
Mark Berger
University of Missouri - Kansas City, School of Law

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Mark Berger*
Oliver H. Dean Peer Professor of Law, University of Missouri-Kansas City School of Law

This article provides an analysis of the procedural aspects of the right to silence falling within Art.6 of the European Convention on Human Rights. The author examines the jurisprudence of the European Court of Human Rights under the following areas: overview, appearance to answer questions, a demand for documents, false responses, warnings and adverse inferences. The subject is discussed at investigation stage, just prior to and during civil and criminal proceedings. The piece concludes with summaries of the jurisprudence in these varying circumstances.

Introduction

Since the European Convention on Human Rights (ECHR) entered into force in 1953, a substantial body of law has developed that defines the scope of the Convention’s individual human rights guarantees. In numerous decisions, the European Court of Human Rights has carefully weighed competing governmental and individual interests in its effort to produce a carefully balanced structure that attempts to provide appropriate

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scope for individual freedom without unduly impeding the exercise of governmental authority.

The development of a jurisprudence of self-incrimination by the European Court represents an attempt by the Court to create a clearly defined set of human rights protections under the ECHR, although there are many areas where uncertainty persists.\(^1\) In a series of cases arising under the laws of a number of different countries, the Court has been systematically attempting to forge a mature right to silence that permits individuals to resist State compulsion to provide self-incriminatory information. At the same time, however, the Court has made it clear that the right to silence is not absolute and that its scope depends upon the setting in which self-incriminatory information is sought.

Understandably, the focus of the Court's decisions has been to identify the circumstances that justify the exercise of the right to remain silent. The Court has been concerned with such issues as the type of pressure exerted by officials, what kind of information has been sought and what consequences are established by domestic law if the demand for information is refused. Answers to these questions define the substantive contours of the right to remain silent and in the process establish the limits of state authority to compel the production of potentially self-incriminatory information.

Although it is appropriate for the European Court of Human Rights to focus its attention on defining the substantive scope of the right to silence, each case presented to it inevitably involves procedural issues as well. While some of the procedural questions may present issues that are generally encountered in litigation, others reflect concerns tied closely to the assertion of the right to silence. For example, must an individual assert the right to silence in response to specific inquiries or may she or he decline to answer all questions; is an individual faced with potentially compelled self-incrimination free to choose between refusing to respond and answering official questions subject to a later complaint when the information is used; may the state impose adverse consequences if an individual falsely answers questions that never should have been asked; and are there some settings in which warnings of the right to silence are required?

The purpose of this article is to focus attention on some of the procedural issues that occur when the right to silence is asserted. Although such issues are readily apparent in many of the European Court's right to silence cases, its decisions have not fully explored what role they should play in determining whether the State may obtain the information it seeks. However, the reality is that substance and procedure go hand in hand in defining both the scope and strength of an individual's right to remain silent under the European Convention. Procedural considerations may serve to limit the ability of the State to demand the production of information or they may minimize the value of the right to resist compelled self-incrimination by making the claim more difficult to assert.

**The right to silence under the European Convention: An overview**

The fact that the European Convention on Human Rights has been interpreted to include a right to silence was not preordained since the Convention itself contains no


language creating any such protection. The most relevant provisions in the Convention are those contained in Art.6 which establish a general right to fair procedures along with a number of specific guarantees including notice of charges, adequate time for preparation of a defence, compelled attendance and examination of witnesses, and a guarantee of the presumption of innocence. Why the framers of the Convention did not include specific language creating a right to silence, a right later explicitly incorporated in the International Covenant on Civil and Political Rights, is not clear. Nevertheless, the absence of a Convention provision creating a right to silence has not deterred the European Court of Human Rights from concluding that the Convention provides equivalent protection.

 Funke v France represents the European Court’s earliest affirmation of right to silence protections under the Convention. French Customs authorities had sought various financial records in connection with an investigation into the violation of French Customs regulations. Funke was fined for failing to turn over the sought-after documents, but the Court concluded that the procedure involved impermissible compulsion to produce self-incriminatory information in violation of the Convention. The Court observed that:

 "being unable or unwilling to procure [the documents] by some other means, [the government] attempted to compel the applicant himself to provide the evidence of offences he had allegedly committed. The special features of customs law . . . cannot justify such an infringement of the right of anyone ‘charged with a criminal offence’, within the autonomous meaning of this expression in Article 6 . . ., to remain silent and not to contribute to incriminating himself."

 In subsequent cases the Court attempted to give a fuller explanation of its reasons for incorporating the right to silence into the corpus of fair trial guarantees under the Convention. Its opinion in Murray v United Kingdom relied upon the widespread acceptance of the legal principle barring compelled self-incrimination as well as the belief that protection of the right to silence would help to ensure fair procedures and the avoidance of unjustified convictions. This was expressed by the Court in its observation that:

 "there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 . . .. By providing the accused with protection against improper compulsion by the

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2 The specific language provides for a right to a “fair and public hearing.” ECHR Art.6(1).
3 Ibid., at Art.6(3)(a).
4 Ibid., at Art.6(3)(b).
5 Ibid., at Art.6(3)(e).
6 Ibid., at Art.6(2).
7 The International Covenant on Civil and Political Rights, adopted December 19, 1966, Art.14(3)(g), 999 U.N.T.S. 171 provides that “everyone shall be entitled...[n]ot to be compelled to testify against himself or to confess guilt”.
9 Ibid., at [44].
authorities these immunities contribute to avoiding miscarriages of justice and to securing the aims of Article 6.”

In Saunders v United Kingdom the Court further explained that recognition of the right to silence provides support for the presumption of innocence by forcing the State to produce independent proof of the defendant’s guilt without being tempted to coerce self-incriminatory evidence from the accused.

Since recognising the right to silence as protected under the Convention, the European Court has steadily expanded its reach in a series of important rulings. The result is that the prohibition against compelled self-incrimination now applies in a wide variety of settings. However, the Court has been careful to point out that the right to silence is not absolute, and how it applies depends upon the circumstances of each case, with every application requiring a careful balance between conflicting state and individual interests.

