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# The right to silence as a safeguard against state abuse of the right to a fair trial

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## TABLE OF CONTENTS

<b>1. INTRODUCTION .....</b>	<b>4</b>
1.1 Background.....	4
1.2 Objectives and delimitations.....	5
1.3 Research questions .....	7
1.4 Importance of the topic .....	7
1.5 Structure.....	11
1.6 Method and material .....	13
<b>2. THE BASIC THEORY OF THE RIGHT TO SILENCE AND ITS EMERGENCE INTO THE LAW OF ECHR .....</b>	<b>16</b>
2.1 The basic theory of the right to silence .....	16
2.2 The emergence of the right to silence in the case law of the ECtHR.....	17
<b>3. ECtHR'S INTERPRETATION OF THE BASIC ISSUES ON THE RIGHT TO SILENCE .....</b>	<b>21</b>
3.1 The necessity of a criminal charge to trigger the right to silence.....	21
3.2 Conditional arguments against the right to silence and its applicability in relation to suspects .....	29
3.3 Oral evidence v. material evidence .....	33
3.4 Issues of identity and shifts in Court's approach regarding the applicability of the right to silence.....	35
3.5 Adverse inferences.....	38
3.5.1 Basic rules .....	38
3.5.2 The role of the reason for refusing to testify in drawing adverse inferences.....	41
<b>4. THE HISTORY OF THE RIGHT TO SILENCE.....</b>	<b>46</b>
<b>5. THE DEBATE ON THE MEANING AND THE EFFECTS OF RIGHT TO SILENCE .....</b>	<b>48</b>
5.1 The debate in a nutshell.....	48
5.2 Arguments for abolition.....	50
5.2.1 The right to silence protects the guilty because the people using it are mostly guilty	51
5.2.2 The right to silence does not protect the innocent and it might harm them. ....	52
5.2.3 The right to silence hinders the government from obtaining self-incriminatory evidence .....	56
5.3 The right to silence as a human right.....	57
<b>6. CONCLUDING REMARKS.....</b>	<b>60</b>
<b>BIBLIOGRAPHY.....</b>	<b>62</b>

# PREFACE

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Razmik Sargsyan  
Lund, Sweden  
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# 1. INTRODUCTION

## 1.1 Background

Silence is a very fundamental and at the same controversial idea. At the most fundamental level, it could be perceived as “*absence of communication*”. Nevertheless, one could fairly argue that a refusal to communicate is a unique form of communication itself, although an implicit one. (“Silence is loud” they say.) Many aspects of the idea of silence have been discussed throughout the history from a variety of standpoints. Some ideologies have underscored the absolute philosophical importance of silence in our lives. On the other hand, some thinkers have highlighted the manipulative power of it. Isn’t it the most unbearable thing in moments when clarifications are most needed? One could endlessly argue on issues such as why people lie or what the difference between lying and keeping silent is.

Unsurprisingly, the legal perception of silence is no less controversial and debated than its philosophical perception. The Latin phrase “*nemo tenetur prodere seipsum*”, meaning that no one should be forced to disclose himself in public, originates from Roman times<sup>1</sup>. The Roman principle guaranteed that only when there was a good reason for suspecting that a particular person had violated the law, would it be permissible to require that the person answers incriminating questions. Nowadays we are talking about the right to silence or the right to remain silent. It is a legal right recognized explicitly or by convention in many of the world's legal systems. It covers many material and procedural legal issues. In general, we are talking about the right of the accused or the defendant to refuse to comment or provide an answer when questioned, either prior to or during legal proceedings in a court of law.

The expression “the right to silence”, nevertheless, is mostly brought about by academia and jurisprudence. Such wording is not used in international treaties, and in some of them the right to silence is not even explicitly guaranteed. Although this right is evolving in international law, in different domestic jurisdictions its nature and extent are different. It

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<sup>1</sup> Eileen Skinnider, F. G. (n.d.). The right to silence, International norms and domestic realities. Sino Canadian International Conference On The Ratification And Implementation Of Human Rights Covenants . Beijing: The International Centre for Criminal Law Reform and Criminal Justice Policy at 7

is also important to note that the right to silence is not a single right, but consists of a cluster of procedural rules that protect against self-incrimination<sup>2</sup>. The examination reveals that the legal debate about the nature of the right to silence, in general, falls 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<sup>3</sup>. In other words, the legal debate is 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<sup>4</sup>.

## 1.2 Objectives and delimitations

Initially, my goal was to write a thesis that would analyze the law of the right to silence in post-communist states. I intended to explore the domestic legislations of eastern European states and identify the gaps. Nevertheless, the focus of my thesis has essentially changed for the following reasons:

Firstly, I have come to realize that there is a big discrepancy between the law and the reality as far as the right to silence is concerned. The reasons of this discrepancy are very diverse and relate to many philosophical, historical, economic, cultural and psychological factors. These challenges are very diverse, and no single discipline can completely address them. Somewhat interdisciplinary outlook is needed.

Secondly, most of the academic literature on the right to silence focuses on the law of the right to silence without properly addressing its meaning and the moral debate about it.

Thirdly, the right to silence can be triggered in a variety of contexts. A clear agreement on the ways of interpretation of the right in these situations does not exist. Although this is quite expected, I believe it is also partly contributable to the fact that the philosophical essence, the rationale and the meaning of the right to silence have not been properly addressed. Even within a single legal system, there are many discrepancies. For example, the European Court of Human Rights (hereafter The ECtHR or The Court<sup>5</sup>), has incorporated

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<sup>2</sup> Michael J., E. B. (1995). "Current topic: The right to silence". *European human rights law review*, 6 at 6

<sup>3</sup> Skinnider at 3

<sup>4</sup> Ibid, page 4

<sup>5</sup> Some other abbreviations are as follows: European Convention on Human Rights – the ECHR, United Nations – UN, European Union- EU, International Covenant on Civil and Political Rights - ICCPR )

the right to silence into the jurisdiction of the Convention although the right is not explicitly guaranteed by it. The ECtHR is expected to guarantee an internal consistency and conceptual coherency in its approaches on the right to silence. Nevertheless, as this thesis will demonstrate, certain discrepancies exist. One of the reasons for this is that the Court has not yet formulated why it decided to bring the right to silence in as a Convention right. Until the Court explains why the right to a fair trial presumes a right to silence, it will be difficult to gain clarity in the application of the right to silence within its conventional meaning.

Thus, within the context of the right to silence, I believe that its non-legal perception is utterly important. By that I mean the understanding of the right to silence from philosophical, moral and pragmatic perspectives. The history has shown that simply amending legislations is not effective. The right to silence will never be addressed at its core if the legal society and the society in general believe that it is only the guilty that prefer silence. This cultivates the belief that the right to silence protects the guilty, so the law gets overshadowed by the morals. Therefore, I have preferred to adapt an “inside out” approach and, besides the law, address the meaning of the right to silence in depth.

Finally, as already noted, not only does the right to silence consist of a variety of procedural rules and aspects, but its nature and extent vary in different domestic jurisdictions. This means that, from a legal perspective, there is a limitless space to explore this issue and limitless depths at which to explore. Therefore, certain delimitations are needed.

I’ve come to realize that the case law of the ECtHR has an increasingly influential role in the development of the jurisdictions of Eastern European states. It is one of the major sources for the development of law in those countries, and the clearer the source, the clearer the outcome. As I already noted, the case law on the right to silence has certain discrepancies, needing to be addressed. Therefore, I have preferred to concentrate my *legal* analysis on the case law of the ECtHR instead of the domestic law of Eastern European countries. I sometimes refer to different jurisdictions, but that is simply to provide a comparison in relation to the most fundamental issues. Thus, the legal analysis of the right to silence will be delimited to the ECHR law.

In regards to the material scope within the ECHR, I will mostly focus on the article 6. Although the right to silence is not explicitly guaranteed by the ECHR, the ECtHR has

claimed that “there can be no doubt that the right to silence under police questioning and the privilege against self-incrimination are generally recognized international standards which lie at the heart of the notion of a fair procedure under article 6<sup>6</sup>”. Under certain interpretations, the right to silence may tackle other articles too, but article 6 is the source and core of it. Additionally, most of the ECtHR’s case law relevant to the right to silence is within the article 6, so focusing on it is pragmatically justified too.

### **1.3 Research questions**

All in all, instead of analyzing the gaps of the right to silence law in Eastern European countries, I have preferred to look at some of the sources the problem, where the answers lie too. Reader reader will get a better understanding of the right to silence as an ECHR right and a better understanding of its meaning as a human right. In my understanding, these two are interconnected to each other. They are the two pillars of the same problem, and they complete each other. The morals, among other things, are brought in when there are no more legal arguments or alternatively, go in parallel with them. The thesis will show that some of the latest developments in the ECtHR’s approaches have left space for entirely alternative argumentation. A whole new debate on the right to silence is expected at the ECtHR level, and I believe that the discussion is very likely to go to the basics, i.e. the meaning of the right to silence.

Therefore, the objective of my thesis is to examine the meaning of the right to silence and to provide its core definition as an ECHR right. Accordingly, the research questions are

- “What is the scope of the right to silence as an ECHR right?”
- “What is the role and the meaning of the right to silence?”.

### **1.4 Importance of the topic**

Through these research questions, the right to silence will be analyzed as a safeguard against state abuse of the right to a fair trial. The ECtHR itself has been constantly pointing towards the crucial importance of the right to silence in regards to the right to a fair trial.

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<sup>6</sup> Murray v. UK, App. no 14310-88 (ECtHR 1996) at 45

This could be easily observed, for example, through the connection of the right to silence and the presumption of innocence, which has been demonstrated in *Saunders v. UK*. As claimed by the Court, “the prosecution in a criminal case should seek to prove their case without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused.”<sup>7</sup> In professor Ashworth’s words, if it wasn’t for the right to silence, “the duty of the prosecution to establish guilt beyond reasonable doubt would be watered down, hollowed out, and even contradicted, by the duty imposed on the defendant”<sup>8</sup>.

Self-incrimination has been an indispensable part of inquisitional criminal procedure. In USSR, for example, the suspect’s self-incriminatory testimony was considered to be *the queen of evidence*. It was presumed that a person would not incriminate himself if he has not committed a crime. So if the person took blame for the crime, the necessity for obtaining additional evidence suddenly disappeared. In circumstances like these, people usually took the blame for other people, friends for example, or were forced or bribed to do so. Alternatively, people would incriminate themselves to escape from a bigger crime they had committed. People would do it to escape from the pressure coming from the prosecution, which, in the absence of the right to silence, would obviously be severe and constant. This is logical because if the self-incriminating testimony is considered the queen of evidence, then the prosecution will adhere to harsher means of obtaining it. As a result, investigators will not put enough attention to other kinds of evidence, which are more likely to contain acquitting proof. Consequently, investigation will be carried out with an incriminating mindset, whereas its purpose is to objectively reveal the facts. Thus, from the perspectives of the right to a fair trial, it is necessary that prosecution looks for incriminating evidence not in the confession or not only in the confession, but rather in other materials. In this regard, the right to silence plays a very crucial rule, and my research questions are intended to demonstrate its role in asserting the right to fair trial.

This topic is also important since, as crucial as the right to silence is, it is also quite vulnerable. Since it is often perceived incorrectly its implementation can be endangered. It is often believed that it protects the guilty, and in order to change such an understanding,

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<sup>7</sup> *Saunders v. UK*, App. no 19187-91, (ECtHR 1996) at 68

<sup>8</sup> Ashworth, A. (2008). Self incrimination in european human rights law- A pregnant pragmatism? *Cardozo L. Rev.* 30 at 767



a better insight is required as to why people might prefer not to testify. Fear, anxiety, the desire to protect someone else, embarrassment, outrage and anger may account for silence, all of which are compatible with innocence<sup>9</sup>. More than that, the whole idea of equal concern and respect points that both the guilty and innocent should be afforded procedural protections. Therefore, the use of the privilege by the guilty does not invalidate its value. The protection of the guilty is to be seen as an unavoidable by-product of protecting the innocent<sup>10</sup>.

Furthermore, the role of the right to silence in protecting the innocent has been often overshadowed. As the saying goes “I don’t know who discovered water, but I am pretty sure it’s not fish”. Perhaps the right to silence has been in effect for enough time for the society to forget what the situation of the innocent was before it became part of law. Thus, it is not often explicit what role the right to silence plays in protecting the innocent, which means it is necessary to observe what would happen if it was removed.

Besides protecting the innocent, the right to silence also has a significant role in for the so called “borderline innocent”, which is also overshadowed. According to Greenwalt, the latter are the people who are mixed up to some extent in a series of events which make up the crime even though they may not be guilty<sup>11</sup>. If they are in a position to necessarily testify and if they forget to mention something while testifying or if the police misinterprets what they say or forget to say, this could have a serious effect. There are empirical studies pointing to this. McCabe and Purves, for example, found that many of the defendants subject to their study admitted to being involved in something which could have been interpreted as crime, yet did not actually amount to a criminal offence<sup>12</sup>.

Additionally, the opportunity not to testify can be of special significance for a vulnerable group of people such as the mentally handicapped or juveniles, who are at risk of making damaging or unreliable statements. People might have various reasons to be intimidated by the atmosphere of the court and likely to make a bad impression on the judge or the jury. Not being educated, not having enough information about criminal procedure, lacking communication skills among many other factors would cause such an effect. In cases like

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<sup>9</sup> Ibid at 54

<sup>10</sup> Easton at 53

<sup>11</sup> Greenwalt, K. (1974). Perspectives on the right to silence. In *Crime, Criminology and public policy*. London: Heinemann at 235

<sup>12</sup> Purves, M. a. (1972). *The jury at work*.

these, the effects of testifying might be bigger than the risks of adverse inferences being drawn, which is why the person might prefer to stay silent<sup>13</sup>. So, the importance of the right to silence goes beyond the innocent and the guilty.

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<sup>13</sup> Easton at 61

## 1.5 Structure

The second chapter, begins with a short illustration of the theory on the right to silence. Next, I illustrate how the discussion on the right to silence started at the ECtHR platform. The core cases are examined in more details to prepare the reader for going deeper into the specific issues.

