



The right to remain silent in UK and in USA

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A comparative study of the right to remain silent in UK and in USA and reflexion about the present and the futur of the right to remain silent.

The Right to Remain Silent in UK and in USA

Introduction

If you look American films or you speak with American people you will see the importance that they accord to Miranda rights and especially to the right to remain silent.

A special guide destined to be printed and put in the passport and to be shown to the custom officers when coming to USA is available on internet. It quotes the case law on the privilege against self-incrimination and on the right to remain silent.

But the right to remain silent, even if it's more developed in USA, exists in UK and in other countries also.

In UK

The important legislative act that regulating the police powers in UK is the Police and Criminal Evidence Act 1984 (PACE). This act was adopted after a case in which some teenagers confessed and then were charged with murder and some years later the police understood that they weren't guilty at all. So thanks to this teenagers was discovered the imperfection of the UK police system. They have suffered for others: the people who would be in the same situation in the future would benefit from the new act and normally shouldn't be accused wrongfully.

PACE extended police powers but also the rights of suspects.

Some other Acts came into force later and they extended even more the rights of police (The Criminal Justice and Public Order Act 1994 and The Serious Organised Crime and Police Act 2005).

All this acts contain the rules of what and when the police officer can ask a person when he conducts investigation and the precisions on when the person has to answer.

"Police officers are always free to ask members of the public questions in order to prevent and

detect crime, but members of the public are not obliged to answer such questions, nor to go to a police station or be detained at a police station unless they are lawfully arrested.”[1]

In the case *Rice v Connolly* (1966 – before the PACE so the Police Act 1964 was in force) there was a policeman who was walking in the region where several crimes have been committed in order to check if there are no persons who behave suspiciously. He saw then a man who behaved strange and came to this man with another police constable and asked the man where he was going, where he had come from, what's his name and address, but the man said he doesn't want to answer. Then he walked away and stopped in order to smoke. Policemen saw a cut on his finger and it made them even more suspicious. They came again near man and asked his name and address. This time man gave his name but not full (Rice) and the street where he lived without mentioning the exact address and refused to say more then that. The policemen asked then Rice to come with him to the police office but Rice said that he won't move and that if they want him to go there they have to arrest him. He was then arrested and convicted of obstructing a police officer in the execution of his duty. But in the appeal he was discharged of this conviction as the judge said that **nobody is obliged to answer questions and he had only moral and not legal duty to help a police officer.**[2]

But if you refuse rudely you can be convinced (case *Ricketts v Cox* in 1982).

There are a lot of other cases about the rights of police officers but they are mostly about the detention, the searches in the house, etc. and not about the right to remain silent.

The right to remain silent exists until the CJPOA of 1994 as a safeguard for people suspected of committing crimes.

This right gave a possibility for suspects to say nothing and the court could not suggest that this silence meant that suspect was guilty (with some exceptions).

It was introduced in PACE in 1984 and then abolished by the CJPOA in 1994 because it was thought that this right was too much in favour of suspects.

Since 1994 in the case when the suspect who is questioned under caution or charge **fails to mention the facts on which his defence will be based after, when he is silent during the trial, when after the arrestment he doesn't explain for example from where he has a blood on his jacket, when he doesn't explain what he made in that or that place, HIS SILENCE CAN BE INTERPRETED LIKE THE SIGN OF HIS GUILTINNESS.** [3]

BUT if the suspect didn't have a lawyer it can't be interpreted in such a way.

The case which reflects well the application of these criteria is *Regina v Argent* (1997). One man was beaten to death with a knife. Someone called to police in order to name the person who did that. This person was arrested and his lawyer said him that he would better keep silence but that “interferences adverse to him might be drawn at the trial” and so he said to his client to choose himself what to do. The defendant decided to keep silence. As several eye witnesses said that he had killed that man and as he said nothing, he was convicted with murder on the base of the criteria mentioned above. The Appeal was dismissed. [4]

The Convention of Human Rights

The right to remain silent is not expressly protected by the European Convention of Human Rights, but the European Court of Human Rights elaborated this right from the Article 6 (Right to a fair trial), which says:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law... Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”

There are some cases which illustrate the European Courts’ of Human Rights vision of the right to remain silent.

In order to show the role of the right to remain silent it’s interesting to see cases which contrast the struggle against terrorism and the right to remain silent.