At the core of the right to silence European Court decisions provide the firmest protection. This is illustrated in two Court rulings finding Irish convictions to be in violation of the Convention. Both Heaney v Ireland and Quinn v Ireland involved the application of an Irish law that criminalised the refusal of a suspect to answer police questions concerning crimes under the Offences Against the State Act 1939. The Irish State’s attempt to justify using the threat of criminal punishment to compel potentially self-incriminatory evidence on the grounds that “the information sought could be essential for the investigation of serious and subversive crime” was rejected by the European Court. In its ruling the Court took the position that:

“the security and public order concerns relied on by the State cannot justify a provision which extinguishes the very essence of the applicants’ rights to silence and privilege against self-incrimination guaranteed by Article 6 § 1 of the Convention.”

When information is sought by the State for purposes that are not strictly or solely criminal, the applicable analysis is more complex. In some cases of this sort

11 Ibid., at [45]. In an earlier decision, the European Court of Justice had observed that “an analysis of national laws has indeed shown that there is a common principle enshrining the right not to give evidence against oneself”. Orkem SA (formerly CDF Chimie SA) v Commission of the European Communities, [1989] E.C.R. 3283 at [98]. In support of this observation the Court reviewed rulings of European Union members applying the right to silence. Ibid, at [99-110].


13 This justification was reflected in the Court’s observation that the “right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6 para. 2 of the Convention.”


16 Heaney and McGuinness, fn.15 above, at [33].

17 Ibid., at [58].

a criminal prosecution may lie just beneath the surface. Such was the case in *Saunders v United Kingdom*, where the United Kingdom Department of Trade and Industry (DTI) undertook an investigation of an illegal stock support scheme implemented by Saunders in connection with a corporate takeover. Saunders complied with a directive that he answer potentially self-incriminatory questions under threat of contempt, and his responses were used at his subsequent criminal prosecution for violating the Companies Act of 1985. However, this was held by the European Court to violate Art.6(1) of the Convention.

While the majority opinion emphasised the fact that Saunders' compelled statements were later used at his criminal trial as the basis for its conclusion, a concurring opinion suggested that the system of statutory compulsion was objectionable in itself, whether or not subsequent use was made of any resulting statements. However, the European Court has been careful to ensure that its right to silence rulings do not totally undermine regulatory reporting requirements, observing in *Allen v United Kingdom* that the

"right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent in the context of criminal proceedings and the use made of compulsorily obtained information in criminal prosecutions. It does not per se prohibit the use of compulsory powers to require persons to provide information about their financial or company affairs."

Nevertheless, exactly when a compelled reporting system crosses the line remains unclear. One factor noted by the Court is the nature of the penalty for non-compliance. *Saunders*, in which the Court found infringement of the right to silence, involved a potential prison sentence of two years for refusing to answer DTI questions, whereas the subject in *Allen* faced a maximum fine of £300. Whether this minimal adverse consequence would have validated the compelled reporting requirement in *Allen* is uncertain, however, because Allen himself fit into the category of those who provide incomplete or misinformation for which the Court has thus far refused to provide right to silence protection.

In another series of cases the European Court upheld the validity of identity disclosure requirements in the context of the enforcement of domestic traffic laws. Initially, this was based upon the Court's assertion that information identifying the name of the driver of a vehicle involved in a traffic offence "is not in itself incriminating." The context of the Court's rulings, moreover, did not involve "criminal proceedings [that] were pending or were at least anticipated." More recently, however, in *O'Halloran and Francis v United Kingdom*, the Court considered the use of a threatened criminal prosecution to

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18 Fn.13, above.
19 Ibid., Concurring Opinion of Judge Morenilla.
21 See fnn.54-67 above, and accompanying text.
23 Ibid., at [52].
require the identification of a driver who was caught on camera speeding. Relying on its earlier ruling in *Jalloh v Germany*, the Court concluded that:

"in order to determine whether the essence of the applicants' right to remain silent and privilege against self-incrimination was infringed, the Court will focus on the nature and degree of compulsion used to obtain the evidence, the existence of any relevant safeguards in the procedure, and the use to which any material so obtained was put." 

Where self-incrimination protections are available, the fact that the State is barred from criminalising non-cooperation has not led the Court to prohibit all adverse consequences. In a series of cases the Court has found that UK legislation providing for adverse inferences where suspects refuse to answer police questions and where criminal defendants do not testify at trial does not violate the fair procedure requirements of Art.6 of the Convention. However, an adverse inference is only appropriate if the suspect's silence is due to the lack of a credible explanation, no conviction may be based solely or mainly on adverse inferences from silence, and the jury must receive proper instructions on when and how adverse inferences from silence may be drawn.

Application of the right to silence under the Convention presupposes that no procedural obstacles have been encountered in the presentation of the claim. But whether there are or should be procedural components to the freedom from compelled self-incrimination is itself a separate question. Moreover, given the wide variety of settings in which right to silence issues arise, procedural requirements, to the extent they are imposed, may vary from one case to another. Although these issues have not been in the forefront of the European Court's right to silence decisions, the Court may well find itself addressing questions of this sort in the future as it more fully develops right to silence principles under the Convention's Art.6 fair procedure standard.

To appear or not to appear

When an individual is called upon to answer official questions related to his or her conduct, and if that conduct may be a violation of the criminal law, potential issues of self-incrimination are readily apparent. In some circumstances the connection between the answers sought and incriminatory evidence will be clear, as where the authorities inquired about whether the individual was in the location where a criminal offence

25 (2007) 44 E.H.R.R. 32. In *Jalloh* the Court found that the forced administration of emetics to reveal a drug offence violated the right to silence and privilege against self-incrimination, even though it resulted in the production of real evidence having an existence independent of the will of the suspect.

