect and police. Some of these safeguards include access to legal services or an independent observer during police questioning or electronic recording of the interview. While legal advisors more likely advise suspects to remain silent, research illustrates that this frequently forms part of a temporary strategy, including obtaining better disclosure of the accusations from the police. A weakness to this argument is the assumption that access to legal advice and other safeguards remove any legitimate reasons an innocent suspect might otherwise have for preferring to remain silent. Another weakness in this argument is illustrated by research conducted in England that shows that the quality of advice and representation is often disappointing. In juvenile cases where a parent, guardian or social worker can be present during questioning, research shows that they provide little assistance or guidance to the suspect. Furthermore, electronically recording the interview does not remove the many legitimate reasons which innocent suspects may have for remaining silent during police interrogation. The review by the Victorian Committee points out that when the United Kingdom modified the right to remain silent, this took place as one of a number of legislative changes that introduced other safeguards for suspects, including the legal aid duty solicitor scheme and electronically recorded interviews. The Committee cited the lack of publicly funded right to free legal advice in Victoria as a hindrance for introducing a modified right to silence.

Another argument for reform is that there is the need to regulate the use made of silence by juries. Where juries become aware that the defendant refused to answer police questions, the argument is that there is a real risk that they will place too much weight on the defendant’s silence unless they are guided by judicial direction as to the inferences which can be drawn. However, it is one thing what a jury may infer, given no help from the court. It is another thing when a court solemnizes the silence of the accused into evidence against him.

There are a number of arguments for retaining the right to silence. One is that there are many legitimate reasons for exercising this right, which are consistent with innocence. For example, permitting judicial comment might operate as a subtle form of compulsion on suspects.

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<sup>53</sup> “Ambush defenses” mean those defenses that are raised for the first time during the trial and based on evidence which could have been disclosed during interrogation.

<sup>54</sup> This study and other studies in the United Kingdom have been summarized in Leng, R. “*The Right to Silence Debate*” in Morgan, D. and Stephenson, G. **Suspicion and Silence: The Right to Silence in Criminal Investigations** (1994).

Suspects may distrust the police and fear that police will trick them into answering questions or distort their answers or harass potential defence witnesses. Suspects may be reluctant to repeat an explanation given to police informally which was disbelieved. Innocent suspects may have a desire to protect others or fear being labeled a police informant or fear reprisal by the offender. Suspects may want to conceal something unrelated to the crime which is personally embarrassing or something that they are ashamed of or to conceal illegal behavior, which is not under investigation. Suspects may be in shock and confusion at police accusations or believe that the allegations are so absurd or offensive that they should not be dignified with a response. Suspects may genuinely not be able to answer police questions. The allegations may be vague and unclear. The police may not have revealed enough detail about the allegations to enable them to answer the questions. The events which give rise to the allegations may be so factually complex or the issues upon which guilt will turn so fine, that suspects may take the view that it would be unwise to answer questions until they had the opportunity to review their situation with the help of a lawyer. Suspects may refuse to answer questions upon the advice of a lawyer. Suspects may have limited language ability or be intoxicated or under the influence of drugs at the time of questioning or have low IQ or mental deficiencies. Research indicates that the physical or mental condition of the suspect was one of the main reasons for legal advice to remain silent. Research also shows that the suspect's general attitude towards the police is a key factor in determining the level of the suspect's cooperation with police questioning.

Another argument for retaining the right to silence as it exists in these jurisdictions is the effect that abolishing or modifying this right would have on police practices and modes of detection of crime. The concern is that modification could result in police manipulating interviews by framing questions in a way that encourages suspects to remain silent. The right to silence provides a necessary incentive to police to investigate thoroughly and search for evidence beyond mere confessions.

If this right is abolished or reformed, the concern expressed by these reviews is that this will result in the substitution of trial by a court by a trial in a police station, which is repugnant to our conceptions of the rule of law. If courts and juries are permitted to draw adverse inferences from the defendant's exercise of this right, it is argued that this would operate, in practice, as a form of compulsion, infringing the requirements that admissions made in police interviews be voluntary. Research in Northern Ireland indicates that, after the modification of the caution given to suspects by police, most suspects believed that there was an obligation to answer any questions put by the police. This argument suggests that any modification would undermine the fundamental principles of the presumption of innocence and the prosecution's burden of proving the defendant's guilt.

Both reviews recommend the retention of the right to remain silent. The New South Wales Commission concluded that the right to silence when questioned by police is "a necessary protection for suspects, and that its modification would undermine fundamental principles". The Committee in Victoria was of the view that the law relating to right to silence should not be changed. They were not convinced that the right to silence created any significant problems. They believed that any changes to this right may have undesirable effects and that allowing adverse inferences to be drawn from silence would create an unacceptable risk of miscarriage of justice. They did however, recommend that prohibiting judges from commenting on silence was undesirable and should be lifted. Judges should be permitted to direct the jury, in

accordance with *Weissensteiner*, about the circumstances in which, and purposes for which, it may use the accused's failure to testify in reaching its verdict.

## VI. THE UNITED KINGDOM EXPERIENCE

### A. Recent changes in legislation

In the United Kingdom, there have been a number of reviews by various Committees and Royal Commissions dating back to 1968 on whether to abolish, retain or modify the right to remain silent.<sup>55</sup> The majority of these reviews recommended retaining the right to remain silent as it was defined in Halsbury: "The failure of an accused person when questioned to mention some fact which he afterwards relies on in his defence cannot found an inference that the explanation subsequently advanced is untrue, for the accused has a right to remain silent... The failure of the accused to testify on his own behalf may not be made the subject of any comment... but he should make it clear to the jury that failure to testify is not evidence of guilt and that the accused is entitled to remain silent and see if the prosecution can prove its case".<sup>56</sup> Despite this, there remained strong political pressure to modify this right. The justification cited for modification was that it was necessary to respond to terrorist suspects, trained in counter interrogation techniques, who exploited the right to silence when questioned by police and raised ambush defenses at trial.<sup>57</sup> In 1988 the Home Office established the Home Office Working Group on the Right to Silence which had as the term of reference to advise the government on how to change the law, not whether or not in principle some form of change was justified.

