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Comparative Law Perspectives

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This book is dedicated in loving memory to Paul and Leanne.

Preface

This book is about the complex balance between effectiveness of law enforcement, in bringing wrongdoers to justice, and ensuring fairness to a criminal defendant. From my experience as a criminal law practitioner, I was concerned and intrigued by a perception that these two objectives may be mutually exclusive. In particular, the book focuses on the significance of maintaining the balance between limiting and protecting the right to silence and the right against self-incrimination in transnational proceedings. This spotlight came about as the result of an initial comparison I undertook of coercive measures in Denmark and Australia, which revealed that the greatest divergence between the uses of such measures in the two systems was the manner in which the rules regulating the right to silence functioned in administrative investigations. In addition, while talking to criminal justice practitioners involved in transnational cases, I learned of the potential difficulties that may arise in relation to differing approaches to the right to silence, for example, when the investigative and prosecution authorities want to question a suspect abroad and must decide as to which state's rules should apply. By ensuring there is a proper foundation of fair trial rights in the national systems, which accords with minimum standards under international human rights law, the admissibility of evidence across borders is maximised, leading to more effective criminal prosecutions.

The book is largely the result of my research towards a PhD qualification. Being in the somewhat unusual position of having 'grown up' as a common lawyer and finding myself in a foreign setting, I set about the formidable task of immersing myself in the Danish system and trying to come to terms with the many alternative viewpoints on the criminal law that I observed. It is my hope that I have been able to shed some light and understanding on the complexities and uniqueness of transnational cases, for the benefit of criminal justice practitioners, the judiciary and policy makers alike—across systems and traditions. I have attempted to state the law as of 1 July 2015.

This book would not have been possible without the support and assistance of many others. First and foremost, I would like to thank the Department of Law and staff at the University of Southern Denmark. In particular, I wish to express my gratitude to my PhD supervisors, Professor Thomas Elholm and Associate Professor Birgit Feldtmann, for their ongoing direction and support and for helping me to demystify Danish criminal law. I would also like to thank the Law Faculty at the University of Tasmania, where I was temporarily based as a guest researcher. I defended my PhD in Odense in May 2014 and I thank the members of the assessment committee, Professor John Jackson of the University of Nottingham and Associate Professors Anette Storgaard and Bugge Thorbjørn Daniel of Aarhus University and the University of Southern Denmark, respectively, for a challenging and constructive process. There are many others along the way who expressed their interest in my research and shared their many good ideas, including academics, prosecution lawyers and other practitioners from various corners of the globe. From amongst them, I would particularly like to thank Mr. Bruce Gardner for his dedicated guidance and friendship.

Finally, this research would not have come to fruition without the continued support and help of family and friends, both in Denmark and Australia. Most of all, I give thanks for the love and devotion of my husband, Frank, and our two lovely children, Felix and Oliver—it was tough on all of us.

Aarhus, Denmark Fenella M.W. Billing
May 2016

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Abstract Is it fair to use international cooperation to obtain evidence of a confession or the suspect's silence in one legal system and use it at trial in another? This is an important question that relates to the problem of maintaining a balance between the effectiveness of law enforcement, on the one hand, and effective defence rights, such as the right to silence, on the other, in transnational criminal proceedings. Procedural differences between legal systems may mean that the international cooperation process disrupts the continuity of law between the investigative and trial phases in a national criminal proceeding that relies on confession evidence or evidence of silence obtained abroad. The differences between legal systems may be more obvious and detrimental when cooperation in the gathering of evidence takes place between countries that are applying different minimum standards of human rights protection, where they come under different human rights frameworks. This chapter introduces these central ideas and concepts and explains how comparative law, primarily based on the functional method, will be used to examine them.

An English Court of Appeal case presents a scenario that illustrates the problem of balancing the right to silence in transnational proceedings, as follows: Two men are offered £300 to take a car from England to the Netherlands. On the return journey they are stopped at a frontier port in Belgium. The men are taken into a customs office while their car is searched. It is found to contain 5 kg of amphetamines and nearly 10,000 LSD tablets, with a total street value of over £100,000. An investigating magistrate instructs the customs officer to interview one of the men through an interpreter and to take him to the court the next morning. During the interview the interpreter keeps a written record of the person's answers. It contains statements made by him to the effect that he has no idea who owns the drugs. Evidence of the interview is later presented at his trial in England and the accused concedes that these statements were lies. On the accused person's behalf an objection is raised in relation to the interview. The interview had been conducted properly and in accordance with Belgian law. However, had the interview been conducted in England, a number of the investigative steps taken would have been in breach of English codes of practice. In particular, no caution had been administered and the

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accused had not been advised that he could have a legal representative present during the interview[1].

