

The 'Right to Silence': Is the EU Presumption of Innocence Directive a Missed Opportunity for the UK?

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THE PURPOSE OF THIS RESEARCH...

This research focuses on whether the right to silence should have been abolished. The 'right to silence' means that a suspect can say 'no comment' to all questions when accused of committing a crime. The suspect will therefore incur no penalty at trial, meaning their silence cannot be used as evidence against them. However, the UK law allows silence to go against the accused. A suspect is therefore expected to reveal their case at interview, but there is no corresponding duty on the police to reveal theirs. The EU says this goes against the presumption that a suspect is innocent until proven guilty. The principle that a prosecution must prove the defendant's guilt beyond reasonable doubt, without assistance from the accused, has also been undermined. The author therefore recommends that this course cannot continue. Additionally, it is perhaps time to review the current position with a view to amending the law in this area.

YOU HAVE
THE RIGHT
NOT
TO REMAIN
SILENT

WHO IS RIGHT?



THE POLICE CAUTION: CAN YOU UNDERSTAND IT?

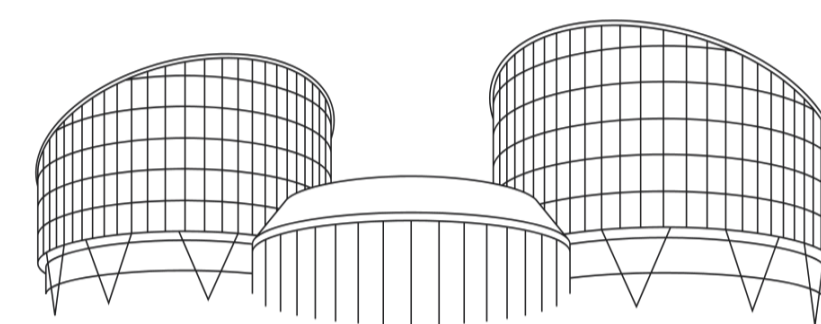
"You do not have to say anything. But it may harm your defence if you do not mention, when questioned, something which you later rely on in court. Anything you do say may be given in evidence."



WHAT DOES THE UNITED KINGDOM SAY?

Allows adverse inferences to be drawn from a defendant's silence: specifically his failure to mention facts later relied on.

Criminal Justice and Public Order Act 1994, Section 34



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

EUROPEAN COURT OF HUMAN RIGHTS

UK law is compatible with the right to a fair trial if:

- **Conviction is not based solely or mainly on silence**
- **Jury are carefully directed** (which cannot be tested)
- **Suspect has access to legal advice**



EUROPEAN UNION

European Union Directive (2016)

Exercise of the right to remain silent **shall not be used as evidence against the accused**



