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Scots Criminal Law and the Right of Silence

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Introduction

The extent to which the police are restrained by law in their dealings with a suspect is and always has been a sensitive matter in practice. The Criminal Justice (Scotland) Act 2016 (asp 1) consolidated the relevant law.[1] In plain terms, in Scotland on arrest a suspect need not say anything to the police, beyond providing some personal details. That limited requirement seems reasonable in a jurisdiction that does not require the production of an identification card on demand by anyone in authority and silence beyond that carries no penalty or adverse judicial comment.

The substantial differences between the law in England and Wales, and separately in Scotland, on evidence of admissions and the procedure around the right of silence afforded in degrees to an arrested person, is arguably an example of the legislative and judicial pluralism of the centralised State of the United Kingdom.[2] The modern statutory basis of English law and Scots law differ widely in detail and in context.[3] This short survey of the new law in Scotland is intended to introduce the 2016 Act to be applied in place of previous statutory provisions. It is likely that the new law will be challenged in due course in appeals. The law in Scotland is examined to confirm the underlying policy of the legislation as to silence by an accused.

A recent study in English law of the legal concept of the right of silence has regard to a wide range of legal authorities from elsewhere in the world and yet, disappointingly, makes no

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[1] The 2016 Act came into force substantially on 25 January 2018: see the Criminal Justice (Scotland) Act 2016 Commencement No. 5, Transitional and Saving Provisions) Order 2017 (SSI No. 345 (C.25)).

[2] The law of Northern Ireland seems in essentials to be the same as that of England and Wales.

[3] *R v Manchester Stipendiary Magistrate* ex parte *Granada Television Limited* [2001] 1 AC 300 HL.

reference of note to Scots law.[4] The statutory authorities regulating police station practice are different in Scotland from those in England and Wales, and the effect in law varies consequentially. It follows that in practical terms the administrative forms, terminology and fluctuating ambience of police station practice varies between the jurisdictions.[5]

The right to silence in Scots law has been consolidated by the 2016 Act. An arrested person must identify himself or herself, beyond this there is a right of silence. The concept of legal silence requires consideration through from police station practice to court given the continuous nature of the process.[6] This paper sets out the comparatively new statutory authorities in regard to the right to silence by a suspect at interview in a police station and follows the extent of that right in the context of any criminal trial where different procedural considerations apply. It will be seen from the authorities discussed that the right of silence as understood at interview with the police is not to be regarded as continuing as such at a criminal trial.

Police Station Practice: Solicitor Access

A person in police custody has the right to have a consultation with a solicitor at any time.[7] Such access to legal advice may affect the exercise of the right of silence. Legal advice need not be followed mechanically, as an accused person might have to decide matters for themselves. The term 'solicitor', for whom access is granted to a suspect by statute, is not defined in the new law but of necessity must surely be a solicitor qualified in Scotland and that is any person "enrolled or deemed to be enrolled" as a solicitor under the appropriate legislation.[8] It is to be recalled that the onus to allow such access is on a 'constable', who is an office-holder within the statutory meaning.[9]

Moreover, that access is to ensure that a suspect can obtain the "professional assistance" of the solicitor.[10] There is a limited definition of "consultation" in that context, and it is achieved by such means as may be appropriate in the circumstances, and includes, for example, consultation

[4] Hannah Quirk, *The Rise and Fall of the Right of Silence* (Routledge, 2017) 166, 168-9 and 171.
[5] The same, of course, may be said comparatively of Northern Ireland.
[6] English law authorities, such as *R v Paris* (1993) 97 Cr. App. R. 99, may yet be held to be persuasive in Scotland.
[7] Criminal Justice (Scotland) Act 2016, s.44(1).
[8] Solicitors (Scotland) Act 1980, s.65(1).
[9] Criminal Procedure (Scotland) Act 1995, s.307(1).
[10] ibid, ss.32 and 33.

by means of a telephone.[11] Amongst the information to be given to a person arrested in regard to certain sexual offences is the restriction on their defending themselves and that it is in their own interests in getting professional assistance.[12]