1.1 A Problem of Balance

Is it fair to use international cooperation to obtain evidence of a confession (or evidence that turns on the suspect's right to silence) in one legal system and use it at trial in another? This was the question that the English Court of Appeal had to decide when the case of *R v Konscol*[2] eventually went on appeal. The Court of Appeal agreed with the trial judge's decision to allow the evidence. The Court found that the procedure was fair and that by using the evidence obtained abroad in an English trial there was still a just balance between the effectiveness of the law enforcement aims involved and the rights of the accused.

This case serves to illustrate the difficulties that may be involved in cross-border transfer of evidence for trial in another system. However, in the 20 years that have followed since Konscol's case was decided in 1993, following the lead of the European Court of Human Rights (ECtHR), there has been a shift in the approach to certain pre-trial due process rights, such as the right to silence and the right against self-incrimination. Today, some of these procedural rights are considered to be so fundamental that evidence obtained in breach of them will be inadmissible. Nevertheless, the same scenario may be envisaged today, even within the EU, as a result of differences in national procedural rules.[3] This may be a particular risk due to a general increased use of international cooperation instruments to gather evidence in transnational criminal cases.

As mentioned in the Konscol case, there has to be a just *balance* between law enforcement interests in bringing wrongdoers to justice and the fair trial rights of the accused, such as the *right to silence*.[4] At the core of the problem is the question of balance between effectiveness of law enforcement and fairness to a suspect or accused. The main assumption of this work is that the overall regulation of this

[1] *R v Konscol* [1993] Crim LR 950.

[2] *R v Konscol* [1993] Crim LR 950. See Chap. 7, Sect. 7.3.1.2 for a full discussion of the case.

[3] In Belgium today, for example, a suspect has the right to remain silent (including the right against self-incrimination) and the right to access a legal representative prior to questioning—though not within the first 24 h of police custody, when questioning may take place. There is no legal obligation on the police to inform a suspect of these rights. This is despite the possibility of legal consequences following from remaining silent. There is a right to be informed that their statements may be used as evidence in court: Cape et al. (2010), pp. 78–80 and 86; European e-justice portal, Rights of defendants in criminal proceedings, Belgium; see also (ECtHR) *Stojkovic v France and Belgium*, Application no. 25303/08, 27 October 2011.

[4] See Thunberg Schunke (2004), p. 37, where the problem of balance between law enforcement interests and the interests of an accused was also one of the perspectives taken in examining international cooperation instruments.

balance generally relies on a *continuity of law* between the investigative and trial phases of a national criminal justice system.

This is a problem that may be viewed from three perspectives: national, transnational and international. Looking at the problem from the *national* perspective, this work seeks to establish that there is continuity between the investigative and trial phases in the law that limits or protects the right to silence in the legal systems of Denmark, England and Wales and Australia. Some national laws are used to limit rights. Other laws create safeguards which enable a suspect or accused to knowingly participate in the criminal justice process, to protect against abuse and restore balance. Sometimes, where rights are limited in the investigative phase of criminal proceedings, safeguards are in place in the trial phase and vice versa. This is the way in which a national system may be built-up in order to regulate the balance between effectiveness and fairness.

Having examined the nature of the balance between effectiveness of law enforcement and fairness to the accused in the national perspective, from a *transnational* perspective, the question is to determine whether it is fair to transfer, for example, confession evidence between different legal systems. Thus, this work looks more specifically at the implications of continuity of national law for transnational criminal cases. Transnational crime is having a growing impact on law enforcement, particularly in regions with open borders, such as the EU. International cooperation is now a standard tool for fighting cross-border crime, particularly organised crime, within the EU and beyond. However, is it always possible in transnational cases to gather confession evidence or evidence of silence under one set of rules and transfer it for use at trial in another system, without disrupting the national balances between limiting and protecting the accused's right to silence and thereby creating unfairness? Problems in relation to jurisdictional 'cross-admissibility' of evidence may arise when evidence of a suspect's confession or silence has been obtained in a manner that is considered to be irregular or unlawful by the trial courts in the requesting state. In transnational cases this may mean that a suspect misses out on rights in the transfer process.[5] This may be due to a perceived inconsistency between the way the evidence has been gathered and the way in which fundamental rights, such as the right to silence, are expressed in the national law of the trial jurisdiction. As a result, the right to silence and the right against self-incrimination may be diluted or undermined.