26 Fn.25, above, at [55].

27 In the words of the European Court, if the factfinder was "satisfied that the applicant's silence at the police interview could not sensibly be attributed to his having no answer or none that would stand up to police questioning it should not draw an adverse inference". *Condron v United Kingdom* (2001) 31 E.H.R.R. 1 at [61].

28 Fn.11 above, at [47].

29 *Condron*, fn.27 above, at [62].
occurred at the time of its commission. Often, however, the self-incriminatory potential of the official inquiry will be indirect, resulting in uncertainty as to whether a valid right to silence claim can be made.

Interchanges about potential criminal conduct regularly occur when police authorities conduct their investigations. Typically, they direct questions to those who may be at the scene of the offence or who are later identified as potentially involved. The individual to whom the questions are addressed must then decide whether or not to answer. These are not situations in which individuals are compelled to appear for questioning since they are already there, but it is also true that police are not granted the authority to require answers. Consequently, the individual being questioned must decide whether to answer all, some, or none of the questioner’s inquiries.\(^\text{30}\)

In other settings, however, officials are granted the authority to compel individuals to appear before an official body and answer questions. If the questions relate to a criminal offence and the right to silence is applicable, the individual may be given the option to withhold potentially self-incriminatory information. But if the risk is sufficiently apparent in advance, should there also be a right to refuse to appear before the questioner entirely thereby in effect declining to answer all questions regardless of whether any specific question has a potential incriminatory impact?

Anytime information may be withheld on self-incrimination grounds the State’s interest in fully performing its investigatory functions may be impeded. However, that interference would be limited if only questions with specific self-incrimination risks could be blocked by an assertion of the right to silence. Other information of a character not infringing on the privilege against self-incrimination would still be obtainable. In contrast, individuals facing self-incrimination risks who are prepared to assert the right to silence may well prefer not to have to answer any questions regardless of their potential incriminatory character. Given the possible uncertainty as to the self-incriminatory risk of specific information the State may seek, an individual may logically conclude that the safest course is a blanket refusal to answer any question if that option is available.

In one area a consensus exists that an individual may legitimately refuse to answer all questions on self-incrimination grounds even though the setting is one where the State is generally entitled to a response. Despite the fact that the State may normally compel witnesses in a trial to answer relevant and non-privileged questions, this rule does not apply to a criminal defendant. Instead, criminal defendants are free not to take the witness stand at all, although European Court cases do permit adverse inferences to be drawn from the defendant’s failure to testify.\(^\text{31}\)

Two possible explanations provide strong support for the extra right to silence protection given to criminal defendants at trial. First, since the prosecution’s questions

\(^{30}\) Interchanges between police and citizens raise the additional procedural question of whether or under what circumstances a warning of the right to silence must be administered. See fn.68–81 above, and accompanying text.

\(^{31}\) Fn.11, above. In a series of cases the European Court has provided guidance on the circumstances that warrant the use of adverse inferences from a suspect’s failure to respond to police questions and a criminal defendant’s refusal to take the witness stand. E.g. Beckles v United Kingdom (2003) 36 E.H.R.R. 13; Averill v United Kingdom (2001) 31 E.H.R.R. 36; Magee v United Kingdom (2001) 31 E.H.R.R. 35; Condron v United Kingdom, fn.27, above.
to the defendant generally have the objective of establishing his guilt or undermining his defence, the risk of incrimination is so clearly present that it is permissible to assume its existence with respect to every inquiry. Secondly, criminal defendants are judged by the fact-finder not only by the testimony they give, but also by their general demeanour. Allowing the defendant to refuse to take the witness stand thus provides him with the opportunity to avoid creating an unfavourable impression even where the testimony he might give would not be self-incriminatory.\textsuperscript{32}

The fact that an individual is called to answer questions in a setting other than a criminal trial does not preclude the possibility that the answers he provides will constitute evidence of a criminal offence. However, this risk can be dealt with by giving the individual the right not to answer specific incriminatory questions or allowing him to decline to appear entirely. The American Supreme Court has resolved this problem for federal grand jury investigations by requiring non-defendants to appear in response to a subpoena and answer all otherwise proper inquiries subject to the right to claim the privilege against self-incrimination with respect to individual questions that present a self-incrimination risk.\textsuperscript{33} However, the right to decline to answer may be removed if constitutionally sufficient protection from the use of the answers is granted.\textsuperscript{34} In contrast, a number of American states afford the target of a criminal investigation the right not to appear at all, thus providing investigatory targets the same right to silence protection as criminal defendants at trial.\textsuperscript{35}

Outside of the criminal trial itself, there is no immediate risk that an individual compelled to answer official questions will be convicted of a criminal offence. The answers may have adverse consequences at some later point, but this is not the same as having a criminal jury or judge present to hear the incriminatory responses which they would then be able to use to determine guilt or innocence. Nevertheless, a criminal charge and trial may be looming in the near future at the time the compelled questioning is undertaken. The impression created by the individual may influence the decision to charge and the information obtained through compulsion may become evidence that can be used to support a conviction. Thus, although the settings are not identical, the case for a right not to appear still exists.

\textsuperscript{32}In a case in which the United States Supreme Court barred adverse reference to the defendant’s failure to testify, it commented that “[e]xcessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against [the defendant], will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would therefore willingly be placed on the witness stand”. \textit{Wilson v United States}, 149 U.S. 60, 66 (1893).

\textsuperscript{33}This was viewed by the American Supreme Court as a reflection of the larger principle that “[t]he public has a right to every man’s evidence”. \textit{United States v Mandujano}, 425 U.S. 564, 572 (1976). So-called “putative” or “virtual” defendants in federal prosecutions are not even entitled to the Miranda warnings of the right to silence that individuals subject to custodial interrogation must receive.

\textsuperscript{34}\textit{Kastigar v United States}, 406 U.S. 441 (1972) imposed the requirement that authorities not make use or derivative use of any information obtained as a result of a grant of immunity.

