CHAPTER IV.

THE RIGHT TO SILENCE

I.

THE RIGHT TO SILENCE HISTORICALLY AND TODAY

1. The origins of the right to silence

The insight that nobody can be expected to be the source of their own demise can be traced back to Talmudic law.[1] While the notion regularly crops up in theological writings in the 11th and 12th centuries, the literature traditionally designates England as the birthplace of the right not to incriminate oneself – known as the *"nemo tenetur"* principle or, frequently used as a synonym of both terms, as the right to silence. In 1641 the Star Chamber and the High Commission were abolished and, with them the institution of *ex officio* oaths, which obligated the accused to answer questions posed by their interrogators.[2] However, the roots of the principle banning the institution of the *ex officio* oath are not to be found in common law but rather stem from the *ius commune* applied by the ecclesiastical courts and special courts (and applied throughout continental Europe). Hence, in English legal practice it was precisely the persons tried by the

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[1] Talmudic law did not recognize a waiver of this right. Confessing one's guilt was meant to serve purification before God, but this had not relevance from the standpoint of evidence. By recognizing the privilege and by rejecting the probative force of a confession it was sought to preclude the possibility of the witnesses of a criminal act evading their obligation to testify. Testifying could result in disadvantages: for false testimony the punishment envisaged for the crime the defendant in the case was charged with could be imposed, and in the case of a guilty verdict the witnesses were compelled to participate in executing the judgment. Offenders, however, were not allowed to provide testimony, and therefore those who did not wish to take on the inconveniences of being a witness upon themselves could exclude themselves from the scope of witnesses by "confessing" to a crime they did not commit. See Klaus Rogall: *Der Beschuldigte als Beweismittel gegen sich selbst.* Berlin, 1977, Duncker & Humblot, pp. 68–69 (Hereinafter: Rogall, Der Beschuldigte).

[2] John H. Langbein: The Historical Origins of the Privilege Against Self-incrimination at Common Law. *Michigan Law Review,* vol. 92, March 1994, p. 1073 (Hereinafter: Langbein, Historical Origins).

Star Chamber and the High Commission who first referred to the prohibition on compelling self-incrimination.[3] When in the 17th century common law courts prohibited the High Commission from compelling religious "heretics" to incriminate themselves, they did so with reference to the *ius commune* used by the High Commission.[4]

But the principle of *nemo tenetur* mandated by the *ius commune* provided only very limited protection when compared to the current interpretation of the right to silence. This is hardly surprising, considering that the ecclesiastical courts and the special courts followed the continental inquisitorial procedure, and a recognition of the right to silence was hardly compatible with this. The principle of *nemo tenetur* did not posit that the defendant was not obliged to provide self-incriminating statements, but only forbade an individual, without evidence substantiating the suspicion against her or without an indictment, from being compelled to make public her own transgressions – heretic views included.[5] The principle did not ensure that the individual could refuse to provide evidence that might incriminate herself, but merely put a prohibition on compelling her to provide the basis for initiating proceedings against her. The *ius commune*, therefore, rather served to ensure a minimum level of freedom of expression, freedom of thought and conscience, as well as the right to private life: *nemo tenetur prodere seipsum* – no one may be compelled to denounce herself, or put differently *nemo tenetur detegere turpitudinem suam* – no one can be obligated to reveal her shame. At the same time it also formulated one of the elements of the principle of accusation: *nemo punitur sine accusatore*, that is no one shall be prosecuted and punished unless there is an accuser. Although the courts could initiate proceedings *ex officio*, one precondition of such a proceeding was that the suspicion must be supported by at least the requisite minimum of evidence.[6] In summary: the principle of *nemo tenetur* (whose application the common law courts demanded from the special courts, which tried cases according to the principles of the inquisitorial procedural order) did not guarantee a right to silence, but rather posited that the individual's duty to speak was triggered by a more or less clearly formulated accusation or suspicion.

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[3] R. H. Helmholz: Origins of the Privilege Against Self-incrimination: The Role of the European Ius Commune. *New York University Law Review,* vol. 65, October 1990, p. 964 (Hereinafter: Helmholz, Origins).

[4] Albert W. Alschuler: A Peculiar Privilege in Historical Perspective: The Right to Remain Silent. *Michigan Law Review*, vol. 94, August 1996, p. 2639 (Hereinafter: Alschuler, Privilege).

[5] Alschuler, Privilege, p. 2640.

[6] Helmholz, Origins, p. 975.

Academic literature today is divided as to whether at the time when the ecclesiastical courts and the Star Chamber were abolished – or in the period prior to it – the common law expressly recognized the right to silence. It is established beyond doubt that when those charged for heretic views before the High Commission argued against the legitimacy of *ex officio* oaths, they did not refer to the rules of *ius commune*, but rather to natural law, divine laws, the Magna Carta and occasionally also to the "law of the land", that is common law.[7] At the same time, the sources also point out that it was only in the second half of the 17th century that the right of the accused to deny making a statement concerning the charges or to answer questions regarding her guilt was recognized.[8] The idea that the accused should be compelled to speak during the evidentiary procedure did not arise: this is also illustrated by the fact that as late as the end of the 19th century, the accused's statement was not recognized as an item of evidence of full value. The accused was not precluded from expressing her views during the trial, nor from partaking in the evidentiary procedure, for example by questioning the witnesses. But only in 1898 was the accused's right to make a statement under oath as a witness for the defense recognized.[9] When, therefore, in the 18th century legal scholarship, representing Enlightenment ideals was at pains to abolish the compulsion to speak on the Continent, in England it was the expansion of the accused's right to speak – in the interest of strengthening her procedural position – that was on the agenda.

The right to silence – though recognized by common law earlier – only became a genuinely applicable and practiced right at the end of the 18th century, when the rules concerning the prohibition on the use of counsel were eliminated.[10] This is because as long as the involvement of defense

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7 For the presentation of the cases and the arguments see Rogall, Der Beschuldigte, pp. 76–81.

8 Rogall, Der Beschuldigte, p. 80.

9 K van Dijkhorst: *The Right to Silence. Is the Game Worth the Candle?* Available at: www.isrcl.org/Papers/van%20Dijkhorst.pdf. By allowing her to testify as a witness, the accused's rights of defense were broadened. This process took place gradually: initially it was only the witnesses of the prosecution who were allowed to appear before the jury, later those testifying in defense of the accused were allowed as well, but they could not testify under oath. Swearing in the defense witnesses and the accused's right to summon witnesses were recognized at the beginning of the 18th century. See M. Ploscowe: The Development of Present-Day Criminal Procedures in Europe and America. *Harvard Law Review,* vol. 48, 1935, pp. 456–457.

10 Rules excluding the defense counsel were gradually eliminated. The process lasted from the end of the 17th century to the middle of the 19th century. See Langbein, Historical Origins, pp. 1047–1048.

counsel was limited, the only practicable way for the accused to defend herself was to speak.[11]

The legislators and courts of the United States outdid their predecessors: the Fifth Amendment of the Constitution explicitly mentions the right not to incriminate oneself: "No person (…) shall be compelled in any criminal case to be a witness against himself."[12] The Fifth Amendment, however, only refers to proceedings before federal courts, though several petitions claimed that the Fourteenth Amendment, which prohibits states from depriving anyone of their life, liberty or property without due process of law, requires that the privilege against self-incrimination be recognized by the states as well. The Supreme Court, however, rejected this interpretation up until 1964, arguing that the privilege against self-incrimination is not a conceptual element of the due process that needs to be ensured by the states. In 1908, in an opinion illustrative of its thinking at the time, the Supreme Court held: "The wisdom of the exemption has never been universally assented to since the days of Bentham many doubt it to-day, and it is best defended not as an unchangeable principle of universal justice, but as a law proved by experience to be expedient. (…) It has no place in the jurisprudence of civilized and free countries outside the domain of the common law, and it is nowhere observed among our own people in the search for truth outside the administration of the law."[13]

In 1964 the Supreme Court overruled its earlier case-law and since then the prohibition on compelling individuals to incriminate themselves has been binding for the states as well.[14] In its *Miranda* decision[15] two years later, the Supreme Court ruled that the police were obliged to inform persons they arrested of their rights – the right to silence among them – before beginning

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11 Until then "the trial became a series of excited altercations between the prisoner and the different counsel opposed to him. Every statement of the counsel operated as a question to the prisoner, and indeed they were thrown into the form of questions, the prisoner either admitting or denying or explaining what was alleged against him." See. James Stephen*: A History of the Criminal Law of England. Vol. I.* London, 1883, Macmillan and C, p. 325. The right to silence therefore is a product of the adversary criminal procedure conducted with the involvement of counsel, *Langbein* claims. See Langbein, Historical Origins, p. 1047.

12 In criminal cases, therefore, in addition to the accused also the victim is entitled to this right. In fact, it is even applicable to other types of procedures.

13 *Twining v. New Jersey,* 211 U.S. 78, 113 (1908).

14 *Malloy v. Hogan,* 378 U.S. 1, 84 (1964). According to this ruling, the privilege against self-incrimination – guaranteed by the Fifth Amendment – is binding for the states as well via the Fourteenth Amendment's due process clause.

15 *Miranda v. Arizona,* 384 U.S. 436 (1966).

their interrogation. By today the contents of this warning have become part of everyday knowledge.[16]

As concerns continental Europe the right to silence had of course no place in the medieval inquisitorial process. Here the accused was the object of the proceedings and in a system of formal proof her confession was the "queen of evidence" whose extortion justified torture. In the age of Enlightenment, the idea that it is inhuman for anyone to be the cause of their own demise through self-incrimination arose in parallel to the demand for the abolition of torture.

At the same time, the abolition of torture did not imply that the accused was recognized as an autonomous subject of the proceeding and from among the evidentiary means her confession retained its pre-eminent status. In order to obtain her statement and make her tell the truth, sanctions on disobedience or lying were extensively applied. In the continental mixed system that was generally adopted in the 19th century, the accused may neither be compelled to make a statement nor is she burdened by the obligation to tell the truth, but her statement is still an autonomous evidence of great probative value. In order to obtain a statement, continental law even tolerates lies: it generally does not mandate the obligation to tell the truth, and even if the accused is under such an obligation, a violation carries no sanction in criminal law.[17] In the same vein, the pre-eminence of the accused's testimony explains why numerous European procedural laws do not mandate that the accused must be informed that she has the right to refuse a statement and that a failure of the authorities to inform the suspect

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16 Based on the *Miranda* model, the Hungarian Code of Criminal Procedure (Act No. XIX of 1998; hereinafter: CPP) provides that "before examining an accused she has to be informed that she is not obliged to testify." The accused also has to be warned that she may "at any time during the examination refuse to give testimony or to answer individual questions." See CCP Article 117 (2). The CCP included the prohibition on compelling self-incrimination among the fundamental provisions. According to Article 8 "no one may be compelled to provide testimony that incriminates her or to provide evidence against herself." For a summary of the Hungarian debates on the warning concerning the right to remain silent see Tamás Földesi: *A „Janus arcú titok" A titok titka.* [The "Janus-faced Secret". The Secret of the Secret] Budapest, 2005, Gondolat, pp. 122–124, and Mihály Tóth: A magyar Miranda első néhány éve. [The First Years of the Hungarian Miranda] In: Erdei Árpád (ed.): *Tények és kilátások. Tanulmányok Király Tibor 75. születésnapjára.* [Facts and Prospects. Studies in the Honor of Tibor Király's 75th Birthday] Budapest, 1995, Közgazdasági és Jogi Kiadó, pp. 67–68 (Hereinafter: Tóth, Miranda).

17 According to Norwegian law "an accused is under no duty to make a statement, but if he chooses to make one, he must tell the truth, if he can do so without exposing himself or his family to the danger of punishment or the loss of the respect of his fellow citizens." At the same time, there is no criminal law sanction for perjury. See Jeffrey K. Walker: A Comparative Discussion of the Privilege against Self-Incrimination. *New York Law Journal of International and Comparative Law*, vol. 14, 1993, pp. 24–25 (Hereinafter: Walker, Self-Incrimination).

of her right not to speak, even if stipulated by law, does not always imply that the contents of the statement have to be excluded from the scope of evidence.[18]

The right to silence has been recognized in numerous international human rights conventions – and in fact even in treaties dealing with different subjects – created in the second half of the 20th century. It is explicitly mentioned in the International Covenant on Civil and Political Rights (hereinafter: Covenant/ICCPR)[19] and – among the regional human rights conventions – in the American Convention on Human Rights. The right to silence is also listed in the 1998 Statute of the International Criminal Court,[20] as well as the Geneva Conventions[21] on the protection of victims of war.

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18 Walker, Self-Incrimination, pp. 20–28.

19 According to Article 14 (3) of the International Covenant on Civil and Political Rights adopted by the XXI. session of the General Assembly on 16th December 1966, "in the determination of any criminal charge against him" everyone is entitled "not to be compelled to testify against himself or to confess guilt." According to the American Convention on Human Rights, "during the proceedings, every person is entitled, with full equality, to the (…) the right not to be compelled to be a witness against himself or to plead guilty (…). A confession of guilt by the accused shall be valid only if it is made without coercion of any kind." [Article 8 (2) *g)* and (3)]

20 According to Article 67 (1) *g)*, the accused is entitled "not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence."

21 The 1949 Geneva Conventions on the protection of victims of war. According to Article 17 of the Third Geneva Convention relative to the Treatment of Prisoners of War: "Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information. (…) No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind." A similar proviso is contained in Article 31 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War: "No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties." The provisions of the Hague Convention of 1899 and 1907 are similar to those of the 1949 Geneva Conventions. The provisions of the laws of war guaranteeing the right to silence are derived from the general principle according to which persons captured by the enemy cannot be compelled to provide direct assistance to the party they are at war with. In addition to the right of silence, another rule deriving from this principle refers to the prohibition of compelling captured persons to undertake activities that are connected to military operations against their own country. See Michael S. Green: The Privilege's Last Stand: The Privilege Against Self-Incrimination and the Right to Rebel Against the State. *Brooklyn Law Review,* vol. 65, Autumn 1999, pp. 706–707 (Hereinafter: Green, Self-Incrimination).

The right to silence is thus a widely recognized procedural guarantee. Nonetheless ever since its inception it has also been mired in skepticism and the debates surrounding it are not limited to questions regarding the right's scope and limits. Even since *Bentham,* according to whom "innocence claims the right of speaking as guilt invokes the privilege of silence",[22] many have questioned the legitimacy of the right to remain silent. The prevailing view of the American scholars is that the right to silence is devoid of a reasonable justification and is merely kept alive by public opinion and the practice of the administration of justice.[23] Beginning in the last third of the previous century, legislatures in the countries adhering to the Anglo-American procedural order – dictatorships and democracies alike – undertook measures to motivate defendants to speak. The United Kingdom followed the example of Singapore, first in the Criminal Evidence (Northern Ireland) Order of 1988[24] and then in the 1994 Criminal Justice and Public Order Act[25] when it authorized judicial decision-makers to draw adverse conclusions from the defendant's choice to remain silent.[26] In Australia it was judicial practice, and not the legislature, which in the early 90s tightened the scope of the right to remain silent.[27]

The Criminal Evidence (Northern Ireland) Order of 1988 was drafted in the hope that it would help uncover and hold accountable the perpetrators of terrorist acts.[28] In the United Kingdom there is a tradition of constricting the

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22 Jeremy Bentham's *Treatise on Judicial Evidence* (London, 1825, J.W. Paget) is usually noted as a source. For the debate surrounding the source see Ian H. Dennis: Rectitude Rights and Legitimacy: Reassessing and Reforming the Privilege Against Self-incrimination in English Law. *Israel Law Review,* vol. 31, no. 1–3, 1997, pp. 24–25 (Hereinafter: Dennis, Self-Incrimination).

23 Green, Self-Incrimination, pp. 628–629.

24 Criminal Evidence (Northern Ireland) Order 1988.

25 The Criminal Justice and Public Order Act 1994.

26 For a discussion of the Order and the Act see Eileen Skinnider – Frances Gordon: *The Right to Silence – International Norms and Domestic Realities.* Available at. *http://www.icclr.law.ubc.ca/Publications/Reports/Silence-BeijingfinalOct.15.PDF* (Hereinafter: Skinnider – Gordon, International Norms). On the prehistory and the circumstances surrounding the adoption of the Act of 1994 see Gregory W. O'Reilly: England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice. *Journal of Criminal Law and Criminology*, vol. 85, Autumn 1994, pp. 423–427.