Within a national legal framework, the circumstances in which evidence is obtained during the investigation may trigger a particular legal response to the manner in which that evidence can be received at trial. Therefore, the circumstances of an investigation may determine the manner in which evidence is received and used at trial. Another question is, therefore, how can we maintain the national balance between effectiveness in obtaining confession evidence or evidence of silence and fairness in protecting the right to silence, when transferring evidence across national borders? Additional measures in transnational proceedings may be required.

Finally, the problem of the fairness of transferring confession evidence (or evidence of silence) across borders may be viewed from a vertical, *international*

[5] See also Bantekas and Nash (2003), pp. 367–369.

perspective. Decision making bodies under international and regional human rights frameworks, such as the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), set minimum standards for human rights protection. What is the effect of applying the same minimum human rights standards within the frameworks of either the ICCPR or the ECHR in relation to the right to silence on the process of international cooperation? If states are applying the same minimum standards the transfer process may be fairer and, thereby, more trusting and effective. The application of varying standards within different human rights frameworks, different national legislative structures and with differences in the pervading culture of cooperation may create fundamental divergences between systems, in the way in which the national balance between effectiveness and fairness is regulated. Being a part of the same human rights framework may minimise the risk of disrupting national balances and creating unfairness. This work also aims to reveal the nature of the relationship between minimum standards for human rights protection and international cooperation.

1.2 The Right to Silence and the Right Against Self-Incrimination

This work looks at the balance between limiting and protecting the right to silence—a composite fair trial right, which may be taken to include the right against self-incrimination. Along with other defence rights, the right to silence and the right against self-incrimination are considered central to fairness in criminal proceedings—without fair trial processes, other abuses of power cannot be challenged.[6]

The importance of a fair trial to notions of justice can be traced back to early philosophical discussions and the first national rule of law documents, such as the English Magna Carta of 1215 and later in the revolutionary texts of the 1689 English Bill of Rights, the 1789 US Constitution and Declaration of the Rights of Man, and the 1789 French Declaration of the Rights of Man and of the Citizen.[7] Today, the right of an accused person to a fair trial is guaranteed nationally by the constitutions, statute, criminal codes and common law of almost every country in the world.[8] The right to silence, including the right against self-incrimination, has developed in international and national law as an important aspect of the right to a fair trial. Nevertheless, despite its centrality the right to silence is approached in different ways in different national legal systems.

[6]Moeckli et al. (2010), p. 304.

[7]See Moeckli et al. (2010), pp. 18–24; Breay and Harrison (2015); and see the texts of the 1689 English Bill of Rights and the 1789 Declaration of the Rights of Man published online by the Yale Law School's Avalon Project, see Yale Law School (2015b) and (2015a), respectively.

[8]Cape et al. (2010), p. 7.

Countries from the civil law jurisdictions, such as Denmark, tend to view issues about the right to silence as forming a part of the right against self-incrimination. For example, the need to caution a suspect about the right not to say anything in response to questioning by the state is categorised as an aspect of the right against self-incrimination; a prohibition that generally applies to documents as well.[9] However, common law jurisdictions tend to focus on the right to silence. For example, a witness's 'privilege' against self-incrimination may have been extended to other types of information, such as documents, due to the procedure of in-court production of documents, where witnesses are subpoenaed to 'give evidence and produce' items to the court. In common law, there is some uncertainty whether a privilege against self-incrimination, in fact, exists in relation to documents—uncertainty which has been compounded by lack of clarity in the jurisprudence of the ECtHR dealing with the scope of the rights.[10] For the reasons explained below, throughout this work, the right against self-incrimination is presented in the context of suspect and accused persons' statements, forming a part of the right to silence.