It is an offence for an unqualified person *inter alia* to take or use any name, title, addition, or description implying that he or she is duly qualified to act as a solicitor or recognised by law as so qualified.[13] Every solicitor wishing to provide criminal legal assistance in Scots law must be entered on the Criminal Legal Aid Register established and maintained by the Scottish Legal Aid Board.[14] There is a Code of Practice in relation to Criminal Legal Assistance on statutory authority.[15]

These requirements, when taken along with the requirement of mandatory professional indemnity insurance, in law effectively prohibit lawyers in other jurisdictions from offering professionally legal advice on the law of Scotland. Principles of the same nature would seem to prohibit solicitors qualified in Scotland from offering advice to arrested people in, say, English or Welsh police stations who are to be interviewed about matters primarily on English law.[16] Little research seems to have been carried out on cross-border investigations by the police and the effect of statutory restrictions on who might provide legal advice before or during interview.

Right of Silence: Police Station

A constable may arrest a person without a warrant if the constable has reasonable ground for suspecting that the person has committed or is committing an offence.[17] On arrest, a constable must inform an arrested person (or as soon afterwards as is reasonably practicable) of certain information, including that the arrested person is under no obligation to say anything, other than to give the personal information specified in the statute.[18] While such an arrest may usually

[11] ibid, s.44(4).
[12] ibid, s.20(2)(b).
[13] Solicitors (Scotland) Act 1980, s.31 (1)(b).
[14] Legal Aid (Scotland) Act 1986, s.25A.
[15] ibid, s.25B.
[16] Solicitors Act 1974, s.21.
[17] Criminal Justice (Scotland) Act 2016, s.1(1).
[18] ibid, s.3(b), and the information required is in s.34(4) of the same Act.

be in the jurisdiction of Scotland, that does not always follow because an arrest may be made competently elsewhere within the United Kingdom.[19]

When a person is arrested and taken to a police station he or she must be informed in the words of the statute that: "there is *no obligation to say anything* [emphasis added]" other than give some information about his or her personal identity.[20] Silence on a requirement being made to provide details for identification is no bar to prosecution, and might attract additional charges depending on the circumstances.[21] There is a right to have intimation sent to certain persons.[22] Moreover, the person arrested is to be provided as soon as reasonably practicable with such information (verbally or in writing) as satisfies a statutory minimum.[23] Those who do not speak English must be provided with an interpreter.[24]

Once advised of such a right of access to a solicitor, a suspected person may make an informed decision to waive access.[25] Scrutiny is likely to be made by the courts where a child is involved.[26] A 'child' is a person under 18 years of age.[27] However, a waiver is not necessarily an absolute and irrevocable decision as the right to have a consultation 'at any time' suggests that there may be an informed change of mind later by the suspect who wishes legal advice.[28] An arrested person may consent to an interview without a solicitor present.[29] A person under 16 years of age may not so consent and other categories of person may not consent to interview without a solicitor except on strict conditions.[30]

A constable may put questions to the arrested person in relation to "the offence".[31] For the avoidance of doubt, nothing is to be taken to mean that the constable cannot put questions to

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[19] Criminal Justice and Public Order Act 1994, s.137 as amended by the Criminal Justice (Scotland) Act 2016 (Consequential Provisions) Order SI 2018 No.46 art.5 and sched. 1.
[20] Criminal Justice (Scotland) Act 2016, s.5(2)(a).
[21] Document for court purposes such as a summary complaint served by the Crown on an unidentified accused in Scotland might merely specify the accused as "a person meantime to the Prosecutor unknown". The practical ability of the police, however, to discover by other means who they are dealing with ought not to be under-estimated.
[22] Criminal Justice (Scotland) Act 2016, s.5(2)(b).
[23] Directive 2102/13/EU of 22 May 2012 applied by the Right to Information (Suspect and Accused Persons) (Scotland) Regulations 2014 (SSI 2014 No.159).
[24] *Ucak v HM Advocate* 1998 SLT 392; The Right to Interpretation and Translation in Criminal Proceedings (Scotland) Regulations 2014 (SSI 2014 No.95).
[25] *Jude, Hodgson and Birnie v HM Advocate* 2011 JC 252.
[26] *McGowan v B* [2011] UKSC 54; [2011] 1 WLR 3121; *McCann v HM Advocate* [2013] HCJAC 29; 2013 SCCR 254; *Application by Children's Reporter, Alloa in respect of JM* (Case B304/11), Alloa, June 6, 2012.
[27] Criminal Justice (Scotland) Act 2016, s.108.
[28] ibid, s.32.
[29] ibid, s.32(3)(a).
[30] ibid, s.33.
[31] ibid, s.34(2): the phrase begs the question: what offence precisely?