In the third chapter I analyze some of the ECtHR cases in depth and illustrate how the right to silence is to be applied. We will find some guidelines from the ECtHR perspectives and show what is still up to interpretation and what is not. The sequence of cases is chosen taking into consideration both the historical evolution of the case law and the thematic division of the chapter. I have chosen the issues that are of fundamental meaning for the definition of this right as part of ECHR law. Additionally, these are the issues that are constantly highlighted by the Court and debated in front of it, hence the choice has been made for practical reasons too.

I start by addressing the Court's opinion whether criminal charges are necessary to trigger the right to silence and what it means in this context. One can be compelled to speak by the police, whereas the proceedings against him might be administrative or they might be substantially criminal from an Article 6 perspective, but disguised as *de jure* administrative. I address which proceedings are relevant in terms of triggering Article 6 protections.

Next, I address whether the right to silence, as an article 6 right, is unconditional or whether is subject to a balancing process between state and individual interests. I address whether suspects have the right not to talk at all or whether they have the right not to answer to incriminating questions. I address whether it is essential or not, in terms of the applicability of the right to silence, whether the information that was compelled from a person is later used against him.

I continue the chapter by analyzing whether the right to silence is applicable only to oral evidence or whether it can be triggered in case of material evidence such as DNA samples. I discuss how the distinction set by the Court is to be applied and whether it is efficient.

It has been originally noted by the Court that the right to silence is applicable to criminal proceedings in respect of all types of criminal offences without distinction from the most

simple to the most complex. Nevertheless, some of the more recent cases of the ECtHR provide space for alternative argumentation. I tackle whether there are any exceptions, such as inquiries to disclose identities. The way the ECtHR has set the distinction is believed to be controversial. I analyze the Court's reasoning in this sense and identify some of the gaps.

Generally speaking, a person should not be punished for exercising his rights including and especially the right to silence. Without this, the right to silence would be illusory. So the law should not grant a right and then condemn a person who uses it. Nevertheless, the right to silence is not absolute either and would that be the case, the state public interests in condemning the guilty would be abolished. Therefore, adverse inferences are at times necessary and I will demonstrate the Court's guidelines on when and how they should be drawn. The examination of the Court's case law reveals that the Court puts a decent weight on the reason why a person refuses to testify. I illustrate how the reason for such behavior and the perception of it by a judge or a jury is connected to adverse inferences.

The fourth chapter is the illustration of the historical evolution of this right. It sheds some light on different perspectives on the issue, and prepares for unfolding the debate about the meaning of the right to silence.

I start the fifth chapter by presenting the general debate on the meaning of the right to silence. I present both the arguments by authors who propose to abolish or seriously limit the right to silence and the arguments in favor of the right to silence.

Afterwards, I address the major arguments promoted by abolitionists:

- *The right to silence protects the guilty, because it is the guilty who stay silent,*
- *The right to silence does not have an essential role in protecting the innocent, and it may even harm them,*
- *The right to silence hinders the government from obtaining self-incriminatory evidence.*

I have chosen these issues for a couple of reasons. Firstly, these are the most common arguments in the reasoning of abolitionists. Secondly, they serve as cross cutting arguments or presumptions in additional arguments against the right to silence. Thirdly, the debate on the right to silence unfolds quite well from the reader's perspective. Fourthly, the arguments against the right to silence are quite diverse: moral, procedural, pragmatic,

philosophical. It is very hard to separate them thematically, since the borderline is not clear and they go parallel with each other. On the other hand, addressing different abolition arguments is more convenient.

After unfolding the debate in detail, I tackle the implications of the right to silence as a human right. Irrespective of whether it protects the guilty or not, it is necessary to remember that the whole point of a human right is that due to its universal importance it should be available to everyone irrespective of the reasons of exercising it. I therefore address how much role the abolitionist arguments, even the strongest ones, can be given considering the nature of the right to silence.

Finally, I summarize my findings in the concluding remarks.

## **1.6 Method and material**

The method and materials of this thesis go parallel with each other. My first research question aims at establishing the scope of Article 6 ECHR in relation to the right to silence. My goal is to define the current law through a *de lege lata* point of view, analyze the ECtHR's approaches and critically analyze them. Thus, I am interpreting the law through a legal dogmatic method, and the most essential object of my analysis is the case law of ECtHR, which has the formal mandate to interpret the ECHR. I have particularly targeted the landmark cases of the ECtHR, in order to identify the starting points of the Court's reasoning and the cross-cutting principles of its analysis. Cases such as *Funke v. France*, *Murray v. UK* and *Saunders v. UK* provide a lot of insights on the most fundamental points of ECtHR's understanding of the right to silence, which is why I start with addressing these cases in more details than the others. Since the quantity of cases is quite big, I keep on analyzing them throughout the chapters 2 and 3.

As I analyze the case law, I contrast the reasoning of ECtHR against certain standards. The ECtHR is to guarantee internal consistency and conceptual coherency in its approaches. Furthermore, since the right to silence is an Article 6 right, it should be an unqualified right. I address whether the ECtHR's standards permit the right to silence to be discarded on grounds less demanding than qualified rights, such as those provided in Article 8-11 of the

ECHR. I have also borne in mind the principle of effectiveness, which demands that the ECHR regulations should be interpreted in a way as to best protect the individual.

Additionally, I have heavily relied on the academic literature by internationally reknown authors who have extensively researched a variety of issues on the right to silence and the privilege against self-incrimination. Mark Berger and Andre Ashworth's works have had a crucial role in this sense. These authors' understanding of the right to silence is beyond a single jurisdiction or approach, so their insights are fundamental and deep.

My second research question is aimed at unfolding the debate about the meaning of the right to silence and its moral and pragmatic consequences. Here, the materials I have used are very diverse both geographically and thematically.

Firstly, I provide a historical overview of the right to silence in order to unfold the debate from its beginning and to show in what context this right originated.

Secondly, I have used works of authors, who addressed what silence is philosophically and morally at a very fundamental level. Works of philosophers, such as Wigmore and Bentham are often quoted. They have addressed the philosophical implications of silence, which is the core idea behind this right. Before the right to silence became an effective part of law, the moral right to stay silent already existed, and hence was protected and criticized. Therefore, I found it very helpful to unfold the debate from the very beginning. Once it became a part of law, the debate has become bigger. More aspects were brought, such as the pragmatic implications of the right to silence, its effects on the efficiency of criminal process and, needless to say, statistics that tackle those issues. Therefore, I have identified and used the works of legal scientists, who addressed the procedural and pragmatic aspects of the right to silence in criminal procedure. In this sense, I have extensively used the works of Susan Easton, who has deeply tackled issues such as why people prefer silence or whether the right to silence protects the guilty.

Additionally, I have relied on the reasoning in conference reports, committee reports, suggestions to alter legislations and some empirical studies. For example, The English criminal law committee report number 11, the report of the SINO Canadian international conference on the ratification and implementation of human rights covenants have been very helpful. Some of these papers have essentially helped me present the arguments in favor of abolition and objectively address them. In this sense, although I am a strong

believer in the right to silence, I have made a reasonable effort to fairly demonstrate the arguments against it.

## 2. THE BASIC THEORY OF THE RIGHT TO SILENCE AND ITS EMERGENCE INTO THE LAW OF ECHR

### 2.1 The basic theory of the right to silence

The most basic rationale behind the right to silence is that people should not be forced to become weapons for their own conviction. If people are prosecuted, they deserve the chance to “put the prosecution to proof<sup>14</sup>”, without themselves contributing to the prosecution. If they are compelled to contribute to convicting themselves, then the presumption of innocence becomes fictional. In Redmayne’s interpretation, this is about the value of citizens being able to distance themselves from the state when the state is exercising its power against them<sup>15</sup>. This doesn’t mean that compulsory powers are not to be exercised to find evidence, but that a person should not be forced to take part in that process.

The presumption of innocence sets up rules for relationship between an individual and a state. The latter is much more powerful than the former and that is why it is necessary to set up rules for their relationship. The role of the presumption of innocence is to guarantee that the state cannot exercise its powers unless it has transcended the burden of proof<sup>16</sup>. This implies that while the state is in the middle of obtaining proof to convict a person, the person should not be forced to provide evidence himself<sup>17</sup>. The difference between the powers of an individual and the state is so big that the state can excessively pressure an individual any time. Therefore, the right to silence is to be maintained even though other procedural guaranteed might be in place. From this perspective, the right to silence belongs to the group of rights referring to the presumption of innocence and the principle of equality of arms and is closely related to rights such as the right to have an attorney, the right to disclosure of evidence held by prosecution etc.<sup>18</sup>. Let’s take a look at how the right to silence was incorporated into the jurisdiction of the ECtHR.

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<sup>14</sup> Ashworth at 767

<sup>15</sup> Redmayne at 225

<sup>16</sup> Ashworth, 2008 at 768

<sup>17</sup> Ibid

<sup>18</sup> Ibid at 769



## 2.2 The emergence of the right to silence in the case law of the ECtHR

The ECHR does not in itself contain a provision on the right to silence. Nonetheless, it has been repeatedly noted by the ECtHR that the right to silence, even if not directly provided by the Article 6 of the Convention, is nevertheless considered a “generally recognized international standard which lies at the heart of the notion of a fair procedure under Article 6”<sup>19</sup>.

As we have already noted, the doctrine of the right to silence has been extensively criticized. In this sense it is important to note that the ECtHR, while initially incorporating the right to silence into the understanding of a fair trial, did not really clarify why it chose to do so. The acceptance of the right to silence was rationalized through the idea that it’s a generally accepted European standard. This is evident in one of the most crucial cases on right to silence, namely *Funke v. France*<sup>20</sup>. The applicant claimed a violation of the article 6 of the ECHR (The right to a fair trial) during an investigation when the records of a bank and a stock exchange were demanded to be presented. The applicant did not provide them and was consequently fined for it. As noted by the Court, there was a “violation of the right not to give evidence against oneself, a general principle enshrined both in the legal orders of the contracting states and in the European convention and the international covenant on civil and political rights”<sup>21</sup>. Even though there was no explicit formulation of the right to silence in the convention the interpretation of the Court was that “Being unable or unwilling to procure the documents by some other means, the government attempted to compel the applicant himself to provide the evidence of offences he had allegedly committed. The special features of customs law... cannot justify such an infringement of the right of everyone charged with a criminal offence to remain silent and not to contribute to incriminating himself”<sup>22</sup>. The court neither offered an explanation of why the right to silence was deemed important nor demonstrated a wide acceptance of the principal.

The same goes for *Murray v. UK*<sup>23</sup>, another crucial ECtHR case on the right to silence. The issue at the stake was the British domestic law that allowed adverse inferences. The

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<sup>19</sup> *Murray v. UK*, App. no 14310-88 (ECtHR 1996) at 29

<sup>20</sup> *Funke v. UK*, App. no 14310-84, (ECtHR 1993).

<sup>21</sup> *Ibid* at 41

<sup>22</sup> *Ibid* at 44

<sup>23</sup> *Murray v. UK*, 1996

applicant did not inform the police of evidence later presented at trial (ambush defense, one might argue), did not testify at court nor cooperated with police to admit or deny his presence at a suspicious location. The Court deemed the right to silence applicable, but did not provide an extended analysis on why it did so. As noted in the decision:

“Although not specifically mentioned in Article 6 of the Convention, there can be no doubt that the right to silence under police questioning and the privilege against self-incrimination are generally recognized international standards which lie at the heart of the notion of a fair procedure under article 6. ... By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aims of article 6”<sup>24</sup>.

Yet another fundamental case relevant to the right to silence is *Saunders v. UK*<sup>25</sup>. The British Department of Trade and Industry (DTI) questioned the applicant in regards to stock scheme used to finance a corporate takeover. The applicant was under a threat of criminal sanctions and therefore decided to answer to the imposed questions. Subsequently, his responses were used against him and he was convicted<sup>26</sup>. The Court claimed that there was a violation of Article 6, but, again, only noted some self-incrimination implications of the use of the compelled testimony without specifying why the right to silence was deemed to be part of the right to a fair trial in the first place<sup>27</sup>.

Examination of the judgment reveals that the Court extensively relied on its prior adoption of the concept of the right to silence under Article 6 (1), but did not go into further substantive analysis<sup>28</sup>. Nevertheless, what’s distinguishable about this case is that for the first time, the Court explicitly noted that there is a clear relationship between the right to silence and the provisions of Article 6 (2) of the Convention which puts the burden of proof in criminal cases on the prosecution<sup>29</sup>. Here is how it is manifested in the judgment:

“The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence

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<sup>24</sup> Ibid at 45

<sup>25</sup> *Saunders v. UK*, App. no 19187-91, (ECtHR 1996).

<sup>26</sup> It should nevertheless be noted that the UK courts did not allow the usage of Sanders’s responses to questions he was asked after being formally charged with an argument that “it could not be said to be fair to use material obtained by compulsory interrogation after the commencement of the accusatorial process”.

<sup>27</sup> Berger, M. (2006). Europeanizing self-incrimination: the right to remain silent in the European court of human rights. *Columbia Journal of European Law* 12 at 344 and (*Saunders v. UK*, 1996) at 32

<sup>28</sup> *Murray v. UK*, 1996 at 45 and Bergat at Ibid

<sup>29</sup> As noted in the article 6(2) of the Convention “Everyone charged with a criminal offence shall be presumed innocent until proven guilty by law”.

obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6 para. 2 of the Convention<sup>30</sup>”.

Nevertheless, the Court does not clarify neither in this judgment nor in the subsequent judgments on the right to silence whether the presumption of innocence guaranteed by the article 6 is alone sufficient to support a broad self-incrimination privilege. Where the Article 6(2) claim has been made, the Court has preferred not to rule on it and instead develop its right to silence jurisprudence under the fair hearing provision of Article 6(1)<sup>31</sup>. The Court’s opinion has been that the argument under the Article 6 (2) presumption clause is duplicative of the argument under the Article 6(1) fair hearing provision<sup>32</sup>.

As it seems from the reasoning of the court in the right to silence relevant cases as well as the argumentation of the parties, the decision that the Article 6 of the Convention also presumes a right to silence was not seriously disputed, so the overall idea that there should be a right to silence within the Article was not really challenged.

