Contents

Part I		The Kig	gnt to Silence in Context	
1	Intr	1	3	
	1.1	A Pro	blem of Balance	4
	1.2	The R	ight to Silence and the Right Against Self-Incrimination	6
		1.2.1	Protecting the Right to Choose to Speak or to	
			Remain Silence	7
		1.2.2	The Right to Withhold Self-Incriminating Information	
			as a Part of the Right to Silence	8
		1.2.3	The Right to Silence and the Criminal Justice Process	12
	1.3	Metho	odology	13
		1.3.1	Comparative Analysis Based on the Functional	
			Method	13
		1.3.2	The Human Rights Frameworks and Systems of Law	
			Under Comparison	15
		1.3.3	Legal Sources and Interpretation	20
		1.3.4	Scope of the Research	30
		1.3.5	Terminology	33
	1.4		mportance of the Right to Silence in Transnational	
				37
				39
	Refe	erences.		41
2	Dev	elopmen	t of the Right to Silence in International Human	
				43
	2.1	Introd	uction	43
	2.2	Fair T	rial Rights and the Right to Silence Under the ICCPR	46
		2.2.1	The ICCPR Framework	46
		2.2.2	The Scope of the Right to Silence Under the ICCPR	50

x Contents

	2.3	A Fair 2.3.1	Trial and the Right to Silence Under the ECHR The ECHR: A Regional Framework for Human Rights	54
			Protection	54
		2.3.2	The Scope of the Right to Silence Under the ECHR	65
	2.4	Conclu	usion	89
	Refe			92
D.				
Pa	rt II		al Perspectives on the Right to Silence	
3	The	Right to	Silence in Denmark	97
	3.1	Introdu	uction	97
	3.2	Humar	n Rights Protection in Denmark	100
		3.2.1	The Danish Constitution (Grundloven)	100
		3.2.2	The European Convention on Human Rights	101
		3.2.3	The EU Charter of Fundamental Rights	103
		3.2.4	Denmark's International Human Rights Obligations	104
	3.3	The Ri	ight to Silence and the Right Against	
			ncrimination	105
	3.4		pplication of Fair Trial Rights in Pre-trial Proceedings	105
		3.4.1	Sigtelse (Charging)	105
		3.4.2	Arrest	107
	3.5	Police	Questioning and the Right to Silence	108
		3.5.1	Cautioning About the Right to Silence Prior to	
			Questioning	108
		3.5.2	The Sigtet Person's Access to Legal Advice Prior	
			to a Police Interview	110
		3.5.3	Written Record of Interview	116
	3.6	Advers	se Inferences of Guilt and the Right to Silence	117
		3.6.1	Free Evaluation of Evidence on the Question of Guilt	117
		3.6.2	Drawing Adverse Inferences from Silence of the	
			Sigtet or the Tiltalt	118
		3.6.3	Producing Evidence of the Interview When the <i>Tiltalt</i>	
			Remains Silent at Trial	120
		3.6.4	Drawing Adverse Inferences from the Lies of the	
			Sigtet or Tiltalt	121
	3.7	Admin	nistrative Questioning Powers	121
	.,	3.7.1	The Use of Coercive Measures in Administrative	
		5.7.1	Investigations	121
		3.7.2	Compulsory Powers and the Right Against Self-	121
		3.7.2	Incrimination—§ 10	122
		3.7.3	Ruling Out That Criminal Law Evidence Will Be	122
		5.7.5	Obtained	124
		3.7.4	What Is a Concrete Suspicion?	125
		3.7.5	Valid Consent to Provide Self-Incriminating	143
		3.1.3	Information—§ 10(3)	126
			$1111011111111011 - 3 10(3) \dots$	120