27 Skinnider – Gordon, International Norms, p. 15.

28 According to the provisions of the Order, the court may draw inferences (that is adverse conclusions) from the fact that in the course of the investigation the suspect fails to account for suspicious objects or marks found on her or in her possession at the time of arrest, or does not explain why she was found at or near the scene of the crime at the time it was committed. Adverse inferences may also be drawn from the fact that in the preparatory phase of the proceeding or during the trial the accused has refused to testify, or if at the trial she refers to circumstances in her own defense which she had failed to mention during the investigation, even though it would have been reasonable to expect that she invoke these circumstances already before the police.

right to silence in the interest of scaling back crimes against the state. The Irish law which authorizes the government to enact a decree by proclamation on the curtailment of the right to silence dates back to 1939. Any person arrested for any crime falling within the scope of this law may be called upon by the police to extensively account for where she was and what she was doing at a specific time; she may further be instructed to provide any information she might have on crimes falling under the scope of the law, which were committed or being planned by other persons. Refusing the statement or providing false information qualifies as a criminal offence punishable by up to six months imprisonment.[29]

The threat of international terrorism has strengthened those voices calling for a further curtailment of the right to silence.[30] The most radical – and thus far widely rejected – proposal was submitted by *Alan Dershowitz,* professor at Harvard Law School: in the case of persons suspected of being involved in terrorist acts, he suggested that the use of "moderate" torture is worth

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29 This is the law on the basis of which the authorities proceeded in the *Heaneys and McGuiness* case, which resulted in a finding of violation of Article 6 of the European Convention on Human Rights [*Heaney and McGuiness v. Ireland* 34720/97 (21/12/2000), Reports of Judgments and Decisions 2000–XII]. The law also declares membership in an unlawful organization a crime and provides that if the government finds that given the domestic situation, the ordinary courts are incapable of carrying out their tasks, it may set up special tribunals adjudicating indictments brought on charges of criminal acts against the state. For a detailed presentation of the law see par. 19–25 of the judgment.

30 As regards the responses given to terrorism, we can observe two tendencies: on the one hand the guarantees in substantive and procedural criminal law are relaxed, and on the other hand the administration of justice – considered to be of low efficacy – is exchanged with instruments that are deemed more efficient. Turning to military instruments or alien law regulations holds the promise of better results than criminal proceedings that are seen as complicated and which, through the safeguards – especially the stringent evidentiary rules burdening the state – often result in an acquittal of guilty persons. There is a significant difference between states in how far these alternative instruments have relegated criminal law into the background: in the Anglo-American countries – maybe because their criminal procedure has retained a greater portion of the rules concerning a formal evidentiary system and because their system of safeguards is more refined than the average – there appears to be a greater temptation to avenge acts of terror with methods other than the administration of criminal justice. In continental Europe – at least the way I see it – criminal law has not yet completely lost its credibility. To give only one example, in an event held in 2004, the attorney general of the Swiss Federation argued in favor of using the instruments of criminal law, while voicing his concern that in many places the "war paradigm" was gaining ground ever more forcefully and uninhibitedly. He thought that criminal law, based on the principle of individually identified personal responsibility would better serve to strike a balance between liberty and security than the instruments deployed under the slogan of the "war on terror." (Source: *Neue Zürcher Zeitung*, 17 June 2004) The full text of the presentation given by the attorney general on 15 June 2004 is available at: *http//www.ba.admin.ch/deutsch/2_bundesanwalt/ pdfs/ d-Ref-0400615_BA_IHRF_Luzern_pdf.*

consideration.[31] The time is therefore sadly appropriate to assess the value of the right to silence and what its worth is, what it entails and what its limits are. Given the weight of the issues involved, I devote a separate chapter to this discussion. In the following, I will examine these issues in light of the European Convention on Human Rights (hereinafter: the Convention) and the case-law of the European Court of Human Rights (hereinafter: the Court/ECtHR). But – as I have done in previous parts of this study – I will also refer to other sources and will assess the relevant provisions of Hungarian procedural law in light of my conclusions.

2. The relationship between the right to silence and the other rights secured by the Convention

In contrast to the Covenant the Convention does not mention the right to silence.[32] Article 14 of the Covenant, states that "in the determination of any criminal charge against" her everyone has the right not to be compelled to make a statement against herself or to confess her guilt. The Covenant's provision enshrines the Roman law postulate of *nemo debet prodere se ipsum* – that is no one may be compelled to provide evidence against herself nor may anyone be forced to contribute to her own conviction.

It is surprising that the Convention is silent on the issue of the "right to silence", especially considering that Article 6 was drafted in the spirit of Anglo-American procedural law and that the privilege against self-incrimination is generally associated with the Anglo-American accusatorial

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31 Alan M. Dershowitz: *Why Terrorism Works. Understanding the Threat, Responding to the Challenge.* New Haven-London, 2002, Yale University Press, pp. 131–163. For the sake of completeness I should note that *Dershowitz* only finds the compulsion to provide a statement – and the resultant use of torture in case of a refusal – defensible if the individual has been assured that she will not be held criminally liable.

32 From the fact that it makes no mention of this right among the components of a fair trial, the European Court of Justice (hereinafter: ECJ) concluded that the Convention does not regard this privilege as one of the elements of the right to a fair trial. See Case 374/87, *Orkem v. Commission* (1989) ECR, 3350–3351. In support of its position, the Luxembourg Court, in addition to the text of the Convention, also referred to the case-law of the European Court of Human Rights. The ECJ held that it is a general principle of community law that the Commission may not compel anyone to admit a violation of law the burden of proof for which lies with the Commission. The ECJ reiterated this position in the *Otto v. Postbank* case, emphasizing that the privilege against self-incrimination applies to criminal cases or proceedings on the grounds of conduct that is subject to administrative sanctions. See Case C-60/92, (1993) ECR, 5711-5712.

procedure. Still, over the last few years many experts have cast doubt on the widely held notion in Anglo-American literature that the *principle of nemo tenetur* in England derives its existence from the fact that common law triumphed over the inquisitorial procedure employed by the Star Chamber and the High Commission.[33] The debates surrounding the historical roots have no bearing on the fact, however, that the type of procedural order in which the privilege against self-discrimination fits without causing inner contradictions is the one in which as a principal rule the accused is not regarded as a source of evidence – and the Anglo-American model is of this kind.

It is also surprising that the privilege against self-incrimination was not included among the rights listed in Protocol No. 7 of the Convention adopted in 1984, even though the drafting of the protocol was deemed necessary precisely to ensure that the safeguards provided by the Convention be brought to an identical standard as those enshrined in the Covenant.[34]

Reviewing the rights laid down in the Convention, one might get the impression that the drafters of the Protocol simply thought it superfluous to include the privilege against self-incrimination among the enumerated rights because they were of the opinion that the values the privilege is intended to protect are sufficiently safeguarded by the other rights. If the rights enshrined in the Convention are respected, the right to silence will be enforced even without being specifically mentioned.

One of the functions of the privilege is to ensure the physical and psychological integrity of the defendant and to preclude her intimidation or torture.[35] It is undeniable that the prohibition of torture, inhuman and degrading treatment[36] offers only limited protection in that they address only the most brutal forms of coercion. In this regard the right to respect for private life guaranteed by Article 8 of the Convention offers a more extensive

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33 *Langbein* shows that as long as the accused was not genuinely provided with a defense by counsel, she had no other choice but to confront the accusation, that is to speak. Silence would have implied waiving one's defense entirely. See Langbein, Historical Origins, p. 1047.

34 Stefan Trechsel: *Human Rights in Criminal Proceedings*. Oxford, 2005, Oxford University Press, p. 361 (Hereinafter: Trechsel, Criminal Proceedings). *Trechsel* still considers it fortunate that the privilege against self-incrimination has not been added to the provisions of the Protocol. Had this right been included in the Protocol, then the Commission and the Court could not have taken the position that even though Article 6 does not specifically mention it, the privilege is an implicit component right of a fair trial. As a result, the privilege would not have been binding for those states that have not ratified Protocol No. 7.

35 Walker, Self-Incrimination, pp. 1–37.

36 Article 3 of the Convention.

protection. In the literature and in judicial practice the privilege against self-incrimination is often derived from the right to have one's privacy respected. According to the argument, the right to silence signifies the recognition of the existence of a private sphere, which in turn is the precondition of preserving personal identity and autonomy.[37] Coercing individuals to reveal their secrets and to share their personal knowledge and impressions conflicts with respect for privacy.[38]

The right to silence may also be construed as a manifestation of the freedom of expression.[39] This was the position taken by the European Commission of Human Rights before the Court recognized the right to silence as a component of the right to a fair trial. In the *K.* case the Commission[40] found a violation of the Convention because the Austrian court had ordered an "insubordination" arrest *(Beugehaft)* in order to coerce a statement from the applicant, who had formally been examined as a witness but was *de facto* a suspect in the case. The Commission found a breach of Article 10 of the Convention by arguing that the freedom of expression does not only apply to communicating freely and to ensuring the free conveyance and dissemination of information and opinion, but also to withholding them. The freedom of expression, as a negative right, thus implies the right to silence.[41]

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37 D.J. Galligan: The Right to Silence Reconsidered. *Current Legal Problems,* vol. 41, 1988, p. 69. Cited in: Dennis, Self-Incrimination, pp. 41–42.

38 Andrew Ashworth: *Human Rights, Serious Crime and Criminal Procedure.* London, 2002, Sweet & Maxwell, p. 20 (Hereinafter: Ashworth, Serious Crime).

39 The historical roots of the prohibition on compelling self-incrimination also point to a relationship between the *nemo tenetur* principle and the freedom of conscience and expression. The Puritans and Catholics charged by the High Commission referred to the postulate of ordinary law (*ius commune*) when they refused to take the oath that was meant to compel them to reveal their conviction. The principle of *nemo tenetur detegere turpitudinem suam* (no one may be compelled to reveal her shame) recognized in *ius commune* did not provide a general right to silence, but offered protection to the accused from having to provide the grounds for the proceedings herself, by making public her views and convictions. See Alschuler, Privilege, p. 2640. On the origins of the right to silence also see Helmholz, Origins, pp. 962–990; and Langbein, Historical Origins.

40 Prior to the entry into force of Protocol No. 11 the Commission examined the case first. It was considered by the Court only after the Commission delivered its decision.

41 Report of the Commission in the case of *K. v. Austria* 16002/90 (13/10/1992). The case did not reach the Court because the applicant and the Austrian government agreed on a friendly settlement. The Commission examined whether the rights of the applicant guaranteed by the Convention were breached when he refused to testify as a witness in a criminal proceeding initiated against drug dealers and, as a result, was first fined and then deprived of liberty. *K.'s* reluctance to testify was explained by the fact that he, too, was facing a proceeding because he had purchased drugs from the same dealers who were the suspects in the parallel criminal case. By providing an

But the right to a private life and the freedom of expression are also guaranteed by the Covenant, as well as the American Convention among the regional human rights documents.[42] Despite this, both documents specifically mention the privilege against self-incrimination among the procedural safeguards. This fact only makes sense if the scope of the right to respect for private life and the right to withhold information – which are equally applicable in both criminal procedure and beyond – and the privilege against self-incrimination, which is meant to provide protection for criminal defendants, do not overlap. This is indeed the case and thus it is no

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incriminatory testimony against the dealers, *K.* would have provided evidence against himself as well, which is why he opted for refusing to testify. In his application *K.* claimed that the Austrian authorities had violated his rights guaranteed in both Articles 6 and 10. The Commission began its examination of the application with the allegation concerning a breach of Article 10 and concluded that freedom of expression was a positive and negative right at the same time. In the event of both, the dissemination of information and withholding it, the right may only be limited if it happens for a legitimate reason recognized by the Convention, in accordance with domestic law and meeting the requirements of the necessity and proportionality test. In the case at hand, the Commission decided that the restriction went beyond the degree necessary in a democratic society. Hence it held that Article 10 had been violated and, pointing to this holding added that there was no further need to examine whether Article 6 had been violated as well. It is open to doubt whether the Commission made the right decision when it refrained from examining whether Article 6 had been violated. The reason may have been that formally *K.* only appeared as a witness in the case against the drug dealers, while Article 6 concerns the rights of those charged with a criminal offence. Hence the Commission did not have to elaborate on the concept of "accused". In my view there would have been no hindrance to the Commission stating – following the example of the autonomous interpretation of the concept of "criminal charges" – that though *K.* was formally to be examined as a witness, given that in the criminal proceeding against him at the same time he was "substantially" in the position of an accused as well (especially since his case could have been adjudicated in the same proceeding that was initiated against the dealers, that is the separation of the cases was not compulsory). Later, in the *Serves* case, the Commission abandoned its previous position: it found a violation of Article 6, even though the applicant in the case had been examined by a French court in a hearing in which he was not formally the accused. See *Serves v. France* 20225/92 (20/10/1997), Reports 1997–VI. The close relationship between the right to silence, the right to respect for private life and the freedom of expression is also supported by the fact that the applicants, in claiming that they had been compelled to incriminate themselves, also claimed a breach of Articles 8 and 10, in addition to Article 6. See the *K.*, *Heaney and McGuiness* as well as *Serves* cases cited above.

42 During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: *g)* the right not to be compelled to be a witness against himself or to plead guilty [Article 8 (2) *g)*]. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind [Article 8 (3)]. The First Amendment of the U.S. Constitution also guarantees the freedom of expression and the Fourth Amendment touches upon the right to private life, in as far it provides protection against unreasonable searches and seizures, but nevertheless the Fifth Amendment still makes specific mention of the privilege against self-incrimination. The U.S. Supreme Court has emphasized in several decisions that the protection laid down in the Fourth and Fifth Amendments do not coincide. See *Fisher v. U.S.* 425 U.S. 391, 400 (1976).

coincidence that over time the Court has recognized the right to silence as an implicit component of the right to a fair trial.

The right to private life as well as the freedom of expression (and both the negative and positive aspect of the latter) are qualified rights. The Convention itself declares that limiting these rights does not constitute a human rights violation, assuming that the restriction is prescribed by national law and is based on a legitimate aim that is recognized in the Convention, and that the restriction passes the necessity and proportionality tests.[43]

As I pointed out in Chapter I, in certain situations an individual may be entirely deprived of qualified rights without this constituting a human rights violation. Those who are banned from distributing their pornographic or racist writings are clearly deprived of their freedom of expression *in the given situation*, but they can nonetheless not claim to be victims of human rights violations. In contrast to the above, the right to a fair trial and its component rights are "unqualified rights". In the case of these rights a *total deprivation* cannot be compatible with the Convention: there is no interest or right in whose name a person may be completely deprived of her right to a fair trial. There is no situation in which the right to a fair trial would have to cede ground to some other right or interest without a violation of human rights occurring. The reason is that the right to a fair trial is composed of numerous component rights whose exact content is not specified, and as previously mentioned the Strasbourg Court assesses proceedings in their *entirety*.[44] Limiting certain component rights does not necessarily render the whole proceeding unfair, as the restriction may be compensated by other elements to such a degree that the overall proceeding retains its fair character. But just as there is no situation in which an *unfair* proceeding would be acceptable, no trial can be compatible with the Convention in which the accused is *entirely deprived* – in the name of some other right or interest – of a *component* of the right of a fair trial.

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43 The U.S. Supreme Court, in its analysis of the differences between the safeguards offered by the Fourth and Fifth Amendments, explains: "If the Fifth Amendment protected generally against the obtaining of private information from a man's mouth or pen or house, its protection would presumably not be lifted by probable cause and a warrant or by immunity. The privacy invasion is not mitigated by immunity; and the Fifth Amendment's strictures, unlike the Fourth's are not removed by showing reasonableness." See *Fisher v. U.S.* 425 U.S. 391, 400 (1976).

44 In addition to the explicit and implicit component rights other factors, too, may be relevant in adjudging the quality of the proceeding. Such a factor may be the severity of the sentence imposed.

