

Contents

Part I The Right to Silence in Context

1	Introduction	3
1.1	A Problem of Balance	4
1.2	The Right to Silence and the Right Against Self-Incrimination . . .	6
1.2.1	Protecting the Right to Choose to Speak or to Remain Silence	7
1.2.2	The Right to Withhold Self-Incriminating Information as a Part of the Right to Silence	8
1.2.3	The Right to Silence and the Criminal Justice Process . . .	12
1.3	Methodology	13
1.3.1	Comparative Analysis Based on the Functional Method	13
1.3.2	The Human Rights Frameworks and Systems of Law Under Comparison	15
1.3.3	Legal Sources and Interpretation	20
1.3.4	Scope of the Research	30
1.3.5	Terminology	33
1.4	The Importance of the Right to Silence in Transnational Cases	37
	Appendix	39
	References	41
2	Development of the Right to Silence in International Human Rights Law	43
2.1	Introduction	43
2.2	Fair Trial Rights and the Right to Silence Under the ICCPR	46
2.2.1	The ICCPR Framework	46
2.2.2	The Scope of the Right to Silence Under the ICCPR	50

2.3	A Fair Trial and the Right to Silence Under the ECHR	54
2.3.1	The ECHR: A Regional Framework for Human Rights Protection	54
2.3.2	The Scope of the Right to Silence Under the ECHR	65
2.4	Conclusion	89
	References	92

Part II National Perspectives on the Right to Silence

3	The Right to Silence in Denmark	97
3.1	Introduction	97
3.2	Human Rights Protection in Denmark	100
3.2.1	The Danish Constitution (<i>Grundloven</i>)	100
3.2.2	The European Convention on Human Rights	101
3.2.3	The EU Charter of Fundamental Rights	103
3.2.4	Denmark's International Human Rights Obligations	104
3.3	The Right to Silence and the Right Against Self-Incrimination	105
3.4	The Application of Fair Trial Rights in Pre-trial Proceedings	105
3.4.1	<i>Sigtelse</i> (Charging)	105
3.4.2	Arrest	107
3.5	Police Questioning and the Right to Silence	108
3.5.1	Cautioning About the Right to Silence Prior to Questioning	108
3.5.2	The <i>Sigtet</i> Person's Access to Legal Advice Prior to a Police Interview	110
3.5.3	Written Record of Interview	116
3.6	Adverse Inferences of Guilt and the Right to Silence	117
3.6.1	Free Evaluation of Evidence on the Question of Guilt	117
3.6.2	Drawing Adverse Inferences from Silence of the <i>Sigtet</i> or the <i>Tiltalt</i>	118
3.6.3	Producing Evidence of the Interview When the <i>Tiltalt</i> Remains Silent at Trial	120
3.6.4	Drawing Adverse Inferences from the Lies of the <i>Sigtet</i> or <i>Tiltalt</i>	121
3.7	Administrative Questioning Powers	121
3.7.1	The Use of Coercive Measures in Administrative Investigations	121
3.7.2	Compulsory Powers and the Right Against Self- Incrimination—§ 10	122
3.7.3	Ruling Out That Criminal Law Evidence Will Be Obtained	124
3.7.4	What Is a Concrete Suspicion?	125
3.7.5	Valid Consent to Provide Self-Incriminating Information—§ 10(3)	126