1.2.1 Protecting the Right to Choose to Speak or to Remain Silence

As part of the right to a fair trial, the right to silence is viewed as a composite right that is made up of a number of more specific rights, which serve to protect the suspect or accused person from abusive coercion and aim to preserve human dignity. The right to silence does so by protecting the suspect or accused's right to choose whether or not to speak to the authorities and enabling him or her to knowingly and willingly participate in his or her own defence.

In particular, the most relevant aim of the protection of the right to silence is to ensure that the suspect or accused is not compelled to make self-incriminating statements when giving an account of the facts, for example, in an oral or written statement in response to police questioning. Thus, by allowing a suspect to *choose whether to speak* to the police (and to provide the evidence upon which he or she may be convicted) or to remain silent, evidence is not gathered in defiance of the *will* of the suspect or accused person through physical or psychological coercion. In addition, by avoiding the gathering of unreliable evidence, these principles contribute to preventing a miscarriage of justice in a criminal case. Along with other fundamental guarantees such as the presumption of innocence and equality of arms in participating in criminal proceedings, these rights contribute to the overall aim of fairness in criminal proceedings.

[9] See §752(1) of the Danish Administration of Justice Act and §10 of the Coercive Measures Act. See further Chap. 3, Sects. 3.5.1 and 3.7.2.

[10] See Emmerson et al. (2012), pp. 616–620.

1.2.2 The Right to Withhold Self-Incriminating Information as a Part of the Right to Silence

In this work the right against self-incrimination is seen as part of the right to silence. The right to silence is centred upon the will of the suspect or accused to choose whether to speak or remain silent. Clearly, it covers the right not to say anything at all. However, this overall choice also inherently covers the decision to speak, which in turn involves a decision about what to say and whether or not to incriminate oneself. Therefore, the right against self-incrimination forms a part of the broader right to silence.[11] However, this is not the complete picture. While the right to silence is broader because silence and all types of statements are protected (including statements of innocence and self-incriminating statements), the right against self-incrimination may be broader in terms of the types of information sources that are protected, including statements as well as documents and other real evidence that exists independently of the will of the accused.[12]

One reason why it may be difficult to define the right to silence and the right against self-incrimination and their relationship to each other is that the rights have not had a clear lineal development together, but have evolved in response to various influences at different times. The precise origins of a right against self-incrimination may be traced back to ancient Christian and Talmudic writings.[13] There are also various links to the development of both the rights in common law, starting with the development in medieval canon law of the maxim *nemo teneter prodere seipsum* (meaning that no one should be required to bear witness against themselves) and the accompanying move against interrogation under oath. In addition, the extension in the late 1700s of the witness privilege rules, firstly to witnesses in *criminal* proceedings, and then to the accused in the mid-1800s, also had an effect on the definition of the rights. Moreover, the rights in common law were influenced by the changes in the status of the criminal defendant from the 1600s, as an undefended person who had restricted rights to call witnesses and who

[11] See (HL) *R v Director of the Serious Fraud Office, Ex p. Smith* [1993] A.C. 1, 30–31; (ECtHR) *John Murray v. The United Kingdom*, Application no. 18731/91, 8 February 1996, [32]; but see Brøbech (2003), p. 164, in which the author suggests that the right to silence is a part of the right against self-incrimination.

[12] Trechsel and Summers (2006), p. 342; see also Jackson and Summers (2012), p. 249, where it is argued that one of the downfalls of the ECtHR's jurisprudence in this area is that the cases refer to both rights as if they are one and the same; see, for example, the ECtHR's admissibility decision in *H and J v The Netherlands*, Application nos 978/09 and 992/09, 13 November 2014, [69] where the court refers to the primary concern of the right against self-incrimination being to respect the will of an accused person to remain silent yet goes on to explain that it does not extend to preventing the use in criminal proceedings of material obtained under compulsion which exists independently of the accused's will, such as documents and other forms of real evidence. This paragraph would have been more clearly understood had they separated the two rights and found that the right to silence did not protect against such use of real evidence obtained under compulsion.

[13] Jackson and Summers (2012), p. 241.