Right to silence issues arising in the context of national laws requiring individuals to appear and answer potentially incriminatory questions or provide potentially incriminatory information have been presented to the European Court in several cases. There is some inconsistency in the Court’s rulings on this question, and views have been expressed in concurring and dissenting opinions that would provide dramatically different solutions to the problem based on differing views of the scope of the right to silence.

Serves v France illustrates one approach. There a French officer and several comrades had been charged in connection with a homicide. However, because of a procedural irregularity, the initial judicial investigation and all subsequent proceedings were declared void. This was followed by a second investigation in which Serves, prior to being recharged in connection with the homicide, was called to appear before a military investigating judge as a witness in the case on three separate occasions. Each time he refused to take the oath and give evidence as a result of which he was subjected to three separate fines. Serves claimed this to be a breach of his Art.6 right not to incriminate himself, but the European Court disagreed.

Although the Court recognized that Serves had a legitimate concern that some of the evidence he might have provided could have been self-incriminatory, it concluded that the proper response would have been for him “to have refused to answer any questions from the judge that were likely to steer him in that direction”. Refusing to take the oath and answer all questions, however, was not a permissible option. In the Court’s view, the French procedure involving fines for refusing to appear did not represent impermissible compulsion to answer potentially incriminating questions, but rather was only a means of ensuring truthful responses.

In a more recent decision, Shannon v United Kingdom, the European Court provided broader right to silence protection for individuals summoned to answer potentially self-incriminatory questions. Unlike Serves, Shannon had already been validly charged with financial offences when he was summoned to appear before financial investigators to determine whether anyone else had gained from his actions. Shannon refused to attend the interview and was ultimately convicted and fined for his conduct, although he was never prosecuted for the offences that were the subject of the original investigation.

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37 Ibid., at [18].
38 Ibid., at [21] and [22].
39 Ibid., at [47].
40 Ibid. In contrast, a dissenting opinion saw the procedure as one in which Serves “must in reality have felt forced to give evidence that could incriminate him,” and consequently fining him for refusing to take the oath and answer any questions breached his Convention rights. Ibid., Joint Dissenting Opinion of Judges Pekkanen, Wildhaber and Makarczyk.
43 Ibid., at [16] and [17].
44 Ibid., at [38]. The Court noted that in other cases right to silence violations were found where the individual was later acquitted of the underlying offence, Heaney and McGuiness v Ireland, (2001) 33 E.H.R.R. 12, and even where it was no longer possible to pursue the underlying charge, Funke v France, (1993) 16 E.H.R.R. 297.
However, Shannon had been charged with financial offences at the time he was summoned to appear, and the Court concluded that “attending the interview would have involved a very real likelihood of being required to give information on matters which could subsequently arise in the criminal proceedings for which the applicant had been charged”.

In its opinion the Court noted its concern that any information Shannon might have supplied could have been passed along to the police and later used at a subsequent criminal trial. The option of appearing pursuant to the summons, but declining to answer specific incriminatory questions was not mentioned.

On a formal level Serves and Shannon are clearly distinguishable since Shannon was facing valid charges at the time he was summoned to answer questions while Serves had not yet been recharged with a homicide offence when he was ordered to appear before a military investigating judge. However, the risk of incrimination which formed the basis of the Shannon opinion may well have been greater for Serves whose previous charge had been voided for technical reasons. Yet, Shannon was free to decline to answer all questions while Serves had to appear, take the oath, and individually assert the right to silence as specific self-incriminatory questions arose.

Complicating matters further is the European Court’s decision in Saunders v United Kingdom. Saunders was one of a number of individuals who were identified by prosecution officials as possible defendants in a stock scheme. He was also the subject of an administrative inquiry into his activities and was required to appear for questioning. Significantly, it was found by the English courts that the relevant legislation obligated Saunders to appear and answer even those questions that were self-incriminatory, and that the answers could later be used against him in a criminal trial.

The European Court concluded that Saunders’ right to silence under the Convention was violated by this procedure, but its opinion focused on the fact that the prosecution authorities made use of his compelled statements. The Court observed that the State’s claim of public interest “[could not] be invoked to justify the use of the answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings”. The opinion suggested that the administrative inquiry in itself, which involved compulsion to answer even self-incriminatory questions, did not violate Art.6 § 1 of the Convention. This prompted a concurring opinion from Judge Morenilla emphasizing his view that it would be sufficient to raise a right to silence claim that “the applicant’s statements had been obtained under compulsion and were considered by the prosecution to be incriminating and capable of reinforcing their case”.

45 Shannon, fn.41 above, at [33].
46 Ibid., at [39] and [40].
47 Fn.12, above.
48 Ibid., at [28].
49 Ibid., at [74]. Following Saunders, the European Court similarly concluded that answers compelled from a bankruptcy applicant on the threat of contempt could not be used against him in a subsequent criminal prosecution. Kansal v United Kingdom (2004) 39 E.H.R.R. 31.
50 Fn.12, above, Concurring Opinion of Judge Morenilla. Similar views were expressed in concurring opinions of Judges De Meyer and Walsh, the latter observing that the “right to the protection against compulsory self-incrimination is not simply a right to refuse to testify in a court but must also apply to bodies endowed by the law with inquisitorial powers”.

European Court caselaw thus appears to suggest alternative procedural options for individuals confronted by a demand to appear and give evidence that is backed by a legal threat sufficient to be covered by Art.6 § 1 of the Convention. The *Serves* decision holds that the appropriate response to potential compelled self-incrimination is to assert the right to silence in response to potentially incriminatory questions rather than refuse to appear at all while *Shannon* allowed the subject of the investigation to refuse to provide any information when ordered to appear and answer questions. Beyond that, *Saunders* suggests that even self-incriminatory questions must be answered, with Art.6 § 1 of the Convention only being relevant if an effort is made to use the answers provided in a subsequent criminal proceeding.