the person "in relation to *any other matter* [emphasis added]".[32] That ambiguity may perhaps justify a police officer asking general health and safety questions. Even if asked in good faith, such questions must be considered carefully in the context of the right of silence at the police station.[33] As a separate issue it seems to be a common event in interviews for a suspect to be asked, in the context of allegations about sexual offences, general questions about the personal sexual preferences of that person: the latter point is essentially a matter of propensity evidence and may yet require to be settled.[34] Further, prior to interview and "not more than one hour before a constable interviews", specific information must be provided to the person to be interviewed.[35] A person is officially charged if a constable charges the person with the offence, or the prosecutor initiates proceedings against the person in respect of the offence.[36]

There is a right for an accused to have a solicitor present.[37] An arrested person whom the police wish to interview may competently have a consultation with a solicitor before the questioning of the suspect by a constable begins, or at any other time during such questioning.[38] Except for that requirement to provide personal details, a suspect has an absolute statutory right of silence.[39] That right has been confirmed by the appeal court.[40] It should be obvious to the police that to seek to undermine the advice of a solicitor to a suspect is wholly improper.[41]

It should be reiterated that on arrest: "a constable may take from the person arrested, or require the person to provide him [*sic*] with such relevant physical data as the constable may, having regard to the circumstances of the suspected offence" in respect of which the person has been arrested reasonably consider it appropriate to take from that person or require to be provided.[42] The 'relevant physical data' that may be required includes fingerprints.[43] There is nothing is in the relevant legislation that requires the arrested person to say anything to the police during the

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[32] ibid, s.34(3).
[33] *Mitchell v Harrower* [2017] SAC (Crim) 14; 2017 SLT (Sh Ct) 207.
[34] It is to be recalled that irrelevant questions and answers ought to be redacted from any transcript of an interview prior to its being lodged in court as a production.
[35] Criminal Justice (Scotland) Act 2016, s.31.
[36] ibid, s.63.
[37] *Cadder v HM Advocate* [2010] UKSC 43; 2010 SLT 1125; also see the Criminal Justice (Scotland) Act 2016, s.32.
[38] Criminal Justice (Scotland) Act 2016, s.44.
[39] ibid, s.34(4) [police officers]; Criminal Law (Consolidation) (Scotland) Act 1995 (c. 39) s. 24 (8) [Revenue and Customs and immigration offences].
[40] *Hoekstra v HM Advocate (No. 5)* 2002 SLT 599, [107]; RW Renton and HH Brown, *Criminal Procedure According to the Law of Scotland* (6th edn, W Green, 1996), paras. 6.15-6.16 (64/3 - 66)
[41] *HM Advocate v Hawkins* [2017] HCJ 79; 2017 SLT 1328, [23] (Lady Scott)
[42] Criminal Procedure (Scotland) Act 1995, s.18(2)— this authority remains unchanged notwithstanding Criminal Justice (Scotland) Act 2016, s.56 and sched. 2, para. 28.
[43] ibid, s.18(7A).

procedures surrounding the provision of the relevant physical data. The participatory requirement is accordingly quite limited.[44]

Statutory authority, distinct from questioning by a constable, now permits judicial authorisation of questioning: a court may authorise a constable to question a person about an offence *after* that person has been officially accused of committing the offence.[45] That is a statutory concession to the police as previously after charge all questioning was to cease, or if it continued any statements made thereafter were inadmissible. [46] Such questioning may now be allowed in practice because additional evidence has subsequently become available.[47] Importantly, the court might now authorise further inquiry with respect to the accused. There is nothing in the new law that suggests a derogation of the any other rights of an accused by this procedure.