Before its integration into the Council of Europe law, the concept of the right to silence was already integrated into EU law by the EU Court of Justice. As noted in (Orkem SA v Commission of the EU communities, 1989) “an analysis of the national laws has indeed shown that there is a common principle enshrining the right not to give evidence against oneself<sup>33</sup>”. The Court of Justice has claimed:

“The laws in each country protect, to a greater or lesser extent, persons being questioned in criminal proceedings in the strict sense. Admittedly, there are significant differences. In some cases the right not to procedure evidence against oneself is available only at the stage of preliminary inquiries. In come cases protection is available only both for witnesses and for persons who have been formally charged, and in others only the latter are protected. But in no case is the right denied to a person who has been formally charged in judicial proceedings *stricto sensu*<sup>34</sup>”.

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<sup>30</sup> Saunders v. UK, 1996 at 68

<sup>31</sup> Berger, 2006 at 345

<sup>32</sup> Ibid as well as Condrón v. UK, 35718-97 (ECtHR 2000) at 72 and Averill v. UK, App. no 36408/97 (ECtHR 2001 at 54

<sup>33</sup> Orkem SA v Commission of the EU communities, ECR 3283 (1989) at 98. The issue in front of ECJ in this case was how the right to silence is to be applied between the members of the EU, but it was particularly focused on implementation of the right to silence in administrative settings. EU law guarantees a privilege against self-incrimination for companies, but refusing to provide documents to the European commission is not allowed. See also Mannesmannrohren-Werke Ag v. Commission of the European Communities, T-112-98 (ECJ 2001).

<sup>34</sup> Orkem SA v Commission of the EU communities, 1989 at 111

As fairly claimed by Berger, it is relevant that there is a consensus among the Convention states that some right to silence protections are a necessary part of their domestic legal systems, but there is much more to it than that. The consensus is relevant to determine what general duties are included within the Article 6(1) fair hearing standard, it is not a sufficient foundation to permit the ECtHR to define how far the Convention's self-incrimination privilege should extend<sup>35</sup>.

The right to silence can be triggered in a variety of contexts. Therefore, an agreement on the ways of interpretation of the right in these situations is very unlikely to exist. The only obvious agreement is about the core rule behind the right to silence, which is that a person cannot be compelled to admit guilt in a criminal trial. Depending on the circumstances in which a person is forced to self-incriminate himself, different approaches will be brought about. In this sense, it is problematic that the Court has not yet formulated why it decided to bring the right to silence in as a Convention right. Until the Court explains why the right to a fair trial presumes a right to silence, it will be difficult to gain clarity in the application of the right to silence<sup>36</sup>.

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<sup>35</sup> Berger, 2006 at 345

<sup>36</sup> Ibid at 346

### **3. ECTHR'S INTERPRETATION OF THE BASIC ISSUES ON THE RIGHT TO SILENCE**

#### **3.1 The necessity of a criminal charge to trigger the right to silence**

The general idea behind the right to silence is about providing a privilege not to be forced to testify against yourself. Nevertheless, it can be a matter of debate what it actually means. If one looks at the provisions on the right to silence in national laws, the answer is not explicit at all. For example, the article 22 of the Constitution of the Republic of Armenia generally states that no one should be compelled to testify against himself. The latter is quite vague in a sense that admitting guilt in a criminal trial is clearly not the only platform where one can testify against yourself. Testifying in an administrative or a civil process can obviously, under certain circumstances, lead to negative consequences for a person too.

Nevertheless, the traditional understanding of the right to silence, as already noted, is within incrimination. The Fifth Amendment of the US constitution, for example, aims at emphasizing the connection between the right to silence and the risk of criminal conviction. It is written in a way to be only deemed applicable in strictly criminal cases. Nevertheless, the US Supreme Court, instead of literally applying the constitutional text, has created an analytical framework that focuses on whether the information that is being compelled could incriminate the defendant in a later criminal process. Therefore, the right to silence is not limited to criminal cases inasmuch as a compelled testimony might present a sufficient incrimination risk later on<sup>37</sup>.

In this sense, considering there is no explicit provision on the right to silence in the ECHR, the ECtHR has had a discretion to define the outreach of the right to silence as wide as it deems necessary. As already noted in the previous paragraph, the ECtHR has preferred to develop the right to silence jurisprudence based on the provision of Article 6.1 instead of 6.2. As noted in the article 6.1, "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." As you have

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<sup>37</sup> *Counselman v. Hitchcock*, 142 US 547 (US Supreme Court 1892) and *Berger, M.* (1980). *Taking the Fifth: the Supreme Court and the privilege against self-incrimination*. Lexington Books at 49-53

already noticed, the provision is not limited to criminal charges, therefore it provides a wider discretion for the ECtHR. Having had that discretion, the ECtHR has nevertheless preferred to limit the right to silence anyway. Here's how it's reflected in the Court's case law.

In *Ozturk v. Federal Republic of Germany*<sup>38</sup> the ECtHR reviewed the German law that decriminalized driving offences. The applicant was charged for driving carelessly and was subsequently compelled to pay for his interpreter. This was argued to be a violation of the Article 6.3.e of the ECHR, which provides that everyone charged with a criminal offence has the right to have the free assistance of an interpreter if he cannot understand or speak the language used in court. The Government claimed that since it had decriminalized driving offenses and turned them into administrative violations, the Article 6.3 and the provision about a translator were not applicable.

Nevertheless, the Court was not convinced and did not consider the formal decriminalization as a sufficient criterion to eliminate the Article 6 jurisprudence. The Court's reasoning is as follows:

"The Convention is not opposed to States, in the performance of their task as guardians of the public interest, both creating or maintaining a distinction between different categories of offences for the purposes of their domestic law and drawing the dividing line, but it does not follow that the classification thus made by the States is decisive for the purposes of the Convention. By removing certain forms of conduct from the category of criminal offences under domestic law, the law-maker may be able to serve the interests of the individual as well as the needs of the proper administration of justice, in particular in so far as the judicial authorities are thereby relieved of the task of prosecuting and punishing contraventions - which are numerous but of minor importance - of road traffic rules. The Convention is not opposed to the moves towards "decriminalization" which are taking place - in extremely varied forms - in the member States of the Council of Europe. The Government quite rightly insisted on this point. Nevertheless, if the Contracting States were able at their discretion, by classifying an offence as "regulatory" instead of criminal, to exclude the operation of the fundamental clauses of Articles 6 and 7 (art. 6, art. 7), the application of these provisions would be subordinated to their sovereign

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<sup>38</sup> *Ozturk v. Federal Republic of Germany*, App. 8544/79 (ECtHR 1984).

will. A latitude extending thus far might lead to results incompatible with the object and purpose of the Convention<sup>39</sup>”.

Even before the Ozturk case, the Court already formulated an important consideration relevant to resolving the issue with the necessity of criminal charges to trigger the right to silence. It has been noted in *Engel and others v. Netherlands*<sup>40</sup> that the states have the discretion to maintain or establish a distinction between criminal law and disciplinary law, and to draw the dividing line, but only subject to certain conditions. The States are free to designate as a criminal offence an act or omission not constituting the normal exercise of one of the rights that the Convention protects<sup>41</sup>. Nevertheless, the converse choice is subject to stricter rules. The Court fairly noted that if the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a "mixed" offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Article 6 would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. The Court therefore has jurisdiction, under Article 6, to satisfy itself that the disciplinary does not improperly encroach upon the criminal. All in all, the states have "autonomy" over the concept of "criminal charges" one way only. So they can criminalize an action (unless it is an example of exercising a convention right, such as a free speech), but not arbitrarily decriminalize an action and hence deprive people of the guarantees that Article 6 provides for such cases<sup>42</sup>.

Ozturk's 1984 case is further distinguishable in a sense that not only did the Court give its preference to substantial understanding of a charge, but also applied a three-part test, which has been often used to determine whether Article 6 rights are applicable<sup>43</sup>. The content of the test is as follows:

1. The first matter to be ascertained is whether or not the text defining the offence in issue belongs, according to the legal system of the respondent State, to criminal law;
2. Next, the nature of the offence is to be taken into consideration;

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<sup>39</sup> Ibid at 49

<sup>40</sup> *Engel and others v. Netherlands*, Application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72) (ECtHR 1976).

<sup>41</sup> Ibid at 80-84

<sup>42</sup> Ibid

<sup>43</sup> The test has been introduced as early as 1976 within the frame of *Engel and others v. Netherlands* case

3. Furthermore, the nature and degree of severity of the penalty that the person concerned risked incurring must be examined.

4. Finally, as the Court claims, the whole assessment has to have regard to the object and purpose of Article 6, to the ordinary meaning of the terms of Article 6 and to the laws of the Contracting States<sup>44</sup>.

The Ozturk case is also helpful in a sense that it demonstrates how the Court applied the test it had set before. The Court actually noted that important steps have been taken place to decriminalize petty offenses in German legislation adopted in 1968 and 1975, which also included formally removing the driving offense that Ozturk has committed from the list of crimes<sup>45</sup>. So in a sense, the Court welcomed what the German government had been doing. Nevertheless, what had been done did not suffice to convince the Court that article 6 protections are to be removed. It was noted that according to the ordinary meaning of the terms, those offences generally come within the ambit of the criminal law offences that make their perpetrator liable to penalties intended, *inter alia*, to be deterrent and usually consisting of fines and of measures depriving the person of his liberty<sup>46</sup>.

Furthermore, the Court emphasized that the offense committed by Öztürk continued to be classified as part of criminal law in the vast majority of the Contracting States, as it was in the Federal Republic of Germany until the entry into force of the 1968/1975 legislation; in those other States, such misconduct, being regarded as illegal and reprehensible, was then punishable with criminal penalties<sup>47</sup>. Therefore, the Court claimed that even though the penalties for these driving offenses were relatively minor, it still did not alter the criminal character of the offense.

Moreover, the Court highlighted that article 6 protections apply unless the Government entirely separates all connections between the procedure rules of crimes and administrative offenses. In Öztürk's case, the Government had not done so, and hence the criminal charges requirement was deemed to be satisfied. By the way, it has been agreed that such cases can generally be treated as administrative provided that there is a panel that provides Article 6 protections<sup>48</sup>.

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<sup>44</sup> Ozturk v. Federal Republic of Germany, 1984 at 50

<sup>45</sup> Ibid at 51

<sup>46</sup> Ibid at 53

<sup>47</sup> Ibid

<sup>48</sup> Ibid at 56



So, all in all, the applicability of the right to silence within the meaning of the article 6 is limited to criminal law and criminal procedure. At the same time, as noted in “Deweere v. Belgium<sup>49</sup>” the prominent place held in a democratic society by the right to a fair trial prompts the Court to prefer a "substantive", rather than a "formal", conception of the "charge" contemplated by Article 6 par. 1. Since the definition of criminal offenses that require article 6 protection is very broad, it covers situations such as

- Proceedings following an acquittal<sup>50</sup>,
- Proceedings after the expiration of a statutory limitation<sup>51</sup> period,<sup>52</sup>
- Proceedings following arrest and detention, but before formal charge<sup>53</sup>.

On the other hand, whereas these can reach to article 6 protection, an investigation into a corporate offence might not necessarily do so. This has been demonstrated in the case of I.J.L., G.M.R. and A.K.P. v. UK<sup>54</sup>. The Court’s reasoning has been that “the functions performed by the inspectors... were essentially investigative in nature and... did not adjudicate either in form or in substance<sup>55</sup>”. So this procedure has been considered to be just “a groundwork”, but not really “a block” to incriminate someone. The Court furthermore claims that “a requirement that such a preparatory investigation should be subject to the guarantees of judicial procedure as set forth in Article 6.1 would in practice unduly hamper the effective regulation in the public interest of complex financial and commercial activities”.

Surprisingly, in a case that the Court dealt with one year after, J.B. v. Switzerland<sup>56</sup>, a wider definition of the scope of article 6 protection was used. But this time the issue at question was a wider litigation process which actually included a criminal element. The Court has argued that the proceedings served the various purposes of establishing the taxes due by the applicant and, if the conditions therefore were met, of imposing on him a supplementary tax and a fine for tax evasion. Nevertheless, the proceedings were not expressly classified as constituting either supplementary-tax proceedings or tax-evasion

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<sup>49</sup> Deweere v. Belgium, Application no. 6903/75 (ECtHR 1980) at 44

<sup>50</sup> Sekanina v. Austria, App. 13126/87 (ECtHR 1994).

<sup>51</sup> Statutes of limitations are laws passed by a legislative body in common law systems to set the maximum time after an event when legal proceedings may be initiated.

<sup>52</sup> Minelli v. Switzerland, App. 8660/79 (1983).

<sup>53</sup> Allenet de Ribemont v. France, App 15175/89 (ECtHR 1995).

<sup>54</sup> I.J.L., G.M.R. and A.K.P. v. UK, App 29522/95, 30056/96, 30574/96 (ECtHR 2000).

<sup>55</sup> Ibid at 100

<sup>56</sup> J.B. v. Switzerland, app 31827/96 (ECtHR 2001).

proceedings. The Court emphasized the fact that from the beginning and throughout the proceedings the tax authorities could have imposed a fine on the applicant on account of the criminal offence of tax evasion<sup>57</sup>.

As part of the settlement, J.B. did indeed incur a fine. The penalty was not, however, intended as pecuniary compensation; rather, it was essentially punitive and deterrent in nature. The fine was “penal” in character. In the Court’s opinion, whatever other purposes served by the proceedings, by allowing the imposition of such a fine on the applicant, the proceedings amounted in the light of the Court’s case-law to the determination of a criminal charge<sup>58</sup>. So, although some part of the case was non-criminal, the Ozturk standards were applicable.

In a nutshell, the Court took into consideration why J.B. was actually compelled rather than the means of being compelled. This means that it is not crucial whether proceedings to compel a person are within criminal procedure law or the state authority that compels a person to testify is of a criminal procedure law character (Police, for example). In other words, what matters is why the information, in our case from the testimony, is sought. Does it have a penal character? Is the government willing to fine or imprison someone? If the answer is yes, then the article 6 protections, including the right to silence is triggered even if the proceedings, at request of which the compelling has been carried out, were administrative.

In this sense, there is a discrepancy in how the court applied the right to silence in the case of *Funke v. France*. The applicant did not provide the information he was required to and therefore got fined. The piece of information was demanded within a customs investigation about the assets he presumably possessed outside the country<sup>59</sup>. So when he was subpoenaed, there weren’t any criminal proceedings against him. Moreover, the government did not use the information that Funke supplied as a taxpayer in a subsequent criminal case<sup>60</sup>.