The law relating to the right to silence in the UK was substantially modified in Northern Ireland by the *Criminal Evidence (Northern Ireland) Order 1988* and in England and Wales by the *Criminal Justice and Public Order Act 1994*. These laws permit the jury to draw strong adverse inference from the exercise of the right to silence when questioned by police or at trial, and allow the trial judge to direct the jury accordingly. Both pieces of legislation allow the court to draw whatever inferences "appear proper" from the accused's silence in four sets of circumstances. First, when the accused fails to mention during questioning or upon charge any fact which he or she later relies in his or her defence at trial, if under the circumstances, he or she would have been "reasonably expected" to mention that fact<sup>58</sup>. Second, where the accused refuses to be sworn or to answer any questions at his or her trial.<sup>59</sup> Third, where the accused fails to account for any objects, substances or marks upon him or her, or upon his or her clothing, or in his or her possession at the time of his or her arrest.<sup>60</sup> Fourth, where the accused fails to account for his or her presence at a particular place.<sup>61</sup> The *1994 Act* contains three

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<sup>55</sup> In 1968, the Justice Evidence Committee proposed to retain the right to silence at trial but recommended that the prosecution be permitted to comment to the jury on the failure of the accused to give evidence at trial. The Criminal Law Revision Committee issued a report in 1972, where the majority of the Committee recommended that adverse inferences could be drawn from both pre-trial and at-trial silence "as appear proper" and such could be the subject of comment by the judge and prosecutor. Due to strong opposition to this report, no implementation took place at that time. The Royal Commission on Criminal Procedure in 1981 proposed the existing law to be retained and introduced a number of reforms including the duty solicitor scheme and substantive rights to legal aid during police questioning.

<sup>56</sup> 11(2) *Halsbury's Laws of England* 937-38 (1990).

<sup>57</sup> Scrutiny of Acts and Regulations Committee, *supra* note 21, Chapter 6: The Right to Silence in the United Kingdom.

<sup>58</sup> *1988 Order*, Article 3 and *1994 Act* Section 34. See annex for full details.

<sup>59</sup> *1988 Order* Article 4 and *1994 Act* Section 35. See annex for full details.

<sup>60</sup> *1988 Order* Article 5 and *1994 Act* Section 36. See annex for details.

<sup>61</sup> *1988 Order* Article 6 and *1994 Act* Section 37. See annex for details.

safeguards: no adverse inferences can be drawn against child defendants or defendants with certain physical or mental conditions; a defendant cannot be convicted solely on an inference drawn from his silence; and a failure to testify cannot give rise to criminal prosecution for contempt.

## B. Jurisprudence

The legislation is complex and has already resulted in a sizeable body of commentary and interpretation. The courts in Northern Ireland have interpreted the provisions in the *1988 Order* widely, holding that such inferences can be drawn once the prosecutor has established a *prima facie* case and does not require that the prosecutor's case be "on the brink" of proving guilt.<sup>62</sup> In one case, unfavorable inferences were drawn where the defendant initially failed to mention the relevant fact but disclosed it later during police questioning.<sup>63</sup> The courts have also held that it is not necessarily reasonable for a suspect to fail to mention a fact on the basis of having received legal advice to remain silent.<sup>64</sup>

In England, the Court of Appeal in *R v Cowan and Others* rejected the argument that the *1994 Act* altered or watered down the burden of proof as the prosecution still had to prove a *prima facie* case.<sup>65</sup> In the *Condrón v UK* case, which later went to the European Court, the English Court of Appeal held that legal advice by itself could not prevent an adverse inference being drawn, reasoning that this would render s. 34 "wholly nugatory". While the Court of Appeal noted that it would have been desirable for the trial judge to give some direction to the jury about drawing adverse inferences, the conviction of Condrón was safe because of the "substantial, almost overwhelming, evidence".<sup>66</sup> Some commentators have noted that the English Courts were more concerned with the safety of the conviction rather than whether the accused had received a fair trial and as such may have future decisions reversed by the European Court.<sup>67</sup>

## C. Debate and European Review

Criticisms of the *1988 Order* and the *1994 Act* surfaced as soon as the legislation was passed. These included being poorly drafted and ill considered, a potent source of confusion and resulting in wrongful convictions.<sup>68</sup> To some, the modification to the right to silence represents a clear shift in the burden of proof in the criminal trial in the United Kingdom. This position is that it is not simply curtailment or restriction but nothing less than abolition of the right to silence. If it is permissible for the silence of the suspect, under police questioning, to reinforce the prosecution's case, this must have the effect of putting pressure on suspects to give answers or run the risk that they will strengthen the evidence against them. This, in effect, removes the pre-existing right to say nothing without significant penalty. Some critics say this is a clear watering down of the prosecution's burden of proof. However, supporters of this modification

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<sup>62</sup> *R v Sean Murray* (Northern Ireland Court of Appeal, October 29, 1991) discussed in Jennings, A., Ashworth, A. and Emmerson, B. "Silence and Safety: The Impact of Human Rights Law" (2000) Criminal Law Review 879.

<sup>63</sup> *R v McLernon* (Northern Ireland, Belfast Crown Court, 20 Dec 1990, Kelly LJ) discussed in Jackson, J., "Interpreting the Silence Provisions: The Northern Ireland Cases" (1995) Criminal Law Review 587.

<sup>64</sup> *R v Kinsella* (1993) and *R v Connolly and McCartney* (1992) as discussed in Jackson, *ibid*.

<sup>65</sup> *R v Cowan and Others*, The Times, October 13, 1995

<sup>66</sup> *Condrón v UK* (1997) 1 Cr.App.R. 185 (Court of Appeal) discussed in Jennings et al, *supra* note 43.

<sup>67</sup> Jennings et al, *supra* note 43.

<sup>68</sup> Jennings, A., "The Right to Silence – A lecture to the Criminal Bar Association" (November 1999)

argue that this change can be safely accommodated within the tolerances of a system that nevertheless remains committed to protecting the rights of defendants.<sup>69</sup>

The European Court of Human Rights, in a number of cases from the English courts, has used as its starting point for analysis the affirmation of the implicit right to silence in the *Convention*. Since that right is not absolute, the trial judge can draw strong unfavorable inferences from the defendant's silence when questioned by police using the "common sense" test, meaning where a situation clearly calls for an explanation, the court can take into account the accused's silence in assessing the prosecution evidence. Where a *prima facie* case exists against the accused independently of adverse inferences from the silence, this direct evidence combined with legitimate inferences could lead a jury to be satisfied beyond a reasonable doubt that the accused was guilty. However, the European Court also stated that the right to silence was an "inherent element" of a fair trial and that the right to a fair trial would be violated if the defendant were convicted solely or mainly on the basis of his exercise of the right to silence.<sup>70</sup>

Recent cases of the European Court give further indication how the English Courts should apply the right to silence and balance drawing adverse inferences. In finding a violation of Article 6, the Court noted in *Condron v UK* that "particular caution" was required before drawing an adverse inference.<sup>71</sup> The Court in *Averill* went farther when it said that "the extent to which adverse inferences can be drawn from an accused's failure to respond to police questioning must be necessarily limited". It further recognised that there may be other sufficient reasons for an innocent suspect to remain silent during police questioning besides relying on legal advice to do so.<sup>72</sup> With the passing of the *Human Rights Act 1998* in the United Kingdom, the case law of the European Court may have more impact on the Court of Appeal in requiring a determination of fairness in criminal trials rather than focusing on the safety of a conviction.