UNITED NATIONS HUMAN RIGHTS COMMITTEE

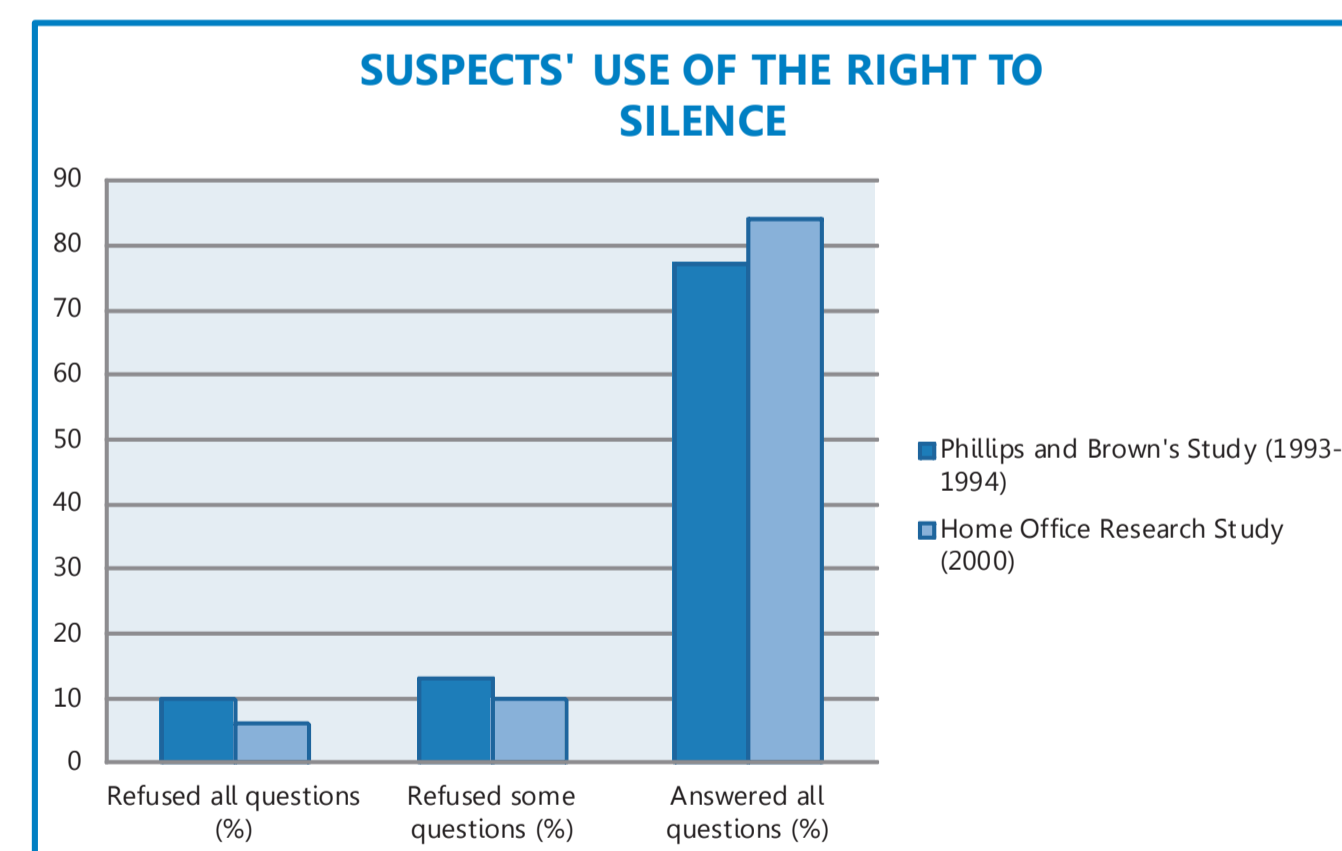
The UK should reconsider, with a view to repealing it, this aspect of criminal procedure in order to ensure compliance with the right to a fair trial