The proceedings against Funke for not providing the subpoenaed information were actually criminal from the perspective of French domestic law. Nevertheless, it wasn’t

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<sup>57</sup> Ibid at 47-48

<sup>58</sup> Ibid at 48-49

<sup>59</sup> *Funke v. UK*, 1993 at 12

<sup>60</sup> *Berger*, 2006 at 350

obvious that “the proceedings in which the production demand was made<sup>61</sup>” were also criminal. And as it has been mentioned, in order to figure out whether article 6 is triggered or not, it is the purpose of having the information that should matter, not the means towards achieving that. Yet, in this case, the Court has dismissed the Government’s claim of inadmissibility referring to the lack of victim status. The Court noted that the applicant’s complaints under Article 6 related to quite different proceedings, those concerning the production of documents<sup>62</sup>. The distinction I have noted above, has nevertheless been pointed out by the concurring opinion of judge Matscher.

This distinction between why the information is sought and how it is sought has been originally established in *Abas v. Netherlands*<sup>63</sup>. Abas presumably resided outside the country, so the tax authorities were investigating to find out if he had actually done so in order to decide whether he is eligible for a tax exemption. He submitted in a written format that he resided outside the country, and as a result he was eventually convicted of a fraud offence<sup>64</sup>.

Abas complained that his right to silence was violated inasmuch as he was not informed that he had the right under the Netherlands code of Criminal procedure not to provide the information because of which he was subpoenaed. The European Commission rejected his submission. The Court claimed that the fundamental goal of the tax investigation was to ascertain and record facts for fiscal purposes and not for a legal determination as to the applicant’s criminal liability<sup>65</sup>. Abas had not been formally charged or arrested, nor was he subject to other measures that would have substantially affected the situation. So the article 6 was not triggered. The contrary result, as noted by the court “would in practice unduly hamper the effective functioning in the public interest of the activities of fiscal authorities”<sup>66</sup>.

The Court’s approach about the distinction we have noted above has been finally confirmed in *Allen v. UK*<sup>67</sup>. There was a potential penalty facing the applicant for not disclosing some information. Nevertheless, the Court claimed that because the

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<sup>61</sup> Ibid

<sup>62</sup> *Funke v. UK*, 1993 at 39-40

<sup>63</sup> *Abas v. Netherlands*, 27943/95 (ECtHR 1997).

<sup>64</sup> Ibid at the Facts, para. A

<sup>65</sup> Ibid at the Law

<sup>66</sup> Ibid and *Berger*, 2006 at 350

<sup>67</sup> *Allen v. UK*, 76574/01 (ECtHR 2002).

information, that has been forced to provide, was not used to incriminate the applicant, Article 6 was not triggered. The Court even mentioned the Funke case in its reasoning and noted that Allen's situation was different, whereas in Funke's situation prosecution scenario was pretty expected (which as already noted, I do not agree with).

To sum up, in spite of some discrepancy in the way the ECtHR has applied the right to silence, the case-law is consistent enough to provide the following:

What is crucial in terms of applicability of article 6 protections is the nature of proceedings for which compulsory production is sought, not the fact that criminal authority is used to force production<sup>68</sup>. In other words, it is not the how that matters, but the why. Police might be used to compel someone to provide information, but that doesn't mean that the information is sought to incriminate a person. At the same time, even if no police force is used and the information is compelled through administrative means, it still does not exclude the opportunity that the government intended to penalize someone, which would imply Article 6 protections.

As to when the right to silence is triggered, one has to, again, use the Court's understanding of criminal charges, which, as noted, should be "substantive", rather than a "formal" one. Which means that even if a person is not formally charged yet, proceedings following an arrest and detention or in fact any proceedings that substantively presume that a person is charged can trigger Article 6. In many states people, who are de facto suspects, are often being interrogated as witnesses, when they don't enjoy the right to silence from the perspective of the domestic law. Yet, due to a substantial method of interpretation of charges, as far as the Article 6 is concerned, these people already have the right to silence. Depending on whether the evidence law of that state uses the "fruit of a poisonous tree" rule, this could have wider implications and all the evidence that is gained based on the testimony of a defendant with a violation of the right to silence, could be deemed inadmissible. This issue is already outside the context of this thesis, but it is yet another factor showing how important it could be to understand how and when the right to silence is triggered.

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<sup>68</sup> Berger, 2006 at 351

### **3.2 Conditional arguments against the right to silence and its applicability in relation to suspects**

Generally, before arresting people, the police warn the arrestees that they are not obliged to speak, but once they do, their statement would be written down and later could be used against them. A similar scenario happened in the case of *Heaney and McGuinness*<sup>69</sup>. Both applicants were questioned about the bombings that happened in Ireland and were requested to provide information about their location upon their arrest. They preferred to stay silent, and so far at that point, everything had been in accordance with the right to silence. Nevertheless, soon after that both applicants were warned in another setting. They were told that if a police question is relevant to a commission of an offence under “Offences against the state act of 1939”, they have an obligation to answer to it. So, unlike the initial warning, this time the applicants were clearly obliged to speak, so either not speaking or speaking false would lead to incrimination. The applicants remained silent again and were convicted. Among other arguments, the Government submitted to the Court that criminalizing silence was lawful because there were additional protections that decreased the risk of unreliable confessions or of the abuse of the powers<sup>70</sup>. The Court has dismissed this argument and noted that “these protections could only be relevant to the present complaints if they could effectively and sufficiently reduce the degree of compulsion imposed by section 52 of the 1939 Act to the extent that the essence of the rights at issue would not be impaired by that domestic provision. However, it is considered that the protections listed by the High Court of Ireland, and subsequently raised by the Government before this Court, could not have had this effect. The application of section 52 of the 1939 Act in an entirely lawful manner and in circumstances which conformed with all of the safeguards referred to above could not change the choice presented by section 52 of the 1939 Act: either the information requested was provided by the applicants or they faced potentially six months' imprisonment<sup>71</sup>”.

In a nutshell, the Court has found that if an intervention destroys the very essence of the right to silence and the privilege against self-incrimination, then security and public order

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<sup>69</sup> (*Heaney and McGuinness v. Ireland*, 2000)

<sup>70</sup> *Ibid* at 15

<sup>71</sup> *Ibid* at 51

concerns relied on by the Government do not justify such an intervention. So the right to silence is not only to be perceived and applied from a substantial as opposed to a formal perspective as we showed in the previous paragraph, but it is also, in a way, unconditional.

The section 52 of the 1939 Act of Offences against the state was once again reviewed by the court one year later within the case of *Quinn v Ireland*<sup>72</sup>. The situation of Quinn was different in a sense that he had consulted his solicitor, which means that there were even more “additional protections” than in the case of *Heaney and McGuinness*. Yet, as confirmed by the Court, the choice that Quinn had to face either to testify or to face a potential six-month prison sentence, once again “in effect, destroyed the very essence of privilege against self-discrimination and the right to silence”<sup>73</sup>.

So from this perspective, the right to silence is indeed unconditional, but the next logical question is whether it means that suspects, within a substantial understanding of the concept “suspect”, have the right not to talk at all or whether they have the right not to answer to incriminating questions.

The case of *Serves v. France*<sup>74</sup> is, in this sense, quite interesting. It also confirms the findings of the two cases I mentioned, even though the applicant did not face imprisonment for fulfilling his right to silence. The Government initiated two proceedings. During the first one, it was manifested as a murder charge against Serves. Yet, the charges were cancelled because of procedural inconsistencies. The second proceeding focused on two other people, so Serves wasn’t formally charged. Nevertheless, as part of these proceedings, he was called as a witness holding an obligation to testify. He stayed silent three times and was consequently fined for doing so.<sup>75</sup> Ultimately, he was convicted to imprisonment<sup>76</sup>. The Court dismissed the Government’s claim that the applicant was not charged and that article 6 was not applicable. As already noted, a substantial, rather than a formal approach is applicable. Serves had claimed that by defining him as a witness in the second investigation, instead of charging him with murder, the judge “had sought to subject him to unbearable procedure so that he would incriminate himself”<sup>77</sup>. The Court dismissed this argument too and noted that it was understandable that the applicant should have feared that some of

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<sup>72</sup> *Quinn v Ireland*, App. no. 36887/97 (ECtHR 2001).

<sup>73</sup> *Ibid* at 54-56

<sup>74</sup> *Serves v. France*, App. no. 20225/92 (ECtHR 1997).

<sup>75</sup> *Ibid* 21-22

<sup>76</sup> *Ibid* at 29

<sup>77</sup> *Ibid* at 43

the evidence he might have been called upon to give before the investigating judge would have been self-incriminating. So, the Court ruled that It would have been admissible for him to have just refused to answer any questions from the judge that were likely to steer him in that direction instead of not testifying at all<sup>78</sup>. It was also noted that the oath was designed to ensure that any statements made to the judge were truthful, not to force the witnesses to give evidence<sup>79</sup>. Nevertheless the dissenting opinion of three judges points to the opposite:

“The applicant must in fact have felt that he would be forced to give evidence once he took the oath. In our view, this was not so much “a degree of coercion” as “definite coercion”. The Court has held on several occasions that the right of any person charged to remain silent and not to incriminate himself lies at the heart of the notion of a fair procedure under Article 6 of the Convention. That right is at stake in the present case. By insisting on the applicant’s obligation to take the oath, without giving him an opportunity to explain the reasons for his refusal, the investigating judge put him in the position prohibited by Article 6 § 1 of the Convention. He must in reality have felt forced to give evidence that could incriminate him. It is of little consequence, in the circumstances of the case before us, whether he was under that obligation as a person charged or as a witness”<sup>80</sup>. Berger points to an interesting fact about this case. The oath that Serves took did not have any provisions of his right not to respond to individual incriminatory questions, which means that he had to assume an obligation to answer to incriminating questions, which in itself would mean that such a treatment amounts to a violation of the right to silence<sup>81</sup>.

The approach adopted by the majority in Serves’s case seems to have changed since. At least, the Court’s ruling on the case of Shannon v. UK<sup>82</sup> points to that. Shannon, within an inquiry conducted by a financial investigator, was demanded to appear and respond to questions on two occasions. He did so the first time, but refused to do it the second time, which lead to him being convicted<sup>83</sup>. After he was summoned the second time, his counselors tried to gain written guarantees that the information he might provide would

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<sup>78</sup> Ibid at 47

<sup>79</sup> Ibid

<sup>80</sup> Ibid at joint dissenting opinion of judges Pekkanen, Wildhaber and Makarczyk

<sup>81</sup> Berger, 2006 at 357

<sup>82</sup> Shannon v UK, App. no. 6569/03 (ECtHR 2003).

<sup>83</sup> Ibid at 17

not be used against him in any subsequent criminal procedures<sup>84</sup>. Their inquiries were only partially met. The submission of the UK government to the Court was that Article 6 could be violated only if the statement that has been forcefully taken, was used<sup>85</sup>. The Court dismissed this argument and claimed that “there is no requirement that allegedly incriminating evidence obtained by coercion actually be used in criminal proceedings before the right to silence applies<sup>86</sup>”. So the right to silence is also applicable unconditional of the usage of the compelled information. This is consistent with the ideology of the right to silence pure and simple. As it has been noted in the earlier sections of this thesis, the nature of criminal procedure is very dynamic rather than static, and at early stages it could be hard to understand whether a specific piece of information has incriminating risks or not, especially if the suspect does not have an attorney.

Nevertheless, the Court did not clarify why it found that Shannon had the discretion not to attend the interview at all, which was actually not granted to Sevres<sup>87</sup>. It is interesting that the Court did not provide justification even though the judge in Shannon’s Belfast Country Court appeal had concluded that the distinction between refusing to attend the interview and refusing to answer specific questions was merely “technical<sup>88</sup>”. Anyway, what we are given is that the Shannon case provides a wider protection than the Serves case, and as correctly argued by some authors<sup>89</sup>, because Shannon is the more recent decision, one could suppose that the Court is now prepared to support suspects who do not appear to the questioning at all.

To sum up, the cases we’ve reviewed point that criminal sanctions cannot be used to compel people to testify against themselves, regardless of the fact that there is some uncertainty about whether it means not answering to specific question or nor talking at all. The Court’s case law also claims that the right to silence in unconditional and in general is not subject to a balancing process of individual interests vs. state interests in protecting public safety<sup>90</sup>.

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<sup>84</sup> Ibid at 12

<sup>85</sup> Ibid at 27 to 28

<sup>86</sup> Ibid at 34

<sup>87</sup> Ibid at 41

<sup>88</sup> Ibid at 19

<sup>89</sup> Berger, 2006 at 358

<sup>90</sup> Ibid at 359



### 3.3 Oral evidence v. material evidence

The court's case law has a fairly different approach regarding oral evidence and material evidence. As it has been noted in the Saunders case: "the right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing<sup>91</sup>".

So, the distinction that the Court provides uses the criterion of the will of the suspect. As already noted, existence of compulsory power is not in itself enough to state that there is a violation of Article 6. The issue in question is the definition of the term "materials existing independent of the will of the suspects", and whether it is consistent enough. The questionable part is especially the "documents acquired pursuant to a warrant. With a wide definition of the term "materials existing independent of the will of the suspects", one might argue that there is a discrepancy in how the Court applied this approach in *Funke v. France*. One could argue that the documents that Funke did not present to the government existed independent of his will, therefore he did not deserve Article 6 protections.

Mike Redmayne<sup>92</sup> claims that the above mentioned excerpt can still be interpreted to support the Court's reasoning in *Funke*. According to him the core point of that case was that the applicant was compelled to provide documents. He is of an opinion that the right to silence relates to "a certain means of obtaining information, means that requires cooperation, and not to a particular type of information- answers to questions as opposed to physical material<sup>93</sup>". In this sense, obtaining bodily samples does not necessarily require the cooperation of the individual in a sense that they can be taken by physical force. Thus

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<sup>91</sup> Saunders v. UK, 1996 at 69

<sup>92</sup> Redmayne, at 214-25

<sup>93</sup> Ibid

they are to be differentiated from attempts to compel someone to testify or to hand over documents<sup>94</sup>.

