

Right to silence

Introduction

- As a rule, witnesses are compellable to answer questions put to them in court.
- However one exception to this rule is the privilege from self-incrimination, which means that suspects are not required to give evidence or answer questions put to them.
- However, while in countries such as the USA the right to silence is absolute, since the introduction of the **CJPOA 1994** this right in the UK has been severely curtailed, allowing 'proper inferences to be drawn by a suspect's failure to disclose facts to the police which they later rely on (**s.34**), failure to testify at court in their own defence (**s.35**), failure to provide explanations for incriminating objects, substances or marks (**s.36**) and failure to provide an explanation for one's presence near the scene of a crime (**s.37**). These provisions have drawn widespread criticism right across the legal profession.
- While the jury may be able to draw inferences from silence, some claim that the right of silence still exists within the UK because it is not a crime to remain silent (Lord Chief Justice in Cowan 1996).
- Despite this, before the introduction of the **1994** legislation, the prospect of inferences being drawn from silence gained massive opposition from **The Bar Council**, **The Law Society**, **civil liberties groups** and many others.
- Many argued that the reforms would lead to false confessions being made, and the prospect of juries attaching too much significance in a case to the defendant's silence.
- However the Conservative government pressed ahead with the legislation which has been attributed to a crime control agenda adopted by the party at the time.
- Indeed, those who support this agenda would argue that innocent people can only gain from assisting the prosecution.
- But it cannot always be this straightforward, particularly where answering police questions before trial is concerned.

Section 34

- Section 34 allows the jury in some circumstances where a suspect fails to give facts to the police which he later relies on in his defence.
- For the crime control minded, this is a common sense provision since only the guilty should have anything to hide, and there is a public interest in getting as much information as possible in order to convict the guilty.
- In support of the law it can be seen of fulfilling one of its objectives to an extent. Research in 1998 by **Phillips and Brown** showed that 84% of suspects were now answering police questions, up from 77% before the legislation.
- Furthermore, a major concern was the amount of ambush defences where the defendant would not give his version of events until the trial.
- Furthermore, allowing inferences is just common sense and in reality is just what juries would do anyway behind closed doors.
- But critics point to the fact that for the most part, the mere suspicion of guilt can make them feel highly uncomfortable. Coupled with the fear of being forced to give an ambiguous answer which could be used as evidence towards a charge, the erosion of the right in these circumstances is clearly a erosion of civil liberties.
- While the ECtHR has declared that the right to silence lies 'at the heart' of **Art.6**, they have declared that it is not an absolute right (Condron v UK).
- But this does not give the courts a free role to find suspects guilty because of their silence.
- **S.38(3)** provides that a conviction cannot be made solely on inferences drawn from guilty.
- The ECtHR in Murray v UK placed emphasis on this section, further declaring that a conviction cannot be based 'solely or mainly' on silence.
- However the court made clear that allowing adverse inferences to be drawn in some situation does not violate **Art.6**.
- But in which situations will drawing inferences be acceptable?
- This is one big question that the courts have had to get to grips with.
- In Argent, the court set out six safeguards which must be fulfilled before the jury could draw inferences. One of these is that an inference should only be drawn if the suspect failed to mention a fact that 'he could have reasonably been expected to mention' in the circumstances existing at the time.
- This however can be a major problem where legal advice is concerned.

Legal Advice

- Firstly, not everyone receives proper legal advice in the first place for a variety of reasons.
- Research conducted by **Sanders and Bridges** showed that police officers actively use techniques in order to discourage access, such as reading the suspect's rights too quickly or failing to mention that it is free.
- Furthermore, for innocent suspects, the environment of the police station can be pretty daunting and many will just want the ordeal to be over as quickly as possible.
- **Zander** quotes **LRSC** research which shows that one in five suspects decline legal advice solely to prevent the delay.
- However, perhaps more controversially, inferences can sometimes be drawn even when a suspect has got a legal adviser who has told them to remain silent.