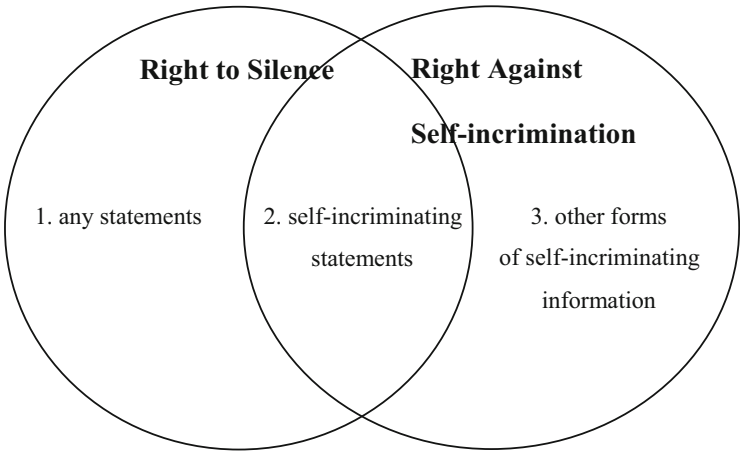

Fig. 1.1 The overlap between the right to silence and the right against self-incrimination

was only allowed to make unsworn statements, to the mid to late 1800s, when the defended accused became a non-compellable witness who was competent to give sworn testimony.[14] On the Continent, the self-incrimination principle has for a long time been a focal point of inquisitorial criminal procedure. This patchwork development of the right to silence and the right against self-incrimination may account for why the rights, when viewed separately and together, are deeply interrelated yet different in certain aspects.[15]

As Trechsel and Summers suggest, perhaps the relationship between the right to silence and the right against self-incrimination is best described as two overlapping circles, as illustrated in Fig. 1.1.[16]

First, the right to silence protects everyone's right not to make a statement or to make any kind of statement about him or herself (including a statement about innocence) and is broader than the right against self-incrimination in this respect. The suspect or accused is commonly cautioned prior to police questioning (or examination), "...you do not have to say anything."[17] Although there may be a civic duty for witnesses to assist in the disruption, prosecution and prevention of crime (and a general requirement to answer a summons to testify in court), even witnesses cannot be forced to speak to the police about private matters relating to

[14]See Helmholtz et al. (1997), pp. 6–8, 84–89, 107, 148–153 and 185–201; Langbein (2003), pp. 107, 178, 254–257, 268, 278–279 and 281; Bentley (1998), pp. 147–149; and see *R v Warickshall* (1783) 1 Leach 263, 263–264 [168 ER 234].

[15]See further Jackson and Summers (2012), pp. 241–243.

[16]However, Trechsel and Summers (2006) refers to the right to silence as protecting acoustic communication rather than statements: 342; see further Jackson and Summers (2012), p. 249.

[17]See the discussion about the *Miranda* warning in Jackson and Summers (2012), p. 244.

themselves.[18] Therefore, the right to silence acknowledges human dignity and everyone's right to keep information about him or herself private, especially when the state seeks their participation in the criminal justice process. The actions of the state in procuring the suspect or accused's participation in criminal proceedings may be the divide between the right to silence (as a fair trial right) and other related rights and freedoms such as privacy and freedom of expression.[19]

Second, within the right to silence, additional protection is provided against making self-incriminating statements. This is the area in which the right to silence *overlaps* with the right against self-incrimination. Here protection of the suspect or accused person—a person who has been engaged by the state in the criminal justice process—against making self-incriminating statements is given extra weight.[20] This means that police questioning should be prevented until certain safeguards are in place. The only effective way of ensuring that a suspect or accused person is guaranteed the right not to incriminate him or herself is by ensuring a right not to say anything at all. Otherwise, a suspect's selective answers would obviously work against him. In addition to respecting the will of the suspect or accused to speak or remain silent, the need for special protection against making self-incrimination statements is also a ground for 'cautioning' the suspect or accused. Witnesses under subpoena who may be compelled to give evidence in a criminal trial under the control of the court are also protected against self-incrimination. Otherwise, it may be a difficult task to bring any witnesses to court in the proof process.

Third, unlike the right to silence, which only deals with statements, the right against self-incrimination may also protects the suspect or accused (and witnesses in court) from being required to produce other sources of self-incriminating information, such as documents, data, fingerprints, DNA or other bodily samples without grounds. For example, subject to the principle of proportionality, the right against self-incrimination may protect against the state compelling the suspect under pain of punishment to come forward with evidence, such as documents, where there are otherwise insufficient grounds to obtain a warrant.[21] Therefore, the right against self-incrimination may be considered the broader of the two rights in this respect.