The first point that the excerpt from Saunders case makes is that the will of an accused person to remain silent is to be respected. Ashworth<sup>95</sup> argues that this is to be interpreted as a connection of the right to silence with the right not to be subjected to inhuman or degrading treatment (Article 3 of the ECHR) and arguably the right to private life (Article 8 of the ECHR) and the freedom of expression (Article 10 of the ECHR). Nevertheless, the idea of materials existing independent of person's will is still questionable.

There is also some inconsistency about how the court has applied this distinction between materials that do and do not exist independent of person's will. In *J. B. v. Switzerland*, for example, the Court noted that "the present case does not involve material of this nature which, like that considered in Saunders, has an existence independent of the person concerned and is not, therefore, obtained by means of coercion and in defiance of the will of that person". Nevertheless, that fact that J.B. was fined for refusing to provide financial records to the tax authorities was considered a violation of Article 6. Therefore, this distinction is somewhat tricky. Ashworth argues that the key issue isn't whether the documents have an existence independent of the person, but rather whether a requirement to provide evidence (oral or real) operates as coercion on the mind of the subject.<sup>96</sup> I certainly agree with this statement and believe that putting bodily samples and documents in the same category is not the most reasonable thing. It is one thing whether bodily samples and documents exist independent of the will of the person, another thing whether they are obtained independent of the will. If you pay attention to Redmayne's statement above, he highlights the means of obtaining information. Therefore it should be analyzed in each case whether the compelling of the information has been through a coercion of the mind of that person. The issue is that bodily samples, to my mind, always exist independent of their will and can mostly be taken independent of their will. This means that, generally, coercion of the mind of a person to get his bodily samples is not probable. It goes without saying that if those sample are obtained through harsh means, that treatment can be regarded as inhuman or degrading, but that does not concern Article

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<sup>94</sup> Ashworth, 2008 at 759

<sup>95</sup> Ibid

<sup>96</sup> Ibid at 760

6. Various other scenarios are possible that could involve violations of other articles, but as far as Article 6 is concerned, samples exist and mostly can be taken independent of the will. Nevertheless, I am not sure if one can argue the same about documents. It might exist independent of the will of that person at a certain point of time, but if the prosecution isn't able to get their hands on it through alternative means, I believe it is possible to have a scenario that implies a coercion of mind and therefore a violation of Article 6.

### **3.4 Issues of identity and shifts in Court's approach regarding the applicability of the right to silence**

As noted in *Saunders v. UK*, the right to silence is applicable "to criminal proceedings in respect of all typed of criminal offences without distinction from the most simple to the most complex"<sup>97</sup>. Nevertheless, some of the more recent cases of the Court provide space for alternative argumentation. In *O'Halloran and Francis v. UK*<sup>98</sup>, the applicants claimed that the obligation, imposed on them to name the driver of a vehicle detected by a traffic camera, prejudiced their right to silence. A failure to inform the police about the driver of the car was punishable with a fine. The Court found no violation of Article 6. The innovation of this judgment is that additional factors were mentioned by the Court in its reasoning whether the right to silence was violated. With this approach, besides the direct nature of the compulsion, the following should be taken into consideration<sup>99</sup>:

- the fact that the compulsion is part of a regulatory scheme that fairly imposes obligations on drivers in order to promote safety on the roads,
- the fact that the information required is the simple, specific and restricted fact of who was driving, rather than a general account of movements or answers to wide-ranging questions,
- and that the particular statutory offense contains a safeguard, in the form of a defense of due diligence.

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<sup>97</sup> (*Saunders v. UK*, 1996 at 74

<sup>98</sup> *O'Halloran and Francis v. UK*, 15809/02 (ECtHR 2008).

<sup>99</sup> *Ibid* and *Ashworth*, 2008 at 763

A similar scenario happened in *Weh. V. Austria*<sup>100</sup>. The Court found no violation of Article 6 with a reasoning that there was nothing to show that the applicant was “substantially affected” so as to consider him being “charged” with the offence of speeding within the meaning of Article 6 § 1. It was merely in his capacity as the registered car owner that he was required to give information. Additionally, the Court highlighted that he was only required to state a simple fact, namely who had been the driver of his car, which is not in itself incriminating<sup>101</sup>.

One could argue that this approach is quite logical and the public interests outweigh, so the right to silence is to be limited. On the other hand, although the fact about the driver of the car is a simple one, it can be quite important. As argued by professor Ashworth, in most cases, this piece of information could be the necessary missing evidence to convict a person<sup>102</sup>. He argues that the Court should have considered this kind of situations as an exception to the privilege instead of denying the *prima facie* violation of the right to silence. Ashworth claims that the Court could have rationalized its decision as an exception based on a pragmatic need to use such an approach to guarantee road safety and on the fact that there is an obvious European consensus to do so<sup>103</sup>. So, since the Court did not do so, and rationalized its decision simply by demonstrating that the above mentioned criteria were met, then this opens some space for alternative argumentation. One could argue that since the right is not applicable just because these were minor cases, then it should also be limited in more serious cases. Interestingly enough, there is an ECtHR judgment on which, this kind of reasoning can rely on. In *Jalloh v. Germany*<sup>104</sup>, the applicant, after being arrested, had been forced to regurgitate a bag of cocaine. He submitted complaint that article 3 and article 6 were violated. Court firstly recognized that the evidence, namely, drugs hidden in the applicant’s body which were obtained by the forcible administration of emetics, could be considered to fall into the category of material having an existence independent of the will of the suspect, the use of which is generally not prohibited in criminal proceedings<sup>105</sup>. Nevertheless, the Court went further and created an exception to

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<sup>100</sup> *Weh. v. Austria*, 2005

<sup>101</sup> *Ibid* at 54

<sup>102</sup> Ashworth, 2008 at 764

<sup>103</sup> *Ibid* at 765

<sup>104</sup> *Jalloh v. Germany*, 54810/00 (ECtHR 2006).

<sup>105</sup> *Ibid* at 113

the exceptional category (materials having an independent existence)<sup>106</sup>. Article 6 was deemed to be violated, because Article 3 was violated, which is fair enough. Yet, Ashworth has identified several gaps in Court's reasoning. Just like in O'Halloran and Francis, the Court listed criteria which are to be applied. Nevertheless, it added a new criterion, that was absent from O'Halloran and Francis case, namely "the weight of the public interest in the investigation and punishment of the offence at issue"<sup>107</sup>. Here is how the application of that criterion is manifested in the judgment:

"As regards the weight of the public interest in using the evidence to secure the applicant's conviction, the Court observes that, as noted above, the impugned measure targeted a street dealer who was offering drugs for sale on a comparatively small scale and who was eventually given a six-month suspended prison sentence and probation. In the circumstances of the instant case, the public interest in securing the applicant's conviction could not justify recourse to such a grave interference with his physical and mental integrity"<sup>108</sup>.

So the Court, while finding a violation of Article 6 and 3, claimed that among other reasons, the right to silence was not applicable because the case was not serious enough. Professor Ashworth claims that this seems to be an implication that the right to silence protects individuals against compulsion in relation to non-serious crimes, but not serious crimes<sup>109</sup>. He adds: "If this were not true, why bring the issue of crime into equation"<sup>110</sup>. Ashworth's arguments have wide implications. As we already noted, the The Court explicitly claimed in Saunders judgment that the right to silence is applicable without distinction from the most simple to the most complex ones. This is a basic point on the Court's interpretation of the right to silence on which other essential points have been made, such as the one that the right is not subject to a balancing process. In Ashworth's words "Insofar as the Court held that a minor drug-dealing case was not sufficiently weighty to justify overriding the privilege against self-incrimination, does this mean that the decisions in Saunders (on serious fraud) and in Heaney and McGuinness (on terrorism) are

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<sup>106</sup> Ashworth, 2008 at 765

<sup>107</sup> Jalloh v. Germany, 2006 at 117

<sup>108</sup> Ibid at 119

<sup>109</sup> Ashworth, 2008 at 766

<sup>110</sup> Ibid

now open to doubt?”<sup>111</sup>. Even though this argument is only implicitly inferred from the Court’s case law, it can surely serve as a starting point in that direction.

### **3.5 Adverse inferences**

#### **3.5.1 Basic rules**

An integral aspect of the right to silence is the legal guarantee that exercising this right should not be interpreted against the person, who prefers to do so. Without it, the right to silence would be just fictional. Simply put, the argument suggests that, the law cannot grant a fundamental right and then penalize a person who chooses to exercise it<sup>112</sup>. Nonetheless, this idea is subject to a lot of criticism. Let’s say a person crosses a border and the police find a huge amount of illegal drugs or weapons in the baggage of that person, and he is refusing to give any testimony. Isn’t it logical that the person is in a position that requires some explanation. If the person is indeed guilty, and the police have no further evidence, then it seems like the probability of the criminal responsibility of that person is pretty much dependent on the interpretation of the fact that he has no reasonable explanation or at least does not provide one. So, there is a space to argue that exercising the right to silence actually should be sometimes interpreted against those exercising it and adverse inferences should be drawn. Different jurisdictions approach this issue differently. In the US, for example, the Supreme Court has strongly prohibited adverse inferences if the defendant does not take the witness stand<sup>113</sup>. It has been highlighted that considering the Miranda warning, using that fact that a suspect has rejected to answer police questions against him would violate due process<sup>114</sup>.

In contrast to such a robust legal structure, the approach in the Council of Europe is much more limited. Generally speaking, what is essential is here is whether the pressure that government puts on that person improperly undermines his free will. As noted by one of the authors, the distinction that ECtHR relies on is between direct compulsion and indirect

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<sup>111</sup> Ibid at 767

<sup>112</sup> Michael J., E. B. (1995). "Current topic: The right to silence". *European human rights law review*, 6 at 6

<sup>113</sup> *Griffin v. Valifornia* (US Supreme Court 1965).

<sup>114</sup> *Doyle v. Ohio* (US Supreme Court 1976).

compulsion. The first is manifested in the form of criminalization of silence, which is forbidden by the Convention. The second is manifested through adverse inferences, which is not necessarily forbidden<sup>115</sup>.

One of the first cases, when the Court addressed the issue of adverse inferences was *Murray v. UK*. The applicant was charged for conspiring to commit a murder and for unlawfully imprisoning. After being arrested, he was given a warning which, among other things, noted that his silence may be used against him in court. For forty-eight hours he had no access to a lawyer and stayed silent.<sup>116</sup> Subsequently, due to his failure to testify during police interrogation and refusal to take stand at the court, the judge drew "very strong inferences"<sup>117</sup>. Amnesty International submitted that allowing adverse inferences to be drawn from the silence of the accused amounted to compulsion which shifted the burden of proof from the prosecution to the accused, which is inconsistent with the right not to be compelled to testify against oneself or to confess guilt<sup>118</sup>. In other words, the argument suggested that Murray's choice was to either testify against himself or let his silence serve the same purpose<sup>119</sup>. Yet, the Court's definition of the problem was the following: "The Court does not consider that it is called upon to give an abstract analysis of the scope of these immunities and, in particular, of what constitutes in this context "improper compulsion". What is at stake in the present case is whether these immunities are absolute in the sense that the exercise by an accused of the right to silence cannot under any circumstances be used against him at trial or, alternatively, whether informing him in advance that, under certain conditions, his silence may be so used, is always to be regarded as "improper compulsion"<sup>120</sup>.

The Court reached to an important finding on the right to silence which is that it is prohibited to convict someone solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself. Nevertheless, the right to silence is not absolute, and in situations which clearly call for an explanation, silence may be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution<sup>121</sup>.

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<sup>115</sup> Jennings, A. F. (2000). *Silence and Safety: The impact of human rights law*.

<sup>116</sup> *Murray v. UK*, 1996 at 12

<sup>117</sup> *Ibid* at 25

<sup>118</sup> *Ibid* at 42

<sup>119</sup> Berger, 1980 at 374

<sup>120</sup> *Ibid* at 46

<sup>121</sup> *Ibid* at 47

The Court also confirmed that international standards, while providing the right to silence and the privilege against self-incrimination, are silent on this point. Therefore, self-incrimination claims in such cases require that all the circumstances be assessed<sup>122</sup>.

The Court's finding was that Murray was not forced to incriminate himself. By preferring not to testify, he put himself under a risk of adverse inferences, not that of being convicted for silence<sup>123</sup>. The Court pointed out some factors in its argument that inferences against Murray were proper. For example, it was noted that proceedings were not with a jury, but with an experienced judge. Furthermore, there were safeguards such as the requirement that prosecutor was obliged to first establish a prima facie case against the accused. There was also a requirement that warnings had to be given to the accused as to the legal effects of maintaining silence<sup>124</sup>.

"The question in each particular case is whether the evidence adduced by the prosecution is sufficiently strong to require an answer. The national court cannot conclude that the accused is guilty merely because he chooses to remain silent. It is only if the evidence against the accused "calls" for an explanation, which the accused ought to be in a position to give, that a failure to give any explanation "may as a matter of common sense allow the drawing of an inference that there is no explanation and that the accused is guilty". Conversely if the case presented by the prosecution had so little evidential value that it called for no answer, a failure to provide one could not justify an inference of guilt. In sum, it is only common-sense inferences which the judge considers proper, in the light of the evidence against the accused that can be drawn under the Order<sup>125</sup>".

What is interesting is that the argumentation of the Court was not essentially affected by the fact that Murray had no access to a lawyer for the forty-eight hours I've mentioned before. Nevertheless, the Court formulated an idea that, to my mind, is of utmost importance in terms of providing guarantees for the right to silence. The Court highlighted that it is of big importance for the rights of the defense that an accused has access to a lawyer at the initial stages of police interrogation. In the context of Murrays case and UK regulations, at the beginning of police interrogation, an accused is confronted with a fundamental dilemma relating to his defense. If he chooses to remain silent, adverse

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<sup>122</sup> Ibid

<sup>123</sup> Berger, 2006 at 375

<sup>124</sup> Murray v. UK, 1996 at 51

<sup>125</sup> Ibid



inferences may be drawn against him in accordance with the provisions of the Order. On the other hand, if the accused opts to break his silence during the course of interrogation, he runs the risk of prejudicing his defense without necessarily removing the possibility of inferences being drawn against him<sup>126</sup>. So even though the Court ruled against Murray, it basically claimed that because the choice that suspects face in early stages of criminal process is a hard one, it requires that they have access to a lawyer.