***Murray v UK (1996)*:** Murray was Irish, arrested under section 14 of the Prevention of Terrorism (Temporary Provisions) Act 1989. That times the Criminal Evidence Order 1988 was applied in Northern Ireland, which set some exceptions to the right to remain silent for example if a suspect during the questioning by police doesn’t mention the facts he will use in defence during the trial it can be seen by court as a support to another facts that court has against him. So Mr Murray was informed about that and he decided to say nothing nevertheless. The solicitor was delayed and so he was questioned during more than 21 hours without to consult a solicitor. He said nothing to police not during the trial. He was then found guilty in the trial before the Lord Chief Justice of Northern Ireland, of the offence of aiding and abetting the unlawful imprisonment of M.L who was an IRA informer and sentenced to eight years because judge has drawn inferences from his silence. Mr Murray made Appeal and lost it. Then his case came to ECHR he said that the rights protected by the Convention were violated, especially his right to remain silent during the questioning by police and during the trial and that his silence was used by judges to find him guilty. He also mentioned that his right to have a solicitor was violated and it was disadvantage for him. There were several opinions on this case (by Amnesty International, etc.) but finally the court decided that the right to remain silent is not absolute and that he was prevented a lot of times that

his silence can be used to draw inferences and these inferences were not the only base for finding him guilty (and as the case was about terrorism the inferences weren't against convention as soon as there are other rights to a fair trial which were respected). But the ECHR agreed that the fact he had no lawyer in time was violating the concept of fairness of the trial and so this right guaranteed by ECHR was violated.[\[5\]](#)

P.S. In the overview of the protection of the right to remain silent in UK we have seen that normally the silence can't be interpreted like a sign of guiltiness if the suspect didn't have a lawyer. In this case Mr Murray had a lawyer but not in time. Maybe these two situations can be aligned and have the same effect.

There is another case about the right to remain silent v. the fight against terrorism:

Heaney and McGuinness v. Ireland and Quinn v. Ireland (December 2000): There were three Irishmen who were arrested on suspicion of serious terrorist offences. The police told them that they had a right to remain silent under the ECHR but that under the Section 52 of the Offences against the State Act they were required to give information about their movements at the time of the relevant offences. They didn't make that and were sentenced to six months of prison. They made Appeal based on the right to a fair process and the right not to incriminate themselves. The ECHR said that section 52 was violating the article 6 paragraph 1 and 2 of the Convention.[\[6\]](#)

USA

Justice Jackson in 1944 in *Aschcraft* case "agreed that the detention and questioning of a suspect for thirty-six hours is 'inherently coercive', so is custody and examination for one hour and arrest itself".[\[7\]](#) But he wasn't ready to say if the constitution prohibited "use of all confessions made after arrest because questioning while one is deprived of freedom is 'inherently coercive'" [\[8\]](#)

If in UK the right to remain silent is protected by a legal act, in USA it's protected today on a higher level, that one of the federal Constitution of the USA.

The right to remain silent is protected in USA by 5th amendment. It is not expressly mentioned in it but it comes out of the privilege against self-incrimination described in this amendment. :

Amendment 5 - Trial and Punishment, Compensation for Takings

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a

presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; **nor shall be compelled in any criminal case to be a witness against himself**, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”[\[9\]](#)

And so people often use in trial a phrase “I plead the Fifth” which means they want to use their right against self incrimination.

Right to have an attorney is protected by the 6th amendment:

Amendment 6 - Right to Speedy Trial, Confrontation of Witnesses[\[10\]](#)

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and **to have the Assistance of Counsel for his defence.**”

Right to remain silent and right to have attorney are, as we will see in the case law , connected together, as the person which doesn't know that she has the right to remain silent and which speaks without haven spoken to a lawyer can say things she would better not have said.

The interpretation of this 5th amendment was made by the U.S. Supreme in the *Miranda v. Arizona* case which was treated together with three other cases (*Vignera v. New York* , *Westover v. United States* and *California v. Stewart*) as they all had the same question of law which was : if the statements which were obtained from a defendant while he was questioned in custody (custodial interrogation is a “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way”[\[11\]](#)) and was deprived of his freedom of action in any significant way can be used against him in trial.

All four defendants were questioned for a very long time without having been consulted by a lawyer before and confessed and were convinced with the crimes.

Specifically speaking about Ernesto Miranda, he was convinced several times before and this time he was arrested and then was taken in custody to a police station and there a witness recognized him and then he was questioned for two hours and made a confession. It was mentioned that he made it voluntary and with knowing of his rights and of the fact that his confession can be used against him.

The judges in both jurisdictions (first instance and supreme court of Arizona) said he was guilty of kidnapping and rape.

The US Supreme Court said that as Miranda wasn't told that he had the right to have an attorney and to have him during the interrogations and he wasn't told neither that he's not obliged to

incriminate himself and so to tell something , **his statements shouldn't be used against him.**

The Court has made some general conclusions in base of this case and created so called **Miranda rights**. He also has fixed certain rules which must be respected during the interrogations but The Fifth Amendment right does not only apply during a trial. He fixed **Miranda warnings** – things that the police officer must tell the suspect (the enumerating of the Miranda rules) . However miranda rights are only *applicable after the arrest* and not before so everything a person have said without having been arrested can be used in trial as although a person not arrested is not obliged to speak with police and can leave if she wants, the police won't tell her that.