One possible distinction between the cases is that only the suspect in *Shannon* was under a valid charge at the time that he was summoned to appear and answer questions. However, the European Court decision focused less on the stage of the proceedings and more on the clear risk of incrimination that Shannon faced. On this basis, however, *Serves* should have been entitled to equivalent treatment since he had already been subject to a voided charge and was clearly a likely target in the renewed investigation. The same was true for *Saunders* who had already been identified as a potential accused by representatives from the UK Department of Trade and Industry and the Crown Prosecution Service. Then again, if the only issue is the later use of compelled incriminatory information, it would appear that all subjects called to answer questions outside of the criminal trial itself should be required to respond, with the Convention thereafter available to protect against improper use of the information so obtained.

Certainly the broadest protection would be a system in which the option of declining to appear and testify was made available to anyone facing a significant risk of self-incrimination. However, this would be a burdensome procedure since identifying the degree of risk sufficient to invoke the right of non-appearance would be both difficult and time consuming. Focusing on the stage of the proceeding, in contrast, would allow authorities to easily separate the two categories, but the risk here is that officials would defer filing charges until the compelled interrogation was completed. The choice would thus be between a system that would be difficult to administer and a process that would be relatively simple to manipulate.

The option suggested by *Saunders* would effectively defer the right to silence issue until trial was underway and an effort was made to use the results of the compelled interrogation as evidence against the accused. However, it is not clear that the majority in *Saunders* fully intended this result. Moreover, it would leave anyone compelled to participate in an investigation in an uncertain position given the absence of clear standards defining what would constitute impermissible use of compelled evidence. If the violation would only occur when statements of the individual were introduced at his trial, as occurred in *Saunders*, authorities would be free to take advantage of the compelled self-incrimination in other ways.

Once an individual has been charged with a criminal offence, as in *Shannon*, he should be free of the obligation to appear and answer official questions about his conduct. The

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51 Fn.12 above, at [23]. The representatives had already met, discussed possible charges, and talked about when a criminal investigation should be started prior to being questioned by the Department of Trade and Industry inspectors.

setting may not be the criminal trial, but allowing the State to obtain information about the offence after it has committed itself to prosecution would only serve to undercut core right to silence values. Beyond that, individuals not yet charged should be free to demonstrate that their situation is comparable. The State interest can be protected by placing the burden of establishing impermissible manipulation of the timing of the charge on the defendant.

If in the pre-charge stage an individual is obligated to answer official questions, and if those questions risk providing the State with incriminatory information about the individual, he should be free to assert the right to silence at that point. Deferring the right to silence issue until a later effort is made to use the compelled information at trial is not an adequate substitute since it will leave the defendant at a significant disadvantage in trying to reconstruct after the fact exactly what the State has done with the information it compelled. Instead, the right to silence issue should be identified and decided when the questions are asked. If the government is prepared to commit to protection against any misuse of the information, the guarantee should be clearly stated then and there. This would result in explicit and legally protected immunity that is on the record in a form that would serve to supplant the incrimination risk protected by the right to silence.

The demand for documents and identification information

An official demand for documents or identification information in connection with an investigation can raise self-incrimination issues comparable to those arising in Servex, Shannon and Saunders where individuals were called to appear at an official proceeding to give testimony. In each setting the recipient of the demand will be required to produce what may turn out to be evidence that is probative of his involvement in criminal activities. Arguably, however, an obligation to appear and answer questions places the individual at a greater disadvantage since any judgment about how to respond will have to be made on the spot. In contrast, an order to produce items or information sought by the State will normally allow time for some thought about how to respond.

If the State order calls for the production of potentially self-incriminatory information, several options are available. Assuming a valid claim of infringement of the right to silence, one possibility is that the individual may opt to resist the production. Alternatively, the individual may choose to comply, leaving the right to silence issue to be raised at some later point. It must be recognized as well that some individuals may respond to the demand for information by providing a partial, misleading or perjurious response.

In Funke v France, French customs authorities ordered the production of statements of bank accounts held outside of France. Funke wound up being fined for refusing to comply. The French Government contested the claim that this procedure was a violation of Funke’s “right not to give evidence against oneself,” but the European Court disagreed. It concluded instead that Funke’s punishment for refusing to produce the self-incriminatory documents was a violation of the Convention’s Art.6 right “to remain

52 Fn.8, above.
53 Ibid., at [41].

silent and not to contribute to incriminating himself".\textsuperscript{54} In so ruling, the Court implicitly accepted the fact that individuals are free to respond to an invalid order to produce documents by refusing to comply on the grounds of their Convention-protected right to silence.

Despite Funke, the status of efforts to compel the production of documents under the Convention is unclear. In Saunders the European Court stated that right to silence protections are inapplicable to demands for:

"[M]aterial which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing."\textsuperscript{55}

Significantly, documents sought without a warrant were not mentioned as outside the scope of Art.6. Nevertheless, it has been argued that providing protection to demands for documents would be inappropriate because it "would come dangerously close to a right to withhold any potentially incriminating material".\textsuperscript{56} Beyond that an Attorney General’s Reference in the United Kingdom took the position that the decisions of the European Court are inapplicable to all efforts to compel the production of documents, whether by subpoena or warrant, as long as they contain no compelled statements of the accused.\textsuperscript{57}

More recently, in O’Halloran and Francis v United Kingdom,\textsuperscript{58} authorities demanded that vehicle owners identify who had been driving their vehicles at the time they were identified as travelling in excess of posted speed limits. O’Halloran responded by confirming that he was the driver at the time in question, while Francis refused to respond on the basis of the right to silence and privilege against self-incrimination. Thereafter O’Halloran was convicted of speeding after failing in his motion to exclude his admission, while Francis was convicted for refusing to provide the information sought by the government. In light of the "nature and degree of compulsion used to obtain the evidence, the existence of ... relevant safeguards in the procedure, and the use to which [the] material so obtained was put",\textsuperscript{59} no violation of the right to silence or privilege against self-incrimination protected by the Convention was found. However, a different combination of these factors could produce a different conclusion. In that case, the choice of responding to the threat by providing the information subject to a later effort to have the information excluded or refusing to provide the information at all could determine the success of the individual’s claim.