3.7.6	The Obligation of Registered Vehicle Owners to Provide Information	128
3.7.7	Using Other Coercive Measures in Cases Where There Is a Concrete Suspicion of Criminal Offending—§ 9	129
3.8	Covert Surveillance and Confessions	130
3.8.1	Invasions of Secret Communications	130
3.8.2	Appointment of Intrusion Lawyers—§ 784 AJA	131
3.8.3	Urgent or Out of Time Measures—§§ 783(4) and 746(3) AJA	131
3.8.4	Evidence Obtained Coincidentally—§789 AJA	133
3.9	The Principle of Material Truth and Admissibility of Confession Evidence	133
3.9.1	The Principle of Material Truth and the Administration of Justice Act	133
3.9.2	Judicial Decisions About the Legality of Investigative Measures—§ 746(1) AJA	136
3.9.3	Admissibility of Accidentally Discovered Evidence Under § 789(3) AJA	137
3.9.4	Judicial Discretion to Exclude Evidence	138
3.9.5	Exclusion of Evidence Obtained in Breach of the Right to Silence and the Right Against Self-Incrimination	141
3.9.6	The Relevance of Disciplinary and Criminal Actions to Exclusion of Evidence	144
3.10	Conclusion	144
	References	148
4	The Right to Silence in England and Wales	151
4.1	Introduction	151
4.2	The Human Rights Framework in England and Wales	154
4.2.1	The Human Rights Act 1998 and Incorporation of the ECHR	154
4.2.2	The Interrelationship Between Convention Rights, Statute, Codes of Practice and the Common Law	156
4.2.3	The EU Charter of Fundamental Rights and Domestic Law in the UK	158
4.2.4	England and Wales' International Obligations Under the ICCPR	159
4.3	The Right to Silence in England and Wales	159
4.4	Police Questioning and the Right to Silence	163
4.4.1	Initial Questioning Without Arrest	163
4.4.2	Arrest and Questioning	164
4.4.3	Interviewing	166
4.4.4	Recording of Interviews	167
4.4.5	Charging and Legal Representation	168

4.5	Inferences of Guilt and the Right to Silence	169
4.5.1	Drawing Adverse Inferences from the Silence of the Accused	169
4.5.2	Lies by the Accused, Untrue Alibi and Adverse Inferences	177
4.6	Administrative Questioning Powers in Serious or Complex Fraud Cases	178
4.6.1	The Legitimacy of Applying Administrative Questioning Powers in the Pre-trial Phase	180
4.6.2	The Admissibility of Incriminating Answers Obtained Under Compulsion	181
4.6.3	The Admissibility of Real Derivative Evidence	183
4.7	Obtaining Confession Evidence by Covert Surveillance Measures	184
4.8	Judicial Discretion to Exclude Unlawfully or Unfairly Obtained Confession Evidence	186
4.8.1	Admissibility of Confessions—Mandatory Exclusion Under s. 76 Police and Criminal Evidence Act 1984	188
4.8.2	Judicial Discretion to Exclude Evidence of a Confession on the Ground of Unfairness—s. 78 Police and Criminal Evidence Act 1984	188
4.8.3	Common Law Discretion to Exclude Evidence—Probative Value Versus Prejudicial Effect	193
4.9	Conclusion	194
	References	198
5	The Right to Silence in Australia	199
5.1	Introduction	199
5.2	The Human Rights Framework in Australia	201
5.2.1	National Obligations Under the ICCPR	202
5.2.2	Federal Institutions and Legislation Establishing the Rule of Law	202
5.2.3	State Protection of Human Rights in Specialised Human Rights Legislation	203
5.2.4	Uniform Evidence Law Harmonising Procedural Rights at Federal and State Levels	204
5.2.5	The Common Law as a Source of Domestic Law About the Right to a Fair Trial	205
5.2.6	The Interrelationship Between Federal Law, State Law and the Common Law	206
5.3	The Right to Silence in Australian Law	206
5.3.1	The Composite Right to Silence	206
5.3.2	The Right Against Self-Incrimination in the Uniform Evidence Law	207