Neither the decisions of the United Kingdom Supreme Court nor subsequent legislation imposes any geographical restriction on the duty of solicitor-access on police officers appointed in Scotland when investigating crimes in Scotland or, indeed, on the right to have a private consultation. Such a duty may reasonably be said to apply to police wherever they go beyond Scotland to question a suspect in their investigations. The powers of the police from Scotland are, however, constrained by such restrictions as there are in force on the scope of the detention in England and Wales: it is the duty of a constable from Scotland who has detained a person in England and Wales, *inter alia* to take that person to the nearest convenient designated police station in England and Wales.[48]

This would all seem to be an example of the territorial principle that the jurisdiction of the Scottish courts is limited to crimes committed in Scotland.[49] Yet, it is to be recalled that it is competent to prosecute, try and punish in Scotland certain offences *committed* outside Scotland.[50] Given the gravity of certain of the crimes relevant to the statute, principally murder

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[44] C.f. for English law, Abenaa Owusu-Bempah, *Defendant Participation in the Criminal Process* (Routledge, 2017) at 3-6.

[45] Criminal Justice (Scotland) Act 2016, s.35(1). "Officially accused" for these purposes means charged by the police or proceedings have been initiated by the prosecutor: s.63 of the 2016 Act.

[46] For the law on the previous position: see Renton and Brown, (n. 40), pp.463-4 (para.18-34 to 18-37).

[47] Criminal Justice (Scotland) Act 2016, ss.35(1) and (5) and 36 set out the conditions for the exercise of the discretion to grant authority.

[48] Criminal Justice and Public Order Act 1994 (c. 33) s.137 (7) (c) which includes comparable requirements about designated police stations after detention in Northern Ireland.

[49] M.G.A Christie (ed.), G.H. Gordon, *The Criminal Law of Scotland* Vol.1 (3rd edn, W Green, 2000), para. 3.41 (95).

[50] Criminal Procedure (Scotland) Act 1995, s. 11 and e.g. *McLeod, Petitioner*, 1993 SCCR 610 (death of a United Kingdom citizen in Spain and later her spouse was tried and acquitted in Scotland).

and culpable homicide, it is not difficult to imagine that the nature and extent of the inquiries to be made by the police in Scotland would include the arrest and subsequent interview of suspected British citizens or British subjects who may be found in a country outside the United Kingdom.

Exceptions to a Right of Silence

There are well-established statutory exceptions to the right of silence. These generally flow from legislation of the United Kingdom Parliament and are grounded in the need to make specific laws, in very particular circumstances, effective. The best known of the exceptions are probably the requirement to identify a driver of a motor vehicle[51], the requirement to provide a password[52], and terrorist related requirements.[53] Context is important: reverse burdens of proof in excise duty appeals, for example, have been held by the courts to be legitimate.[54] There is at least one common law principle of evidence that may amount to an exception to the right of silence: where an accused is in possession of recently stolen goods in criminative circumstances he or she must displace the inference of guilt raised by these circumstances, a displacement very difficult to achieve in practice.[55]

Right of Silence: At Trial

What compulsion in law, if any, requires an accused to participate in their own criminal trial? Modern statutes on occasions appear, to put it no higher, to state new procedural matters in apparently peremptory terms. Thus, participation through live television link is now competent and the court "may *require* [emphasis added]" a detained person to participate in that manner.[56] Participation in that regard does not infringe any right of silence and there is provision for making representations not to participate in that specific procedure may very well do so, either directly or through counsel or a solicitor.[57] This does not infringe a right of silence at trial