The right to private life and the freedom of expression may be limited in the interest of preventing and prosecuting crime,[45] assuming, among others, that the interference meets the requirements of proportionality. In assessing proportionality, the gravity of the criminal offence the defendant is suspected of is also considered. In the previously cited *K.* case the Commission deemed the interference with the applicant's freedom of expression disproportionate because – among other reasons – the authorities wanted to coerce the applicant into incriminating himself in the interest of revealing a relatively *insignificant aspect* of the criminal case.[46]

The norms which make up the right to a fair trial, however, need to be applied uniformly, regardless of the gravity or nature of the criminal offence that is the object of the proceeding. It was precisely in its judgment recognizing the right to silence as part of the right to a fair trial that the Court observed: "The special features of customs law cannot justify such an infringement of the right of anyone »charged with a criminal offence«."[47] In another case that also touched upon the right to silence the Commission declared unequivocally: "The right of silence, to the extent that it may be contained in the guarantees of Article 6 (…), must apply as equally to alleged company fraudsters as to those accused of other types of fraud, rape, murder or terrorist offences. Further, there can be no legitimate aim in depriving someone of the guarantees necessary in securing a fair trial."[48]

3. The right to silence in the Court's jurisprudence

With its ruling in *Funke*[49] in 1993 the Court elevated the right to silence to one of the elements of the right to a fair trial. The decision was predictable, not least because the Council of Europe's Expert Commission on Human Rights had already in 1973 taken the position that the privilege against self-incrimination is an ineluctable component of a fair trial.[50] The Court's

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45 Both, Articles 8 and 10 of the Convention speak of "prevention of crime" as a legitimate aim for restriction, but the case-law also includes law enforcement in this concept.

46 See par. 51 of the Commission's Report in the case of *K. v. Austria* 16002/90 (13/10/1992).

47 *Funke v. France* 10828/84 (25/02/1993), A256–A, par. 44.

48 See par. 71 of the Commission's report in the *Saunders v. the United Kingdom* 19187/91 (10/05/1994) case.

49 *Funke v. France* 10828/84 (25/02/1993), A256–A.

50 Rogall, Der Beschuldigte, pp. 114–115.

position was also unsurprising in that the right to silence is closely intertwined with the presumption of innocence,[51] which is expressly mentioned in Article 6, as well as with the adversary nature of the trial, which the Court had already previously ranked among the implied guarantees of a fair trial.[52] It is true that the adversary nature of the trial primarily ensures that the accused has access to all such information as may impact the decision of the judge, and may express her opinion about them.[53] But a proceeding in which one of the parties may be compelled to serve as a source of evidence is not compatible with the notion of adversariness.

One element of the presumption of innocence laid down in Article 6 is that the burden of proof lies with the accuser. This implies a recognition of the accused's *right to passivity*: the accuser has to provide the evidence and this burden cannot be relegated to the accused. Thus if the accused cannot be compelled to prove her innocence, she may obviously remain silent.

In the customs administration proceeding underlying the *Funke* judgment[54] a heavy fine was imposed on the applicant for his unwillingness to turn over documents, receipts and vouchers that would presumably have provided proof of his guilt.[55] The judgment, which found France in violation of the Convention, took a position on several issues. It expanded the scope of Article 6 to administrative proceedings, which could result in criminal prosecution, if the applicant is

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51 In its laconic decision the Hungarian Constitutional Court with reference to the presumption of innocence declared unconstitutional the provision within the decree on the foreign exchange authority that mandated an obligation of co-operation to the customers and did not allow them to refuse testimony. [Constitutional Court Decision no. 41/1991 (VII. 3.)]

52 For sources see Richard Clayton – Hugh Tomlinson: *The Law of Human Rights*. Oxford, 2000, Oxford University Press, p. 647 (Hereinafter Clayton – Tomlinson, The Law of Human Rights) and Trechsel, Criminal Proceedings, p. 90.

53 Trechsel, Criminal Proceedings, p. 85.

54 According to the provisions of French law in force at the time of the case, the investigation could result in the initiation of a criminal proceeding, which did not occur in the case of *Funke*, however.

55 According to the French customs and exchange law, the authorities may – in addition to their extensive inspection authorizations – initiate a wide range of coercive measures. They may examine the foreign financial transactions of the investigated person, her affairs concluded abroad, and, depending on the results, they may initiate criminal proceedings. They may conduct searches and they can take interim measures in order to secure the assets of the investigated party if they feel that the investigation may result in the initiating of a criminal proceeding and that in the interest of enforcing potential criminal sanctions the limitation of the individual's property rights is justified. The person who is thus investigated is obliged to co-operate: she needs to make the documents specified by the customs authorities available and a refusal to comply may carry fines. If the individual is late in fulfilling this obligation, a daily fine may be imposed, and in case of non-payment she may be committed to prison.

'substantially affected' by the criminal sanctions already at the administrative procedure. The Court's observation that the protection offered by the right to a fair trial is unitary and cannot be dependent on the type or gravity of the criminal offence was particularly significant.[56] In the portions of the judgment addressing the search of the applicant's home by the customs authorities, the Court provided guidelines for how the proportionality of the interference with the individual's private sphere could be ensured.[57]

Although the judgment conclusively settled the debate about whether the right to silence is part of the right to a fair trial, the Court merely proclaimed the right without specifying its content or its scope, or without introducing

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56 *Funke v. France* 10828/84 (25/02/1993), A256–A, par. 44. The Commission, however, noting the specific nature of economic/financial investigations and related criminal offences, did not arrive at the same conclusion. It started from the assumption that the objective of the investigations is to protect the fundamental economic interests of the state, as well as to secure the success of the state's economic policy and its fiscal balance. Thus those falling under the jurisdiction of the state are obliged to a certain measure of loyalty: they are obligated to turn over such evidence to the authorities as may be relevant for the investigation. The Commission also noted that it is by no means unusual in a member state of the Council of Europe for the tax authorities to compel the tax-payers to provide information regarding their wealth, their income or financial transactions. According to the Commission, the obligation to provide information does not serve the purpose of making law enforcement easier, but is meant to assist the implementation of legislation in the given area. Moreover, given that it only requires information periodically, the state's generosity and its trust vested in its citizens becomes apparent: as a result of this stricter measures need not be applied and continuous inspections are not necessary. Finally, the Commission stated that the applicant had only himself to blame for the losses he suffered: had he co-operated with the authorities, he could have avoided the sanctions. (See par. 64 and 65 of the Commission's report.) The Commission's reasoning is debatable on two grounds – and the Court did indeed reject these arguments. The first is the postulate that there is a form of crime the fight against which could be considered a policy issue. This implies that the margin of appreciation of the legislature is extensive in this area and that the administration of justice may apply instruments that are not generally permitted in a criminal proceeding. The other problematic aspect of the Commission's reasoning is how it seeks to justify the obligation to co-operate. This in effect deprives the *nemo tenetur* principle of its essence.

57 The Court established a violation of Article 8 because it was of the opinion that the search and seizure conducted by the customs authorities did not meet the proportionality requirement. In support of this position, it noted that Article 8 (2) regarding the interference with the right to a respect for private life needs to be construed narrowly. The Court acknowledged that the complexity of the banking system and financial channels, and the immense scope of international investments, make interference (including house searches), necessary, but it added that appropriate and efficient guarantees are necessary to ensure that the interference is compatible with the Convention. Such guarantees were not in place in the *Funke* case. They were absent primarily because the authority granted to the customs organs was too broad: these organs had exclusive competence to decide whether an investigation was necessary, as well as to set the time and scope of the investigation. Their decision was not subject to judicial review. As the legal conditions were too lax and had too many loopholes, the interference was disproportionate as compared to the legitimate interest (preventing criminal offences or the well-being of the domestic economy). See *Funke v. France* 10828/84 (25/02/1993), A256–A, par. 56–57.

any argument for its justification. Nor did it provide an explanation as to why this right prohibits the authorities from compelling an accused to turn over documents. Critics of the judgment cited the decision of the U.S. Supreme Court which asserted that the privilege against self-incrimination is limited to testimony and that the Constitution is not violated if the taxpayer is compelled to turn over documents that may incriminate her.[58]

But the text of the Strasbourg Court judgment does not merely condemn coercion to provide testimony or to turn over documents, but in fact it seems to prohibit any form of compulsion. According to the Court, Article 6 (1) was violated because the authorities attempted to coerce the applicant into turning over incriminating evidence that they were "unable or unwilling to procure themselves by some other means."[59] This formulation suggests that the right to silence also guarantees that the accused may not be compelled to provide fingerprints, breath or blood samples, or to stand in a police line-up[60] – in other words it raises obstacles to the prosecution of crime which may completely paralyze the work of law enforcement officials.

Critics of the judgment also call attention to the fact that in as far as the state cannot compel her citizens to provide documents, it will have to resort to house searches and requisitions more often, that is to take measures that continuously and brutally interfere with our private lives.[61] The delegate of the Commission also called the Court's attention to this possibility: "What other possibilities will a State have to control the capital flows? It could completely close down the frontiers and anyone going abroad or coming back from a visit abroad would be searched from head to toe to see whether there is any evidence of bank statements or bank transactions or any cash that they are carrying in one way or another. You could supervise all bank transactions and all telecommunications in order to spot any fraudulent activity."[62] Critics of the *Funke* judgment also point out that the decision makes it impossible to uncover and prosecute economic/financial crimes committed by legal persons or in the context of their operations.[63] Moreover, by extending the scope of Article 6 – and hence of the right to silence – to

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58 Bert Swart: The Case-Law of the European Court of Human Rights in 1993. *European Journal of Crime, Criminal Law and Criminal Justice*, 1994, No. 2, pp. 187–188.

59 *Funke v. France* 10828/84 (25/02/1993), A256–A, par. 44.

60 Andrew S. Butler: *Funke v. France* and the Right Against Self-Incrimination: a Critical Analysis. *Criminal Law Forum,* 2000, vol. 11, No. 4, pp. 476–477 (Hereinafter: Butler, Funke).

61 Butler, Funke, p. 471.

62 The verbatim record of the hearings in the cases of *Funke, Crémieux, Miailhe v. France* on 21 September 1992 (Doc. 38721). *Stefan Trechsel*'s reasoning is cited in Butler, Funke, p. 472.

63 Butler, Funke, pp. 470–471.

preliminary investigations preceding formal criminal proceedings, it also prevents rational decriminalization.[64]

The Court answered some of the issues it had left open in the *Funke* judgment in the context of the *Saunders* case.[65] The British Department of Trade and Industry had ordered an investigation prior to opening criminal proceedings against the applicant. In the course of the investigation, the applicant was compelled to make statements and to answer questions put to him. Had he refused to provide answers, he could have been held liable for a criminal offence.[66] During the criminal trial, the prosecutor widely referred to the statements made by the applicant during the investigation and the court used them when assessing the credibility of the statements *Saunders* made at the hearing.[67]

In its decision, which found the United Kingdom in violation of the Convention, the Court reiterated that the privilege against self-incrimination is a generally recognized international requirement which constitutes an essential element of a fair trial as enshrined in Article 6, and it is furthermore also closely intertwined with the presumption of innocence. At the same time the principle – in accordance with the way it is interpreted in some Contracting States to the Convention and elsewhere – does not refer to

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64 Butler, Funke, p. 474.

65 *Saunders v. the United Kingdom* [GC] 19187/91 (17/12/1996), Reports 1996–VI.

66 During the investigation the affected person is obliged to co-operate: she needs to appear before the investigators, must produce the requested documents and testify under oath. A violation of this obligation may be punished by the court as if she had committed contempt of court and thus she may be sentenced to up to two years imprisonment.

67 The British government argued – among other things – along the lines formulated by the Commission in the *Funke* case: it claimed that the "right to silence" is not absolute and it also referred to the particularities of the case, as well as to the special status and responsibilities of persons directing corporations. The Commission, however, first made clear that even though the Convention does not explicitly mention it, the "right to silence" – according to the *Funke* judgment – is a conceptual component of a fair trial as laid down in Article 6. The applicant was not allowed to exercise this right, however. If he had refused to answer the questions put to him by inspectors of the Department of Trade and Industry, or if he had failed to produce the requested documents, he would have been subject to criminal sanctions. And since the incriminating evidence in the criminal proceeding mostly stemmed from the self-incriminating testimony and documents submitted during the earlier examinations, in reality the applicant had no choice but to act as his own witness – "silence" was not a realistic alternative, which is why the applicant's right to defense was breached. The Commission – in response to the Court's judgment rendered in the *Funke* case – was forced to abandon its earlier position and thus rebuffed the Government's arguments, stating that it was unacceptable that different categories of accused are entitled to varying degrees of a fair trial. The right to silence must be accorded to the same degree to someone who is suspected of having committed commercial fraud, as it is to someone who is accused of ordinary fraud, rape, murder or a terrorist act.

evidence that is obtained from the accused by coercion but whose existence is independent of the will of the accused, such as for instance documents seized during house searches, breath, blood or urine samples, as well as tissue samples taken in the course of a DNA examination.[68] Yet despite all the above, the judgment only answered some of the criticisms voiced in relation to the *Funke* judgment and still failed to respond to the question of what the exemption precisely refers to.

The judgment sometimes refers to the privilege against self-incrimination, sometimes to the right to silence, but generally it mentions the two together. This suggests that the Court believes the scope of these two rights overlap: "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. Their rationale lies, *inter alia*, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfillment of the aims of Article 6."[69]

Judge *Martens,* who attached a dissenting opinion to the Court's decision, draws a distinction between the prohibition on coercing self-incrimination (or the exemption therefrom) and the right to silence. According to him the two rights are in a general-specific relationship to one another. The privilege against self-incrimination implies the right to refuse co-operation. As far as its scope is concerned, the question is in how far the accused can be compelled to co-operate in any way with the authorities and to thereby provide evidence against herself, or to aid the process of obtaining evidence against herself. Further questions relate to the sanctions that may be applied for a refusal to co-operate, namely to what degree may the person refusing co-operation be compelled to accept that the authorities obtain the

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68 *Saunders v. the United Kingdom* [GC] 19187/91 (17/12/1996), Reports 1996–VI, par. 69.

69 Par. 68 of the Court's judgment cited par. 45 of the *Murray* judgment – which was delivered earlier and will be discussed here later. [*John Murray v. the United Kingdom* [GC] 18731/91 (25/01/1996), Reports 1996–I] From the text of the judgment we can deduce that the content of the two rights coincides. At most, they differ insofar as the right to silence, in addition to containing the privilege against self-incrimination, also implies the requirement – which is also mandated by the presumption of innocence – that the accuser has to provide evidence. See Michael O'Boyle: Freedom from Self-Incrimination and the Right to Silence: a Pandora's Box? In: Paul Mahoney – Franz Matscher – Herbert Petzold – Luzius Wildhaber (eds.): *Protecting Human Rights: The European Perspective. Studies in memory of Rolv Ryssdal/Protection des droits de l'homme: la perspective européenne: mélanges a la mémoire de Rolv Ryssdal.* Köln-Berlin-Bonn-München, 2000, Carl Heymanns Verlag KG, p. 1023 (Hereinafter: O'Boyle, Self-Incrimination).

incriminating evidence against her will? The right to silence – as it is understood in the everyday interpretation – gives a person the right to refuse to answer. The privilege against self-incrimination is a broader right that implies the right to silence.[70] The latter refers to the refusal of a certain form of co-operation: it offers protection against being compelled to provide a self-incriminating *testimony*.[71] Later I will show that the two rights should indeed be kept distinct, but I will also show that the two – due to the divergence in their respective functions – are also qualitatively different. First, however, I will undertake an analysis of the ECtHR's relevant case-law, which as will be seen is often marred by inconsistency.

The previously cited findings of the *Saunders* judgment suggest that the Court identifies the privilege against self-incrimination with the right to silence. The privilege against self-incrimination – we read in the judgment – "is primarily concerned (…) with respecting the will of an accused person to remain silent."[72] Alternatively, the privilege does not refer "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."[73]

The Court does not limit the privilege against self-incrimination to statements admitting violations of law or directly incriminating the person in question: "Testimony obtained under compulsion which appears on its face to be of a non-incriminating nature – such as exculpatory remarks or mere information on questions of fact – may later be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility."[74] This broad understanding of the prohibition on compelling self-incrimination also appears to show that the privilege is limited to ensuring the voluntary nature of *testimony*.