## VII. THE UNITED STATES EXPERIENCE

### A. The Fifth Amendment and *Miranda*

In the United States, case law has recognized two constitutional bases for the requirement that only voluntary confessions will be admitted: first, the Fifth Amendment which provides that no person "shall be compelled in any criminal case to be a witness against himself" and the Due Process Clause of the Fourteenth Amendment which states that the voluntariness test is controlled by the Fifth Amendment.

In *Miranda v. Arizona*<sup>73</sup> the United States Supreme Court formulated a set of concrete constitutional guidelines in the area of police interrogation that has, over the past thirty four years, become part of the American lexicon. Prior to *Miranda*, a confession was excluded only where it was established by evidence that it had been made as a result of actual coercion, threat

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<sup>69</sup> *ibid.*

<sup>70</sup> *Murray v UK, supra* note 17.

<sup>71</sup> *Condron v UK, supra* note 18

<sup>72</sup> *Averill v UK* (2000) Crim. L.R. 680

<sup>73</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966)

or promise. The Supreme Court decision departed from this rule and established an irrebuttable presumption that a statement was involuntary if taken in custody by the police without a "Miranda warning." Even where a confession could otherwise be proven to be voluntary and not the result of threat, coercion or promise, it would be excluded in the absence of the proper warning. The warning, which must be given prior to any questioning, requires the police to warn a person in custody of the following constitutional rights: a.) the right to remain silent, b.) that anything the suspect says can be used against him in court, c.) the right to have a lawyer present, and d.) the right to have a lawyer appointed by the state if the suspect cannot afford one. Furthermore, the police must afford an opportunity to exercise these rights throughout any subsequent interrogation. If, at any time the suspect indicates that he wishes to consult a lawyer before speaking, the questioning must cease. Similarly, if the suspect indicates that he does not wish to be interrogated, the police must not commence questioning. A suspect who consents to answer some questions may withdraw that consent at any time. Once consent has been withdrawn, the police are required to stop questioning. At trial, the prosecution must prove that these warnings were given and the accused provided a statement to the police only after he "knowingly and intelligently" waived these rights.

Only statements stemming from custodial interrogation fall within the Miranda rules. The Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." In *Miranda*, the Court examined in some depth the nature and setting of in-custody interrogations as well as police training and common practices used to obtain confessions. It found that, although modern police practice uses psychological rather than physical methods to obtain statements, the similar intent was to "subjugate the individual to the will of the examiner," which the Court found was coercive and destructive to human dignity. Generally, the Court has upheld the principle that the accused's exercise of his right to remain silent should not be used as evidence against him at trial.

Over the years, the Supreme Court has carved out some exceptions to the strict interpretation of the Miranda rules. For example, where police informants pose as inmates and question the suspect about his involvement in a murder, an inculpatory statement may be admissible on the basis that there was no inherently coercive atmosphere where a suspect believes he is merely chatting to a fellow inmate rather than talking to a police officer.<sup>74</sup> In *Pennsylvania v. Muniz*<sup>75</sup> the Supreme Court ruled that responses to booking questions which dealt with routine biographical information such as name, address, height, weight etc., were admissible despite the absence of a Miranda warning and waiver of rights.

## **B. Recent developments**

Subsequent to *Miranda*, the United States Congress attempted, by legislation, to limit the effect of the ruling by enacting a provision that allowed courts to admit as evidence otherwise voluntary statements where police had failed to inform the suspect of his rights according to the

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<sup>74</sup> *Illinois v. Perkins* 496 U.S. 292 (1990)

<sup>75</sup> *Pennsylvania v. Muniz* 496 U.S. 582 (1990)

Miranda rules. In *Dickerson v. United States*<sup>76</sup> the Supreme Court reiterated that *Miranda* was a constitutional decision in which the Court had interpreted and applied the provision of the Constitution relating to the right against self-incrimination. As such, Congress did not have the authority to legislatively supercede the Supreme Court's decision by enacting legislation. The Court further declined to overrule *Miranda* on the basis of *stare decisis* even though it acknowledged the obvious disadvantage of a rule that excludes both voluntary and involuntary statements.

## VIII. CONCLUSION

From an examination of the international and regional human rights instruments and the implementation practice in various domestic jurisdictions, it would appear that the question is not whether there is a right to silence, but rather what is the precise nature of this right. Is it an absolute right essential to a fair trial or is it subject to certain qualifications in order to provide for a balancing between individual rights versus states' interest?

In 1966, at the time the *ICCPR* was drafted, the right to silence was not explicitly mentioned in any international instrument. However, recent developments, including the jurisprudence from the European Court on Human Rights, the *Draft Body of Principles on the Right to a Fair Trial*, the recent *Rules of Procedure and Evidence* adopted by the criminal tribunals established for the Former Yugoslavia and Rwanda and the *Rome Statute of the International Criminal Court*, appear to firmly establish this right as an international standard. The most recent articulation of this right in the *Rome Statute* provides for a broad interpretation in that "silence may not be used as evidence to prove guilt and no adverse consequences may be drawn from the exercise of the right to remain silent".

While the right seems to be evolving in international law, in various domestic jurisdictions the nature and extent of the right to silence is very much in issue. In Australia, recent reviews have examined whether the right should be abolished, modified or retained. In the United Kingdom, the legislative modifications of the right are much in debate both in domestic courts and the European Court on Human Rights. Canadian case law also reflects the debate as to the extent and effect of adverse inferences when a suspect exercises the right to silence. All of these jurisdictions recognize a right to silence both at trial and during investigation. The differences lie in the importance placed on this right and balancing the use of drawing adverse inferences with the presumption of silence and the right not to be compelled to testify against oneself. Underlying these differences is the fundamental debate dating back to the origins of the right to silence. There are those who believe that "innocence never takes advantage of it. Innocence claims to the right of speaking, as guilt invokes the privilege of silence." On the other hand, some believe that the right to silence is fundamental to a fair trial and protection of human dignity and can never be qualified.