\textsuperscript{54} Ibid., at [44].
\textsuperscript{55} Fn.12, above, at [69].
\textsuperscript{58} Fn.24, above.
\textsuperscript{59} Ibid., at [55].
If an individual wishes to claim freedom from compulsion to produce potentially self-incriminatory documents or information, pursuing this objective by simply refusing to comply comes with a price tag. The production order will usually have some penalty attached to it in order to insure that the items will be produced, and this means that the individual will have to face proceedings designed to impose the penalty as a consequence of his non-production. In short, the choice is to turn over the sought-after items or information or be prepared to be charged and tried for resisting the State’s demand.

Obviously, individuals cannot have the right to make unilateral and unreviewable decisions that they are free on right to silence grounds to refuse to turn over sought-after documents. It is the responsibility of the courts to ultimately determine whether or not production may be resisted. In Funke that determination was made in the context of proceedings to impose a penalty for non-compliance. However, there is no inherent reason why such a dramatic procedural choice should have to be imposed as the price for asserting the right to silence.

Actually facing a penalty proceeding is likely to be a significant deterrent against asserting otherwise valid rights. There is not only the risk of having a penalty actually imposed, but also the cost of mounting a defence. This could be averted without encouraging resistance to legitimate demands by creating a procedure that would allow individuals to secure a prompt judicial assessment of their self-incrimination claims as grounds for the non-production of items sought by the State. Such a procedure would permit the rapid identification of categories of situations where self-incrimination claims could not be made because there was no reasonable likelihood that information so obtained would be used in a subsequent criminal proceeding. Where this was not the case, self-incrimination claims could be reviewed expeditiously, thereby providing the individual with a prompt legal ruling on his or her right to silence claim. Any further resistance would then legitimately be subject to the imposition of penalties, but at least there would be a non-threatening procedural mechanism in which the right to silence claim initially could be heard.

With an adequate procedure available to review right to silence claims, there would seem to be no reason to permit individuals to choose to provide the sought-after documents and later claim that the right to silence restricts their use. In contrast, when information is sought at an oral hearing, the opportunity to make a reasoned judgment about the validity of one’s self-incrimination claim is likely to be limited. Beyond that, if the individual is not accompanied by adequate legal representation, the risk of a mistaken assessment is readily apparent. This would seem to justify giving individuals presented with oral demands for potentially self-incriminatory information the option of resisting at the time or answering the questions subject to a later challenge to the use of the information so obtained. Since these considerations are not likely to occur where a demand for documents is presented, there would be no need to provide for this alternative procedural option.

False, misleading and incomplete information

To date, the European Court has not ruled against an applicant who has raised a right to silence claim on the sole and exclusive basis that the applicant responded to an impermissible demand for information by either lying or providing a misleading or
incomplete response. However, the provision of false or incomplete responses to State demands for information has been a factor in several Court decisions. The Court's treatment of the issue strongly suggests its belief that lying, misleading or otherwise failing to provide a complete response are not acceptable alternatives even when the State improperly issues a demand for information.

Two cases were presented to the European Court arising out of Austrian legislation that requires the owner of a vehicle to identify its driver at a particular time when a driving or parking offence occurred. In both *Weh v Austria*\(^60\) and *Reig v Austria*,\(^61\) the car owners had been ordered to name the individual who had been driving their cars in violation of local speeding laws. Even if accurate responses might have been self-incriminatory, the legislation specifically stated that the "right to require such information shall take precedence over the right to refuse to give the information."\(^62\)

The car owners in both *Weh* and *Reig* did not refuse to provide the identity of the driver, something that was prohibited by the legislation itself, nor did they state that they were the drivers of vehicles at the relevant times, something that would have provided self-incriminatory information to the State. Instead, each car owner identified someone else as the driver, but did so in a way that authorities concluded was false, misleading or incomplete. Both individuals were charged with violating the compulsory reporting statute, and in neither case were charges filed for the original speeding offences.

The European Court's resolution of the issue emphasized that at the time of the demand for information there were no proceedings for vehicle offences against the parties that were either pending or anticipated,\(^63\) nor was there any "element of suspicion"\(^64\) that the owners of the vehicles were also their drivers when any vehicle offences might have occurred. Viewing the cases as presenting a connection between potential criminal proceedings and the disclosure obligation that was "remote and hypothetical," the Court concluded that they lacked a "sufficiently concrete link" to raise a valid issue under the right to silence and privilege against self-incrimination.\(^65\)

Moreover, although stating that the element was not decisive in itself, the Court specifically noted that *Weh* was punished for giving inaccurate information, not for refusing to respond to the State's demand,\(^66\) while *Reig* failed to give a sufficiently complete response.\(^67\)

The perjury problem arose in a direct and dramatic form in *Van Vondel v The Netherlands*.\(^68\) There a Parliamentary inquiry was initiated to investigate the activities of special crime detection units established within larger municipal police forces and districts of the national police. The underlying legislation supporting the inquiry made it a criminal offence to fail to appear or refuse to answer any question, while also providing that any statement given in such an inquiry could not be used except in

\(^{60}\) Fn.22, above.

\(^{61}\) (App. No.63207/00), judgment of March 24, 2005.

\(^{62}\) Motor Vehicles Act of Austria s.103 § 2, reprinted in *Weh*, fn.22 above, at [24].

\(^{63}\) *Weh*, fn.22 above, at [53]; *Reig*, fn.61 above, at [30].

\(^{64}\) *Weh*, fn.22 above, at [53], quoted in *Reig*, fn.61 above, at [31].

\(^{65}\) *Weh*, fn.22 above, at [56]; quoted in *Reig*, fn.61 above, at [31].

\(^{66}\) *Weh*, fn.22 above, at [55].