This led the Court to find violations in subsequent cases, such as *Averill v. UK*<sup>127</sup> and *Magee v. UK*<sup>128</sup>. In *Averill*, the applicant was denied access to a lawyer for a shorter period than what was applied to Murray. Nevertheless, the Court claimed that the refusal to allow an accused under caution to consult a lawyer during the first twenty-four hours of police questioning must still be considered incompatible with the rights guaranteed to him by Article 6<sup>129</sup>. The Court considered of no significance the fact that the applicant maintained his silence after he had seen his solicitor. It also found that the Court's conclusion as to the drawing of adverse inferences from the applicant's silence cannot legitimate the authorities' refusal to provide him with access to a solicitor during the first twenty-four hours of his interrogation. *Averill*'s silence was actually invoked by the trial judge during the first twenty-four hours of his detention against him. As noted by the Court, access to a lawyer should have been guaranteed to the applicant before his interrogation began<sup>130</sup>.

### **3.5.2 The role of the reason for refusing to testify in drawing adverse inferences**

As argued by the Berger, "in order for adverse inference instructions to meet article 6 standards, the circumstances of silence must warrant the adverse inference and the fact finder must be properly instructed<sup>131</sup>". Since depending on whether the fact finder is a jury or an experienced judge, the requirements could basically vary. As noted in the earlier paragraphs, people might prefer to be silent because of different reasons. In this context, adverse inferences should be drawn only if it is established that the defendant is silent due to his or her inability to answer. And by saying inability, I mean that a person has logically

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<sup>126</sup> *Ibid* and Berger, 2006

<sup>127</sup> *Averill v. UK*, 2001

<sup>128</sup> *Magee v. UK*, App. 28135/95 (ECtHR 2001).

<sup>129</sup> *Averill v. UK*, 2001 at 60

<sup>130</sup> *Ibid*

<sup>131</sup> Berger, 2006 at 375

no answer or the one they could come up with would not really stand against the evidence already accumulated. And since the issue is not a simple one, in case of jury as a decision maker, they have to be fully instructed. The case of *Condrón v. UK*<sup>132</sup> demonstrates this point quite well. The domestic judge instructed the jury that they could draw adverse inferences if defendants did not provide certain information to the police, but that silence alone was not sufficient to consider him guilty<sup>133</sup>. Yet there should have been more to it than that.

It was argued in front of the Court that since the applicants were tried before a jury it was impossible to ascertain whether their silence at the police station played a significant part in its decision to convict. Juries' verdicts were not accompanied by reasons which were amenable to review on appeal. This fact in itself required that the trial judge approach the issue with the utmost caution. However, the terms of his direction were defective since he failed to advise the jury that it should only draw an adverse inference if it concluded that their silence was attributed to their having no answer to the charges or none that would stand up to cross-examination. The end-result of the direction was to leave the jury free to draw an adverse inference even if it was satisfied that the reason why the applicants held their silence was because they were withdrawing from heroin and were acting on the firm advice of their solicitor, reasons which could not in any way be construed as probative of their guilt<sup>134</sup>.

So the decision maker (jury, in this case) was not properly guided on when to make adverse inferences. Additionally, there were no references to the requirement for the prosecution to prove a prima facie case before an adverse inference could be drawn from defenders' silence.<sup>135</sup> Therefore the Court claimed that the jury should have been directed that it could only draw an adverse inference if satisfied that the applicants' silence at the police interview could only sensibly be attributed to their having no answer or none that would stand up to cross-examination<sup>136</sup>.

By the way, this issue is also to be perceived from a substantive viewpoint. There is no certain method or a form of instructing juries to draw adverse inferences. What is

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<sup>132</sup> *Condrón v. UK*, 2000

<sup>133</sup> *Ibid* at 22

<sup>134</sup> *Ibid* at 47

<sup>135</sup> *Ibid*

<sup>136</sup> *Ibid* at 61

important is that the core safeguards are present and the instruction are not overly confusing<sup>137</sup>. For example, in the case of *Wood v. UK*<sup>138</sup>, the domestic judge committed mistakes while instructing the jury by failing to mention that the applicant had the right to silence and that he could not be convicted solely based on his silence. In spite of this, the ECtHR found that there was no violation of Article 6 claiming that the jury, although not instructed, was not actually enjoying a discretion to convict the defendant solely based on his silence. Therefore, it is not actually the instruction that matters, but whether the decision is made with a kind of reasoning that is contrary to the right to silence. In case there is no jury, it would be crucial to determine whether the judge is experienced or knowledgeable enough not to convict a person just because of his silence, regardless of whether such an approach is, for example, formulated in judgment or manifested otherwise during a trial.

So, the evaluation of the reason why the defendant or the suspect is keeping silence matters. It is not uncommon that people claim to refuse to testify due to their lawyer's advice to do so. The issue is whether that reason is strong enough in itself to prevent adverse inferences.

In *Condrón v. UK*, the lawyer of applicants during the domestic procedure advised them not to testify because believed that they were unfit to be interviewed and might prejudice their defence through the incoherence of any answers they might volunteer to the police. The domestic judge accepted it, but left the jury with an option of drawing adverse inferences. In the applicants' submission, it was inconsistent with the rights guaranteed by Article 6 of the Convention to penalize them in this manner for having relied on conscientious legal advice, all the more so when they were obliged to subject themselves to cross-examination on the content of that advice in a way which was at variance with respect for the confidentiality of lawyer/client communications<sup>139</sup>.

The court highlighted that the very fact that an accused is advised by his lawyer to maintain his silence must be given appropriate weight by the domestic court. There may be good reason why such advice may be given. The applicants of this case stated that they held their silence on the strength of their solicitor's advice that they were unfit to answer

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<sup>137</sup> Berger, 2006 at 376

<sup>138</sup> *Wood v. UK*, App. 23414/02 (ECtHR)

<sup>139</sup> *Condrón v. UK*, 2000 at 45

questions. Their solicitor testified before the domestic court that his advice was motivated by his concern about their capacity to follow questions put to them during interview<sup>140</sup>.

At the same time the Court observed that the fact that the applicants were subjected to cross-examination on the content of their solicitor's advice cannot be said to raise an issue of fairness under Article 6 of the Convention. They were under no compulsion to disclose the advice given, other than the indirect compulsion to avoid the reason for their silence remaining at the level of a bare explanation. The applicants chose to make the content of their solicitor's advice a live issue as part of their defence<sup>141</sup>. So in Court's interpretation, the fact that an accused remains silent invoking that he is advised to do so by his lawyer, is crucial, but not necessarily enough to justify the silence and exclude adverse inferences. As beautifully put by Berger, "the explanation offered for silence, even if not in itself an automatic bar to the evidentiary use of silence against the accused, must be decently treated in the content of any adverse inference instruction ultimately given to the jury<sup>142</sup>".

In *Beckles v. UK*<sup>143</sup>, the ECtHR found a violation of Article 6, since the judge did not give the jury sufficiently clear direction to consider the accused's explanation on why he had not answered questions. Before the applicant was formally called to testify at the police station and before he consulted with his lawyer, he just orally said that the victim of the criminal case jumped outside the window as opposed to the argument of the victim stating that someone pushed him. Nevertheless, before testifying he consulted with his lawyer and decided to keep silence<sup>144</sup>. After some time he nevertheless testified at a trial and noted that he previously kept silence because of the advice of his lawyer. Once again, he pleaded not guilty and confirmed his earlier statement. He was asked whether he could also testify about what he talked about with his lawyer before he decided to refuse to testify, and he said yes. No one initiated the testimony, so he actually didn't get to testify. Here is an excerpt from the jury instruction:

"So it is for each defendant ... to decide whether to answer or not. You decide what you make of the reasons given for not answering. If you thought that the reason given was a good one, then of course you could not hold it against them. If you thought that they were

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<sup>140</sup> Ibid at 60

<sup>141</sup> Ibid

<sup>142</sup> Berger, 2006 at 377

<sup>143</sup> *Beckles v. UK*, App. 44652/98 (ECtHR 2003).

<sup>144</sup> Ibid 15-17

failing to answer certain awkward questions because, for example, they were keeping their powder dry, as it were, hoping against hope they would not be identified and the other reasons I mentioned a moment ago, or because they had not yet worked out what their defence was going to be, you could draw the inference that I have mentioned and, if you did, that might point towards guilt, but it is you who decide whether it is fair and proper to draw those adverse inferences.<sup>145</sup>”

It was fairly argued that adverse inferences are only justified where silence can only sensibly be attributed to guilt or to the accused having no answer or none that would stand up to cross-examination. However, the jury in this case was permitted to hold the applicant’s silence against him on the basis that it found his decision to do so unreasonable without necessarily also finding that it was only sensibly attributable to guilt. Indeed, the jury was directed that it could draw adverse inferences if the applicant had stayed silent for innocent reasons<sup>146</sup>.

The Court claimed in *Beckles*’ judgement that defendant’s explanation for his silence has to be given appropriate weight. The jury is to be reminded (which also means that if the decision maker is a judge, he should take into consideration) all of the relevant background considerations. The Court has explicitly noted that the jury should NOT draw an adverse inference if it was satisfied that the applicant’s silence at the police interview could not sensibly be attributed to his having no answer or none that would be stand up to police questioning.

I think this statement beautifully shows the connection between the right to silence and presumption of innocence. In this sense, just like it is up to the prosecution to prove the guilt of an accused, it is up to the jury or the judge, in case adverse inferences are to be drawn, to make sure that the person’s silence is attributable only to him having no reasonable answer other than that which implies his guilt.

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<sup>145</sup> *Ibid* at 23

<sup>146</sup> *Ibid* at 52

## 4. THE HISTORY OF THE RIGHT TO SILENCE

An overview of the evolution of the right to silence is crucial inasmuch as it sheds some light on the different perspectives and considerations on the issue. As it has been noted by Wendell Oliver Holmes, “a page of history is worth a volume of logic<sup>147</sup>”.

The exact time of the historical origin of this right is not clear. As already noted, the Latin phrase “nemo tenetur prodere seipsum” comes from Roman times<sup>148</sup>. According to this principle, a person could be compelled to incriminate himself only if there was an overarching reason to believe that he had committed a violation. Nevertheless, it seems that at that time, the right to silence was not a subjective right of anyone who was accused of a crime, but rather a privilege for some officials<sup>149</sup>. In essence, the right to silence evolved only at 17th century. It originated in England in response to the forced interrogations and arbitrary power of the Star Chamber (the prerogative Court of King Charles I) and the Ecclesiastic Court of the High Commission<sup>150</sup>. The Star Chamber was quite powerful. “The judges had the 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 interrogations often took place before charges were laid and without the person being informed of what he was alleged to have done”<sup>151</sup>. “The Star Chamber was also a source of censorship of political works of unorthodox religious ideas which could not be enforced through Parliament and the common law courts. Through extracting admissions, they detected heretical opinions, both religious and political, and identified dissidents. Both the Star Chamber and the High commission were abolished in 1641 and by 1660 the common law courts had established their supremacy<sup>152</sup>”. It was within this political setting, that the right to silence evolved contributing to a general disapproval of Stuart practices of the time, that eventually led to the English revolution.

After these events, the accused were not compelled anymore to take oath to answer any

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<sup>147</sup> Skinnider at 7

<sup>148</sup> Ibid

<sup>149</sup> Ibid

<sup>150</sup> Christopher., H. (1974). Change and Continuity in Seventeenth-Century England. "Men as They Live Their Own History.", 239-247

<sup>151</sup> Skinnider at 7

<sup>152</sup> Easton, S. (1991). The right to silence. Hants: Avebury at 2

question. Nevertheless, they were neither allowed take an oath, which means that the side effect of this improvement was that the value of their testimony was overall decreased. By that time, the accused were not even permitted to be represented by a lawyer. That's why the core idea behind the right to silence transformed into reality in common law only when people became represented by lawyers.

“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<sup>153</sup>”.

As it has been pointed my many scholars, the recognition of the right to silence was not rapid at all. Only after the English revolution had been strongly instituted, the previous incriminating practices of questioning disappeared. “In the parliamentary declarations and petitions leading up to the expulsion of the Stuarts, the privilege was rarely mentioned and did not achieve the prominence it received in discussions of the American constitution and Bill of rights in the 1787-89 period”<sup>154</sup>.

As to the right to silence during interrogations by state authorities in pre-trial stages, it evolved as the professional police force was founded in England in 1829. Suspect's right to refuse to answer questions was finally established by 1912, when an amendment was made to *the Judges Rules*, which was aimed at setting better principles for police interrogations. This was followed by a case of Ibrahim v. R, which guaranteed that a confession by the accused was only admissible if the authorities could verify that “it had been voluntary, made in the exercise of a free choice about whether to speak or remain silent<sup>155</sup>”.

After the establishment of the right to silence in England, it became spread through the former English colonies and subsequently the rest of the world.

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<sup>153</sup> Skinnider at 8

<sup>154</sup> Easton at 2

<sup>155</sup> Skinnider at 8

## 5. THE DEBATE ON THE MEANING AND THE EFFECTS OF RIGHT TO SILENCE

### 5.1 The debate in a nutshell

The right to silence has a very deep, ideological background and meaning. It is crucial for the united and interdependent balance of public and private interests in criminal procedure. Because of public state interest the general presumption in criminal procedure is that giving testimony is compulsory<sup>156</sup>. Nonetheless, individuals cannot be forced to assist public interests if such an assistance comes through moral deprivations. The obligations of a private individual to assist public interests (in this case, to testify so that the guilty are found and convicted) and the obligations of public state organizations to do so cannot and should not be equal. By providing the right to silence, the law, in general, prevents an imbalance between public and private interests in criminal procedure and gives priority to private interests<sup>157</sup>.