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<sup>76</sup> *Dickerson v. United States* No. 99-5525 (2000)

## APPENDIX – SUMMARY OF SELECTED CASE LAW AND LEGISLATION

### CANADA

*R v Oakes* (1986) 50 C.R. (3d) 1 (SCC)

Facts: The accused was charged with drug trafficking. He challenged the validity of provision in the *Narcotic Control Act* which provides for a reverse onus, if the court finds that the accused is in possession of a narcotic he is presumed to be in possession for purposes of trafficking unless he establishes that he had no intent.

SCC Held: The presumption of innocence (s. 11(d)) was violated and there was no objective purpose to justify it under s. 1 of the Charter. The court discussed the purpose of the presumption of innocence, saying that it lies at the very heart of the criminal law, protected expressly by section 11(d) and also integral to the general protection of life, liberty and security of the person in s.7. This right requires that an individual be proven guilty beyond a reasonable doubt and that the state bears the burden of proof. In general, a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact which is an important element of the offence violates the presumption of innocence. In this case, the legislative provision infringes s. 11(d) in requiring the accused to prove no purpose of trafficking once the basic fact of possession is proven.

*R v Hebert* (1990) 77 C.R. (3d) 145 (SCC)

Facts: After the accused was arrested and read his rights, he refused to provide a statement to the police. He was then placed in a cell with a police officer who was in plain clothes and posed as a suspect. The police started a conversation with the accused and the accused made incriminating statements.

SCC Held: The right to remain silent is protected as a principle of fundamental justice and is broader than the common law confession rule and the rule against self-incrimination. Rooted in this right is the notion that a person whose liberty is placed in jeopardy by the criminal process cannot be required to give evidence against himself, but rather has the right to choose whether to speak or to remain silent. The issue in this case was whether the conduct of the authorities, considered on an objective basis, effectively and unfairly deprived the suspect of the right to choose whether to speak to the authorities. Thus when the police use subterfuge to interrogate an accused after he has advised them that he does not wish to speak to them, the accused right to remain silent is violated. The right applies only to detainees and does not affect the use of an undercover police officer prior to detention.

*Chambers v R* (1990) 80 CR (3d) 235 (SCC)

Facts: At the accused's trial, the prosecution was allowed to cross-examine the accused as to his pre-trial silence. The trial judge did not direct the jury as to the limited use of that evidence. The Court of Appeal decided that there had been misdirection by the judge. During the accused's cross-examination, the prosecution had attempted to demonstrate that some of the accused testimony was a recent concoction and suggested to the accused that when he told his story in court it was the first time he had ever told it to anyone in authority. Both defence and prosecution asked the judge to direct the jury to ignore that line of questioning but he forgot to. While this amounted to misdirection the majority of the court held that there was no substantial miscarriage of justice.

SCC Held: Ordered a new trial There is a right to silence which can properly be exercised by an accused person in the investigative stage of proceedings. It is the basic tenet of Canadian law and falls within the ambit of s. 7 of the Charter. Since there is a right to silence, it would be a "snare and a delusion" to caution the accused that he need not say anything in response to a police officer's questions but nonetheless put in evidence the fact that the accused exercised his right and remained silent in the face of a question which suggested his guilt. Unless the crown can establish a real relevance and a proper basis for admission, neither the questions by the investigating officers nor evidence as to the ensuing silence of the accused should be admitted.

*R v Noble* (1997) 6 CR (5th) 1 (SCC)

Facts: A witness discovered the accused in a parking lot appearing to break into a car with a screwdriver. The witness asked the accused for a driver's license and he testifies that he believed that the driver's license accurately depicted the likeness of the accused. At trial the witness could not positively identify the man but the judge felt he himself could compare the drivers license likeness to that of the accused. The trial judge noted that the accused faced an overwhelming case to meet as a result of the license, yet remained silent. Trial judge said he could draw an adverse inference that would add to the weight of the prosecution's case on the issue of identification and convicted the accused. The Court of Appeal ordered a new trial.

SCC Held: Agreed with the Court of Appeal. The trial judge erred in law in using the failure of the accused to testify as evidence going to identification that permitted him to reach a belief in guilt beyond a reasonable doubt.



The right to silence, which is found in ss.7 and 11(c) of the Charter, is based on society's distaste for compelling a person to incriminate himself or herself with his or her own words. The use of silence to help establish guilt beyond a reasonable doubt is contrary to the rationale behind the right to silence. Just as a person's words should not be conscripted and used against him or her by the state, it is equally inimical to the dignity of the accused to use his or her silence to assist in grounding a belief in guilt beyond a reasonable doubt. The presumption of innocence, enshrined at trial in s. 11(d) of the Charter, provides further support for the conclusion that silence of the accused at trial cannot be placed on the evidentiary scales against the accused. If silence may be used against the accused in establishing guilt, part of the burden of proof has shifted to the accused. In order for the burden of proof to remain with the prosecution, as required by the Charter, the silence of the accused should not be used against him or her in building the case for guilt. While earlier cases on the appropriate use of silence by the trier of fact are admittedly ambiguous, recent decisions are clear: silence may not be used by the trier of fact as a piece of inculpatory evidence. Alibi defenses create exceptions to the right to silence. While the accused generally has a right to silence during the investigative stage of a criminal proceeding, if an alibi defence is not disclosed in a sufficiently particularized form at a sufficiently early time to permit the police to investigate it prior to trial, the trier of fact may draw an adverse inference from the accused's pre-trial silence. It is based on the relative ease with which an alibi defence can be fabricated.

*R v Liew* (1999) (SCC) unreported

Facts: The accused was arrested during a drug deal and the police also pretended to arrest the undercover officer involved in the deal. The police arranged a cell block interview between the accused and the officer. The accused initiated an exchange by referring to the circumstances of his arrest. The officer asked him what had happened and stated that his fingerprints were on the drugs. The accused then admitted that his fingerprints were on the drugs as well. The trial judge found that the police conduct breached the right to silence. The statements were excluded and the accused was acquitted. The Court of Appeal disagreed and ordered a new trial.