[51] Road Traffic Act 1988, ss. 172 and 178; and see *Brown v Stott* 2001 S.C. (P.C.) 43; 2001 S.L.T. 59.
[52] Regulation of Investigatory Powers Act 2000, s. 53(1), (5A), (6) and 7(c).
[53] Terrorist Act 2000, s. 53 and sched. 7, regs 2 and 18, and s. 89.
[54] *Euro Wines (C & C) Ltd. V Revenue and Customs Commissioners* [2018] EWCA Civ 46; [2018] 1 W.L.R. 3248
[55] M.G.A. Christie (ed.), G.H. Gordon, *The Criminal Law of Scotland* Vol.2 (3rd edn, W. Green, 2001), para. 20.10 (238).
[56] Criminal Procedure (Scotland) Act 1995 s.288H (3) as inserted by Criminal Justice (Scotland) Act 2016 s.110(1).
[57] Criminal Procedure (Scotland) Act 1995 s.288H (2)(a).

which is essentially a right not to be compelled to testify. The facts and circumstances in the evidence at a trial are most likely to require in practice that an accused gives evidence. Where silence is maintained by an accused then there is a risk that the prosecutor may use the legitimate discretion to comment on the failure of the accused to give evidence.

At common law an accused was not a competent witness at their own trial.[58] The modern approach in Scotland to the accused and his or her trial may be found in several surprisingly recent cases. At common law:

> "[…] the question whether an accused should ever be required to assist the Crown in any way in the presentation of the evidence at his trial […] admits of only one answer, and that is in the negative. […] [The accused] is to be regarded purely as an object, as one whose role in the trial is an entirely passive one as it unfolds around him. It is on that basis that the Crown must present its case."[59]

Some judicial dicta are less persuasive than others in the circumstances prevailing in recent years, but cognisance must, nevertheless, be taken of what was said:

> "The Crown have all the resources of the state behind them in the preparation of a case but by the time a case has come to trial the Crown cannot rely on any assistance whatsoever on the part of the accused."[60]

The phrase "all the resources of the state" is now a cliché that may in practice suggest the availability of more, unspecified, resources than there is in fact. However, an accused may always put the Crown to proof.[61] That was again asserted in a more recent authority:

> "An accused is always entitled to put the prosecution to the proof of its case; and there may often be potential advantage to the accused in delaying a [guilty] plea. Apart from the natural human tendency to put off the evil moment, one never knows but that the principal Crown witness may become unavailable, by reason of death or otherwise."[62]

The prosecutor, however, may comment on the failure of an accused to give evidence.[63] Whether any prosecutor would want to do so is a matter of professional discretion in the circumstances of the individual case: "Where the law itself only allows comment with restraint,

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[58] Renton and Brown (n. 40), para. 24.10 (428).
[59] *Beattie v Scott* 1990 J.C. 320, 323 (Lord Hope).
[60] ibid, 324 (Lord Wylie).
[61] *Du Plooy v HM Advocate* 2005 (1) J.C. 1, [21].
[62] *Gemmell v HM Advocate* 2012 J.C. 223, [148] (Lord Eassie).
[63] Criminal Justice (Scotland) Act 1995, s.117 and sched. 7 repealing Criminal Evidence Act 1898, s. 1(b).

and only for inferences to be drawn in narrow circumstances, it would be a foolish prosecutor indeed who went further than that".[64]

Consideration has been given recently to the question of the right of silence and the extent to which an accused may do nothing at trial: the importance of the decision lies in its authority as a decision of a seven-judge court.[65] The accused had been indicted in a Sheriff Court on a charge of fraud. The Crown served a statement of uncontroversial evidence. [66] It listed 68 alleged facts that were said to be uncontroversial, although they were matters that went to the *species facti* of the crime charged, and therefore the guilt of the accused.[67]

Counsel throughout had been instructed not to agree any of the matters set out in the statement and declined to explain why these instructions had been given. It was asserted that to require an explanation in terms of the legislation would violate the right to silence. [68] The Sheriff thought it entirely appropriate that an accused should be asked to justify a challenge to facts which had seemed to the Crown to be unlikely to be disputed. [69]