[18]Witnesses are generally compellable to give trial testimony in the controlled atmosphere of the courtroom—otherwise it would be extremely difficult to prove any criminal case beyond reasonable doubt. A witness may be a co-accused when his unwillingness to assist indicates a level of involvement in a crime by being an accessory after the commission. See further Jackson and Summers (2012), p. 249.

[19]But see Jackson and Summers (2012), p. 249.

[20]Jackson and Summers (2012), pp. 275–277.

[21]See, for example, [ECtHR] *Funke v France*, Application no. 10828/84, 25 February 1993; *JB v Switzerland*, 31827/96, 3 May 2001; *Weh v Austria*, Application no. 38544/97, 8 April 2004 and the discussion about this case in Chap. 2, Sect. 2.3.2.4. But see Gans and Palmer (2014), p. 289, citing *Sorby v The Commonwealth* [1983] HCA 10, [8], to say the privilege against self-incrimination under common law and uniform evidence law in Australia only extends to 'testimony'. See further Easton (2014), pp. 194–197, about the suspect's body as a source of evidence.

The distinction between the right to silence and the right against self-incrimination can also be demonstrated by the decisions of the ECtHR. A violation of art. 6 has been found by the ECtHR in two types of cases: first, where *criminal proceedings are pending or anticipated*, and compulsion has been used to obtain potentially *self-incriminating information* from the suspect, including statements and 'real evidence' sources of information such as documents[22]; second, where *incriminating information in the form of statements only*, which has been obtained under compulsion at a time when there are *no criminal proceedings on foot*, is used in subsequent criminal proceedings.[23] In the second situation, the protection afforded by the right to silence and the right against self-incrimination does not appear to apply to the use in subsequent proceedings of real evidence previously obtained under compulsion. In other words, where no criminal charges are anticipated at the time compulsion is used, for example, under compulsory powers in an investigation by an administrative authority, documents or other real evidence sources of information may then be used in subsequent criminal proceedings; where any statements obtained under compulsion may not. Therefore, a suspect or accused is given extra protection against making self-incriminating *statements*.

In international case law, the reason for the distinction in the level of protection afforded has not been made clear.[24] However, the most obvious difference between statements and real evidence is that real evidence is tangible and capable of independent examination, such as forensic testing. In this sense, it is independent of the "...will of the accused." Real evidence is, therefore, perhaps more trustworthy and less open to manipulation by physical or psychological compulsion. Today, subject to human error in the lab and its complicated nature, DNA evidence is particularly probative of a suspect or accused's identity. Fingerprint evidence may be even more probative of an accused person's presence at a crime scene, given its objective reliability and probative value. Real evidence, such as documents and DNA, is often obtained by the police under the court's supervision by means of a warrant system. If not by consent, then it is commonly accepted that fingerprints can be obtained by force, without destroying the reliability of the evidence. On the other hand, due to the unlikelihood that a person will make a false confession,

[22][ECtHR] *Weh v Austria*, Application no. 38544/97, 8 April 2004 [42], which refers to *Funke v France* [44]; *Heaney and McGuinness v Ireland* [55–59] and *J.B. v Switzerland* [66–71]. Here, the case of *Weh* does not refer to the defiance of the will of the accused as being an element of the violation of the right against self-incrimination; but see Jackson and Summers (2012), p. 251, including fn 55.

[23][ECtHR] *Weh v Austria*, Application no. 38544/97, 8 April 2004 [43–45 and 50], referring to *inter alia* [GC] *Saunders v The United Kingdom*, Application no. 19187/91, 17 December 1996 [67]; *Allen v. The United Kingdom*, Application no. 76574/01, decision of 10 September 2002; and *Vasileva v Denmark*, Application no. 52792/99, 25 September 2003 [34].

[24]See Emmerson et al. (2012), p. 618; Jackson and Summers (2012), pp. 248–256 and 269–271; and see further [ECtHR GC] *Jalloh v Germany*, Application no. 54810/00, 11 July 2006, where the level of compulsion involved in administering emetics to force the suspect to regurgitate a packet of drugs was considered to be in breach of the prohibition against ill-treatment in art. 3 of the ECHR.

confession evidence is generally highly probative and the community interest in capturing it is high. Therefore the right to silence is central to defining pre-trial due process. these distinctions between statements and real evidence are significant and, therefore, between the right to silence and the right against self-incrimination in broader contexts. It is against this background that three is an important focus on the right to silence, primarily where it overlaps with the right against self-incrimination. In other words, in the present context, in discussing the transfer of confession evidence and evidence of silence across borders, the approach is that the right against self-incrimination is a part of the broader right to silence.