The Supreme Court stated^[12]:

- 1) "The prosecution **may not use statements**, whether exculpatory or inculpatory, **stemming from questioning** initiated by law enforcement officers **after a person** has been taken into custody or otherwise **deprived of his freedom of action in any significant way**, unless it demonstrates the use of **procedural safeguards** effective to secure the Fifth Amendment's privilege against self-incrimination.
- Unless **adequate preventive measures** are taken to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.
- **The privilege against self-incrimination**, which has had a long and expansive historical development, is the essential mainstay of our adversary system and **guarantees to the individual the "right to remain silent unless he chooses to speak in the unfettered exercise of his own will,"** during a period of custodial interrogation as well as in the courts or during the course of other official investigations.
- The person in custody **must**, prior to interrogation, **be clearly informed** that **he has the right to remain silent**, and that anything he says will be used against him in court; he must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation, and that, if he is indigent, a **lawyer will be appointed to represent him**.
- **If the individual** indicates, prior to or during questioning, that he **wishes to remain silent, the interrogation must cease**; if he states that he wants an attorney, the questioning must cease until an attorney is present
- Where an **interrogation** is conducted **without** the presence of an **attorney** and a statement is taken, a heavy burden rests on the Government to **demonstrate that the defendant knowingly and intelligently waived his right to counsel**.
- Where the individual answers some questions during incustody interrogation he has not waived his privilege and **may invoke his right** to remain silent **thereafter**.
- The warnings required and the waiver needed are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement, inculpatory or exculpatory, made by a defendant.
- 2) The limitations on the interrogation process required for the protection of the individual's constitutional rights **should not cause an undue interference** with a proper system of law

enforcement, as demonstrated by the procedures of the FBI and the safeguards afforded in other jurisdictions.”

What are the miranda warnings?

- You have the right to remain silent.
- Anything you say can be used against you in a court of law.
- You have the right to have an attorney present now and during any future questioning.
- If you cannot afford an attorney, one will be appointed to you free of charge if you wish.

There is no strict formulation of miranda warnings but in some states there is a question after each of warnings listed above – “ Do u understand?”

The warnings must be said in the language which the suspect understands. So if he doesn't understand English, an interpreter must be invited.

The right to remain silent is absolute in USA, contrary to UK, where some limits mentioned above exist. **No inferences can be drawn from accused's silence**. The decision in 2010 precised this right in *Berguis v Hopkins*.

New changes are going to come maybe with the Obama presidency.

The Obama administration plans to ask the Congress to change the constitutional rights of persons taken in custody in the frame of the struggle against the terrorism.

And a new judge appointed by Obama says that the right to remain silent shouldn't be tacit and so the person must say expressly that she wants to keep silence in order to do this.

Some considerations about the present and the futur of the right to remain silent

- Is the right to remain silent a good right?

It seems to be a good right for guilty people as it is more easy for a defense lawyer to defend somebody who hasn't incriminated himself yet or hasn't confessed.

It's also a good right for innocent people as law-abiding citizens often think that the best thing is to say the truth and that truth will set them free. They feel compelled that it will be then evident to police that they are innocent and so they will be released. It's not true. Some things can make the police officers suspicious, they begin to ask more and more questions and the person begins to flounder in the testimonies. The police influenced atmosphere makes this even more possible.

But from other side the police offices get suspicious when a person decides to keep silence. You cannot be arrested just because you refused to answer questions but the police can arrest you for other reasons. They think that she has something to hide and begin to investigate more about this person. For exemple, the police will find that this man has a gun so maybe it was he who killed this woman.

In some cases the use of the right to remain silent **can provoke the impunishment**. The good exemple is that of Miranda himself, who afterwards was the victim of the right his case created. He had a second trial and was nevertheless found guilty even without the use of his confessions and then after 11 years he was free. He was stabbed to death in a fight and the killer wasn't convinced as he used his right to remain silent and there were no prooves nor witnesses against him.

In France it's exactly for this reason that the right to remain silent exists but the person is not notified that she has this right.

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- Is the right to remain silent useless? Does it need some perfections?

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What is the goal of the right to remain silent and the interdiction to draw interferences from the silence? To protect against wrongful convictions? But today there is still so much people who were wrongfully convinced and who then come out 10,30 years later and start finally to live. The newspapers speak often about that.

The only thing the people can have is to win compensation.

The "Britain's Supreme Court, ruling in a case from Northern Ireland, has made it easier for people wrongly convicted of crimes to win compensation.... It held that compensation was due if newly discovered evidence would have made it impossible to convict. The old standard required the victim to prove his or her innocence."[\[13\]](#)

The United States Supreme Court said in *Raffel v. U.S*[\[14\]](#). that when the suspect begins to cooperate and answers questions or helps to make searches before being arrested (P.S. Miranda rights are not read before the arrest) , he can't invoke his right to remain silent after and must continue to cooperate.

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The police can question you even before to read Miranda Warnings if it concerns the immediate

safety of other people. And the answers to these questions can be used against the person.

Another question is to know how the suspect would prove he wasn't mirandized if there was only one police officer to arrest him and there were no witnesses.

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Finally, 75 % of suspects give up their right to remain silent and speak and answer to the questions.

The right to remain silent should then be expanded or , better to say, improved as it's far to be perfect.

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