That decision was appealed and amongst the considerations for the appeal court was that of whether there the right to silence existed in the absolute form for which counsel for the appellants had contended.[70] The appeal had been presented as a collision between two legally protected values: the right of the accused to silence and the public interest in the expeditious conduct of prosecutions.[71] It is certain that statements of uncontroversial evidence cannot be ignored: the silence of an accused merely results in the conclusive proof of the facts contained within the statement.[72]

There had for a long time been a requirement on an accused to give advance notice of particular defences.[73] That still remains the required practice.[74] It is certain also that: "in modern practice the accused has to break his silence also in other ways".[75] An accused must give advance notice of possible defence witnesses. [76] In more recent times, statute requires a defence statement to

[64] Lord Rodger of Earlsferry, as Lord Advocate: Hansard, HL Deb 16 January 1995, Vol 560, col 416.
[65] *Ashif and Ashraf v HM Advocate* [2015] HCJAC 100; 2017 JC 7.
[66] Criminal Procedure (Scotland) Act 1995, s. 258 (2).
[67] *Ashif* (n.65), [16].
[68] ibid [18].
[69] ibid [26].
[70] ibid [44].
[71] ibid [45].
[72] Criminal Procedure (Scotland) Act 1995, s.258 (3), and *Travers v HM Advocate* [2018] HCJAC 8, [9].
[73] *Ashif* (n.65), [45]-[48].
[74] Criminal Procedure (Scotland) Act 1995, s.70A.
[75] *Ashif (n.65)* [49].
[76] ibid [49].

be lodged prior to trial, setting out aspects of the defence case.[77] There is a duty on the prosecutor and an accused to agree evidence in specified circumstances.[78] It was held that it is reasonable for Parliament to seek to strike a balance between these disparate interests so long as the accused does not receive an unfair trial.[79]

> "It is not in the interest of good order in society if a trial of needless length places burdens upon the State and third parties in terms of time and money, and puts justice at risk. […] it is reasonable that legislation should provide a procedure by which, in advance of the trial, a fact that seems bound to be proved in the normal course of the prosecution can be deemed to be conclusively proved, provided always that there are adequate safeguards for the interests of the accused.[80]

The Court could see "

> […] no reason why an accused should have the liberty not to admit a fact as to which he cannot reasonably withhold his agreement. Not to admit such a fact is obviously inconsistent with an accused's duty in terms of s. 257(1) [of the Criminal Procedure (Scotland) Act 1995]".[81]

The Court could not accept that the right to silence:

> "[…] should mean that the accused can fold his arms and prolong a prosecution in the off-chance that a witness will abscond or that the prosecutor will make a blunder; or in the hope that the sheer volume of formal evidence will leave the jury weary or bewildered. Such a strategy is not […] in the interests of justice".[82]

The decision of the court was unanimous. One Judge referred to the need to consider what is in law embraced by the phrase 'right to silence' and what are its consequences.[83] Reference was made to an article in an academic journal where it was pointed out that:

> "[…] such phrases tend to refer to important values to which the criminal justice process gives varying degrees of weight in determining the appropriate legal rules at different stages of the process, rather than to hard and fast legal rules. What such rhetoric tends

[77] Criminal Procedure (Scotland) Act 1995, s.70A.
[78] ibid, s.257.
[79] *Ashif* (n.65), [57].
[80] ibid [58].
[81] ibid [59].
[82] ibid [59].
[83] ibid [83].