Contents xi

		3.7.6	The Obligation of Registered Vehicle Owners	
			to Provide Information	128
		3.7.7	Using Other Coercive Measures in Cases Where There	
			Is a Concrete Suspicion of Criminal Offending—§ 9	129
	3.8	Covert	Surveillance and Confessions	130
		3.8.1	Invasions of Secret Communications	130
		3.8.2	Appointment of Intrusion Lawyers—§ 784 AJA	131
		3.8.3	Urgent or Out of Time Measures—§§ 783(4) and	
			746(3) AJA	131
		3.8.4	Evidence Obtained Coincidentally—§789 AJA	133
	3.9	The Pr	inciple of Material Truth and Admissibility of	
			ssion Evidence	133
		3.9.1	The Principle of Material Truth and the Administration	
			of Justice Act	133
		3.9.2	Judicial Decisions About the Legality of Investigative	
			Measures—§ 746(1) AJA	136
		3.9.3	Admissibility of Accidentally Discovered Evidence	
			Under § 789(3) AJA	137
		3.9.4	Judicial Discretion to Exclude Evidence	138
		3.9.5	Exclusion of Evidence Obtained in Breach of the Right	
			to Silence and the Right Against Self-Incrimination	141
		3.9.6	The Relevance of Disciplinary and Criminal Actions to	
			Exclusion of Evidence	144
	3.10	Conclu	ısion	144
	Refere	ences		148
4	The E	Dight to	Silence in England and Wales	151
_	4.1		iction	151
	4.2		uman Rights Framework in England and Wales	154
	7.2	4.2.1	The Human Rights Act 1998 and Incorporation	134
		4.2.1	of the ECHR	154
		4.2.2	The Interrelationship Between Convention Rights,	137
		7,2,2	Statute, Codes of Practice and the Common Law	156
		4.2.3	The EU Charter of Fundamental Rights and Domestic	150
		7.2.3	Law in the UK	158
		4.2.4	England and Wales' International Obligations	150
		1.2.1	Under the ICCPR	159
	4.3	The Ri	ght to Silence in England and Wales	159
	4.4		Questioning and the Right to Silence	163
		4.4.1	Initial Questioning Without Arrest	163
		4.4.2	Arrest and Questioning	164
		4.4.3	Interviewing	166
		4.4.4	Recording of Interviews	167
		4.4.5	Charging and Legal Representation	168
		1.1.5	charging and Legar Representation	100

xii Contents

	4.5		nces of Guilt and the Right to Silence	169
		4.5.1	Drawing Adverse Inferences from the Silence of the	
			Accused	169
		4.5.2	Lies by the Accused, Untrue Alibi and Adverse	
			Inferences	177
	4.6		nistrative Questioning Powers in Serious or Complex	
		Fraud	Cases	178
		4.6.1	The Legitimacy of Applying Administrative Questioning	
			Powers in the Pre-trial Phase	180
		4.6.2	The Admissibility of Incriminating Answers Obtained	
			Under Compulsion	181
		4.6.3	The Admissibility of Real Derivative Evidence	183
	4.7	Obtair	ning Confession Evidence by Covert Surveillance	
		Measu	ıres	184
	4.8	Judici	al Discretion to Exclude Unlawfully or Unfairly	
		Obtair	ned Confession Evidence	186
		4.8.1	Admissibility of Confessions—Mandatory Exclusion	
			Under s. 76 Police and Criminal Evidence Act 1984	188
		4.8.2	Judicial Discretion to Exclude Evidence of a Confession	
			on the Ground of Unfairness—s. 78 Police and Criminal	
			Evidence Act 1984	188
		4.8.3	Common Law Discretion to Exclude Evidence—Probative	
			Value Versus Prejudicial Effect	193
	4.9	Concl	usion	194
	Refer	ences.		198
5	The I	Right to	Silence in Australia	199
	5.1		uction	199
	5.2	The H	luman Rights Framework in Australia	201
		5.2.1	National Obligations Under the ICCPR	202
		5.2.2	Federal Institutions and Legislation Establishing	
			the Rule of Law	202
		5.2.3	State Protection of Human Rights in Specialised	
			Human Rights Legislation	203
		5.2.4	Uniform Evidence Law Harmonising Procedural	
			Rights at Federal and State Levels	204
		5.2.5	The Common Law as a Source of Domestic Law	
			About the Right to a Fair Trial	205
		5.2.6	The Interrelationship Between Federal Law, State Law	
			and the Common Law	206
	5.3	The R	ight to Silence in Australian Law	206
		5.3.1	The Composite Right to Silence	206
		5.3.2	The Right Against Self-Incrimination in the Uniform	_00
			Evidence Law	207
			Lyluclice Law	201