1.2.3 The Right to Silence and the Criminal Justice Process

At certain points, whether during an investigation or at trial, a suspect or accused person will be required by the state to participate in the criminal proceedings being brought against him or her. If what is being asked of the suspect or accused is that he provides an account of the facts, then the right to silence (including the right against self-incrimination) is the procedural right that protects the suspect or accused's choice of whether to speak out or to remain silent.[25] The state may call on a person to make such a choice, for example, when the police openly seek to interrogate or during the course of a trial. Alternatively, by the use of compulsory powers, the state may question a suspect in the absence of the right. Further, the choice of whether to speak or remain silent is also relevant when a suspect decides to talk to a person whom he believes is not an agent of the state, such as a family member, friend or business associate, and where the conversation may be the subject of covert surveillance.

In all the above examples, the purpose of the right to silence is the same—and it is closely connected to the presumption of innocence.[26] By protecting the suspect or accused's choice to speak or to remain silent, the burden of proof will always remain on the prosecution. A suspect or accused person is protected psychologically and physically against coercive and abusive questioning. As well as being protective, the right to silence may also be described as an enabling, participatory fair trial right, which ensures that the suspect or accused person's participation in the proof process of his own prosecution is on an informed, knowing and willing basis.[27] In turn, the reliability of potential suspect evidence is protected, as is the integrity of the criminal justice process as a whole.

[25]See further Jackson and Summers (2012), pp. 277 and following.

[26]See [ECtHR GC] *Saunders v The United Kingdom*, Application no. 19187/91, 17 December 1996 [68].

[27]Jackson and Summers (2012), pp. 241, 276–277 and 285 and following, in relation to defence participation; Jackson (2009), pp. 860–861.

Although the right to silence is a foundational fair trial right and central to any criminal justice system, the legal mechanisms that limit and protect the right to silence, and thereby ensure overall balance between effectiveness and fairness, are significantly different between legal systems. Therefore, it is highly relevant to emphasise the right to silence when considering the fairness of transferring evidence in transnational cases.

1.3 Methodology

This thesis is based on the hypothesis that there is continuity between investigative and trial procedures in the course of criminal proceedings in every legal system. The regulation of national balances between limiting and protecting the right to silence in transnational cases is a particular focus. As with the overarching right to a fair trial, the right to silence and the right against self-incrimination are ongoing rights and exist to protect and enable the suspect or accused person throughout the criminal proceedings. For example, the suspect's choice to speak to the police or to remain silent in the pre-trial phase has consequences for the way in which the evidence unfolds at trial. These consequences may be different depending on which legal system is under consideration. Therefore, in order to assess the fairness of transferring confession evidence or evidence of silence for trial in another system (the transnational perspective) and to examine influence of the international human rights frameworks on the cooperation process (the international perspective), a thorough examination of the right to silence and the right against self-incrimination in each cooperating system is necessary in order to discover the similarities and the differences. Such an examination will give way to an understanding of how the rights are structured in the national system and how they work in a trial in another system. Detailed examination of the rights in question in national law is the foundation for subsequent analyses about the fairness of relying on confession evidence or evidence of silence gathered abroad.

1.3.1 Comparative Analysis Based on the Functional Method

Comparative analysis based on functionality is the primary method by which the laws limiting and protecting the right to silence and their jurisdictional cross-admissibility will be considered. Zweigert and Kötz state that the basic methodological principle in comparative law is that of functionality.[28] Thus, the national laws that function to limit or protect the right to silence are of central focus to the question of the fairness of cross-border transfer of evidence. The types of investigative measures that are considered, which tend to limit the right to remain silent

[28]Zweigert and Kötz (1998), p. 223.

and relieve the prosecution of the burden of proof, include administrative compulsory information-gathering powers; interrogation of suspects; and covert surveillance. The national law that determines how the evidence gathered by these measures is used at trial is also relevant. This includes any national laws that consider the fairness of relying on the evidence obtained, such as rules about admissibility of evidence. Therefore, in line with the comparative legal theory of Zweigert and Kötz,[29] detailed reports of the law about the right to silence in each national jurisdiction under comparison, as well as the international human rights law under the ICCPR and the ECHR that forms the background to the national law and may influence its development, is presented.