SCC Held: Agreed with Court of Appeal. A detained person's right to silence was not absolute. The accused had the right to speak or to remain silent. Despite the officer's subterfuge, the accused's responses were not actively elicited or the result of interrogation. The accused directed the conversation to an area where the police were seeking information. The officer's question did not re-direct the conversation to a sensitive area. The officer's introduction of the subject of fingerprints did not change the voluntary nature of the accused's admissions. There was no evidence of a trust relationship between the officer and the accused, and the officer did not manipulate him to bring about a mental state in which the accused was more likely to talk.

## AUSTRALIA

*Petty and Maiden v The Queen* (1991) 173 CLR 95 F.C. 91/029 (High Court)

Facts: Both accused were convicted of murder. One remained silent during police interrogation and took the stand at trial whereas the other provided a statement to the police but did not testify. The judge directed the jury regarding the drawing of adverse inference from the silence.

Held: Pre-trial right to silence can be exercised without penalty. A person who believes on reasonable grounds that he or she is suspected of having been a party to an offence is entitled to remain silent when questioned or asked to supply information by any person in authority about the occurrence of an offence, the identity of the participants, and the roles which they played. An incident of that right of silence is that no adverse inference can be drawn against an accused person by reason of his failure to answer such questions or to provide such information. To draw such an inference would be to erode the right to silence or to render it valueless. That incident of the right to silence means that, in a criminal trial, it should not be suggested, either by evidence led by the Crown or by questions asked or comments made by the trial judge or the crown prosecutor, that an accused's exercise of the right of silence may provide a basis for inferring a consciousness of guilt. Thus, to take an example, the crown should not lead evidence that, when charged, the accused made no reply. Nor should it be suggested that previous silence about a defence raised at the trial provides a basis for inferring that the defence is a new invention or is rendered suspect or unacceptable. In this case, the High Court rejected a line of authority suggesting that there was a distinction between inferring a consciousness of guilt from silence and denying credibility to a late defence or explanation by reason of earlier silence. The court found the denial of the credibility of the late defence or explanation is just another way of drawing an adverse inference against the accused by reason of his exercise of the right of silence.

*Weissensteiner v R* (1993) 178 CLR 217 F.C. 93/051 (1993) 68 A Crim R 251 (High Court)

Facts: The accused was convicted of murder of two people and theft of a vessel. The evidence against him was circumstantial. He gave no evidence at trial nor did he call any witnesses. He appeals arguing that the trial judge erred in directing the jury that they might more safely draw an inference of guilt from the evidence because the appellant did not give evidence of relevant facts which could be perceived to be within his knowledge.

Held: Appeal dismissed. Judge did not err in his direction. The court indicated that three conditions would have to be satisfied in order for the accused's failure to testify to be used in the way sanctioned – (1) the prosecution case must already (that is, without taking into account the failure to testify) be able to support an inference of guilt; (2) the accused must be seen to be in possession of some knowledge of the events forming the subject of the charge which is peculiar to himself; and (3) it must be reasonable to expect that the accused would give that version of events, at trial, if he or she were innocent. Silence on the part of the accused at trial cannot fill in any gaps in the prosecution case. It is only when the failure of the accused to give evidence is a circumstance which may bear upon the probative value of the evidence which has been given and which the jury is required to consider, that they may take it into account, and they may take it into account only for the purpose of evaluating that evidence.

## **UNITED KINGDOM**

### Criminal Evidence (Northern Ireland) Order 1988: selected articles

Article 2(4): A person shall not be committed for trial, have a case to answer or be convicted of an offence solely on an inference drawn from such a failure or refusal as is mentioned in Article 3(2), 4(4), 5(2) or 6(2).

2(7): Nothing in this Order prejudices any power of a court, in any proceedings, to exclude evidence (whether by preventing questions from being put or otherwise) at its discretion.

Article 3 “Circumstances in which inferences may be drawn from accused’s failure to mention particular facts when questioned, charged, etc.”

3(1): Where, in any proceedings against a person for an offence, evidence is given that the accused

- (a) at any time before he was charged with the offence, on being questioned by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or
- (b) on being charged with an offence or officially informed that he might be prosecuted for it, failed to mention any such fact, being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, paragraph (2) applies.

3(2) Where this paragraph applies

- (a) the court, in determining whether to commit the accused for trial or whether there is a case to answer,
- (b) ....
- (c) the court or jury, in determining whether the accused is guilty of the offence charged, may
  - (i) draw such inferences from the failure as appear proper;
  - (ii) on the basis of such inferences treat the failure as, or as capable of amounting to, corroboration of any evidence given against the accused in relation to which the failure is material.

3(3) Subject to any directions by the court, evidence tending to establish the failure may be given before or after evidence tending to establish the fact which the accused is alleged to have failed to mention.

Article 4 “Accused to be called upon to give evidence at trial”

4(1) At the trial of any person (other than a child) for an offence paragraphs (2) to (7) apply unless

- (a) the accused’s guilt is not in issue, or
- (b) it appears to the court that the physical or mental condition of the accused makes it undesirable for him to be called upon to give evidence

but paragraph (2) does not apply if, before any evidence is called for the defence, the accused or counsel or a solicitor representing him informs the court that the accused will give evidence.

4(2) Before any evidence is called for the defence, the court

- (a) shall tell the accused that he will be called upon by the court to give evidence in his own defence, and
- (b) shall tell him in ordinary language what the effect of this Article will be if
  - (i) when so called upon, he refuses to be sworn;

(ii) having been sworn, without good cause he refuses to answer any questions

4(3) If the accused

(a) after being called upon by the court to give evidence in pursuance of this Article, or after he or counsel or a solicitor representing him has informed the court that he will give evidence, refuses to be sworn, or

(b) having been sworn, without good cause refuses to answer any question, paragraph (4) applies.

4(4) The court or jury, in determining whether the accused is guilty of the offence charged, may

(a) draw such inferences from the refusal as appear proper;

(b) on the basis of such inferences, treat the refusal as, or as capable of amounting to, corroboration of any evidence given against the accused in relation to which the refusal is material.

4(5) This article does not render the accused compellable to give evidence on his own behalf, and he shall accordingly not be guilty of contempt of court by reason of a refusal to be sworn.

#### Article 6 “Inferences from failure or refusal to account for presence at a particular place”

6(1) Where

(a) a person arrested by a constable was found by him at a place or about the time the offence for which he was arrested is alleged to have been committed, and

(b) the constable reasonably believes that the presence of the person at that place and at that time may be attributable to his participation in the commission of the offence, and

(c) the constable informs the person that he so believes, and requests him to account for that presence, and

(d) the person fails or refuses to do so,

then if, in any proceedings against the person for the offence, evidence of those matters is given, paragraph (2) applies.