Contents xiii

	<i>5</i> 1	D.1'	O section and des Biologo City	200			
	5.4	5.4.1	Questioning and the Right to Silence	209			
			Investigative Authority to Make Initial Enquiries	209			
		5.4.2	Cautioning and Persistent Questioning	209			
		5.4.3	Arrest	210			
		5.4.4	Access to Legal Advice	211			
		5.4.5	Interviewing	213			
		5.4.6	Recording Police Interviews Between the Suspect	214			
	<i></i>	A 1	and the Investigating Authorities	214			
	5.5		rse Inferences of Guilt and the Right to Silence	217			
		5.5.1	Drawing Adverse Inferences When the Accused	217			
		<i>5 5 0</i>	Remains Silent	217			
		5.5.2	Drawing Adverse Inferences from Lies Told by	222			
	5 6	a	the Accused	223			
	5.6	-	ulsory Questioning Powers in Australia	226			
		5.6.1	Compulsory Questioning Powers and the Right Against	226			
		5.60	Self-Incrimination	226			
		5.6.2	Compulsory Questioning Powers and Derivative Real	222			
		a	Evidence	232			
	5.7		t Surveillance to Obtain Confession Evidence	233			
		5.7.1	Covert Surveillance and Deception	233			
	<i>7</i> 0	5.7.2	Warrants	234			
	5.8		xclusion of Confession Evidence and Fairness	235			
		5.8.1	Judicial Exclusion of Confession Evidence	235			
		5.8.2	The Unfairness Discretion to Exclude Confession				
		.	Evidence	237			
		5.8.3	Exclusion of Evidence for Public Policy Reasons	242			
		5.8.4	Overlap Between s. 90 and s. 138	245			
		5.8.5	Gravity of Offending and Exclusion of Confession	• • •			
		~ .	Evidence	248			
	5.9		usion	251			
	Refer	ences.		254			
Dα	rt III	Trans	snational and International Perspectives on the Right to				
1 a	1111	Silenc					
,	A al !						
6	Admissibility of Confession Evidence Across Borders: A Transnational Perspective						
	6.1		-	257 257			
	6.2		uction	231			
	0.2		1	259			
		6.2.1	edings	239			
		0.2.1	Denmark, England and Australia	259			
		6.2.2	Access to Legal Assistance and Other Pre-Trial Due	239			
		0.2.2	Process Requirements	262			
		622	Effective Requests for Police Questioning	268			
		0.4.3	Literine Requests for Folice Outstibiling	_∠∪0			

xiv Contents

	6.3	Cross-Admissibility of Statements Obtained Under Compulsory		
		Power	'S	273
		6.3.1	National Compulsory Information-Gathering Powers	273
		6.3.2	Cross-Admissibility of Statements Obtained by Direct	
			Regulatory Compulsion	275
		6.3.3	Using Compulsory Information Gathering to Obtain	
			Derivative Real Evidence	277
	6.4	Cross-	-Admissibility of Confession Evidence Obtained by	
			vful Covert Surveillance	278
		6.4.1	Using Covert Surveillance to Listen to Private	
			Conversations	278
		6.4.2	Exclusion of Confessions Obtained by Unlawful	_, 0
		···-	Covert Surveillance	279
		6.4.3	Maintaining Fairness: A Comparative View	282
	6.5		usion	285
				291
				271
7			st and the Right to Silence in International	
			1	293
	7.1		uction	293
	7.2		igative and Prosecutorial Approaches to Procedural	
		_	s in Transnational Cases	296
		7.2.1	International Cooperation as Prosecutorial Tool	296
		7.2.2	Contextual Realities and Different Approaches to	
			Utilising International Cooperation	297
	7.3	Judicia	al Approaches to Confession Evidence Obtained Abroad	301
		7.3.1	Transferring Confession Evidence Between States	
			Within the Same Regional Human Rights Framework:	
			The ECHR	301
		7.3.2	Transferring Confession Evidence Between States Not	
			Operating Within the Same Regional Human Rights	
			Framework	308
	7.4	Mutua	al Trust in International Cooperation	319
		7.4.1	Mutual Trust Between Countries That Are Not Within	
			the Same Regional Human Rights Framework	319
		7.4.2	Mutual Trust Between EU Member States	321
		7.4.3	Mutual Trust in Gathering Confession Evidence	328
	7.5	Concl	usion	329
	Refer			331
8	Ralar	ncing tk	ne Right to Silence in Transnational Criminal Cases	333
Ü	8.1		uction	333
	8.2		ight to Silence in Transnational Proceedings	334
			Police Questioning	336
			The Use of Silence as Evidence of Guilt	339

Contents xv

	8.2.3	Administrative Questioning Powers	339					
	8.2.4	Covert Surveillance Measures to Listen to Private						
		Conversations	340					
8.3	The R	elationship Between Human Rights and International						
	Coope	eration	341					
8.4	The W	Vay Forward: Confession Evidence Across Borders	342					
	8.4.1	Right of Access to Legal Assistance in Transnational						
		Cases	342					
	8.4.2	The European Investigation Order	344					
	8.4.3		346					
	8.4.4	Reinforcing Procedural Rights in International Cooperation						
		Outside the EU	348					
8.5		uding Remarks	349					
Refe	rences.		350					
Table of	f Cases .		351					
Table of	f Statute	es and National Legislation	361					
Table of	Intern	ational Treaties and Legislation	365					
Total and			260					
muex	dex							