Nevertheless, there are many issues that are subject to debate. As noted, the right to silence has been controversial since it became an effective part of law<sup>158</sup>. Many arguments have been brought against the core idea behind this right. The most common argument has been that an innocent person should always be interested the most in revealing the truth. Therefore, it is argued that it is not in their interests to hold the factual circumstances of the case in secret. As noted by Jeremy Bentham in his popular treatise, “Innocence never takes advantage of it. Innocence claims to the right of speaking, as guilt invokes the privilege of silence”<sup>159</sup>. According to Bentham, the right to silence leads towards eliminating the most trustworthy evidence, which, to his mind, comes directly from the accused. Because of this, other and less trustworthy evidence artificially gains more importance. Bentham clearly disagreed with the argument that the right to silence protects people against judicial torture. He also claimed that this right hindered the courts from finding the truth. Even though his critique did not prevent the right from evolving into its modern form,

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<sup>156</sup> Harutyunyan G., V. A. (n.d.). Comments to the Constitution of the Republic of Armenia. Yerevan: Iravunk at 261

<sup>157</sup> Ibid

<sup>158</sup> Skinnider at 8

<sup>159</sup> Wigmore n.d. at 241



his comments have become an ideological base for formulating arguments aimed at restricting the right to silence<sup>160,161</sup>.

Yet, there are also many valid counterarguments. Bostjan Zupancic, an ECtHR judge, actually reverses Bentham's argument that the right to silence leads towards the exclusion of trustworthy evidence. Zupancic claims that that it is irrational to justify forms of self-incrimination as needed for truth finding<sup>162</sup>. He argues that "the relative nature of truth changes according to the definition of the all-powerful State"<sup>163</sup>. His submission is that such legal procedures are not all in all designed for truth finding. So, the issue here has more to do with "moral indignation into a legal process". Zupancic's understanding of the right to silence is very prominent. To my mind, its core purpose is indeed to prevent conflicts between law and morality when a person is under a risk of becoming a weapon for his own conviction.

The modern critique towards the right to silence is based on the idea that a greater efficiency is necessary in convicting the guilty. Correspondingly, arguments are brought about to either restrict or abolish the right to silence.

In regards to these issues, we need to understand whether the right to silence causes certain problems (for example, ambush defences<sup>164</sup>). Alternatively, if it does, it would also be necessary to address whether there are means of resolving it, other than abolishing the right to silence, as it is suggested by some authors.

Galligan, for example, argues that there is a potential problem facing the police in that if the right to silence were to be fully exercised, "the impact on investigation could be momentous<sup>165</sup>". Similarly, Zuckerman claims that if there were no pressures on the suspects to speak and they were told in a presence of an attorney that they would not be interrogated without their consent, then they would be unlikely to be questioned at all<sup>166</sup>.

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<sup>160</sup> Skinnider at 8

<sup>161</sup> Bentham's critique is further substantiated at Helms, R. H. (1997). *The privilege against self-incrimination: its origins and development*. Chicago: University of Chicago Press

<sup>162</sup> Skinnider at 9

<sup>163</sup> See Ibid and Bostjan, Z. (2004). *Privilege against Self-Incrimination as a Human Right*. *Eur. JL Reform*, 15.

<sup>164</sup> An ambush defense is one in which defense evidence, notably from expert witnesses, has not been adduced in advance to the prosecuting authorities, leading to their inability to rebut it. In other words, ambush defenses are those that are "sprung" in the middle of a trial, which take the prosecution by surprise, allowing insufficient time for preparation of the prosecution's case and consequently leading to wrongful acquittals. So because the defense withholds the information until trial, it gets quite hard for the prosecution to challenge it or to carry out further investigation on the issue. See Easton at 47

<sup>165</sup> Galligan, D. J. (1988). *The Right to Silence Reconsidered* at 69

<sup>166</sup> Zuckerman. (1989). *The principles of criminal evidence*. Clarendon Press

Yet, it seems that very little evidence has been substantiated to support the submission that the guilty are abusing the right to silence through, for example, ambush defenses, although the burden to provide arguments for abolition should lie on those proposing it. Easton argues that “the allegation that the right to silence facilitates crime deflects attention from wider cause of crime and the ways in which crime prevention and detection might be improved. It fails to take account of the principal aims of the law of evidence, to provide fairness to the accused and the attainment of reliable evidence, rather than the control of crime<sup>167</sup>”. She further notes that because the right to silence is being exercised by a small number of people, it is not likely to seriously influence the number of acquittals or to seriously obstruct the work of police, as the majority of suspects do not exercise their right at either pre-trial or trial stage<sup>168</sup>.

I believe the right to silence will never be fully exercised, inasmuch as all state jurisdictions have aspects that encourage people to testify, and these aspects will never disappear if not rise. So the fear about the full exercise of the right to silence seems to be unrealistic. It is also necessary to take into consideration the informal pressures to speak or the fears that adverse inferences might, and as this thesis has shown, could be drawn.

Easton submits that even if the right to silence is fully exercised (which is, as noted, unlikely), “it could be seen as demonstrating the strength of the criminal justice system rather than its weakness<sup>169</sup>”. Let’s look at some of the more specific abolitionist arguments more closely.

## 5.2 Arguments for abolition

As already noted, even in jurisdictions when there are robust legal mechanisms, protecting the right to silence, there is a discrepancy between the law and the reality. This is caused by the disbelief in the right to silence or by the belief that it may do more harm than good. Until this understanding changes, all the protection mechanisms will stay undermined. In order to identify the basic issues, that cause this imbalance, I have looked into the arguments of authors suggesting the abolishment of the right to silence. I tried to

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<sup>167</sup> Easton at 49

<sup>168</sup> *Ibid*

<sup>169</sup> Easton at 50

combine them into a couple of categories and unfold the debate through them. So, here are some of the major arguments promoted by abolitionists:

- *The right to silence protects the guilty, because it is the guilty who stay silent,*
- *The right to silence does not have an essential role in protecting the innocent, and it may even harm them,*
- *The right to silence hinders the government from obtaining self-incriminatory evidence.*

Let's address them one by one.

### **5.2.1 The right to silence protects the guilty because people using it are mostly guilty**

Many authors proposing to abolish the right to silence compare it to everyday life situations and note that an innocent person would usually make a reasonable effort to explain himself. True, but only partly. There can be variety of reasons why a person would prefer silence. "Fear, anxiety, the desire to protect someone else, embarrassment, outrage and anger may account for silence, all of which are compatible with innocence<sup>170</sup>". A person might be afraid that his statement can be misinterpreted. A person might have a fear of being labelled as an immoral person or feel an obligation towards a relative. Not to mention a person's natural instinct of protecting himself or his privacy. If a person has already had a negative experience with the government, he might be especially uneager to speak or have doubts that the police would believe in his statements. These factors are all important and should be taken into consideration.

The problem is that it is hard to reliably distinguish the suspicious silence from silence resulting from other causes (after all, if the person keeps silence, it is not always easy to understand why he does so). The population of people who would prefer to keep silent is pretty diverse. An opportunity not to testify can be of special significance for a vulnerable group of people such as the mentally handicapped or juveniles, who are at risk of making

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<sup>170</sup> Ibid at 54

damaging or unreliable statements<sup>171</sup>. “Not all persons interrogated by the police or subjected to prosecution are mentally subnormal, near-illiterate youths, any more than they are all “sophisticated professional criminals”, consequently the rules of law and criminal procedure must accommodate both classes”<sup>172</sup>. So one cannot clearly distinguish suspicious silence from “normal” silence, and therefore a general right to silence needs to exist.

It is important to note that if there was no right to silence, the same reasons that lead people to keeping silent would probably lead them to lying. Thus, if a person speaks and lies or makes adjustments to cover up his personal embarrassment, he would undermine his credibility. That’s why in situations like that silence can be a rational choice, and not necessarily a sign of guilt.

### **5.2.2 The right to silence does not protect the innocent and it might harm them.**

Parallel to the argument that the right to silence protects the guilty is the presumption that abolition it would not harm the innocent. It is presumed that the innocent have nothing to lose if this right was abolished. It is argued that if everyone was to provide clarifications on circumstances that seem incriminating, it would not prejudice the innocent but would enable the matter to be more quickly resolved to the advantage of accused. It is furthermore claimed that because of the limitations on how the confessions are taken and restraints on the admissibility of involuntary confession, the innocent are unlikely to be led into incriminating admission<sup>173</sup>.

The current law, in general, presumes that silence is generally legal, except for where it’s totally illogical and hence adverse inferences can be drawn. So, some of the abolitionists suggest to reverse things so that keeping silent is generally illegal, except for situations where there is a “good cause” for refusing to answer questions. It is suggested that the reasons qualifying for initial silence could be incorporated into law<sup>174</sup>. In that case, it would be up to defense to show that the silence of the accused should not be used in order to

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<sup>171</sup> Easton at 61

<sup>172</sup> Fisher, H. (1977). Report of an inquiry into circumstances leading to the trial of three persons on charges arising out of the death of Maxwell Confait and the fire at 27 doggett road, London at. 1.8

<sup>173</sup> Easton at 59

<sup>174</sup> Ibid

determine his guilt because of these specific circumstances that prevent him from testifying.

Additionally, it is argued that judges could use their general discretion to allow defendants not to answer certain questions. In case of juries, if the accused had, for example, been found in embarrassing circumstances, the judge could advise the jury not to draw adverse inferences. It is even argued that preventing personal embarrassment to a defendant should not play a crucial role in discussions of getting rid of the right to silence<sup>175</sup>. Williams claims that if witnesses may not refuse to answer questions just because they would be embarrassed, why should this chance be given to the accused? "Even if a particular defendant finds himself in a bit of a prickle, are we obliged to frame our law of evidence in order to protect him. Practically all defendants who do not give evidence are motivated by a desire to avoid conviction, not by a desire to avoid confessing peccadilloes<sup>176</sup>". Likewise, Cross acknowledged that "has had stony heart in all cases except that of an accused with a criminal record" and was "left completely in the cold by horror stories about the innocent man advised not to give evidence because he would be such a bad witness, or the innocent husband, who did not want his wife to know that he had been with his mistress at the material time<sup>177</sup>". He also claims that such cases are very uncommon but when they occur, the accused runs a greater risk by not answering to the allegations of the complainant than by agreeing to be cross examined. Some authors go further and claim that not only does the right to silence not play a vital role for the innocent, but it might even harm the innocent, while protecting the guilty. The Criminal Law Committee of England, for example, noted that the caution advising of the right to silence could be of little help to the innocent as it might discourage them from making an explanatory statement<sup>178</sup>. Just like early disclosure would assist the prosecution in dealing with the problem of ambush defenses, so it would also help the innocent in allowing for early verification of an explanation which established innocence<sup>179</sup>.

It is claimed that the earlier suspect speaks the earlier the charges against them are likely to be cleared up, because it's up to the prosecution to drop the charge, and it would be

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<sup>175</sup> Ibid

<sup>176</sup> Williams. (n.d.). The tactic of silence. 1987: New LJ 137 at 1108

<sup>177</sup> Cross. (1973). The evidence report: sense or nonsense. A very wicked animal defends the eleventh report of the criminal law revision committee" at 336

<sup>178</sup> Committee., Criminal Law Revision, Eleventh Report

<sup>179</sup> Easton at 60

more inclined to do so in case of a satisfactory explanation. Otherwise, silence may actually lead to prosecution and to long periods spent on remand<sup>180</sup> or at worst to a wrongful conviction. So it is basically noted that the early disclosure would result in a faster and more accurate determination of the case, and the fact of silence itself might discourage the prosecution from dropping a charge against the accused.

Furthermore, it's argued that the innocent may be convicted because a guilty person stays silent<sup>181</sup>. The argument that the situation of innocent is frequently damaged than improved by the right to silence is advanced by Friendly<sup>182</sup> and Williams, who claim that refusing to answer questions "would greatly increase the risk of being wrongfully convicted<sup>183</sup>". In support of this argument, Williams cites a justice report which points to "a number of cases where defendants with a valid defense had been found guilty because they had been foolishly advised not to give evidence<sup>184</sup>".

Nevertheless, the claim that the innocent wouldn't be harmed if the right to silence was abolished is problematic. First of all, there is no clear indication to the fact that waiving the right to silence would result in an early release from detention. It is true that a lot of people, who refuse to testify, spend a lot of time waiting for trial. Yet, there can be a variety of reasons for the delay of trial, such as administrative processes or the overloaded graphic of courts<sup>185</sup>. So, no clear evidence shows that the delay is due to silence. As noted by Easton, "the right of the innocent not to be wrongfully convicted should not be overshadowed by the issue of the wrongful acquittal of the guilty<sup>186</sup>". As already noted, there may be a variety of reasons why a person would need to stay silent, so totally allowing adverse inferences would clearly harm their private interests. It is precisely the people in such vulnerable situations that are most likely to be negatively affected by losing the right to silence.

The abolition of the right to silence, besides affecting the innocent, is also likely to influence the so called "borderline innocent". According to Greenwalt, the latter are the people who are mixed up to some extent in a series of events which make up the crime

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<sup>180</sup> Ibid

<sup>181</sup> Ehrman, H. (1970). *The case that will not die*. London

<sup>182</sup> Friendly, H. (1968). *The fifth amendment tomorrow: the case for constitutional change*. University of crincinatti law review at 676

<sup>183</sup> Williams at 1107

<sup>184</sup> Ibid

<sup>185</sup> Easton at 60

<sup>186</sup> Ibid

even though they may not be guilty<sup>187</sup>. If they are in a position to necessarily testify and if they forget to mention something while testifying or if the police misinterprets what they say or forget to say, this could have a serious effect. There are empirical studies pointing to this. McCabe and Purves, for example, found that many of the defendants subject to their study admitted to being involved in something which could have been interpreted as crime, yet did not actually amount to a criminal offence<sup>188</sup>.

As already noted, Cross claims that a person refusing to speak simply because of a fear of embarrassment, does not deserve a waiver. Yet, there might be cases, where more important matters are at stake. Nothing proves that the reasons for being silent are insignificant. Defendants, that are weaker, not well-educated or poorer, might have significant fears of making themselves understood during an examination, and they may prefer to take the risk and remain silent. An individual, that's nervous, uninformed about criminal procedure and lacking communication skills, will most probably be intimidated by the atmosphere of the court and is likely to make a bad impression. In cases like these, the effects of testifying might be bigger than the risks of adverse inferences being drawn, if the person prefers to stay silent<sup>189</sup>. Correspondingly, relying on the right to silence at a pretrial stage gives a chance to the weak or the confused suspect to calm down and take time to rationally address the situation. The majority of suspects consider being in police detention extremely threatening. As long as they are in such a fearful state, they may be at risk of making false admissions<sup>190</sup>.