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70 Judge *Martens* also cites the *Murray* judgment. See par. 4 of his dissenting opinion.

71 In *Trechsel's* view the right to silence refers to acoustic communication, but the right obviously also safeguards against coercion to provide written testimony. See Trechsel, Criminal Proceedings, p. 342.

72 *Saunders v. the United Kingdom* [GC] 19187/91 (17/12/1996), Reports 1996–VI, par. 69.

73 *Ibid.*

74 *Ibid,* par. 71.

II.

THE SCOPE OF THE RIGHT TO SILENCE

1. The pre-eminent protection of defendants' testimonies

My cautious formulation above was no coincidence. The text of the *Saunders* judgment leaves open the possibility that the privilege may also refer to something beyond the right to withhold testimony. After all, the privilege does not exclusively, but only *"primarily"* mean that the defendant is free to remain silent. This formulation does not rule out that there may be something else that has no "existence independent of the will of the defendant" and which may therefore not be obtained by coercion. I will return to this question at a later point, but first I will seek to explore the justification for the pre-eminent protection afforded to the voluntary nature of testimony. The key question here is why does the privilege primarily mean that one must "respect the will of an accused person to remain silent"?[75]

The distinction drawn by the Court, according to which testimony has no independent existence as opposed to a urine or breath sample, for instance, does not in itself provide an explanation. Let us put aside our doubts as to whether a writing sample or a breath sample, which are designed to assess the influence of alcohol, really exist apart from the will of the accused.[76] Even if we were to accept that the testimony of the accused is the only evidence that is truly inseparable from her will, it would not justify the pre-eminent protection for the freedom to testify. It does not explain why coercing a statement is prohibited, whereas intrusion into the private sphere through house searches for the sake of obtaining incriminating documents is unproblematic and coercion in the interest of taking a blood or tissue sample is allowed.[77] After all, the authorities proceed against the will of the accused in all these instances.

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75 *Ibid,* par. 69.

76 In his dissent, Judge *Martens* mentions as further examples the pin code or the password needed to access information technology systems. See par. 12 of his dissenting opinion. American legal practice unhesitatingly excludes the compulsion to provide a writing sample from the privilege against self-incrimination guaranteed by the Fifth Amendment, since the coerced and potentially incriminating sample contains nothing "testimonial". See *Fisher v. U.S.* 425 US 391, 411 (1976). In the *Delalic* case, the ICTY on the other hand qualified the compulsion to provide a handwriting sample as conflicting with the *nemo tenetur* principle. (*Prosecutor v Zejnil Delalic, Zdravko Mucic also known as "Pavo", Hazim Delic, Esad Landzo also known as "Zenga"*, Case No: IT-96–21–T, Trial Chamber, 16/111998, par. 66.)

77 Ashworth, Serious Crime, p. 19.

The theories invoked to justify the differentiated treatment – hence those which trace the prohibition on coercing a statement back to the respect for the private sphere or for individual autonomy – do not provide a satisfactory explanation for the special status of the freedom to testify.[78] In continental procedural law, which tolerates, although does not encourage, lying – that is it does not oblige the defendant to tell truth – the theory of "hard choices" does not provide an answer either. According to this theory, the defendant, in the absence of the right to silence, would be faced with a choice that is antithetical to the requirement of basic *fairness*: either she contributes to her own conviction by submitting a statement or she refuses to testify – or alternatively testifies falsely – and is punished as a result thereof.[79]

The pre-eminent status of the exemption from testifying could undoubtedly also be explained by historical reasons: in numerous decisions the U.S. Supreme Court notes that without rules guaranteeing that the accused's testimony is voluntary, the administration of justice would inevitably sink to the level of the inquisitorial process, which it regards as barbaric. "[A]ny system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. (…) The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture."[80]

The goal of obtaining information or extorting a confession is one of the definitional elements of torture in the United Nations' Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as well.[81] But the prohibition of coercion in the interest of obtaining a

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78 Dennis, Self-Incrimination, p. 43; Ashworth, Serious Crime, p. 20.

79 *Green* believes that the "cruel trilemma" argument only holds if we consider the criminal sanction itself as cruel: "(I)f punishment for wrongdoing is not cruel, how can it be that compelling the truthful testimony leading to such punishment is cruel?" See Green, Self-Incrimination, p. 631.

80 *Wigmore's* thoughts are cited in Justice *Goldberg's* opinion in *Escobedo*. *Escobedo v. Illinois* 378 U.S. 478 (1964).

81 According to Article 1 of the Convention: "For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

statement does not extend only to acts that inflict pain which is sufficient to establish the use of torture, degrading or inhuman treatment.[82]

Other theories trace the pre-eminent status of the freedom to testify to the differing probative value of evidentiary instruments obtained by compulsion. Objective evidence which has an independent existence cannot be manipulated by the accused: the credibility of a blood sample – its probative value – is not affected by the means of its obtainment, whether it was obtained with or without coercion.[83] A testimony, however, can be either true or false. The limitation of the right to silence to testimonies is thus based on the desire for determining the facts of the case truthfully. The right to silence also contributes to a disclosure of the truth by attributing greater probative value to the testimony of innocents. If an obligation to testify were mandated, then the courts – precisely because of how easily testimonies are manipulated – would attribute low credibility to testimonies made by the accused. Since the veritably guilty generally opt for refusing to testify, the credibility of the innocents' testimony appreciates if the right to remain silent is recognized.[84]

The force of this game theory explanation is limited, however: it could only account for the pre-eminent status of free testimony in the Anglo-American system. In other words, in a system in which the accused – if she chooses to testify – is obliged to tell the truth[85] and in which she is subject to ruthless cross-examination in the course of which her criminal record may also be revealed. All these factors may indeed motivate the accused to remain silent, but these incentives are absent in the continental procedural model. Yet even in the Anglo-American procedural system the explanatory value of this theory is dubious, since it rests on empirically unverified assumptions. It assumes that those who are willing to testify on their own behalf will tell the truth and that the truly innocent accused – despite the depressing atmosphere

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82 Just as compulsion for the sake of gathering material evidence may cause pain and suffering that qualifies as inhuman or degrading. This is presumably why the 1984 Police and Criminal Evidence Act in the United Kingdom do not permit drawing so-called intimate bodily samples (sperm, blood, urine, saliva, pubic hair, *etc.*) without the consent of the accused. At the same time, the court may draw adverse conclusions from the accused's refusal and this may be interpreted as a corroboration of other evidence of guilt. See Butler, Funke, p. 477.

83 This is why the practice of the ICTY, which does not permit compelling the accused to turn in a writing sample, is defensible.

84 Ashworth, Serious Crime, p. 21.

85 If the accused violates the obligation to tell the truth, she will be held liable for perjury. This is not the case in continental procedural laws.

of a police interrogation room and despite the prosecutor's harsh cross-examination – is capable of submitting testimony that will persuade the adjudicator of her innocence. The practice, however, shows that there are hardly ever criminal proceedings launched against an accused-witness who is caught lying, which suggests that fear of the consequence of perjury hardly motivates the telling of the truth. In the decisions of the American Supreme Court, the right to silence is justified – among other things – precisely with the argument that the compulsion to testify will nudge weak and uneducated innocent defendants to provide groundless confessions, and that the "victims" of cross-examination are in fact often those non-guilty individuals who are merely bad witnesses in their own defense.[86] From the above I conclude that even though the pre-eminent status of the accused's testimony may be justified on epistemological grounds (this is what I will attempt to show below), it is not true that the right to silence indeed raises the probative value of the testimonies made by innocent defendants and thus can be considered as a guarantee of fact-finding accuracy.

As to their relationship to cognition – as I showed in the previous chapters – we can distinguish three groups of procedural norms. The expressed or at least primary function of rules in the first group is precisely to help the decision-maker establish the facts of the case in correspondence with reality. The legitimacy of these norms stems from their capability to assist in realizing the objective of the criminal proceeding: namely they contribute to the disclosure of truth.

The norms belonging to the second group are not justified on such instrumental grounds. They are meant to protect autonomous values regardless of whether they help or even hinder the disclosure of truth. Finally, I grouped into the third category the so-called *fairness* norms – the right to silence among them – whose particular quality is that even though they do affect fact-finding in the criminal process, they are not intended to help determining the truth *in general,* but rather projected onto a previously undertaken *evaluation.* Their function is to minimize the chance of wrongful conviction, at the price that on occasion the guilty will evade punishment.

This last function is most clearly embodied in the presumption of innocence, which is closely intertwined with the right to silence: the rule derived from the presumption provides that when doubt regarding guilt remains, the decision must be in favor of the defendant. In this way the rule

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[86] *Wilson v. United States*, 149 U.S. 60, 66 (1893); *Murphy v. Waterfront Commission of New York Harbor,* 378 U.S. 52, 55 (1964).

serves to eliminate the possibility of wrongful convictions, at the price that the guilty sometimes also escape justice. The presumption of innocence, therefore, does not generally guarantee the accuracy of findings in a trial. (The other *fairness* guarantees, such as, the right to defense, the rights to be informed of the charges or to examine witnesses also *primarily* serve to prevent the punishment of innocents and are not *principally* safeguards aimed at ensuring that the court arrives at the truth.)

"The privilege, while sometimes »a shelter to the guilty«, is often »a protection to the innocent«" – the U.S. Supreme Court claims.[87] If it is true that the privilege primarily serves to prevent wrongful convictions, its applicability must obviously be limited to testimonies. If compulsion were permitted in order to obtain a testimony, then there would be a real danger that innocent persons would be convicted. In the case of compelling someone to hand over evidence that exists independently of the will of the accused, or when compelling someone to endure the search or other means aimed at obtaining such evidence, this risk is low. Prohibiting coerced testimonies hence reduces the probability of convicting innocents. This is also proclaimed in the phrase of the *Saunders* judgment cited above, which asserts that the rationale for the right to silence and the right not to incriminate oneself lies "in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice."[88] There is, therefore, a powerful argument in support of the pre-eminent status of the voluntary nature of testimony: this is an important way of preventing innocent people from being punished.

But let us cite another sentence in the *Saunders* judgment as well: the privilege "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."[89] In the context of *documents,* this phrase only refers to the obligation to *tolerate compulsion*. This means that an individual may not invoke the right to silence if documents that support her guilt are obtained against her will through some form of coercion, for example during a house search. It follows from this

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87 *Murphy v. Waterfront Commission of New York Harbor*, 387 U.S. 52, 55 (1964).

88 *Saunders v. the United Kingdom* [GC] 19187/91 (17/12/1996), Reports 1996–VI, par. 68.

89 *Ibid,* par. 69.

formulation, however, that the right to silence not only prohibits compelling testimony, but also forbids the authorities to oblige – on the pain of sanctions – the accused *herself to turn over* documents which might incriminate her in proceedings already underway or in proceedings to be initiated at later stage which would be based precisely on the evidence so obtained.[90]

The Court did not, therefore, overrule the holdings of the *Funke* judgment, a fact further supported by the judgment delivered in the *J.B.* case.[91] Here the Court found that the Swiss government had violated the right to silence: the applicant was involved in an administrative proceeding initiated on the grounds of a presumed tax evasion and was fined because he had refused to turn over documents which could have incriminated him.

To thus extend the scope of the right to silence would be contrary to the jurisprudence of the United States Supreme Court, on which the Strasbourg Court relied to a significant degree in its decisions. The Supreme Court only recognizes the scope of the privilege enshrined in the Fifth Amendment in the instances of testimonial communication: utterances in which statements are explicitly or implicitly presented or information is revealed.[92] The communication is of a testimonial type – and may hence not be compelled – if the individual reveals the contents of her thoughts, divulges information or confesses her guilt. This is why the privilege laid down in the Fifth Amendment does not apply if the individual is compelled "to furnish a blood sample, to provide a handwriting exemplar, or a voice exemplar; to stand in a line-up, and to wear particular clothing."[93] Similarly, documents of any kind or their incriminating content do not fall in the category of testimonial communication.[94]

The rationale underlying the Court's limiting of the scope of the right to silence – namely that the right only authorizes the withholding of something that has no independent existence apart from the will of the individual in question – does not justify the extension of this right to the turning over of documents, as official documents and receipts do exist – in as far as they exist – regardless of the will of the accused. Similarly, the arguments I raised in favor of the pre-eminent status of the freedom to testify are not valid in the

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[90] It is probably unnecessary to note this explicitly, but by testimony I mean both those submitted verbally and in writing. The latter case does not imply an official document.

[91] *J.B. v. Switzerland* 31827/96 (03/05/2001), Reports of Judgments and Decisions 2001–III.

[92] See *Doe v. U.S.* 487 U.S. 201, 210 (1988).

[93] *Ibid.*

[94] *Fisher v. U.S.* 425 U.S. 391, 409. (1976).

case of refusing to turn over documents. It would be absurd to claim that the probability of wrongful convictions increases if the accused is compelled to turn over incriminating documents in her possession.

But then what justifies extending the right to silence to refusing to turn over such documents? Why may the individual not be compelled to turn over documents herself? Moreover why is the right to silence not violated if the police or officials of the tax authority obtain such documents by ransacking the affected person's home or even by potentially violating her physical integrity in a body search? Neither the *Saunders*, nor the *J.B.* decisions answer these questions and in the latter judgment the Court merely notes that in the case of documents whose submission was refused by the applicant, the issue at hand did not concern material "which has an existence independent of the person concerned." However, the Court failed to provide any kind of explanation for this statement.

O'Boyle rightly asserts that there are undoubtedly situations in which the compulsion to produce some documents is, in effect, identical to a confession by testimony. If someone is accused of membership in an illegal organization and is being called upon to surrender her membership card to the authorities, then she essentially confesses to a criminal offence by complying with the request.[95] In the *Funke* case it would have been equivalent to a confession if the applicant had handed over documents confirming his foreign bank transactions, since he lacked permission to undertake these transactions and without the requisite permission a criminal offence is committed. Yet this does not imply that the document – be it a membership card or a receipt confirming foreign deposits – loses its autonomous existence. The *J.B.* decision suggests that the Court does not limit the privilege against self-incrimination to documents whose delivery would be tantamount to a confession. Although a blood or breath sample could also be "an evidence identical to a confession", according to the Court the right to silence is not affected if it is obtained by compulsion, or even force, from the person in question. In summary, the specifics of the given document's content are not sufficient for justifying the Court's decision.

The Court's position could, however, be supported by the argument that compelling an accused to "betray" herself is a graver violation of the values underlying the right to silence – the respect for human dignity, the individual's instinct of self-preservation and her autonomy – than a situation

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95 O' Boyle, Self-Incrimination, p. 1028.

in which the evidence of guilt is coercively taken, without leaving the accused with a choice in the matter. In as far as this line of reasoning holds, it is not a violation of the right to silence if the authorities obtain incriminating documents by interfering with the right to a private sphere or to physical integrity through a house or body search respectively. There is also no choice involved if a blood or tissue sample is coercively obtained from the defendant: the individual cannot reproach herself for causing her own demise and the right to silence is not violated in this case either. The Court, however, does not justify the distinction by referring to differing degrees of violations of human dignity or autonomy. In fact, the Court provides no explicit reason for making the distinction at all.

But if we organize the assertions made in the *Funke* and *J.B.* judgments, we can indeed find an answer to the question of why the right to silence is implicated by the compulsion to produce documents or by the application of sanctions for refusing to do so in some cases, when in other situations, in which direct coercion is used to obtain documents or other evidence, the same right is not effected? In *Funke* the Court asserted that the officials of the customs authority wanted to gain access to documents whose existence they were uncertain of, but which they presumed to be extant. As they were incapable or unwilling to obtain the documents in another manner, they compelled the applicant to turn over the evidence which could potentially prove his guilt.[96] In the *J.B.* case the Swiss government defended itself by arguing that – in contrast with the facts in *Funke* – the authorities were aware that the applicant was making investments which he could only have sustained with income that was concealed from the tax authority.[97] The government argued that "the applicant had not been obliged to incriminate himself, since the authorities were in fact already aware of the information in question." The Court was not persuaded by this argument. The government, we read in the judgment, did not dispel doubts that the authorities wanted to obtain the incriminating documents from the applicant himself, especially "in view of the persistence with which the domestic tax authorities attempted to achieve their aim. Thus, between 1987 and 1990 the authorities found it necessary to request the applicant on eight separate occasions to submit the information concerned and, when he refused to do so, they successively imposed altogether four disciplinary fines on him."[98]

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96 *Funke v. France* 10828/84 (25/02/1993), A256–A, par. 44.