EMPIRICAL EVIDENCE

Sample Size: Phillips and Brown: 1,785; Home Office Research Study: 1,227

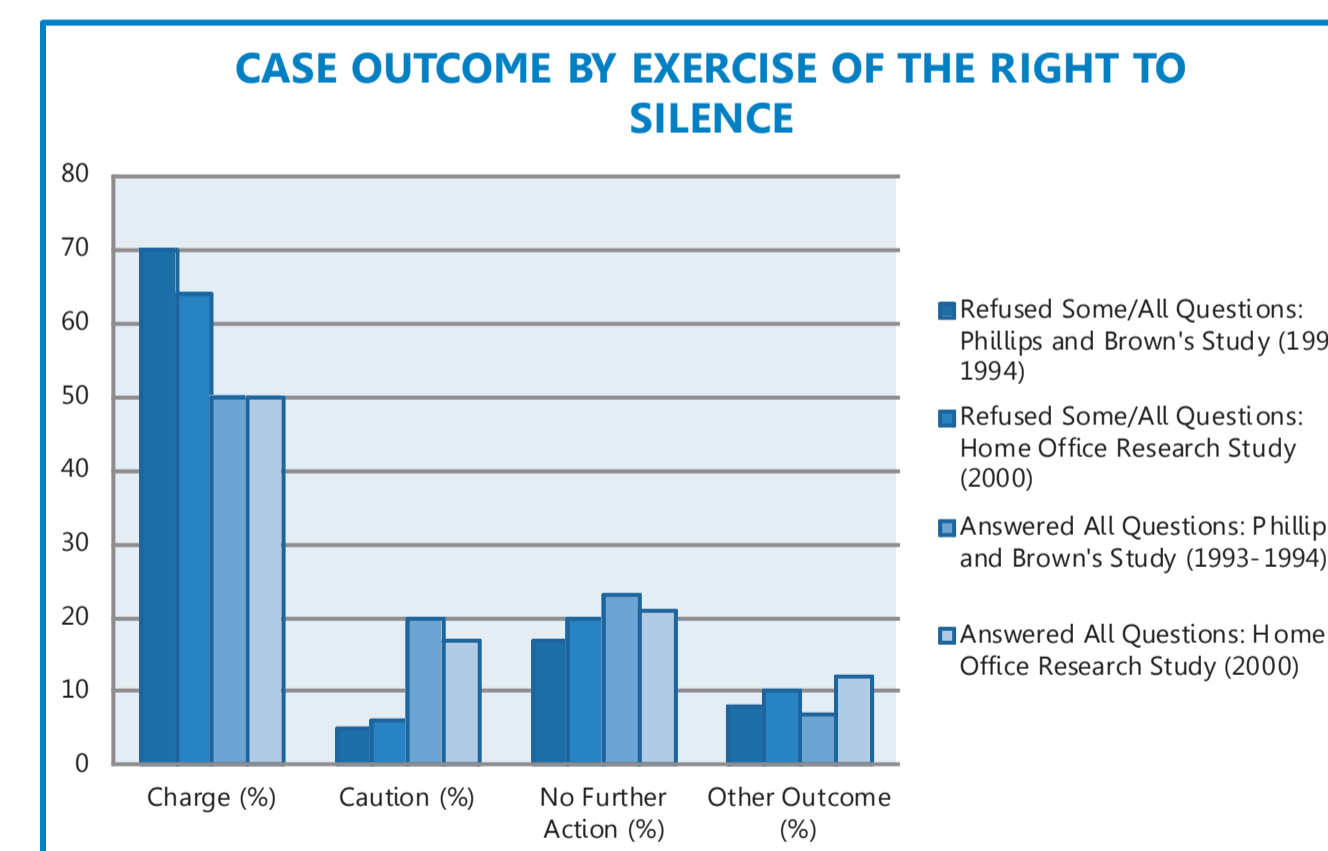
8 OUT OF 10 PEOPLE SEE THE ADVERSE INFERENCE AS PRESSURING OR THREATENING.

What do you think?



WHAT DOES THIS MEAN?

ONLY 16% OF SUSPECTS EXERCISED THEIR RIGHT TO SILENCE COMPARED TO 23% BEFORE THE LEGISLATION



WHAT DOES THIS MEAN?

DROP IN THE CHARGE RATE AMONG SILENT SUSPECTS. NO CHANGE IN CHARGE RATE AMONG THOSE WHO ANSWERED ALL QUESTIONS.

40% OF SUSPECTS ACCEPT LEGAL ADVICE AT THE POLICE STATION.

Are those without a legal adviser adequately protected?

KEY FINDINGS FROM THE LITERATURE

FUTILITY

The law was intended to:

1. Reduce 'ambush defences';
2. Change the behaviour of 'professional criminals'; and
3. Convict the guilty.

This research demonstrates that this has not been achieved.

COMPLEXITY

The complexity of the law outweighs the benefit of using silence as evidence:

1. Jury do not know what inferences to draw.
2. Silence is fundamentally inscrutable.
3. Common-sense thinking and speculation, as opposed to positive evidence e.g. forensics.

CONCEPTUAL

The law has undermined fundamental principles of criminal justice:

1. Presumption of Innocence
2. Burden of Proof
3. Reversing 300 years of progress towards the accusatorial system.

SEMANTIC

Common-sense can cause jurors to doubt or even disregard innocent reasons for silence.

1. As demonstrated by Bentham, "guilt invokes the privilege of silence".
2. This is dangerous because common-sense may instinctively equate silence with guilt.

PRAGMATIC

The nature of the police interrogation has changed. Therefore, the suspect should be entitled to various fair trial rights:

1. Presence of a legal adviser
2. Disclosure of the evidence against him
3. An impartial tribunal.

These cannot be met in the pre-trial context.