5.4	Police Questioning and the Right to Silence	209
5.4.1	Investigative Authority to Make Initial Enquiries	209
5.4.2	Cautioning and Persistent Questioning	209
5.4.3	Arrest	210
5.4.4	Access to Legal Advice	211
5.4.5	Interviewing	213
5.4.6	Recording Police Interviews Between the Suspect and the Investigating Authorities	214
5.5	Adverse Inferences of Guilt and the Right to Silence	217
5.5.1	Drawing Adverse Inferences When the Accused Remains Silent	217
5.5.2	Drawing Adverse Inferences from Lies Told by the Accused	223
5.6	Compulsory Questioning Powers in Australia	226
5.6.1	Compulsory Questioning Powers and the Right Against Self-Incrimination	226
5.6.2	Compulsory Questioning Powers and Derivative Real Evidence	232
5.7	Covert Surveillance to Obtain Confession Evidence	233
5.7.1	Covert Surveillance and Deception	233
5.7.2	Warrants	234
5.8	The Exclusion of Confession Evidence and Fairness	235
5.8.1	Judicial Exclusion of Confession Evidence	235
5.8.2	The Unfairness Discretion to Exclude Confession Evidence	237
5.8.3	Exclusion of Evidence for Public Policy Reasons	242
5.8.4	Overlap Between s. 90 and s. 138	245
5.8.5	Gravity of Offending and Exclusion of Confession Evidence	248
5.9	Conclusion	251
	References	254

Part III Transnational and International Perspectives on the Right to Silence

6	Admissibility of Confession Evidence Across Borders:	
	A Transnational Perspective	257
6.1	Introduction	257
6.2	Pre-Trial Due Process Requirements in Transnational Proceedings	259
6.2.1	The Right To Be Cautioned and to Audio-Recording: Denmark, England and Australia	259
6.2.2	Access to Legal Assistance and Other Pre-Trial Due Process Requirements	262
6.2.3	Effective Requests for Police Questioning	268

6.3	Cross-Admissibility of Statements Obtained Under Compulsory Powers	273
6.3.1	National Compulsory Information-Gathering Powers	273
6.3.2	Cross-Admissibility of Statements Obtained by Direct Regulatory Compulsion	275
6.3.3	Using Compulsory Information Gathering to Obtain Derivative Real Evidence	277
6.4	Cross-Admissibility of Confession Evidence Obtained by Unlawful Covert Surveillance	278
6.4.1	Using Covert Surveillance to Listen to Private Conversations	278
6.4.2	Exclusion of Confessions Obtained by Unlawful Covert Surveillance	279
6.4.3	Maintaining Fairness: A Comparative View	282
6.5	Conclusion	285
	References	291
7	Mutual Trust and the Right to Silence in International Cooperation	293
7.1	Introduction	293
7.2	Investigative and Prosecutorial Approaches to Procedural Rights in Transnational Cases	296
7.2.1	International Cooperation as Prosecutorial Tool	296
7.2.2	Contextual Realities and Different Approaches to Utilising International Cooperation	297
7.3	Judicial Approaches to Confession Evidence Obtained Abroad	301
7.3.1	Transferring Confession Evidence Between States Within the Same Regional Human Rights Framework: The ECHR	301
7.3.2	Transferring Confession Evidence Between States Not Operating Within the Same Regional Human Rights Framework	308
7.4	Mutual Trust in International Cooperation	319
7.4.1	Mutual Trust Between Countries That Are Not Within the Same Regional Human Rights Framework	319
7.4.2	Mutual Trust Between EU Member States	321
7.4.3	Mutual Trust in Gathering Confession Evidence	328
7.5	Conclusion	329
	References	331
8	Balancing the Right to Silence in Transnational Criminal Cases	333
8.1	Introduction	333
8.2	The Right to Silence in Transnational Proceedings	334
8.2.1	Police Questioning	336
8.2.2	The Use of Silence as Evidence of Guilt	339

8.2.3	Administrative Questioning Powers	339
8.2.4	Covert Surveillance Measures to Listen to Private Conversations	340
8.3	The Relationship Between Human Rights and International Cooperation	341
8.4	The Way Forward: Confession Evidence Across Borders	342
8.4.1	Right of Access to Legal Assistance in Transnational Cases	342
8.4.2	The European Investigation Order	344
8.4.3	The European Public Prosecutor's Office	346
8.4.4	Reinforcing Procedural Rights in International Cooperation Outside the EU	348
8.5	Concluding Remarks	349
	References	350
	Table of Cases	351
	Table of Statutes and National Legislation	361
	Table of International Treaties and Legislation	365
	Index	369