> to ignore or downplay is that 'basic rights' or 'fundamental principles' are rarely untrammelled in practice. They are usually qualified in application in any particular area of law by the need to strike a balance with the demands of other competing values. For instance, the right to free speech, at an operational level, is limited by the legal rules governing obscenity, the law of defamation and various other rules which derive their force from other competing values."[84]

It was held that in general, a decision of the House of Lords in the context of English law could be taken as an accurate statement of the position in Scots law.[85] The decision accepted in Scotland included a judicial assertion that the phrase 'right to silence' does not denote any single right but rather refers to a disparate group of immunities, which differ in nature, origin, incidence and importance, and also as to the extent to which they have already been encroached upon by statute.[86]

Discussion

There is no duty in law on people in Scotland to carry with them, and to produce when required to do so by a constable, a national identity card, or something similar. It would seem, accordingly, that such freedom, a right in practice, not to carry such personal identification is balanced by a reasonable duty when arrested to provide to certain minimum personal details.[87] It is arguably not inconsistent with the presumption of innocence to require a suspect to co-operate with the police to that extent with the police investigation.[88]

The police in Scotland labour under the demands of corroboration. The question of whether to speak or remain silent is, for an arrested person, always one of sufficiency of evidence in that context. Moreover, a regime that requires corroboration necessarily requires a different investigative imperative. In Scotland, for a suspect to choose to say something implying knowledge of, or involvement in, the matter being investigated by the police could be highly significant evidentially in the context of the continuing requirement for corroboration for proof

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[84] Peter Duff, "The Agreement of Uncontroversial Evidence and the Presumption of Innocence: An Insoluble Dilemma?" (2002) 6(1) Edinburgh Law Review 25, 32.
[85] *Ashif* (n.65), [84] – [85].
[86] *R v Director of Serious Fraud Office* ex parte *Smith* [1992] 3 WLR 66 HL, 74 (Lord Mustill)
[87] Criminal Justice (Scotland) Act 2016, s. 5(2)(a).
[88] Pamela R. Ferguson, "The Presumption of Innocence and Its Role in the Criminal Process" (2016) 27 Criminal Law Forum 131, 150-1.

of crime and identity. In order for a statement made by a suspect to be admissible and used as evidence against him or her, it must be truly spontaneous and voluntary.[89]

The onus is on the Crown to demonstrate on the balance of probabilities that a statement by an accused was fairly obtained and therefore admissible. In any assessment of fairness regard must be had to the whole circumstances.[90] It may be suggested, without any direct authority to cite in support, that while the police have a right to require details of personal identification, they have a duty to recognise a right of the suspect to remain silent if that is the choice of the suspect.[91]

It is a corollary of the right to silence that no inference can be drawn from silence as to the credibility of the evidence of an accused on any matter in relation to which he or she declined to say anything while being interviewed or, indeed, in answer to caution and charge.[92] Advice to a suspect who has been arrested must always be given in that specific context. There are in Scots law no statutory warnings of the nature ordinarily provided for in English law. In short, statutory provision permitted comment upon and the drawing of inferences at trial from the failure of suspects, amongst other things, to mention when questioned or charged any feature of their defence that could reasonably have been mentioned then. [93] In Scots law a suspect is merely advised that he or she is under no obligation to answer any questions.[94]

It has been said that smaller jurisdictions will have had less chance to develop law in relation, for example, to libel and data protection than has been the case in the English appeal courts, but that the "the highly respected judicial system in Scotland has its own methods of dealing with such matters based on long experience".[95] Scots law, as now established by the Criminal Justice (Scotland) Act 2016, has thus dealt with the silence of an accused by adhering closely to the requirements of art. 6(1) of the European Convention on Human Rights.[96] The absence in the new Act of an exemption for any category of crime means, it may be suggested, that the statutory right of silence applies in respect of "all types of criminal offences without distinction,

[89] *HM Advocate v Mair* 1982 SLT 471.
[90] *HM Advocate v Hawkins* [2017] HCJ 79, [21].
[91] In *HM Advocate v Hawkins* ibid, the suspect said 213 times that he had no comment to make and yet the detective persisted: [23] (2).
[92] *Larkin v HM Advocate* 2005 SLT 1087, [10].
[93] Criminal Justice and Public Order Act 1994 s.34; and see ss.35,36 and 37 of the same Act for other circumstances in which comments or the drawing of inferences may be permissible.
[94] Criminal Justice (Scotland) Act 2016, s.34(4).
[95] *Kennedy v The National Trust for Scotland* [2017] EWHC 3368 (QB), [79] (Eady J.).
[96] *Saunders v United Kingdom* (1996) 23 EHHR 313.

from the most simple to the most complex".[97] Any exception to that rule seems to flow from United Kingdom legislation, as the point has not yet been dealt with in Scottish legislation.