97 *J.B. v. Switzerland* 31827/96 (03/05/2001), Reports of Judgments and Decisions 2001–III, par. 58.

98 *Ibid,* par. 69.

Compelling the handing over of documents thus violated the right not to incriminate oneself because the method employed by the authorities sought to obtain evidence of which they were unaware or of whose existence they only had a very vague notion. In such cases it is indeed the individual in question who produces the incriminating evidence, which constitutes a violation of the principle of *nemo tenetur seipsum prodere* as it was originally construed. Here the individual is forced to betray herself and is compelled to be the cause of her own demise. The privilege against self-incrimination is not violated, however, if based on sources other than the investigated person herself the authorities deem the existence of the incriminating evidence probable and, against the will of the individual, either by violating the sanctity of the home or the right to physical integrity, obtain these documents through a search of the individual's body or house. When, therefore, the Court limits the privilege against self-incrimination to "materials" existing "independently" of the will of the accused, it uses the concept in a peculiar manner which is different from its everyday meaning.

The "material", the object or document, either exists or it does not. Its physical existence does not depend on whether the authorities are aware or have some notion of its existence. In the Court's interpretation, however, the document has no separate existence from the will of the accused unless the authorities can establish its existence with evidence other than that which derives from the active co-operation of the investigated person. In other words, it is from the *perspective of the authorities* that the "material" has no "existence independent of the will" of the accused. This interpretation can also be applied to the testimony. The only reason this is not obvious is that by definition the defendant's testimony is an account of the event of the criminal offence and its circumstances, submitted to the authorities in the course of an inquiry. If I go into the field and shout my sins into the sky – no matter how loudly and in what detail I do so – I am not giving testimony and I do not make a confession. Similarly, if I write down the details of the crime I committed either for posterity or as a reminder to myself, I only produce a confession in the everyday sense of the word, but not in terms of procedural law. The fact that my testimony exists in a written form does not entitle the authorities to compel me to speak against my will.

But the testimony – by virtue of the concept itself – truly has no existence independently of the accused's will. At the same time it is disingenuous to make the independent existence of the documents contingent upon whether the authorities are aware of them or not. The document does exist, regardless of whether the authorities know of it. But even such a questionable

interpretation of the concept of "materials" existing independently from the will of the accused cannot justify an identical assessment of compulsion directed at coercing testimony and that aimed at the submission of documents.[99] This is what I wish to show below.

According to the principles formulated in the *Saunders* judgment, therefore, the privilege against self-incrimination does not extend to evidence "obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect."[100] As an example of this kind of evidence, the judgment mentions documents seized during a house search.[101] According to the above, a document has an "independent existence" if its existence is at least assumed to be probable by the authorities. There would be an obvious contradiction, however, if the Court were to ban compulsion in the case of refusal to turn over documents that "have no independent existence", but were at the same time to permit – through ransacking the investigated person's home – the obtainment of incriminating evidence whose existence the authorities were entirely unaware of. Hence a house search cannot be compatible with the Convention either, unless the authorities can show the requisite minimum evidence in support of their belief in the existence of the object or document sought and that it can presumably be found in the individual's home. The Court is of the same opinion: it found a house search in such a case to be incompatible with the respect for private sphere. The case-law does not prescribe that the authorities indicate in detail in the search warrant the objects or documents they wish to obtain, nor does it prohibit the use of evidence that was obtained "accidentally": evidence which the authorities got hold of without being aware of its existence beforehand. It does require, however, that the coercive measures be reasonably substantiated, and this in turn necessitates that the authorities have cause to believe that the specific objects and documents do exist and that they can only obtain them by interfering with the rights of the individual in question.

Strasbourg's control is naturally limited when it comes to assessing whether a given house or body search was reasonable or not. However the assessment can extend to an examination of whether domestic law contains such guarantees as are necessary to ensure that an interference with the

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99 *Prosecutor v Zejnil Delalic, Zdravko Mucic also known as "Pavo", Hazim Delic, Esad Landzo also known as "Zenga"*, Case No: IT-96–21–T, Trial Chamber, 16/111998, par. 66.

100 *Saunders v. the United Kingdom* [GC] 19187/91 (17/12/1996), Reports 1996–VI, par. 69.

101 *Ibid.*

individual's private life only occurs on the basis of reasonable grounds for suspicion (reasonable *indicia*) and that it is executed only to a justifiable degree. Such guarantees can include, for instance, a clear specification of house search criteria or the designation of its authorization into the competence of a judicial body. In *Funke* the Court found a violation of Article 8 because "the customs authorities had very wide powers; in particular, they had exclusive competence to assess the expediency, number, length and scale of inspections. Above all, in the absence of any requirement of a judicial warrant the restrictions and conditions provided for in law, which were emphasized by the Government (…), appear too lax and full of loopholes for the interferences with the applicant's rights to have been strictly proportionate to the legitimate aim pursued."[102]

If the authorities conduct the house search with the aim of finding incriminating documents whose existence is not supported by some minimal evidence, then – in line with the above – they seek to obtain evidence that has no existence independent of the defendant's will. Without at least some substantiating *prima facie* evidence a house search or coercion applied for a failure to hand over documents both violate the Convention.[103] The prohibition on compulsion is justified by the same interest in both cases: to rule out groundless interference with the individuals' life and to ensure respect for their private sphere.

In summary, we can conclude that the values that justify the right to silence on the one hand, and the prohibition on compelling the handing over of documents that do "not exist independently of the will" of the accused on the other, coincide only partially. The basis for both is the desire for having one's human dignity and private sphere respected. These are substantive values whose recognition, as I have shown, is not justified by their potential to enhance fact-finding accuracy (in fact they rather encumber the disclosure of truth), or reduce the probability of wrongful convictions. Besides the substantive values, the prohibition of using compulsion in order to obtain a confession is also justified by the value that legitimates *fairness* rights: namely it reduces the chances that a person will be punished who is, in reality, innocent.

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102 *Funke v. France* 10828/84 (25/02/1993), A256–A, par. 57.

103 This is why the conclusion – drawn by many on the basis of the *Funke* judgment – that if the authorities may not use compulsion to obtain documents they will have no choice but to order house searches, which are a much deeper intrusion in the private sphere, is wrong. See Butler, Funke, pp. 471-472.

What would have been compatible with the principles derived from earlier judgments was for the Court to handle the right to silence separately from the other instances of the privilege against self-incrimination. We saw that it is only the former which reduces the risk of wrongful convictions and is hence an element of procedural *fairness*. If we limit the right to silence, we violate the right of the accused guaranteed by Article 6 (1). In the other instances pertaining to the privilege – the coerced obtainment of documents among them – it is the right to a private life enshrined in Article 8 that may be violated. Had the Court been mindful of this, then it could have avoided the justified criticisms. It would not have classified documents as evidence that does not exist independently from the will of the accused, a notion that requires a rather far-fetched and artificial justification. Moreover, had the Court followed this path, I do not consider it impossible that it would have arrived at a different result in the *Funke*[104] and *J.B.* cases.

A separate treatment of the right to silence and the other manifestations of the privilege would have helped to answer some of the fundamental questions raised by the *Funke* and *Saunders* cases. For example, is it acceptable that the contents of human rights and the corresponding level of protection they provide are established differently depending on the particularities of the criminal offence that is the object of the proceeding? Do we find a certain degree of compulsion that we classified as a human rights violation in one context justifiable in another instance, for example with reference to the exceptional gravity of the criminal offence in question or, on the contrary, because the potential punishment that may be imposed is so mild, or because proving the offence requires the use of specific measures?

From the analysis of the case-law above[105] I concluded that a relaxation of those procedural guarantees that are meant to avert the wrongful conviction of innocents (to recall, these are the *fairness* rights as well as the requirements *vis-ŕ-vis* the courts) is not acceptable with reference to less serious nature of the particular criminal offence or the relative mildness of the applicable sanction.[106] But neither can a deviation from the general standard of a fair trial be justified on the grounds that the proceeding is conducted on the basis

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104 It is merely a hunch that the Court's choice not to examine the *Funke* case with respect to Article 8 but to rather focus on Article 6 stemmed – in response to the *Orkem* decision – from its desire to state that the right to silence is indeed a part of the right to a fair trial.

105 See section II. 4 of Chapter I.

106 In some cases relating to the right to an impartial tribunal, the Court ended up diverging from this postulate, but formally it nevertheless preserved its effect. See section II. 2 of Chapter II.

of the suspicion of an especially grievous crime. Finally, the pre-eminent status of the right to a fair trial also does not allow for its scope to be subordinated to considerations of expediency. A deviation from the general standard can therefore not be justified by the nature of the criminal offence in question. These are the tenets summarized and generalized by the Court in its *Saunders* decision, which clearly states that it is unacceptable that different groups of accused be afforded different levels of protection under Article 6.

This principle does not apply to the right to a private life, which is open to limitation. As a qualified right, it may be limited in the name of other rights or interests. Interference with the private sphere – among other things – is acceptable if it serves one of the legitimate aims specified in the Convention, and if the interference is both necessary and proportionate. In order to assess necessity and proportionality, one must compare the degree of the limitation with the value of the opposing right or interest. As I pointed out previously, the gravity and type of the criminal offence, as well as the potential means of protecting the interest that justifies the interference, are all relevant factors. The coercion that is necessary for uncovering and prosecuting a particular criminal offence may be unnecessary in another case when the same goal can be reached without a restriction. An interference proportionate with the interest in prosecuting and trying the perpetrators of grave criminal offences may be disproportionate if the procedure is used for proving a less grievous criminal offence.

The arguments expressed by the Commission in the *Funke* case, which are truly indefensible in the context of Article 6, may be persuasive if we qualify the compulsion employed by the authorities not as a restriction of the right to a fair trial but as an interference with the right to respect for private life. To recall, *Funke* was fined because he had refused to turn over documents and receipts which the authorities believed would prove that he committed an offence. The Commission refrained from finding a violation of Article 6 because – among other things – it thought that the specific nature of economic/financial crimes may justify a deviation from the general level of protection offered by the right to a fair trial. The fight against such crimes may be regarded as a policy issue, the Commission argued, and hence the margin of appreciation available to the domestic legislature is rather broad, which means that the authorities can employ instruments that are otherwise inadmissible in criminal proceedings. Invoking the implementation of the state's economic policy is really a poor argument when applied to Article 6. This is what Commissioner *Soyer* demonstrated in his dissenting opinion, in which he criticized the majority's position. According to *Soyer's* argument if in

proceedings initiated on the grounds of customs or foreign exchange offences economic interests can justify obliging the investigated person to co-operate, then in reality any suspect can be compelled to supply evidence against himself. This is so because we could claim for any crime that its prosecution ultimately serves to enforce the state's public safety policy and the success of this policy requires that all citizens co-operate with the police.[107]

In as far as we regard the compulsion to produce receipts or other documents as an interference with private life (I have already shown that this is indeed the case), then the arguments of the Commission's majority in *Funke* are no longer absurd. In enumerating the legitimate aims for limiting the right to respect for private life, Article 8 of the Convention makes special mention of the country's economic well-being, in addition to crime prevention, which latter, based on the case-law, also includes the prosecution of crimes. Implementing the state's economic policy may thus justify an intrusion into private life in the interest of uncovering financial crimes. In itself this does not mean that restricting the right to a private sphere is compatible with the Convention; for that to happen the interference needs to withstand the necessity and proportionality tests. Let us recall once more what *Stefan Trechsel* explained before the Court in the Commission's name: if in the interest of supervising capital flows the state would not be able to compel an individual citizen to co-operate, then it would have no other choice but to extend its control to everyone. It would have to conduct a full body search on everyone crossing the borders, review all banking transactions and tap all phone conversation in order to uncover fraudulent operations: "Obviously this would be a totalitarian approach and would, of course, work against the interests of citizens."[108]

Among the reasons justifying an interference with private life, the Convention also mentions the protection of the rights of others. Intruding into the private sphere of a citizen who is under suspicion and compelling her to turn over incriminating documents in her possession may qualify as proportional if the alternative were for the state to permanently and intensely limit the same right of every citizen instead.

I do not claim that in the *Funke* or *J.B.* cases the Court would have found that the Convention had not been violated if it had classified the compulsion

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107 See par. 4 and 5 of the dissenting opinion in *Funke v. France* 10828/84 (25/02/1993), A256–A.

108 Verbatim record of the hearing in the cases of *Funke*, *Crémieux*, *Miailhe v. France*. Cited in Butler, Funke, p. 472.

to turn over documents as an intrusion into the private sphere. But I do assert that it erred when it qualified the compulsion used for this purpose as a violation of the right to a fair trial, instead of examining the question in the light of Article 8 of the Convention.

2. Limits to the right to silence

As opposed to the right to refuse the handing over of documents, the right to withhold testimony is indeed part and parcel of the right to a fair trial and within this an implicit component of procedural *fairness*. We already noted above that the right to a fair trial is an unqualified right as are the component rights in the sense that the accused may not be entirely deprived of them with a reference to other rights or interests. But according to the ECtHR the right to silence does not apply in an unlimited manner either.[109] This position is not surprising given that in the case of implicit rights, such as the right to silence, it is the Court itself that designates the scope and limits of these rights.

The right to silence can only fulfill its functions if its exercise does not incur disproportional costs. At first glance this statement may appear striking: how could exercising one's right involve costs? I will return to this question at the end of this chapter. The fact is that numerous legal systems allow courts to draw adverse inferences from the defendant's exercise of her right to silence. This is morally most disconcerting in legal systems in which the accused is explicitly reminded that she has the right to remain silent.[110] It is no coincidence that in the United States the accused's silence may not be specifically commented on by the prosecutor or the judge in a manner that could influence the jury's verdict to the detriment of the accused.[111] According to the U.S. Supreme Court, it does not raise any problems, however, if the prosecutor attacks the credibility of an accused who chose to remain silent prior to the trial phase of the proceeding and then decides to speak at the hearing as witness for the defense. In this case, the prosecutor

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109 *John Murray v. the United Kingdom* [GC] 18731/91 (25/01/1996), Reports 1996–I, par. 47.

110 This is why in the debate between *Endre Bodor*, *Endre Bócz*, *Gyula Szeder* and *Mihály Tóth* at the end of the 1980s, one of the central issues was whether the accused had to be instructed about her rights. On the presentation of the different viewpoints see Endre Bócz: Jog-e a hallgatás joga? [Is the Right to Silence a Right?] *Belügyi Szemle*, 1988, No. 11, pp. 65–71.

111 *Griffin v. California* 380 U.S. 609 (1965). Justice *Douglas*, who wrote for the majority, argues: "For comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' (…) which the Fifth Amendment outlaws." 380 U.S. 614.

may point out that if everything that the accused raises in her defense were true, she could obviously have mentioned it earlier.[112]

In the United Kingdom, however, the abovementioned Northern Ireland Order (1988) and the Criminal Justice and Public Order Act (1994) authorize the trier of fact to draw "proper inferences" from the accused's silence. The 1988 order provided the basis for the Strasbourg application that gave the Court the opportunity to clarify whether the right to silence is absolute and, if not, then what degree of indirect compulsion may be justified in the interest of obtaining a testimony.[113] In its decision rendered in the *Murray* case,[114] the Court reiterated the fundamental principle that the right to silence is a cornerstone of a fair trial as it provides protection against unacceptable compulsion.[115] But this right is not absolute and it does not guarantee that the courts will not consider the silence at all when assessing the evidence. Whether Article 6 is breached depends on the circumstances of the specific case, on the type and degree of compulsion used and also on how much weight is accorded to the silence when assessing the evidence.[116] In the *Murray* case the Court – also with a view to the strength of the indirect incriminating evidence presented by the prosecution – did not find a violation of Article 6.

The Northern Ireland Order and the Act of 1994 triggered sharp criticisms in the scholarly literature.[117] *O'Reilly* flat out claimed that England has stepped on the path towards adopting an inquisitorial type criminal

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112 *Jenkins v. Anderson* 447 U.S. 231 (1980).