6(2) Where this paragraph applies

(a) the court, in determining whether to commit the accused for trial or whether there is a case to answer, and

(b) the court or jury, in determining whether the accused is guilty of the offence charged, may

(i) draw such inferences from the failure or refusal as appear proper

(ii) on the basis of such inferences, treat the failure or refusal as, or as capable of amounting to, corroboration of any evidence given against the accused in relation to which the failure or refusal is material.

6(3) Paragraphs (1) and (2) do not apply unless the accused was told in ordinary language by the constable when making the request mentioned in paragraph (1)(c) what the effect of this Article would be if he failed or refused to do so.

6(4) This Article does not preclude the drawing of any inference from the failure or refusal of a person to account for his presence at a place which could properly be drawn apart from this Article.

#### Criminal Justice and Public Order Act 1994 (Eng) sections 34-38

##### Section 34: Effect of accused's failure to mention facts when questioned or charged

(1) Where, in any proceedings against a person for an offence, evidence is given that the accused:

(a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or

(b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact,

being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, subsection (2) below applies.

(2) Where this subsection applies:

(a) a magistrates' court inquiring into the offence as examining justices;

(b) a judge, in deciding whether to grant an application made by the accused under:

(i) section 6 of the Criminal Justice Act 1987 (application for dismissal of charge of serious fraud in respect of which notice of transfer has been given under section 4 of that Act); or

- (ii) paragraph 5 of Schedule 6 to the Criminal Justice Act 1991 (application for dismissal of charge of violent or sexual offence involving child in respect of which notice of transfer has been given under section 53 of that Act);
  - (c) the court, in determining whether there is a case to answer; and
  - (d) the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure as appear proper.
- (2A) Where the accused was at an authorised place of detention at the time of the failure, subsections (1) and (2) above do not apply if he had not been allowed an opportunity to consult a solicitor prior to being questioned, charged or informed as mentioned in subsection (1) above.
- (3) Subject to any directions by the court, evidence tending to establish the failure may be given before or after evidence tending to establish the fact which the accused is alleged to have failed to mention.
- (4) This section applies in relation to questioning by persons (other than constables) charged with the duty of investigating offences or charging offenders as it applies in relation to questioning by constables; and in subsection (1) above "officially informed" means informed by a constable or any such person.
- (5) This section does not:
- (a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his presence relation to the conduct in respect of which he is charged, in so far as evidence thereof would be admissible apart from this section; or
  - (b) preclude the drawing of any inference from any such silence or other reaction of the accused which could properly be drawn apart from this section.
- (6) This section does not apply in relation to a failure to mention a fact if the failure occurred before the commencement of this section.
- (7) (Repealed)

#### Section 35: Effect of accused's silence at trial

- (1) At the trial of any person who has attained the age of fourteen years for an offence, subsections (2) and (3) below apply unless:
- (a) the accused's guilt is not in issue; or
  - (b) it appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence;
- but subsection (2) below does not apply if, at the conclusion of the evidence for the prosecution, his legal representative informs the court that the accused will give evidence or, where he is unrepresented, the court ascertains from him that he will give evidence.
- (2) Where this subsection applies, the court shall, at the conclusion of the evidence for the prosecution, satisfy itself (in the case of proceedings on indictment, in the presence of the jury) that the accused is aware that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence and that, if he chooses not to give evidence, or having been sworn, without good cause refuses to answer any question, it will be permissible for the court or jury to draw such inferences as appear proper from his failure to give evidence or his refusal, without good cause, to answer any question.
- (3) Where this subsection applies, the court or the jury, in determining whether the accused is guilty of the offence charged, may draw such inferences as appear proper from the failure of the accused to give evidence or his refusal, without good cause, to answer any question.
- (4) This section does not render the accused compellable to give evidence on his own behalf, and he shall accordingly not be guilty of contempt of court by reason of a failure to do so.
- (5) For the purposes of this section a person who, having been sworn, refuses to answer any question shall be taken to do so without good cause unless:
- (a) he is entitled to refuse to answer the question by virtue of any enactment, whenever passed or made, or on the ground of privilege; or
  - (b) the court in the exercise of its general discretion excuses him from answering it.
- (6) Where the age of any person is material for the purposes of subsection (1) above, his age shall for those purposes be taken to be that which appears to the court to be his age.
- (7) This section applies:
- (a) in relation to proceedings on indictment for an offence, only if the person charged with the offence is arraigned on or after the commencement of this section;

- (b) in relation to proceedings in a magistrates' court, only if the time when the court begins to receive evidence in the proceedings falls after the commencement of this section.

Section 36: Effect of accused's failure or refusal to account for objects, substances or marks

- (1) Where:
  - (a) a person is arrested by a constable, and there is:
    - (i) on his person; or
    - (ii) in or on his clothing or footwear; or
    - (iii) otherwise in his possession; or
    - (iv) in any place in which he is at the time of his arrest,any object, substance or mark, or there is any mark on any such object; and
  - (b) that or another constable investigating the case reasonably believes that the presence of the object, substance or mark may be attributable to the participation of the person arrested in the commission of an offence specified by the constable; and
  - (c) the constable informs the person arrested that he so believes, and requests him to account for the presence of the object, substance or mark; and
  - (d) the person fails or refuses to do so,then if, in any proceedings against the person for the offence so specified, evidence of those matters is given, subsection (2) below applies.
- (2) Where this subsection applies:
  - (a) a magistrates' court inquiring into the offence as examining justices;
  - (b) a judge, in deciding whether to grant an application made by the accused under:
    - (i) section 6 of the Criminal Justice Act 1987 (application for dismissal of charge of serious fraud in respect of which notice of transfer has been given under section 4 of that Act); or
    - (ii) paragraph 5 of Schedule 6 to the Criminal Justice Act 1991 (application for dismissal of charge of violent or sexual offence involving child in respect of which notice of transfer has been given under section 53 of that Act);
  - (c) the court, in determining whether there is a case to answer; and
  - (d) the court or jury, in determining whether the accused is guilty of the offence charged,may draw such inferences from the failure or refusal as appear proper.
- (3) Subsections (1) and (2) above apply to the condition of clothing or footwear as they apply to a substance or mark thereon.
- (4) Subsections (1) and (2) above do not apply unless the accused was told in ordinary language by the constable when making the request mentioned in subsection (1)(c) above what the effect of this section would be if he failed or refused to comply with the request.
- (4A) Where the accused was at an authorised place of detention at the time of the failure, subsections (1) and (2) above do not apply if he had not been allowed an opportunity to consult a solicitor prior to the request being made.
- (5) This section applies in relation to officers or customs and excise as it applies in relation to constables.
- (6) This section does not preclude the drawing of any inference from a failure or refusal of the accused to account for the presence of an object, substance or mark or from the condition of clothing or footwear which could properly be drawn apart from this section.
- (7) This section does not apply in relation to a failure or refusal which occurred before the commencement of this section.
- (8) (Repealed)