Nearly twenty years after this major statement of principle from the European Court of Human Rights and followed recently by the Scottish Parliament in the 2016 Act, the relevant decision is unlikely to be decided differently now.[98] Yet, the new Scottish legislation has arguably provided a bold affirmation of the protection of the right to silence at the police station. The differences on specific issues of law amongst the jurisdictions of the United Kingdom is not signalled merely for the sake of novelty: the right of silence by a citizen in the presence of representatives of the State must surely be, by any test, regarded as a matter of constitutional right.

Academic criticism of the jurisprudence of the European Court of Human Rights has included a suggestion of a lack of analytical rigour.[99] The superficial nature of the justification of the court has been attacked as consisting of: "*generalised statements* [emphasis added] about the inappropriateness of gathering criminal evidence through coercion or oppression in defiance of the will of the suspect."[100] One person's generalised statement is another's fundamental principle. The comment in itself illustrates how, observing common law evidence from the Continental perspective, one of the main features is the complexity of common law regulation.[101]

Concluding Remarks

It has been written of English law that in the present era the participatory requirements imposed on the defendant demonstrate that the fact-finding aim has been prioritised at the expense of fairness and respect for the rights of the defendant.[102] A broader conclusion by the same commentator attacks broader and fundamental principles: "In particular, England can no longer be described as having a system akin to adversarialism".[103] In Scotland, as a matter of legislative policy no participation is required of an arrested person at interview beyond merely

[97] ibid, [74].
[98] A.L.T. Choo, *The Privilege Against Self-Incrimination and Criminal Justice* (Hart Publishing, 2013), 79.
[99] ibid, 79.
[100] ibid, 117.
[101] Mirjan R. Damaška, *Evidence Law Adrift* (Yale University Press, 1997) at 8 and 11-12.
[102] Owusu-Bempah (n.44), 173.
[103] ibid, 183.

providing basic details for identification.[104] Some degree of active participation in the procedural process, beyond mere identification and pleading not guilty, is required of an accused who has been charged and summoned lawfully to a trial which proceeds.

Admissions against interest might be made outside police stations and in response to questions put on proper statutory authority. Indeed, these few statutory authorities serve as exceptions to the generality of a right of silence at interview. The importance of these exceptions is to be found in their serving as examples of how important any answer to a question might be when, for example, an admission on a crucial fact means that very little is required to corroborate that admission.[105]

It has been shown, it is to be hoped shown conclusively, from the authorities that the right of silence as understood at interview with the police is not to be regarded as a continuing right at any subsequent criminal trial. As the Lord Justice General (Lord Gill) said:

> "I cannot accept that the right to silence should mean that the accused can fold his arms and prolong a prosecution in the off chance that a witness will abscond or that the prosecutor will make a blunder; or in the hope that the sheer volume of formal evidence will leave the jury weary or bewildered. Such a strategy is not, in my view in the interests of justice. Fairness to the defence is adequately secured by, amongst other things, the right of the accused not to incriminate himself, the right to cross-examine witnesses led against him, the placing of the burden of proof on the prosecution, and the demanding nature of the standard of proof". [106]

Silence as a right, beyond providing details of identification, on being interviewed by the police is an entitlement but silence at a trial cannot allow an accused to elide responsibilities in law put in place in the interests of justice. There is no absolute right to utter silence in Scots law.

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[104] That is emphasised again by the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) introduced into the Scottish Parliament on 13 March 2018 which provides by s.38 that no child being interviewed need answer any question put during an investigative interview.
[105] E.g. *Coltman v Mundell*, [2018] SAC (Crim) 6, [6].
[106] *Ashif* (n.65), [59]. The other members of the Court concurred with that view.