113 In terms of drawing inferences from silence, the literature distinguishes the prohibition on coercing self-incrimination and the right to silence in the following terms: while the first inhibits *direct* coercion in the interest of obtaining a testimony or information, the latter precludes *indirect* coercion. The right to silence therefore draws the boundary beyond which an accused's failure to speak may not justify drawing adverse conclusions regarding her guilt. See Ashworth, Serious Crime, p. 18.

114 *John Murray v. the United Kingdom* [GC] 18731/91 (25/01/1996), Reports 1996–I.

115 *Ibid,* par. 45.

116 *Ibid,* par. 47. The Court finally concluded that the coercion did not reach a degree that would have "destructed" the right to silence. Silence does not qualify as a criminal offence or as contempt of court, and on the basis of judicial practice it cannot be regarded as an indication of guilt. The fact that the applicant was warned that his silence *vis-ŕ-vis* the police and the refusal to serve as a witness may result in adverse inferences being drawn by the court may be regarded as indirect coercion, but this is not enough to find a violation of Article 6. See par. 48–50 of the judgment.

117 See for example James Michael – Ben Emmerson: Current Topic: The Right to Silence. *European Human Rights Law Review,* 1995, No.1, pp. 4–19.

procedure.[118] He is right in so far as the inquisitorial trial invests greater effort into making the accused talk than the accusatorial model. This also applies to modern continental procedural laws, which are also closer to the inquisitorial model. At the same time, provisions openly declaring the possibility of drawing reasonable inferences from silence can be explained with a particularity of the Anglo-American procedural model, namely that as opposed to modern continental procedural laws it has preserved some elements of the formal evidentiary system. This is what *H. Danielus,* the representative of the Commission, alluded to in the proceeding before the Court: "(T)he courts in a considerable number of countries where evidence is freely assessed may have regard to all relevant circumstances, including the manner in which the accused has behaved or has conducted his defence, when evaluating the evidence in the case. It considers that, what distinguishes the drawing of inferences under the Order is that, in addition to the existence of the specific safeguards mentioned above, it constitutes, as described by the Commission, »a formalised system which aims at allowing common-sense implications to play an open role in the assessment of evidence«.[119]" Let me add to all the above that it is not at all unusual in the Anglo-American model to impose the persuasive or at least the evidential burden of proving certain facts on the defense.[120]

In the continental system, it is in principle the prosecutor who has to prove all elements of the criminal offence, the positive elements and the absence of negative conditions alike. But, as *Tibor Király* writes, in such a trial, too, there can be situations in which the accused has to waive the right to silence in order to avoid conviction: "There can be (…) situations in which the grounds for suspicion and the circumstantial evidence seem to amass so solidly that breaking them apart is not possible without the co-operation of the accused. [In such cases] the actual [as opposed to the legally mandated] evidentiary burden falls on the accused."[121] In the situation described by *Király*, the accuser has persuasively demonstrated the guilt of the accused. The issue is not that the court needs to fill the missing link in the chain of incriminating evidence by adding the accused's silence to them. Commissioner *Danielus*, on

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118 Gregory W. O'Reilly: England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice. *Journal of Criminal Law and Criminology*, 1994 Fall, vol. 85, pp. 402–452.

119 *John Murray v. the United Kingdom* [GC] 18731/91 (25/01/1996), Reports 1996–I, par. 54.

120 Ashworth, Serious Crime, p. 256.

121 Tibor Király: Mit ér az ártatlanság vélelme? [What is the Presumption of Innocence Worth?] *Magyar Jog,* 1987, No. 12, p. 1023.

the contrary, referred to this very situation: in countries accepting the system of free proof the court may evaluate the silence of the accused as a piece of incriminating evidence without whose assessment it could not completely dispel its doubts concerning the guilt of the accused.

It is indisputable that continental procedural law attempts to make the accused speak. To do so, it even tolerates her lying (even though lying is morally justifiable in a considerably narrower range than silence[122]). It promises milder punishment in return for repentance, but in the unitary trial model, where no separate sentencing hearing is held after the conviction, the accused can only hope for equitable treatment if she herself provides evidence of her guilt.[123] Once the accused has spoken, be it during the investigation or in the course of the trial, the court is no longer restrained in any way in assessing her testimony. All this inevitably follows from the nature of the system of free proof. The principle of free evaluation of evidence requires that the judge herself take a position on the probative value of the evidence. She does so by *comparing the respective* credibility of the individual evidentiary means.[124] This method of determining the truth is expressly formulated in a provision of the Hungarian CCP as follows: "The court (…) freely evaluates the pieces of evidence separately and in their *entirety* [emphasis added], and it establishes the results of the evidentiary procedure

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122 Kent Greenawalt: Silence as a Moral and Constitutional Right. *William and Mary Law Review*, Fall 1981, vol. 23, p. 30 (Hereinafter: Greenawalt, Silence).

123 A confession is a substantial mitigating circumstance if an "accused who does not exercise her right to refuse testimony thereby essentially contributes to determining the facts of the case." (BH 1992/5–291) Judicial practice also motivates the accused to make a confession that helps uncover the crime by weighing a confession submitted during the investigation phase as a substantial mitigating circumstance, even if the accused exercises her right to silence during the trial but assents to having her previous confession read out. (BH 1993/8–480). Position paper No. 154 of the Supreme Court's Criminal Division also emphasizes that "a confessional testimony touching on the issue of guilt is a mitigating circumstance (…) and it has even greater impact if it helps uncover the facts; in such an instance a confession extending to the act as a whole has an extenuating effect even if the guilt is partially denied." (BK 154, point 11) The emphasis is therefore not on contrition or on confessing guilt, but rather on the accused's help – through her statement – in uncovering the crime she committed.

124 In systems of legally controlled proof formal rules of evidence serve to assist in determining credibility. The value of individual evidentiary instruments is previously determined and it does not need to be compared to others. In the Anglo-American system cross-examination is meant to serve this purpose: the examiner seeks to show contradictions in the accused's statement and thus to cast doubt on the testimony itself, without having to show that the accused's statements are incompatible with other evidence. See Károly Bárd: *A büntetőhatalom megosztásának buktatói.* [The Pitfalls in the Division of Criminal Authority] Budapest, 1987, Közgazdasági és Jogi Könyvkiadó, pp. 161–162.

based on its conviction resulting therefrom."[125] The silence of the accused not only deprives the court of a piece of evidence that can be separately evaluated, but also of a point of reference that might help it to assess the value of the other evidentiary instruments.[126]

Any rule which guarantees that the accused may exercise her right to silence in any stage of the proceedings can lose a great deal of its practical value once the accused has spoken given that her testimony may be read out without restrictions. The intention is – among other things – to thereby motivate her to speak again, not only to scrutinize her credibility but also because her testimony helps the court evaluate the value of other evidence. If she nevertheless chooses silence, then at least by reading out her prior statement this becomes part of the trial materials, and can be evaluated and compared with all the other evidence. It is conceivable that the objective formulated at the beginning of drafting the new Hungarian criminal procedure law, namely that the principles of directness and of the primacy of the trial (as compared to the investigation) should figure more prominently in the code, came to naught because the new law preserved the system of free proof in undiminished scope. The provisions of the law that might have bolstered the principle of directness are not effective because those applying the law stick to the previously followed method for determining the truth.[127]

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125 CCP Article 78 (3).

126 *Damaska* writes: "It appears, then, that the continental system is not concerned about exposing the trier of fact to the defendant's unsworn testimony, although – considered as a class – it is of dubious trustworthiness. It is believed that precious information can be obtained even from false denials of guilt, detected inconsistencies, and other verbal or non-verbal expressions emanating from the defendant's person. All this information enters into the totality of data on the basis of which guilt-determination will eventually be made." Mirjan Damaska: Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study. *University of Pennsylvania Law Review,* vol. 121, 1973, p. 528.

127 On the ideas concerning codification and on what portion of them ended up being realized, as well as on the subsequent history of the 1998 CCP, see – among others – the writings of *Péter Hack*, *Ákos Farkas*, *Tibor Bodor*, *András Túri*, *László Láng* and *János Bánáti* on the reform of criminal procedure law in the "Fórum" column of the 2002/2 issue of the *Fundamentum* magazine (pp. 46–69), as well as the interviews by *Gergely Fabidi* and *Csaba Tordai* with *Tibor Király* and *Károly Bárd* in the same issue (pp. 41–45); furthermore Péter Hack: Az új eljárási törvény és az ügyészség alkotmányos helyzete. [The New Procedural Law and the Constitutional Status of the Prosecutor's Office] In: Ákos Farkas (ed.): Emlékkönyv *Kratochwill Ferenc (1933–1993) tiszteletére.* [Memorial Volume Published in the Honor of Ferenc Kratochwill] Miskolc, 2003, Bíbor Kiadó, pp. 143–160.; Péter Hack: A kihallgatás rendszere a tárgyaláson. [The System of Examination in the Hearing] In: Mihály Tóth (ed.): *Büntető eljárásjogi olvasókönyv.* [A Reader on Criminal Procedure Law] Budapest, 2003, Osiris Kiadó, pp. 353–356; Anna Kiss – Renáta Kardos: Az ügyész szerepe a büntetőeljárásban. [The Role of the Prosecutor in Criminal Procedure] In: Ferenc Irk (ed.): *Kriminológiai Tanulmányok 40.* [Studies in Criminology 40.] Budapest, 2003, Országos Kriminológiai Intézet, pp. 230–253; Tibor Király: *Büntető eljárási jog.* [Criminal Procedure Law] Third revised edition, Budapest, 2003, Osiris Kiadó, pp. 89–95.

To recall, at the beginning of the codification process there was a consensus among scholars and practicioners in Hungary that the trial should be the primary arena for determining the truth, and that its function should not be limited to reviewing the information gathered in the course of the investigation. Thus there was also a consensus that the practice of automatically reading out the investigation documents, including those containing testimonies, had to be ended. The provision of the CCP that drew a distinction between the *reading out* and the *presentation* of testimony submitted as an accused or a as witness was also meant to advance this objective. Testimony submitted by the defendant during the investigation may only be read out if the accused does not wish to testify during the hearing, if she failed to appear at the hearing in spite of being properly summoned, or if she is at an unknown location and the proceeding may be conducted in her absence.[128] As opposed to this, the *presentation* of some parts of the earlier testimony takes place if there is a contradiction between the accused's testimony at the trial and her earlier statement.[129]

Drawing a distinction between the reading out and the presentation of testimony only makes sense if they have distinct consequences. The legislative intent was for the read-out testimony to serve as a direct basis for the judicial decision, while in the case of a presentation only the following explanation or potential silence of the accused was to be used by the court. However judicial practice has not followed this distinction. In practice the difference between a reading out and a presentation is seen as a quantitative one, with the former extending to the testimony as a whole, while the presentation only to certain parts of it. Moreover, there are judges who even today routinely read out the whole testimony submitted during the investigation, even though the law clearly provides that "a presentation of parts of the earlier testimony may only take place if the accused was asked questions regarding facts and circumstances that are contained in the presentation, or if the accused has testified during the trial with regard to these facts and circumstances." The law, furthermore, makes it the responsibility of the presiding judge to ensure that the presentation does not exceed what is necessary to establish the facts of the case.[130]

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128 CCP Article 291 (1).

129 Article 291 (4).

130 Article 291 (5). With this practice the judges followed the guidelines developed during the era of the fCCP (Act no. 1 of 1973), which made it mandatory to read out the testimony submitted during the investigation if there were differences between the statements made at the hearing and during the investigation. Reading out is not optional, therefore, "and it cannot be replaced by a presentation of the testimony provided during the investigation." (BH 1990/7–251)

While judicial practice, therefore, runs counter to the intent of the legislator and is often even contrary to the text of the law, it cannot be criticized from a human rights standpoint. (The fact that a court does not follow all the provisions of the procedural law does not in itself render the trial "unfair".) Reading out the accused's earlier statement and using it in such a way does not violate the right to silence if she had testified freely, without coercion. It cannot be derived either from human dignity or from the right to a fair trial that the accused herself be accorded the right to determine how her voluntarily submitted testimony will be used during the trial. By remaining silent during the trial or changing her earlier statement, the accused cannot exclude such earlier testimony from the range of evaluated evidence.

The situation is different if the court wishes to read out a testimony the accused made in an earlier phase of the proceedings as a witness. The original text of the CCP left no doubt that reading out such testimony is only acceptable if the accused herself files a motion to this effect.[131] Since the amendment of the CCP in 2002,[132] the text of the law also allows for an interpretation that such testimony can be read out at the trial practically without limitation. (I will show later that such an interpretation is in fact unacceptable.) According to the provision currently in force, "if the accused is interrogated as a witness during the investigation, then the testimony may only be read out if the accused so requests, or if it [emerges] from the minutes of the witness testimony" that before the interrogation it was clarified that there was no obstacle to interrogating her and, furthermore, she was reminded of her obligation to tell the truth as well as of the consequences of perjury. By employing a purely grammatical interpretation of this provision, some courts have concluded that the accused's previous testimony – which she provided as a witness – may be read out against her will, provided that the procedural safeguards regarding the examination of witnesses had been observed. This latter condition, however, is not a real limitation because it is not mindful of the transformation in the procedural position of the individual in question. If the investigative authority fails to inform the witness of her rights and privileges, or her duties, then her witness

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131 CPP Article 291 (1). From the wording it also emerged unequivocally that the accused may only request the reading out of her previous witness statement if she wishes to exercise her right to remain silent at the hearing. This makes sense, since if the accused wishes to speak; she may repeat everything that is contained in her previous testimony, which would render its reading out superfluous.

132 Article 173 of Act no. I of 2002.

testimony may not be used in any case.[133] In other words, if we accept the courts' interpretation then the law says that the accused's previously submitted witness testimony may be read out if it is used according to the general rules governing the use of witness testimony. This, however, is self-evident and its repetition appears superfluous, unless the legislator sought to make it clear thereby that while in the absence of a motion by the accused only witness testimony submitted under regular circumstances may be used, at the request of the accused even such testimony may be considered which – since it was obtained through a violation of the Code's provision – would otherwise have to be excluded.[134] Such an interpretation is not altogether unreasonable, for example the accused may seek to bolster her credibility by referring to testimony which she submitted without a proper reminder of her privilege against self-incrimination. However, the probability that the legislator wanted to allow for an exception to the general rule of prohibiting the use of witness testimony made without a proper reminder is rather low.

Although the current text of the law leaves no doubt that previous testimony provided as a witness may only be evaluated if the accused does not speak at the trial, some courts – failing to consider the previously discussed distinction between reading out and presenting – confront the accused with her previous testimony if it does not correspond to her statements made during the trial.[135] The courts believe that this practice is justified on the grounds that the law obliges them to uncover all the facts of the case.[136]

We can now consider whether it is a violation of human rights if the courts use testimony previously provided by the accused as witness without her consent. An aspiration to uncover the truth is not a ground for an exemption from the obligation to respect human dignity and the requirements of a fair trial. The privilege against self-incrimination, due to the accused and the witness alike, can be traced back to human dignity and respect for privacy.

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133 See CCP Article 82 (2) and Article 78 (4).

134 It emerges from the text of Article 84 of the CCP that the testimony cannot be taken into consideration if the witness was not properly warned.

135 See the report prepared by *Ágnes Frech* summing up the issues related to the interpretation of some provisions of the Code of Criminal Procedure discussed at the judges' conference on 13 March 2006. Available at: *http://www.fovarosi.birosag.hu/szellemimuhely/szellem.htm*

136 According to the second phrase of Article 75 (1) of the CCP "the evidentiary procedure must strive to establish the facts of the case as thoroughly and comprehensively as possible, in accordance with reality."

The values embodied in these rights (I referred to these values as substantive values) are those which we feel are worth protecting in criminal proceeding as well, even though our respect for them does not increase the chances of accurate fact-finding. In fact, they are rather a hindrance to the trier in her efforts to determine the facts of the case. In the institution of the exemption from providing testimony, as in general when it comes to exclusionary rules, we recognize these substantive values. Citing *Beling* again, exclusionary rules in law obstruct a passable route, a route that would safely lead to the destination, but of which we nevertheless think that it should not be treaded.

With regards to the accused's right to silence we observed that it is one of the components of procedural *fairness*. The function of the *fairness* norms is not to generally aid the accurate determination of the facts, but rather to provide a safeguard against wrongful convictions, even at the price that some of the guilty will go unpunished.