Section 37: Effect of accused's failure or refusal to account for presence at a particular place

- (1) Where:
  - (a) a person arrested by a constable was found by him at a place at or about the time the offence for which he was arrested is alleged to have been committed; and
  - (b) that or another constable investigating the offence reasonably believes that the presence of the person at that place and at that time may be attributable to his participation in the commission of the offence; and
  - (c) the constable informs the person that he so believes, and requests him to account for that presence; and
  - (d) the person fails or refuses to do so,

then if, in any proceedings against the person for the offence, evidence of those matters is given, subsection (2) below applies.

(2) Where this subsection applies:

(a) a magistrates' court inquiring into the offence as examining justices;

(b) a judge, in deciding whether to grant an application made by the accused under:

(i) section 6 of the Criminal Justice Act 1987 (application for dismissal of charge of serious fraud in respect of which notice of transfer has been given under section 4 of that Act); or

(ii) paragraph 5 of Schedule 6 to the Criminal Justice Act 1991 (application for dismissal of charge of violent or sexual offence involving child in respect of which notice of transfer has been given under section 53 of that Act);

(c) the court, in determining whether there is a case to answer; and

(d) the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure or refusal as appear proper.

(3) Subsections (1) and (2) do not apply unless the accused was told in ordinary language by the constable when making the request mentioned in subsection (1)(c) above what the effect of this section would be if he failed or refused to comply with the request.

(3A) Where the accused was at an authorised place of detention at the time of the failure, subsections (1) and (2) above do not apply if he had not been allowed an opportunity to consult a solicitor prior to the request being made.

(4) This section applies in relation to officers of customs and excise as it applies in relation to constables.

(5) This section does not preclude the drawing of any inference from a failure or refusal of the accused to account for his presence at a place which could properly be drawn apart from this section.

(6) This section does not apply in relation to a failure or refusal which occurred before the commencement of this section.

(7) (Repealed)

#### Section 38: Interpretation and savings for sections 34, 35, 36 and 37

(1) In sections 34, 35, 36 and 37 of this Act:

"legal representative" means an authorised advocate or authorised litigator, as defined by section 119(1) of the Courts and Legal Services Act 1990; and

"place" includes any building or part of a building, any vehicle, vessel, aircraft or hovercraft and any other place whatsoever.

(2) In sections 34(2), 35(3), 36(2) and 37(2), references to an offence charged include references to any other offence of which the accused could lawfully be convicted on that charge.

(3) A person shall not have the proceedings against him transferred to the Crown Court for trial, have a case to answer or be convicted of an offence solely on an inference drawn from such a failure or refusal as is mentioned in section 34(2), 35(3), 36(2) or 37(2).

(4) A judge shall not refuse to grant such an application as is mentioned in section 34(2)(b), 36(2)(b) and 37(2)(b) solely on an inference drawn from such a failure as is mentioned in section 34(2), 36(2) or 37(2).

(5) Nothing in sections 34, 35, 36 or 37 prejudices the operation of a provision of any enactment which provides (in whatever words) that any answer of evidence given by a person in specified circumstances shall not be admissible in evidence against him or some other person in any proceedings or class of proceedings (however described, and whether civil or criminal).

In this subsection, the reference to giving evidence is a reference to giving evidence in any manner, whether by furnishing information, making discovery, producing documents or otherwise.

(6) Nothing in sections 34, 35, 36 or 37 prejudices any power of a court, in any proceedings, to exclude evidence (whether by preventing questions being put or otherwise) at its discretion.

## EUROPEAN COURT OF HUMAN RIGHTS CASES

*Funke v France* (1993) 16 E.H.R.R. 297 (ECHR)

**Facts:** The accused had refused to provide information to customs officers about his interests in a number of foreign bank accounts. He was prosecuted and fined for failure to cooperate.

**Court held:** Violation of Article 6. The special features of custom law cannot justify such an infringement of the right of anyone charged with a criminal offence, within the autonomous meaning of this expression in Article 6, to remain silent and not to contribute to incriminating himself. This was the first time the European Court established

the right to remain silent as part of the Convention obligations. This case did not deal with the issue of drawing adverse inferences.

*Murray v UK* (1996) 22 E.H.R.R. 29 (ECHR)

Facts: The accused was arrested under the Prevention of Terrorism (Temporary Provisions) Act 1989 when police entered a house in Belfast. It was the prosecution case that the accused was a member of the IRA and that they had kidnapped an informer whom they were interrogating on tape inside the house. The informer gave evidence that on arrival of the police, the accused had removed the taped confession from the cassette machine. The police found the accused on top of the stairs and the tape in the upstairs bathroom. He was provided with the warning under the 1988 Order. The accused stated he had nothing to say. Again he was cautioned and requested to account for his presence at the house where he was arrested. He was warned that if he failed or refused to do so, a court, judge or jury, might draw such inference from his failure or refusal as appears proper. He was interviewed for 21 hours and 39 minutes. He was denied access to a lawyer for 48 hours. At trial, the judge said "I am also required by law to tell you that if you refuse to come into the witness box to be sworn or if, after having been sworn, you refuse, without good reason, to answer any question, then the court in deciding whether you are guilty or not guilty may take into account against you to the extent that it considers proper your refusal to give evidence or to answer any questions." The trial judge drew an adverse inference from the failure of the accused to account for his presence in the house and for failing to testify in court.

Court held: No violation to Article 6(1) – burden of proof on crown or 6(2) – presumption of innocence. While the court stated that "there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6", this does not entail an absolute right not to have an adverse inference drawn from one's silence, whether in the face of police questioning or in court, but only one to be protected from improper compulsion. In Murray's case, the evidence was substantial against him and this made the drawing of inference against him a matter of "common sense". Also the court held that the 1988 Order contained various safeguards for the suspect, including a clear caution.