\(^{67}\) *Reig*, fn.61 above, at [12].


a prosecution for perjury based on the statement itself. This was sufficient for the European Court to conclude that there was no basis to find that "such disclosure would have exposed [the applicant] or any other person to a risk of criminal prosecution on the basis of such evidence". Beyond that, the Court commented on the fact that the applicant responded to the demand for information by committing perjury, stating:

"It may be that the applicant lied in order to prevent uncovering conduct which, in his perception, might possibly be criminal and lead to a prosecution. However, the right to silence and not to incriminate oneself cannot be interpreted as giving a general immunity to actions motivated by the desire to evade investigation."

Although the Court's language has been unreceptive to the idea that an effort to compel potentially self-incriminatory evidence can legitimate a false, misleading or incomplete response, in each case alternative principles supporting the denial of the applicants' right to silence claims were stated. Thus the matter cannot be considered as definitively resolved. Supporting the uncertainty is the dissenting opinion in Weh in which the authors state that "[w]hen assessing a possible risk of incriminating oneself, we see no reason to distinguish between situations where the owner of the car has refused to give any information and where he has given wrong or insufficient information."

As long as there is an adequate mechanism for an individual to claim his right to silence, it is reasonable to conclude that the European Court would not sanction a procedural response of perjury, misleading or incomplete information. As in Van Vondel, the State could limit itself to prosecuting the individual for the perjury contained in the statement itself in which case the compelled statement would not be the source of incriminating evidence for the prosecution of some other pre-existing offence. Elsewhere it has been argued that the state has a strong interest in not being misled when it receives information pursuant to an inquiry. For this reason, it is appropriate to limit individuals to the options of refusing to answer specific questions based on an assertion of the right to silence or providing the information subject to limitations on any later use of the response, although the later choice may ultimately make it more difficult for the state to secure a conviction.

However, one must recognize that the reality of a compulsory demand for information may present unique pressures. The individual who is the subject of a demand for information subject to legal penalty for any failure to satisfactorily comply may find himself drawn into unanticipated areas of inquiry where the legal risks are unclear.

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69 Ibid., at [The Law].
70 Ibid.
71 Weh, fn.22 above, Joint Dissenting Opinion of Judges Lorenzen, Levits and Hajiyev, at [2].
72 Peter Westen and Stewart Mandell, "To Talk, to Balk, or to Lie: The Emerging Fifth Amendment Doctrine of the 'Preferred Response'" (1982) 19 American Criminal Law Review 521, pp.528–533. Along with concern over the state being misled, the authors also note that disallowing perjury as an acceptable response is further justified on the grounds that lying in itself is morally unacceptable.
73 Ibid.
Legal representation may or may not be available, but in any event the individual may have to make a quick choice among a series of undesirable options.

Beyond that, legal assurances against future use of compelled information may not be clear or easily verified, nor will they necessarily leave the individual free of all potential adverse criminal consequences. The European Court did not indicate whether compelled statements could be used as a basis for prosecution decisions, as investigatory leads to other evidence that the State might wish to offer against the individual, or as admissible to counter other testimony the accused may offer in court. All of these factors suggest at least the possibility that there may be some settings in which the interests furthered by the right to silence might outweigh the interests of the state in discouraging false, misleading or incomplete responses to a demand for potentially incriminatory information. Neither Weh, Reig, nor Van Vondel necessarily foreclose this possibility.

The warning and notification issue

To what extent should individuals be warned of their self-incrimination rights? No doubt many who are presented with State demands for information are already aware of their right to silence at the time they must make a decision whether and how to respond. Others, however, may not be aware of their rights and may not have ready access to legal counsel. Moreover, even those familiar with the right to silence may feel pressured by the authorities, and for them a warning would serve to defuse the pressure and permit them to make a voluntary and reasoned choice. But there is also the possibility that a notice or warning could have the opposite effect by heightening the pressure on the individual to respond to the State’s demand, thereby contributing to the creation of an impermissibly coercive environment that might itself render any resulting statement inadmissible.

A number of cases have been presented to the European Court involving UK legislation that permits adverse inferences from silence in situations involving a suspect’s failure to answer police questions or a criminal defendant’s failure to take the witness stand at his criminal trial.\(^{74}\) UK law specifically requires that the suspect be informed by the officer who undertakes to question him both of the right to remain silent as well as the potential adverse inference from silence that may later be drawn by the factfinder in court.\(^{75}\) Similarly, the criminal defendant must be advised that his failure to take the witness stand can be used against him by the factfinder.\(^{76}\) In upholding the legitimacy of drawing adverse inferences from silence,\(^{77}\) the European Court has frequently noted the fact that the system specifically includes a warning that this consequence may ensue.\(^{78}\)

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\(^{75}\) Ibid., at §§ 34, 36, 37.

\(^{76}\) Ibid., at § 35.

\(^{77}\) Murray, fn.10 above. It is important that the factfinder be properly instructed on the circumstances justifying the drawing of an adverse inference. These require that the jury be satisfied that assertion of the right to silence “could only sensibly be attributed to [there being ] no answer or none that would stand up to cross-examination”. Condron, fn.27 above, at [61].

\(^{78}\) E.g. Murray, fn.10 above, at [11], quoting the caution to Murray “that if you fail to mention any fact which you rely on in your defence in court . . . it may be treated in court as supporting any
What the Court has not had to address is whether a system of adverse inferences from silence would be permissible in the absence of a warning. When this issue has been presented to the United States Supreme Court, its response has been a multi-category analysis. Where a suspect under custodial interrogation had been specifically warned of his right to remain silent, the so-called Miranda warning under American law,79 no adverse inference from silence may be drawn. The Court considered that it would be fundamentally unfair to use silence against an accused after receipt of a Miranda warning since the warning itself contains an implicit assurance against adverse consequences from silence.80 On the other hand, a pre-Miranda warning failure to reveal information to the authorities may be used to impeach inconsistent statements made at trial since the individual could not claim any implicit assurance against such a consequence.81 Broader use of pre-Miranda silence can be found at the lower court level where it has been held that silence in the face of an accusation may be considered as a tacit admission which may be used as substantive evidence of guilt.82 Finally, American law strictly forbids any adverse comment on the criminal defendant's failure to take the witness stand.83

While this analysis addresses a number of important adverse inference issues, it does not answer the question of whether a warning is a prerequisite where official questioning produces an incriminatory response. Warnings may well be a wise policy choice for individual signatory nations, but it is not clear that the very generalized standards of the European Convention would necessarily make them a required procedural feature of the Convention-based right to silence in all situations.