An approach that allows for using the accused's testimony that she provided earlier as a witness without her consent has no regard for the essential idea underlying the right to silence, according to which the accused freely decides whether by speaking she will provide any information that may be evaluated at a later point just as any other collected evidence.[137] (If she chooses to speak of her own volition, she no longer disposes of the fate of her testimony; this is why her previously made statement as a suspect or an accused may be used later, even if she chooses to exercise her right to silence subsequently.) The witness, however, is not in a position to decide: she is both obliged to speak and to tell the truth.[138] Thus "it is not fair to hold an accused who is not obliged to tell the truth accountable for previous testimony, made while she was a witness under the duty to tell the truth."[139] But this is not only morally unfair, it is also legally unacceptable as it violates the right to a fair trial.

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137 (Dem nemo-tenetur-Prinzip) „entsprechend ist das Aussageverhalten nur dann der prozessualen Beweiswürdigung zugänglich, wenn der Beschuldigte seine Aussage in freier Willensbestimmung zum Gegenstand jenes Entscheidungsfindungsprozesses machen will." Tido Park: Die prozessuale Verwertbarkeit verschiedener Formen der Beschuldigteneinlassung im Strafverfahren. *Strafverteidiger,* 2001/10, p. 590 (Hereinafter: Park, Beschuldigteneinlassung).

138 Only the defendant chooses freely. It is no coincidence that the CCP – exactly in the interest of allowing the defendant to decide freely, with an awareness of the potential consequences – only mandates an obligatory warning in the case of the defendant: whatever she says may be used as evidence [Article 117 (2)]. As far as witnesses are concerned, such warnings are superfluous: the witness has no room for consideration because she has to testify.

139 Ágnes Frech: A büntetőeljáráson kívül beszerzett bizonyítékok felhasználása. [The Use of Evidence Obtained outside the Criminal Proceeding] In: Gábor Halmai (ed.): *Személyi szabadság és tisztességes eljárás.* [Personal Liberty and Fair Trial] Budapest, 1999, INDOK, p. 33.

The witness is obliged to speak: the compulsion does not cease and the testimony does not become voluntary by virtue of the fact that she may refuse to testify if as a result of speaking she were to charge herself with a criminal offence.[140] Invoking this privilege is obviously not without risks. Ultimately it is up to the authorities to decide whether the privilege applies. Hence the witness must decide whether to provide information that makes the existence of grounds for refusal more probable (thereby indirectly incriminating herself) or to expose herself to fines for groundlessly refusing to testify, potentially even provoking a criminal proceeding against herself (either for abetting a crime or for withholding information on extenuating circumstances). But even if we put these concerns aside, it is still true that the cited provision of the CCP does not eliminate compulsion. It only guarantees the right to withhold *incriminating* information, but it does not allow for refusing testimony.[141] The witness is otherwise obliged to speak and we know from the *Saunders* judgment that the right to silence is not limited to directly incriminating statements or statements through which the defendant admits to her guilt. "Testimony obtained under compulsion which appears on its face to be of a non-incriminating nature – such as exculpatory remarks or mere information on questions of fact – may later be deployed in criminal proceedings in support of the prosecution's case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility."[142]

To reiterate, using testimony provided by the accused when she was a witness (who was at that time under compulsion) violates the right to silence unless she consents to its use. My claim is that through a systematic and historical interpretation Article 291 of the CCP can be interpreted in a way that is compatible with the right to a fair trial as guaranteed by the Convention and the Hungarian Constitution.

The former Code of Criminal Procedure had no provisions regarding the use of testimony submitted prior to a change in the procedural position. Judicial practice construed the silence of the law as implying that the accused's earlier testimony as a witness may not be read out in case she chooses to

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140 CCP Article 82 (1) *b)*.

141 The German Code of Criminal Procedure also makes the difference apparent by distinguishing the right to refuse incriminating answers – as a right to refuse information (*Auskunftsverweigerungsrecht*) – from the right to refuse testimony (*Zeugnisverweigerungsrecht*). See StPO Articles 52, 53, 53a and 55.

142 *Saunders v. the United Kingdom* [GC] 19187/91 (17/12/1996), Reports 1996–VI, par. 71.

remain silent at the trial, and that the accused may not be confronted with her earlier witness testimony if its contents conflict with her statements made at the trial.[143] The original text of the 1998 CCP only authorized the use of previously recorded witness testimony based on the accused's own motion (that is in her own interest). The 2002 amendment changed the original text, but according to the explanatory note prepared by the Ministry of Justice all that the amending act did was to coherently order the provisions regarding the use of earlier testimony submitted by the accused, without effecting any substantial changes as compared to the previous regulation. I know from personal experience that those drafting the commentary occasionally consciously choose to remain silent on some rules of the law which – given their importance – they should have commented on. Nevertheless the drafters of the commentary did not tend to lie, and if the drafters of Act no. I of 2002 would have wanted to extend the use of testimony provided previously as a witness to cases in which the accused did not make a motion to this effect, then the commentary would have been untruthful in stating that the previous regulation was not changed substantially.

In light of the above, the current provisions of the CCP allow for an interpretation that is compatible with the Convention. The relevant text is as follows:

Article 291 (1) If the accused does not wish to testify at the trial or in the case of Article 281 (5), as well as in a situation in which the whereabouts of the accused are unknown, her testimony submitted during the investigation may be read out on the corresponding motion of the prosecutor, the accused or her counsel or *ex officio* by the presiding judge or by the court reporter.

(2) If the accused was examined as a witness during the investigation, then her testimony may only be read out if the accused makes a corresponding motion or if it emerges from the minutes of the investigation that the warning laid down in Article 85 (3) [on the privilege against self incrimination and the witness' duty to tell the truth] was unequivocally conveyed and understood.

Article 291 (1) therefore allows a previously submitted testimony – either in a capacity as suspect or as an accused – to be read out in two cases:

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143 Ágnes Frech: *II. A vádlott és a tanú korábbi, esetleg más eljárásjogi pozícióban tett vallomásának felolvasására és felhasználására vonatkozó szabályok.* [Provisions Pertaining to the Reading out and Use of Previous Testimonies Submitted as Accused or Witness or Any of Them in a Different Procedural Position] Available at: *http://www.fovarosi.birosag.hu/szellemimuhely/szellem.htm*

a) if the accused exercised her right to remain silent (which naturally means that she must be present)

b) if the accused is not present and the proceeding or parts thereof may be conducted in her absence.

Paragraph 2 makes provisions concerning the reading out of testimony submitted previously as a witness and it establishes the criteria for allowing this to be handled differently based on the distinct situations described in paragraph 1, without actually reiterating these situations. The first phrase (reading out is allowed if the accused makes a corresponding motion) refers to the situation described in point *a)*, while the second (the testimony was made and recorded in accordance with the provisions of the Code on witness testimony) refers to situations described in point *b)*, when the accused is not present at the trial and is therefore obviously not in a position to motion for her testimony to be read out.

If the accused is present at the hearing and testifies, then her previous statement made as a witness may not be used under any circumstances. In such cases only a *presentation* (and not a reading out) of the previous testimony may take place in order to clarify contradictions, and Article 291 (4) expressly limits such presentations to testimony submitted as suspect during the investigation or as accused in an earlier phase of the trial.

3. The price of silence?

Based on everything I have written thus far it can be concluded that continental law strives to make the accused speak, a fact that follows necessarily from the logic of free proof. Thus if the accused even temporarily or partially waives the right to silence then her testimony will be subject to evaluation. In this case the courts may even lean towards evaluating the partial silence as evidence substantiating the guilt of the accused. German jurisprudence makes a distinction between so-called *horizontal* and *vertical* silence in this regard. The former addresses a situation in which the defendant – either during the investigation or the trial – makes statements in the course of some interrogations while choosing to stay silent during others. In such a situation no adverse inferences can be drawn from the accused's refusal to testify. If the defendant has grounds to be concerned that her silence during the investigation will be interpreted to her detriment if she chose to testify later, then she is in reality deprived of her choice: what else could she do but to completely waive her right to silence from the beginning

of the proceeding.[144] Choice is similarly out of the question if the accused's subsequent silence would be interpreted negatively by the court: if in such a scenario an accused were to speak at some point, she would no longer be able to exercise her right to silence later.[145]

In the case of vertical silence the accused, in the course of the same examination, makes statements only regarding some aspects of the case by responding to only some of the questions raised while refusing to answer others. According to German jurisprudence silence in such cases may be interpreted to the detriment of the accused: "If the accused makes a statement in the knowledge that she will not be compelled to do so later, she turns herself into an evidentiary instrument out of her own volition, and thereby her statement, just as other evidence, becomes a subject of free evaluation. The judge may not be precluded from drawing inferences from the fact that an accused, who is otherwise willing to make statements, leaves certain questions unanswered" – says the judgment of the German Federal Supreme Court.[146] The Federal Court's reasoning is subject to debate in the literature,[147] but the procedure described as unproblematic by the *Bundesgerichtshof* meets the requirements of common sense. Thus it appears probable that in freely assessing the evidence, the courts – regardless of whether they have an explicit authorization to do so or not – will consider a refusal to answer certain questions as factors substantiating the guilt of the accused.

Let me reiterate that continental law, though it recognizes the right of the accused to remain silent, at the same time motivates her to speak. If the accused even temporarily or partially waives the right to silence, then not only her testimony, but in fact her silence, too, will become part of the court's consideration. But the free evaluation of evidence does not authorize the courts to interpret silence as a circumstance substantiating guilt in all situations, as Commissioner *Danielus'* opinion in the *Murray* case suggests. The *Telfner* judgment illustrates this point.[148] In *Telfner* the Austrian courts

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144 BGHSt 20, 281; 38, 302 (305).

145 Park, Beschuldigteneinlassung, p. 591.

146 BGHSt 20, 298 (300).

147 According to the critics of this judicial practice, the structural situation of the defendant is identical in the case of horizontal and vertical partial silence: in both cases she is deprived of choice if her silence results in adverse inferences regarding her guilt. Hence the two cases ought to be treated in the same manner and the courts should be precluded from construing the accused's silence against her. See Park, Beschuldigteneinlassung, p. 591.

148 *Telfner v. Austria* 33501/96 (20/03/2001).

found that the applicant had caused an accident with his mother's vehicle, as a result of which the victim suffered slight injuries. Even though the injured party could not identify the driver of the vehicle, the Austrian courts held that it was in fact the applicant. Their conclusion was based on the fact that the car was generally used by him, that he had spent the night of the accident away from home, and that – apart from denying his guilt – he did not make a statement. The Strasbourg Court found a breach of the presumption of innocence because it was of the opinion that the Austrian courts had construed the applicant's silence as a factor substantiating his guilt, thereby violating the rules deriving from the presumption of innocence: namely that the burden of proof lies with the prosecution and that doubts need to be considered in favor of the accused. The Court made clear that the judge may indeed draw inferences from the accused's silence in procedural systems accepting free proof as well. But, in accordance with the Convention, she may only do so if the evidence presented by the prosecutor is so persuasive that common sense only allows one conclusion to be drawn from the silence, namely that the accused has no answer to the case against her.

The *Telfner* judgment is instructive because it shows that while to limited degree only, the Strasbourg Court does review the process whereby the national courts arrive at a determination of guilt, and thus it also expresses its views on the question of whether the conclusions thus derived are substantially correct. Weighing evidence falls within the competence of national fora, but the ECtHR – just as domestic appellate courts – reviews the accurate application of the rules of logic. In the case at hand, the Strasbourg Court found a violation of the Convention because the facts established by the domestic courts (*i.e.* that the accused generally used the car, that he had not slept at home during the night of the accident and that he exercised his right to silence) did not allow for only one conclusion, namely that the applicant had indeed committed the crime. The Court has no authority to review the evidence, but it may check the accuracy of inferring facts from facts. What enables the Court to ascertain whether a national court proceeded according to the rules of logic is the obligation of the continental judge to attach a reasoning to her judgment wherein she must account for the thought process which led her to the conclusion that the accused is guilty.

What we have seen, therefore, is that in the jurisprudence of the Court the right to silence is not absolute: its limitation may be justified, though only in a narrow range. Whoever uses this right must be prepared to potentially pay a price for doing so because her silence can be construed as evidence of her guilt. But how can the exercise of a legitimate right carry a price? The other

components of the right to a fair trial may also be limited to various degrees. The right to confront witnesses is not an "absolute" right and the right to consult with counsel may also have acceptable limits.[149] But unlike in the case of the right to silence, in these examples the issue is not that the accused suffers disadvantages because she exercises her rights. And we saw previously that not even a disobedient accused who refuses to fulfill her procedural obligations may not be penalized with the loss of her *fairness* rights.[150]

It is possible, of course, that the ECtHR plainly made a bad decision in *Murray*. But it is not the only court which believes that exercising the right to silence may also incur disadvantages. This was the position taken by Hungarian Constitutional Court as well in its decision on excluding compensation for pre-trial detention or imprisonment.[151]

The body held that the provision of the criminal procedure law excluding compensation if the defendant "tried to deceive the authority for the purpose of preventing successful investigation, or had otherwise attributably given ground to the suspicion of having committed the criminal offence" was unconstitutional.[152] It did not, however, consider the exclusion of compensation for imprisonment suffered as a result of a final court decision as an unconstitutional limitation of the right to defense "if the defendant had withheld in the original procedure the facts (…) on which the judgment in the retrial is based."[153] The right to silence is thus not absolute and it is not *per se* unacceptable if the law also attaches negative consequences to its exercise. This position is consonant with that of the U.S. Supreme Court, which has stated that "the criminal process, like the rest of the legal system, is

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149 See for example the Commission's decision in *Kurup v. Denmark*. The Commission declared the application inadmissible, even though the Danish court had prohibited the defense counsel from sharing information with his client, based on which the latter could have identified those persons at whose examination only his lawyer, but not he himself, was allowed to be present. *Kurup v. Denmark* 11219/84 (10/07/1985), D. R. 42, p. 287.

150 See the cases discussed in Chapter III, where the issue was how far the rights of an absconded defendant may be curtailed. *Poitrimol v. France* 14032/88 (23/11/1993), A277–A.; *Lala v. the Netherlands* 14861/89 (22/09/1994), A297–A.

151 Constitutional Court Decision no. 41/2003 (VII. 2.). I do not regard compensation as an institution within criminal procedure, though I also do not regard it as problematic that CCP contains provisions concerning it. According to Article 580 of the CCP individuals may claim compensation for pre-trial detention if the investigation into their case was terminated or if as a result of the trial they have been acquitted or the procedure has been discontinued. According to Article 581 convicts are entitled to compensation for imprisonment if the process initiated upon an extraordinary remedy results in acquittal or the discontinuation of the process.

152 See Section 1 of the Decision and Section III.B. 3.2 of the opinion.

153 See Section 3 of the Decision and Section III.B. 4 of the opinion.

replete with situations requiring 'the making of difficult judgments' as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose."[154] "Not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid."[155]

True, the cited decision of the Hungarian Constitutional Court, just as those of the U.S. Supreme Court, does not deal with the question of whether the silence of the accused may be subject to evaluation and, if it indeed may be, whether it could be construed as a fact substantiating the guilt of the defendant. The Constitutional Court only took a position on the question of whether someone may lose her right to compensation for pre-trial detention or imprisonment if she even partially exercised her right to silence. The U.S. Supreme Court, for its part, decided whether the privilege against self-incrimination is violated if the law allows the judge to give a milder punishment to someone confessing her guilt. But it is indisputable that both bodies affirmed that the right to silence is not necessarily violated if its exercise carries risks or potentially even disadvantages.

In the case of the other *fairness* rights we would find this idea inherently unjustifiable. We believe that the exercise of these rights may not imply any risks. It would be unacceptable for us if the accused had to consider, for instance, whether to exercise her right to be informed of the charges, to prepare for her defense or to make use of counsel, because if she were to exercise these rights she would be incurring a risk. Why then do the Supreme Court of the United States, the Hungarian Constitutional Court and the European Court of Human Rights all believe that silence can carry risks and that its exercise may indeed carry a price?