*Saunders v UK* (1997) 23 E.H.R.R. 313 (ECHR)

Facts: On pain of criminal sanction, the applicant was required by law to answer questions put to him by the Department of Trade and Industry inspectors. At trial, the judge allowed the prosecutors to use the transcripts of what Saunders said to the inspectors as evidence against him. He was convicted. He complained to the European Court that he had been deprived of his privilege against self-incrimination.

Court held: Violation of Article 6. Freedom against self-incrimination was an important element in safeguarding an accused from oppression and coercion during criminal proceedings and noted that the freedom was closely linked with the presumption of innocence.

*Condron v UK* (2000) 8 B.H.R.C. 290 (ECHR)

Facts: The applicant, William Condron, an Irish citizen and Karen Condron, a British citizen were living in London when charged with supplying heroin and possession with intent to supply. At the time of police questioning, their solicitor considered that they were not fit to be questioned since they were suffering from heroin withdrawal symptoms; the doctor who examined them at the police station disagreed with the solicitor's assessment. During the police interview the applicants were cautioned and remained silent. During the trial they offered explanation as to why certain items were seen to be exchanged over their balcony. They also declared that they did not answer police questions on their solicitor's advice. The trial judge, referring to s. 34 of the Criminal Justice and Public Order Act 1994, gave the jury the option of drawing an adverse inference from the applicants' silence during the interview. The applicants were found guilty.

Court held: unanimously that a trial judge had not properly directed the jury on the issue of the applicant's silence during police interview and as a consequence the applicants did not receive a fair trial within the meaning of article 6.1 of the ECHR. The court observed with reference to *Murray v UK* that the right to silence could not be considered an absolute right. Whether the drawing of inference from an accused's silence during police questioning infringed Art 6 was a matter to be determined in the light of all the circumstances of the case. For the court, the fact that the question of an accused's silence was left to the jury could not in itself be considered incompatible with art 6. However, given that the right to silence lay at the heart of the notion of a fair procedure guaranteed by that article, the court stressed, in line with its *Murray* judgment, that particular caution was required before a domestic court could invoke an accused's silence against him. It reinterpreted in that connection that it would be incompatible with the right to silence to base a conviction solely or mainly on the accused's silence or on

a refusal to answer questions or to give evidence himself. That being said, it was obvious that right could not and should not prevent that the accused's silence, in situations which clearly called for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution. The court noted that the domestic law of UK provided a number of safeguards in order to ensure that a proper balance was struck between an accused's exercise of his right to silence and the drawing of an adverse inference from that fact at a jury trial.

The ECHR found fault in the judge's charge to the jury. It noted that the terms of the direction could not be said to reflect the balance which the court in its *Murray* judgment sought to strike between the right to silence and the circumstances in which an adverse inference could be drawn from silence. In the court's opinion, as a matter of fairness, the jury should have been directed that if it was satisfied that the applicants' silence at the police station could not sensibly be attributed to their having no answer or none that would stand up to cross-examination, it should not draw an adverse inference.

*Averill v UK* (2000) Crim. L.R. (ECHR)

Facts: The accused was detained under the prevention of terrorism act in connection with a double murder. He remain silent during police questioning about his movements at the time of the murder and about the fibers found on his hair and clothes which matched those found on a balaclavas and gloves found at the burnt out car. At trial, the accused gave evidence about his whereabouts at the time of the killings and offered an explanation about the fibers. He was convicted. The judge was persuaded by the weight of the forensic evidence linking the accused to the killings and he also drew very strong adverse inferences from the accused's silence in the face of police questioning.

Held: No violation of the right to a fair trial and presumption of innocence. The court referred to *Murray v UK*, saying that they must look at all the circumstances of the case, having regard to the situations where inferences may be drawn, the weight attached to them by national courts in their assessment of the evidence and the degree of compulsion inherent in the situation. They reiterated that the right to silence cannot and should not prevent that an accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution. The Court stated that safeguards were in place to prevent impermissible use being made of the accused's silence. The trial judge was under no legal obligation to draw inferences and he had to give reasons for his decision, which were reviewed on appeal.

*Heaney and McGuinness, Quinn v Ireland* (2000) (found at [www.echr.coe.int](http://www.echr.coe.int).)

Facts: The accused persons were all arrested on suspicion of serious terrorist offences and were requested under s. 52 of the Offences Against the State Act which required them to give details about their movements at the time of the relevant offences. They remained silent and were charged with membership in an illegal paramilitary organisation and for failing to account for their movements. They were acquitted of the first offence but convicted of the latter.

Held: Violation. The Court found that the safeguards referred to by the UK government could not effectively and sufficiently reduce the degree of compulsion imposed by s. 52, to the extent that the essence of the rights at issue would not be impaired, since the choice between providing the information or facing imprisonment remained. The degree of compulsion in effect destroyed the very essence of the privilege against self-incrimination and the right to remain silent.

## UNITED STATES

### *Fifth Amendment*

No person shall... nor shall be compelled in any criminal case to be a witness against himself.

*Miranda v Arizona* (1966) 384 US 436 (USSC)

Facts: The accused was questioned by police while in police custody. He was not given a full and effective warning of his rights at the outset of the interrogation process. He signed a confession which was admissible at his trial. He was convicted.

Supreme Court held: The prosecution may not use statements, whether exculpatory or inculpatory, stemming from questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom in any significant way, unless it demonstrates the use of procedural safeguards effective to secure



the Fifth Amendment's privilege against self-incrimination. This case looks at the compulsion inherent in custodial surroundings and the adequate preventive measures needed to ensure that any statement made in that atmosphere is by free choice. The Court stated that the privilege against self-incrimination is the essential mainstay of the adversarial system and guarantees to the individual the "right to remain silent unless he chooses to speak in the unfettered exercise of his own will". The person in custody must, prior to interrogation, be clearly informed that he has the right to remain silent, and that anything he says will be used against him in court; he must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation, and that, if he is indigent, a lawyer will be appointed to represent him.

*Dickerson v US* (2000)(USSC)

Facts: The defendant, Dickerson confessed to being the driver of a getaway car in a series of bank robberies. At trial, the court suppressed his confession because it found that the accused made the statement in police custody in response to police interrogation and without the necessary Miranda warnings. On appeal, the Court of Appeal held that the admissibility of the confession was governed by the 1968 Crimes Control Act which provides that a confession is admissible if it is voluntarily given and not by the judicially created Miranda rule.

Supreme Court held: Reaffirmed the Miranda decision and held that Miranda "being a constitutional decision of the court, may not be in effect overruled by an Act of Congress..."