However, even if not mandated, the absence of a warning would certainly be a factor of relevance in determining whether or not the environment leading to the incriminatory statement was coercive. Conversely, where conditions of confinement were severe, and where access to counsel was not made available during intense questioning, the European Court concluded that the giving of the UK warning, which includes the threat of adverse consequences from silence, could become "an element which heightened [the suspect's] vulnerability to the relentless rounds of interrogation on the first days of his detention".84 This is a somewhat unusual context, and there is no indication that the Court would find warnings generally coercive in the more typical interrogation environment.

Two other European Convention proceedings in which notice issues were raised in the context of right to silence claims are also worthy of note. In Abas v The Netherlands,85 the applicant was convicted of tax evasion. He sought to exclude as evidence information he provided to the authorities pursuant to their demand. He argued before the European Commission that he was in a position similar to that of a suspect questioned about a

relevant evidence against you". See also, Conlon, fn.27 above, at [15]; Averill v United Kingdom, fn.31 above, at [11] and [13]; Beckles v United Kingdom, fn.31 above, at [12].

80 Doyle v Ohio, 426 U.S. 610 (1976).
82 State v Peebles, 569 S.W.2d 1 (Mo. App. 1978). The Supreme Court has not addressed whether this constitutes an infringement of the American self-incrimination privilege.
84 Magee, fn.32 above, at [43].

criminal offence, and therefore was entitled to the protection of the right to silence. He noted, in particular, that there was no warning that he was not obligated to answer any questions or provide information that might be self-incriminatory.

Based on these facts, the Netherlands Supreme Court found that there was no basis to conclude that there was reasonable suspicion of a criminal offence at the time that the demand for information was made, and thus no right to silence violation occurred. The European Commission agreed with this conclusion, suggesting as a rule of law that right to silence protections would not be available in such preliminary proceedings. However, since the official investigation continued following a search of the applicant’s family home, protections afforded by Art.6 of the Convention arose. But the Commission offered no disagreement with the Netherlands Supreme Court position that there is no duty to give a caution in the context of a written demand for information “as there is no direct confrontation between the interrogator and the interrogated person and the latter is not required to immediately answer the questions put to him or her.”

It is certainly true that the characteristics of a face-to-face interrogation are markedly different than situations in which an individual receives a written demand for information. The latter allows the individual to take advantage of the opportunity to secure legal advice and exercise reasoned judgment. While that does not mean that informing individuals of their rights and the risks they face are inappropriate requirements, it is difficult to consider decisions made in such a context as unfair. Overall, it is unlikely that the Court would view the Convention as imposing any notice or warning requirement unless the official demand for an answer or for other potentially self-incriminatory information had the attributes of an oral interrogation.

The failure to warn was also a factor in the European Court’s more recent decision in Macko and Kozubal v Slovakia. The concern expressed by Macko was that he was punished for refusing to make statements as a witness in a criminal case against another. He claimed that his refusal was in reliance on a Code of Criminal Procedure provision allowing him not to respond if his statement involved the risk that criminal proceedings would be brought against him or someone else close to him. He complained further that he had never been warned that he was subject to a fine nor was he investigator that his situation precluded the bringing of criminal proceedings against him. As a result of this background, the Court rejected the argument that the complaint was manifestly ill-founded, and held it to be admissible under the Convention.

If the Court's ultimate ruling favours the applicant, it could be interpreted to mean that authorities are required to notify individuals that they do not face an incrimination risk before they may insist on answers to potentially self-incriminatory questions. It would further suggest that in the context of at least face-to-face questioning, individuals should know exactly where they stand before they may be compelled to respond. This would include information concerning the right not to answer potentially self-incriminatory questions, the risk of adverse consequences if the questions are not answered, and a clear statement of freedom from potential adverse consequences if answers are required despite their potential self-incriminatory character. Provision of this information insures that the individual being questioned can make an intelligent choice among the available

86 Ibid., at [Relevant Domestic Law and Practice].
87 (App. Nos 64054/00 and 64071/00), admissibility decision of January 5, 2006.
options rather than being subjected to unknown consequences following whatever choice he may ultimately make.

**Conclusion**

The development of a jurisprudence of self-incrimination by the European Court of Human Rights has been marked by the Court's clear recognition that the task requires sensitivity to the complex of interests that are involved. The result has been an emerging right to silence under the ECHR that recognizes the general principle that the state may not compel an unwilling individual to incriminate himself, but also respects the right of the state to acquire information for non-criminal purposes. Additionally, the Court's careful balancing process does not prohibit the state from using the exercise of the right to silence as a basis for adverse inferences in criminal cases, albeit under limited circumstances and with appropriate jury instructions.

Similar care will need to be taken when the Court directly addresses the procedural issues that can arise as part of the invocation of the right to silence. The fact that an individual may not be compelled to incriminate himself does not necessarily mean that he must be informed of the right or that he has the option to commit perjury in the face of impermissible compulsion. If the setting presents a clear risk of incrimination, the right to silence may or may not justify the individual's assertion of the right to refuse to appear for official questioning as opposed to being obligated to appear, subject to the right to assert a privilege of silence in the face of specific incriminatory questions.

In right to silence cases presented to the European Court thus far, related procedural issues have been present, but they have not served as the exclusive basis for any of the Court's decisions. Consequently, how the Court would resolve these issues is largely a matter of inference. However, if future cases present procedural right to silence problems in a form that makes their resolution outcome determinative, the Court will no doubt undertake a careful weighing of competing interests just as it has done in the context of the substantive right to silence questions it has addressed. The answers the Court gives will have a substantial influence on the breadth and scope of right to silence protections under the ECHR.