Undoubtedly, as far as its formal character is concerned the right to silence differs from the other components of *fairness*. The latter are *positive* rights in the sense that they enable action (or they create the preconditions thereof); through their exercise the accused can shape the proceedings. By recognizing these rights we treat the accused as a subject of the proceedings and hence we respect her human dignity as well.

The right to silence, in contrast, is – in terms of its form – a *negative* right in a dual sense. It gives a license to refuse co-operation and thereby it also

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154 *Corbitt v. New Jersey* 439 U.S. 212, 220 (1978).

155 *U.S. v. Henry* 883 F.2d 1010, 1011 (1989).

impedes the authorities' intervention and it also prohibits them from using any coercion in the interest of obtaining testimony. This does not change the fact, however, that through the right to silence, too, we recognize the individual as someone who shapes the proceedings: we grant her a choice and thereby respect her dignity. It is up to her to decide how she wants to influence the proceedings, something she may do either by talking or by remaining silent. Silence may be construed either as a permitted mode of defense or even as a waiver of the right to defense.

Nevertheless, we find it morally indefensible if someone has to suffer adverse consequences for exercising *positive fairness* rights. We agree that a regulation is morally unbearable if on the one hand it provides incentives for the accused to act and to shape the proceedings, or leaves it up to her discretion whether to make use of such a possibility, but at the same time holds out the prospect of potential disadvantages if she were indeed to exercise these rights. But why is there no such consensus regarding the right to silence?[156] The fact that the accused is entitled to the other *fairness* rights in her capacity as principal subject of the proceedings, while to the right to silence also as a source of information for the court, does not provide an explanation.

The function of all *fairness* rights – the right to silence among them – is identical: they are meant to offer protection against the wrongful conviction

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156 The reason may lie in the different evaluation from a moral perspective of the purely positive *fairness* rights and the right to silence. While the moral assessment of purely positive rights is unequivocally positive, the right to silence is morally ambivalent. It would not occur to us to condemn anyone who is under suspicion and sought to learn the charges against her, or for utilizing the help of someone who, precisely because she is not personally affected, can rebut the charges more rationally. At the same time, we do not necessarily find it unacceptable if her environment judges the accused negatively for withdrawing into silence and failing to respond to what she is charged with. Law and ethics take different paths in that legally we recognize the option of silence as a right from the moment that a violation of a norm is supported by grounds for suspicion, that is to say exactly from the moment when – on moral grounds – we would expect an explanation from a person who is suspicious. Prior to that, the right to silence does not apply. Ethically, it is exactly the other way round: we believe that silence is an adequate reaction when the suspicions of the "accuser" appears to have no basis in fact. In such instances it is morally acceptable if one deems the charges beneath response. But as soon as the grounds for suspicion thicken, morals dictate that the person accused respond and raise something in her defense. I will not examine the issue of how the rules of criminal procedure can diverge from everyday moral norms. But in any case, the notion that something is amiss with the right to silence is also well illustrated by the fact that many of its advocates also argue in its favor by noting that accused individuals do not often exercise this right and, even if they do so, it does not substantially influence the outcome of the case; in other words it does not reduce the success of the prosecution. See for example Tóth, Miranda, pp. 69–70.

of innocents. Any difference in their assessment may perhaps stem from the consideration that the right to silence and the other *fairness* rights fulfill this function to varying degrees. While there is consensus that the positive *fairness* rights veritably fulfill this function, there are some doubts in this context regarding the right to silence. Those who argue in favor of restricting this right invoke American studies which show that jurors assess silence as a circumstance substantiating guilt, which is why a truly innocent accused is better off if she opts to speak.[157]

But if it can indeed be proven that the right to silence increases the probability of convicting innocents, then it should obviously be done away with and be replaced with an obligation to speak – assuming that the protection of innocents is really regarded as valuable. In this case the protection of innocents would not be best served by the right to silence, but on the contrary, through an obligation to testify. This is *Bentham's* view: innocence claims the right of speaking as guilt invokes the privilege of silence.

Legislation and court practice, however, do not eliminate the right to silence but "only" seek to relax it. They believe that by doing so fact-finding accuracy can be enhanced and as a result fewer guilty individuals will evade punishment. At the same time, the argument continues, it is also in the interest of the innocent that the truth emerges. According to the U.S. Supreme Court, the right to silence diminishes rather than increases the probability of determining the truth.[158] "The basic purpose of a trial is the determination of truth, and it is self-evident that to deny a lawyer's help through the technical intricacies of a criminal trial or to deny a full opportunity to appeal a conviction because the accused is poor is to impede that purpose and to infect a criminal proceeding with the clear danger of convicting the innocent. (…) By contrast (…) the privilege against self-incrimination is not an adjunct to the ascertainment of truth (…) [but] stands as a protection of quite different constitutional values."[159] Thus the right to silence is not legitimated on the grounds that it increases the

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157 David Dolinko: Is there a Rationale for the Privilege against Self-Incrimination? *UCLA Law Review*, vol. 33, April 1986, p. 1075 (Hereinafter: Dolinko, Privilege).

158 *Baxter v. Palmigiano,* 425 U.S., 308, 319 (1976); *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966). Cited in Dolinko, Privilege, p. 1075.

159 *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966).

reliability of findings of fact, but by values that reach beyond the proceeding. The value worth protecting, according to the above-cited *Tehan* decision, is the respect for personality and the private sphere.

According to the decision, one group of the procedural guarantees is made up of the pure *positive* participatory rights, which help in determining the truth. Through the application of these rights the veritably guilty are convicted and suspicious but innocent persons are acquitted. In the other group are those rights – the inviolability of home, of the private sphere, of human dignity or of personal integrity – that embody non-procedural (substantive) values. These rights do not enhance fact-finding accuracy and are hence also unsuitable for protecting the innocent from wrongful conviction. According to *Tehan*, therefore, the right to silence belongs in the second group. The participatory rights are "unqualified" rights which may not be limited in the name of other interests. In contrast the scope of those rights protecting substantive values lying outside the criminal proceedings may be limited by other rights or interests.

The right of silence, however, is not only meant to protect values that are completely irrelevant with regard to fact-finding in the criminal process, and the positive participatory rights are not justified on the grounds that they ensure that the verdict will always reflect the truth.

We stated earlier that the norms meant to protect substantive values are not due exclusively to criminal defendants. In the name of respecting her privacy, the witness, too, may request not to be coerced to provide testimony that would incriminate her. The freedom of conscience also prohibits compelling a priest to violate the seal of confession. In all these cases, "silence" is a hindrance to uncovering the truth and may result in convicting an innocent who has fallen under suspicion.[160]

The "right to silence" due to a witness and to an accused do differ, however. In the American and English literature and jurisprudence the temptation for treating these two in the same way may lie in the fact that if she chooses to speak the accused testifies as a witness. But in the Anglo-American procedure, just as in the continental one, the witness refusal to testify or to answer questions falls within the concept of an exemption or

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160 But there is also the view in American literature which suggests that the innocent individual is helped by the witness' testimonial privilege. If a witness does not have to respond to incriminating questions, she will be willing to step in and to testify in favor of the accused. See Dolinko, Privilege, pp. 1065–1066.

privilege,[161] *i.e. the privilege against self-incrimination.* It is an advantage, an *exemption* from doing something that is not due to other citizens or that in other context must be done. The other party (the state) does have the right to enforce the general obligation of citizens to testify. But if someone has an exemption, she may refuse to answer. In *Hohfeld's* classification this privilege is up against the other party's *non-right.*[162] Through the privilege we recognize the rights to private life and the right to preserve secrets. On matters falling outside the range of secrets, however, the witness must testify. The accused's right to silence is – as we know – complete, while that of the witness is partial only. The relevant issue is not the quantitative difference, however, but rather the *negative* aspect of liberty that is embodied in the witness's privilege which represents a slice of human life that may not be subject to social control.[163] This is what *Isaiah Berlin* defined as *liberty from*[164] something: my right to be left in peace, to be left alone in this one area whose boundaries, though they may shift, can always be drawn at any given moment. My negative liberty manifests itself as a duty on the other side to leave my private sphere inviolate.

By not compelling the accused to speak, we of course leave her private sphere undisturbed, too. But it is the *positive* notion of liberty that takes shape in the accused's right to silence. The positive aspect of liberty means that the individual is her own master. I am free, I determine how I will live my life; my decisions depend on myself and not on external forces. "I wish to be an instrument on my own, not of other men's acts of will. I wish to be a subject, not an object. (…) I wish to be somebody, not nobody; a doer – deciding, not being decided for."[165]

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161 *Kellie* and *O'Sullivan* claim that the uncertainty surrounding the right to silence stems from the incapacity of the administrators of justice to properly define what it really is: a right, a privilege, an exemption or a rule? See Deborah Kellie – Helen O'Sullivan: *Ethical or amoral? Is an unqualified right to silence at trial defensible from an ethical perspective?* Available at: *http://www.iipe.org/conference2002/papers/KellieOsullivan.pdf* (Hereinafter: Kellie – O'Sullivan, Silence).

162 Wesley Newcomb Hohfeld: *Fundamental legal conceptions as applied in judicial reasoning.* New Haven, 1964, Yale University Press. On the classification see András Sajó: *Jogosultságok.* [Rights] Budapest, 1996, MTA Állam- és Jogtudományi Intézet, Seneca Kiadó, pp. 50–51 and Kellie – O'Sullivan, Silence, p. 7.

163 Isaiah Berlin: Two Concepts of Liberty. In: *Four Essays in Liberty.* Oxford-New York, 1992, Oxford University Press, p. 126.

164 *Ibid*, p. 127.

165 *Ibid*, p. 131.

With the right to silence we recognize that the accused is a principal actor with the power to shape the proceedings. The issue is not that we leave her private sphere inviolate, but rather that we recognize her autonomy and freedom of action. She decides how to shape her fate and how to exercise her rights of defense. She makes her choices.[166] It is precisely in Anglo-American procedure, where the accused, if she speaks, does so as a witness, that the distinction between the privilege of the witness and the accused's right to silence is most obvious. The witness has a duty to testify, but the respect for her private sphere commands that she may not be compelled to make a statement that would reveal her guilt. If the accused chooses to testify and becomes a witness for the defense, she may not refuse to give answers by pointing out that she would thereby incriminate herself. An accused choosing to testify cannot demand anymore that her private sphere be respected. What the accused is entitled to is the choice between the two options, and if she pays the price for having chosen silence, then it is her right to be recognized as a subject shaping the proceedings that is curtailed.[167]

Those rights that are exclusively meant to protect substantive values external to the proceedings actually have nothing to do with fact-finding in the criminal process and its outcome. The right of the accused to remain silent is not such a right. The proposition in the *Murphy* judgment is correct: "the privilege, while sometimes »a shelter to the guilty«, is often »a protection to the innocent«."[168] The right to silence – as a *fairness* norm –, as I have pointed out repeatedly, does

166 At least in the case of absolute obstacles, the witness, in contrast, is in no position to choose: she has to remain silent.

167 This is true for the continental procedural order as well, even though the testimony of the accused is an independent evidence and not a witness testimony, and the accused may exercise the right to silence partially and may even make inaccurate statements.

168 *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964) The issue in the *Tehan* case was whether following the Supreme Court's *Malloy* and *Griffin* decisions (in which they posited that the privilege against self-incrimination guaranteed by the Fifth Amendment is also binding for the states through the Fourteenth Amendment and that the privilege does not only extend to refusing self-incriminating answers, but also precludes the accuser from making comments to the jury regarding the silence) those convicted persons whose cases had been concluded before the aforementioned judgments were handed down – and in whose cases the prosecutor had pointed out to the jurors that they may draw adverse inferences from their silence – had the right to demand an annulment of their conviction. The Supreme Court decided that this was not the case, primarily on the pragmatic grounds that one would have to annul thousands of judgments (see *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 418). But obviously the justices felt that they also needed to raise arguments rooted in principle: they deduced the right to silence from the respect of the private sphere and hence they could refer to their previously established position that "the ruptured privacy cannot be restored". (*Ibid*, p. 416)

not *generally* ensure that the truth will be established but that the facts will be established correctly in the light of a prior evaluation. Its function is to provide protection against the wrongful conviction of innocents, even at the price that some guilty individuals will evade criminal liability. This is true for all *fairness* norms. Previously I raised the accused's right to question the witnesses – especially her right to cross-examine incriminating witnesses – as an example. Today we believe that *Wigmore* was wrong when he thought that cross-examination is the most outstanding instrument of uncovering the truth.[169] Nevertheless, cross-examination remains a fundamental procedural guarantee in the Anglo-American system because it is unquestionably suitable for reducing the probability of wrongful convictions. If we therefore relax the right to silence, we do not generally increase the probability of correctly ascertaining the facts of the case. What we do indisputably achieve is to reduce the number of those guilty individuals who evade criminal punishment, but at the same time we proportionally increase the probability of convicting innocents.

The notion that *fairness* rights are primarily meant to prevent wrongful convictions, and that they only contribute to uncovering the "truth" through this function, is also applicable to the right to counsel, invoked in the *Tehan* decision. The probability of convicting veritably guilty individuals may be increased by weakening this right as well. If we curtail the right to counsel, then obviously fewer guilty persons will evade criminal liability – though clearly this would also result in increasing the probability of wrongful convictions.

If the involvement of counsel would *generally* ensure that the truth is revealed, then the legislature would obviously not make occasional attempts at curtailing this right. But this is exactly what it does from time to time. Let us recall the *Murray* case: the Northern Ireland Emergency Provisions Act discussed therein allowed for preventing persons suspected of terrorist acts from establishing contact with their legal representation for 48 hours, and it did so by openly citing the interests of uncovering and prosecuting crimes. The measure was clearly aimed at uncovering the truth and making sure that guilty persons do not escape liability. Yet the European Court of Human Rights found a violation of Article 6 (3) because the police exercised their law-provided authority in the applicant's case. To recall, however, at the same

169 See his work entitled "*A Treatise on the Anglo-American System of Evidence in Trials at Common Law*". Cited in John H. Langbein: Historical Foundations of the Law of Evidence: A View form the Ryder Sources. *Columbia Law Review*, vol. 96, June 1996, p. 1175.

time the Court did not find it problematic that the domestic court drew adverse inferences from the accused's silence.

Why is it not problematic if the efficiency of law enforcement is achieved by limiting the right to silence, which evidently also increases the probability of erroneously convicting innocents? Why does it seem unacceptable that the same objective be achieved by diluting another *fairness* right? The general notion that the right to silence, as compared to the other component rights of *fairness*, provides a weaker protection to the innocents may undoubtedly serve to mitigate any bad conscience decision-makers might experience. If we want to increase the probability of convicting the guilty, and in return we accept that there will be innocent victims of such a process – thus we might argue – then we should do this by curtailing a right that is less valuable than the others. The right to silence is less valuable because it hardly contributes to revealing the truth nor does it provide a very efficient protection against wrongful conviction.

But this would lead to a further devaluation of the right to silence, which in turn might justify still further restrictions of it. I do not claim that this will necessarily happen and there are some encouraging signs to the contrary. In the *Condron* case[170], the Court made clear that only with the application of strict criteria may adverse inferences be drawn from the defendant's silence. Already in 1995 the United Nations Human Rights Committee expressed its concerns that with the Criminal Justice and Public Order Act of 1994, the United Kingdom extended the scope of its regulation restricting the right to silence – which had originally only applied to Northern Ireland – and in the Committee's opinion this violated several provisions of Article 14 of the Covenant.[171] When they took the position that silence may not be considered as a circumstance indicating the guilt of the accused, it was probably a concern for the future of the right to silence that motivated the drafters of the Statute of the International Criminal Court as well.[172] But the fact is that there are attempts in national law and judicial practice to curtail the right to silence. Those who exercise their right to remain silent have to be prepared to pay a price. International human rights bodies will – I am afraid – in the future have the opportunity to express their opinion on just how high this price may go.

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170 *Condron v United Kingdom* 35718/97 (02/05/2000), Reports of Judgments and Decisions 2000–IV.

171 *United Kingdom of Great Britain and Northern Ireland.* 27/07/95. CCPR/C/79/Add.55; A/50/40, par. 408–435. Available at the UN's human rights webpage *http://www.unhchr.ch.*

172 Article 67 (1) *g*): The accused has the right to "to remain silent, without such silence being a consideration in the determination of guilt or innocence."