From a horizontal, transnational perspective, the reports are the foundation for an analysis of what happens when the individual systems are forced to interact through the process of international cooperation in the gathering of evidence. In addition, the reports are used to examine the vertical, international perspective. It is a common assumption that the process of international cooperation in gathering usable (admissible) evidence is assisted by the *application* of common minimum standards in relation to fair trial rights. Common minimum standards reduce the gaps between national legislation and build trust among the cooperating states. In the EU, for example, the principle of 'mutual trust' in international cooperation in criminal matters is based upon the assumption that Member States are applying the minimum standards set by the ECtHR. In order to test such assumptions and define the role of international human rights instruments in the transnational transfer of evidence, the international reports will establish the minimum standards that are applicable in each national system under consideration. Of significance, the national reports will be used to examine whether these minimum standards are in fact being met.[30] Any residual unfairness in the national system as a result of an inadequacy in using safeguards may carry over to the international cooperation process.

However, as Bell states, any comparative analysis based on the functional method must inherently involve some consideration of the legal setting in which legal problems emerge.[31] No comprehensive comparative analysis using the functional method can completely avoid consideration of the operation of the rules in action in the conceptual setting of the system under examination. The explanation for some of the conclusions in this comparison have been found by looking at the underlying procedural tradition or structure of the systems more broadly.

[29]Zweigert and Kötz (1998), p. 43.

[30]But see Zweigert and Kötz (1998) where it is suggested that each individual system report should be neutral and free from criticism: 43.

[31]Bell (2011), p. 170.

1.3.2 The Human Rights Frameworks and Systems of Law Under Comparison

In examining the operation of national law that limits and protects the right to silence, the question of continuity between investigation and trial phases will be considered in relation to the jurisdictions of Denmark, England and Wales and Australia. According to the analysis of Van Hoecke and Warrington, the legal systems of Denmark, England and Australia would fall all within the one general legal family based on Western culture, all having European roots.[32] Common *legal culture* includes shared understandings on a number of paradigmatical elements, which may include: concept of law; theory about legal sources and legal interpretation; methodology of law; theory of argumentation; theory of legitimation of the law; and a common basic ideology.[33] Some of these elements may make what is referred to as legal tradition a part of legal culture.[34] When comparing the legal doctrine (the description and systemisation of the law) of different systems they conclude that, due to anthropological and sociological differences, a strict legal comparison is only possible within a single legal cultural family, such as the Western legal cultural family.[35] In addition, the authors consider the plurality of law and argue that a new, common European legal language is developing due to the "intersystematicity" forced by instruments and institutions of EU and European integration.[36]

Although writing primarily from a private law and civil procedure perspective, Zweigert and Kötz have found that there are four identifiable legal families in Europe: Romanistic, German, Nordic and the Common Law family, with its roots in the law of England.[37] Alternatively, Mattei suggests that in order to move away from a Western-centric classification of systems and achieve a more dynamic approach to legal families, legal systems should be grouped based on patterns of law.[38] He described three groups: first, rule of professional law, in which the legitimacy of law is neither political nor religious, but technical (this group includes most western democratic systems); second, rule of political law, in which the political process and the legal process are not autonomous (such as countries in

[32]Other legal cultural families may include Asian, African and Islamic: Van Hoecke and Warrington (1998), pp. 502–508.

[33]Van Hoecke and Warrington (1998), pp. 514–515; at 498 the authors refer to the definition by John Bell of legal culture as "a specific way in which values, practices, and concepts are integrated into the operation of legal institutions and the interpretation of legal text."

[34]On the relationship between legal culture and legal tradition see Glenn (2004), pp. 8–14.

[35]Van Hoecke and Warrington (1998), pp. 523 and following. At 533, the authors suggest that a purely technical comparison is only possible at a third level of comparison between systems within a family that have the same paradigmatical theories within the six areas mentioned above. It is not suggested that this is a purely technical comparison, or pure functionality; although it is primarily based on the functional method.

[36]Van Hoecke and Warrington (1998), pp. 527 and 533.

[37]Zweigert and Kötz (1998), pp. 68–69.

[38]Mattei (1997), pp. 11–12 and 19–44.