Finally, even if the innocent are convicted when the others stay silent (let's say it's true), it does not yet suffice for abolishing the right to silence. Wrongful conviction is indeed a serious problem. Nevertheless, if it exists, what it shows is that there are serious gaps during investigation. Even though the suspect's admission is not considered to be the queen of evidence in most of the jurisdiction anymore, it is still crucial for conviction. If there was no right to silence, such an admission would have much less value. So it is hard to see how the abolition of the right to silence would benefit the innocent. Furthermore, if it weren't for the right to silence, people who appeal the court decision (including and

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<sup>187</sup> Greenwalt, K. (1974). Perspectives on the right to silence. In *Crime, Criminology and public policy*. London: Heinemann at 235

<sup>188</sup> Purves, M. a. (1972). *The jury at work*.

<sup>189</sup> Easton at 61

<sup>190</sup> *Ibid*

especially the innocent people) would find it very hard to win their appeal. On the contrary, the position of these people might be worsened if they are pushed to testify<sup>191</sup>.

Williams<sup>192</sup> brings examples where people have been convicted since they have been advised not to testify. Yet, this has to be taken into account in relation to the cases where defendants, in spite of testifying or perhaps because of it, were convicted. Lawyers seldom advise their clients not to testify unless there is a reasonable doubt that they they would perform bad enough to risk being convicted. If it happens so that people do not testify at any level either before or during a court court session, then the prosecution would just have to put more diligence into finding other sources of evidence<sup>193</sup>.

### **5.2.3 The right to silence hinders the government from obtaining self-incriminatory evidence**

The argument that the right to silence protects the guilty is under the presumption that suspect's or defendant's admission is crucial for incriminating him. I have come to believe that the value of the value of self-incriminatory testimony might be overestimated in the judgment of the people who propose an abolition of the right to silence. Firstly, in most of the cases, evidence is available from independent sources. Secondly, if the confession plays a crucial role and without it the prosecution doesn't stand, then it is dangerous to convict a person solely on the confession. There are many examples, when a person takes a blame for a friend or a relative or takes a blame for a smaller crime in order to hide from the heavier. As supported by many authors, the problem of wrongful convictions could be a more vital problem than that of wrongful acquittals<sup>194</sup>.

Stressing the high importance of the self-incriminatory testimony was something very common in inquisitional criminal procedure. In the old times (this idea was also very common in the USSR) the suspect's self-incriminatory testimony was considered to be the queen of evidence. It was presumed that a person would not incriminate himself if he has not committed a crime. So if the person took blame for the crime, the necessity for obtaining additional evidence suddenly disappeared. But especially in circumstances like

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<sup>191</sup> Ibid at 62

<sup>192</sup> Williams

<sup>193</sup> Ibid

<sup>194</sup> Easton at 52



these, people usually took the blame for other people, friends for example, or were forced or bribed to do so. Alternatively, as I noted, people would incriminate themselves to escape from a bigger crime. People would do it to escape from the pressure coming from the prosecution (if there was no right to silence, such pressure would obviously be much more severe and constant). It is logical because if the self-incriminating testimony is considered the queen of evidence, then the chance is higher that the prosecution would adhere to harsher means of obtaining it. That is why it is necessary to look for incriminating evidence not in the confession or not only in the confession, but rather in other materials. So in case of an abolition of the right to silence, it would get easy for the investigator to press the suspects (the notion that it is the queen of evidence would be back). This in turn would lead the investigation not to put enough attention to other kinds of evidence (which are more likely to contain acquitting proof), and it would obviously result in creating a mindset, that is mostly incriminating, whereas the purpose of investigation is to objectively reveal the facts. Hence, the right to silence plays a crucial rule in this regard.

Furthermore, most of the critique towards the right to silence fails to take into consideration a dynamic, rather than a static nature of criminal procedure. Depending on which stage of the criminal process one is situated at, the perception of relevance of the evidence to the final decision may vary<sup>195</sup>. This idea, as we have seen, has been underscored by the ECtHR as well. So something, that seems an unimportant factor at an early stage, might later turn out to be absolutely crucial. That's another reason why it's important to retain and develop the right to silence.

### **5.3 The right to silence as a human right**

Beyond all these arguments whether the right to silence protects the guilty or not, it is necessary to remember that the whole point of a human right is that due to its universal importance it should be available to everyone irrespective of the reasons of exercising it. This is especially so about the right the silence, since it's based on the presumption of innocence. Hence, the use of the right to silence by the guilty should not be considered as misusing the right. There is no mention of "innocent people have the right to..." in the

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<sup>195</sup> Skinnider at 53

sources of law that guarantee the right to silence. At the moment of using it, any person is presumed to be innocent and the fact that a person using it was guilty can be tackled only post factum. So it is a right of every individual, including the guilty. There is a space to even argue that since it is the guilty that are under the highest risk of mistreatment by the government, they are those needing this right the most.

As noted by professor Redmayne, people should be able to distance themselves from the state when it is exerting its power against them in this case by bringing a prosecution for a criminal offense<sup>196</sup>. This does not mean there should not be any compulsion to obtain evidence, but only that compelling the individual citizen to participate in supplying evidence (oral or real) for the purpose of prosecution is oppressive, and the core point of the right to silence is to prevent that<sup>197</sup>. This kind of reasoning is universal enough to encompass both the innocent and the guilty.

The whole idea of equal concern and respect points that both the guilty and innocent should be afforded procedural protections. Therefore, the use of the privilege by the guilty does not invalidate its value or mean that it is to be abandoned. The protection of the guilty is to be seen as an unavoidable by-product of protecting the innocent<sup>198</sup>.

Let us draw an analogy with bail. Some of the suspects, that are given bail, are eventually sentenced. Nevertheless, that wouldn't be a ground to deny the opportunity of bail for them or for others, would it? This depends on the domestic legislation, but usually in order to withhold the bail there should be real reasons for believing that the person might commit a crime, hinder the process of obtaining evidence etc.. While deciding whether or not to grant the bail, the nature and seriousness of the crime with which he is charged and the strength of the prosecution case are factors to take into consideration. Nevertheless, the guilt of the person, which at that point is still yet to be established (the same goes for the right to silence), is not crucial. Even if some people who were granted bail actually escaped, it would not in general negate the presumption in favor of bail for suspects in general<sup>199</sup>. Yet, this kind of thinking seems to work for the right to silence, and it is claimed that since it safeguards the guilty, it should be eliminated.

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<sup>196</sup> Redmayne, M. (2007). Rethinking the privilege against self-incrimination. Oxford at supra note 69, p. 225

<sup>197</sup> Ashworth, A. (2008). Self incrimination in european human rights law- A pregnant pragmatism? *Cardozo L. Rev.* 30, at 768

<sup>198</sup> Easton at 53

<sup>199</sup> *Ibid*

One might oppose to the comparison to bail by pointing out that the grounds for denial of bail are certain, whereas the right to silence is general. Yet, as this thesis has shown, there are various methods of making comments on the silence and drawing adverse inferences, which has a chilling effect on the harmony between the interests of suspects and defendants on one hand and the government on the other. In case of ambush defenses, for example In England, there is a possibility to comment that the failure to refer to a defense prior to trial has denied the police and prosecution the opportunity to check on its veracity while acknowledging the accused's right to remain silent<sup>200</sup>.

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<sup>200</sup> The bail act 1976, section 4

## 6. CONCLUDING REMARKS

No one should be forced to become a weapon for his own conviction. If people are prosecuted, they deserve the chance to “put the prosecution to proof<sup>201</sup>”, without themselves contributing to the prosecution. If they are compelled to contribute to convicting themselves, then the presumption of innocence becomes fictional. And that is why the right to silence is so important. It is about the value of citizens being able to distance themselves from the state when the state is exercising its power against them<sup>202</sup>. It has a symbolic significance in affirming the presumption of innocence and the placing of the burden of proof on the prosecution between the individual citizen and the state, which has been carefully drawn over the past three centuries<sup>203</sup>.

It is important to note that the right to silence does not protect the guilty, even though the guilty might at times benefit from it. It is inevitable, but it does not invalidate the value of the right to silence or mean that it should be abandoned. The protection of the guilty is to be seen as an unavoidable by-product of protecting the innocent<sup>204</sup>.

So the necessity of the right to silence is beyond doubt and that’s why, without any serious challenges, it has become an Article 6 standard. The ECHR does not in itself contain a provision on the right to silence. Nonetheless, as it has been originally noted in the Saunders case<sup>205</sup>, “The right to silence and the right not to incriminate oneself are generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6”.

Regarding the scope of the right to silence, the Court’s understanding of criminal charges, and hence, the right to silence, is a "substantive", rather than a "formal" one. In this sense, even if a person is not formally charged yet, proceedings following an arrest and detention or in fact any proceedings that substantively presume that a person is charged can trigger Article 6 and therefore, the right to silence.

The right to silence is primarily concerned with respecting the will of an accused person to remain silent. It does not extend to the use in criminal proceedings of material which

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<sup>201</sup> Ashworth at 767

<sup>202</sup> Redmayne at 225

<sup>203</sup> Easton at 10

<sup>204</sup> Easton at 53

<sup>205</sup> Saunders v. UK, 1996 at 68

may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing<sup>206</sup>.

Nevertheless, this approach is problematic and has been heavily criticized. As argued by professor Ashworth, the key issue isn't whether the documents have an existence independent of the person, but rather whether a requirement to provide evidence (oral or real) operates as coercion on the mind of the subject.<sup>207</sup> Redmayne<sup>208</sup> claims that the right to silence relates to "a certain means of obtaining information, means that requires cooperation, and not to a particular type of information- answers to questions as opposed to physical material<sup>209</sup>.

In my opinion, it is one thing whether bodily samples and documents exist independent of the will of the person, another thing whether they are obtained independent of the will. If you pay attention to Redmayne's statement above, he highlights the means of obtaining information. Therefore, it should be analyzed in each case whether the compelling of the information has been through a coercion of the mind of that person. The issue is that bodily samples, to my mind, always exist independent of their will and can mostly be taken independent of their will. This means that, generally, coercion of the mind of a person to get his bodily samples is not probable. It goes without saying that if such samples are obtained through extremely harsh means, then such a treatment can be regarded as inhuman or degrading, but that does not concern Article 6. Various other scenarios are possible that could involve violations of other articles, but as far as Article 6 is concerned, samples exist and mostly can be taken independent of the will. Nevertheless, I am not sure if one can argue the same about documents. They might exist independent of the will of that person at a certain point of time, but if the prosecution isn't able to get their hands on it through alternative means, I believe it is possible to have a scenario that implies a coercion of mind and therefore a violation of Article 6.

The ECtHR sets up a distinction direct compulsion and indirect compulsion. The first is manifested in the form of criminalization of silence, which is forbidden by the Convention.

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<sup>206</sup> Ibid at 69

<sup>207</sup> Ashworth, 2008 at 760

<sup>208</sup> Redmayne at 214-25

<sup>209</sup> Ibid

The second is manifested through adverse inferences, which, as opposed to the US legal system, is not necessarily forbidden<sup>210</sup>.

Thus, the right to silence is not absolute, and in situations that clearly call for an explanation, silence may be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution<sup>211</sup>. So the Court has approved the use of adverse inferences from silence, whether as part a structured legislative system, such as in the UK<sup>212</sup>, or as a tool used by a judge while evaluating the evidence<sup>213</sup>

Nevertheless, it is prohibited to convict someone solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself. The Court has also claimed that because the choice that suspects face in early stages of criminal process (to testify or let adverse inferences be drawn) is a hard one, it requires that they have access to a lawyer. Nevertheless, there have been cases where compelling a person without a presence of attorney has been considered compatible with the convention. So, although it is not black and white, attorney's presence is crucial. The very fact that an accused is advised by his lawyer to maintain his silence must be given appropriate weight, nevertheless, lawyer's advice cannot, in itself, be sufficient to raise an issue of fairness under Article 6 of the Convention.

More importantly, a jury or a judge has a discretion to draw adverse inferences if the person's silence is only attributable him having no reasonable answer other than that which implies his guilt.

It has been originally noted that the right to silence is applicable "to criminal proceedings in respect of all typed of criminal offences without distinction from the most simple to the most complex"<sup>214</sup>. It has also been claimed that the right to silence in unconditional and in general is not subject to a balancing process of individual interests vs. state interests in protecting public safety<sup>215</sup>.

This approach is based on the judgment of *Saunders v. UK*, to which, while there are now alternatives to it. It has been deemed compatible with the convention to compel people to

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<sup>210</sup> Jennings, A. F.

<sup>211</sup> *Funke v. UK*, 1993 at 49

<sup>212</sup> *Murray v. UK*, 1996

<sup>213</sup> *Telfner v. Austria*, 2002

<sup>214</sup> *Saunders v. UK*, 1996 at 74

<sup>215</sup> Berger, M. (2006). Europeanizing self-incrimination: the right to remain silent in the European court of human rights. *Columbia Journal of European Law* 12 at 359

disclose their identities in certain situations. As phrased by Berger, it is “the duty to self-identify”<sup>216</sup>. Thus, there is a space to argue that the right is not anymore unconditional to the balancing process of individual interests v. public interests. This approach, as noted, has been strongly criticized by many authoritative scholars. Indeed, the right to silence, which is supposed to be an unqualified right since it is an Article 6 right, is being discarded on grounds less demanding than qualified rights provided in Article 8-11 of the ECHR<sup>217</sup>. As it has been already noted, the Court, in some of its recent decisions regarding road safety, has preferred not to consider the situation as an exception to the privilege but basically denied that there was a violation of the right to silence. In professor Ashworth’s words “Insofar as the Court held that a minor drug-dealing case was not sufficiently weighty to justify overriding the privilege against self-incrimination, does this mean that the decisions in Saunders (on serious fraud) and in Heaney and McGuinness (on terrorism) are now open to doubt?”<sup>218</sup>. Even though this argument is only implicitly inferred from the Court’s case law, it can surely serve as a starting point in that direction.

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<sup>216</sup> Berger, M. (2006). Compelled self-reporting and the principle against compelled self-incrimination: Some comparative perspectives.

<sup>217</sup> Ashworth at 760

<sup>218</sup> Ibid at 767

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