"EQUALITY OF ARMS" BETWEEN THE SUSPECT INTERROGATED IN GARDA CUSTODY AND THE GARDAÍ?

Encroachments on the Right to Silence, the proposed Safeguard for the Suspect in the form of Legal Advice and the Consequent Implications for Garda Accountability

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I. NATURE AND STATUS OF THE RIGHT TO SILENCE

The right to silence, or as it has also been broadly labelled, the privilege against self-incrimination, is widely recognised across the democratic world as being an integral component of a fair and balanced criminal justice system, particularly in those countries operating under an adversarial/accusatorial process. Indeed, it garners international support under the much-esteemed United Nations Covenant on Civil and Political Rights.[1] Moreover, the European Court of Human Rights (ECtHR) has consistently held that the right to silence is inherent in the right to a fair trial protection of Article 6(1) of the European Convention on Human Rights (ECHR).[2] However, the right to silence has quite a chequered past in Ireland, ranging from arguments as to its very existence, to the legal source of such a right, and, most importantly in recent times, to the extent and parameters thereof.

The basic underlying rationale of the recognition and protection of a right of suspects to remain silent can be justified on several grounds: first, to ensure that any statements and/or confessions made by a suspect are free and voluntary, not

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[1] United Nations Covenant on Civil and Political Rights (1976) UNTS 171, Article 14(3)(g) conferring a right on a suspect, *inter alia*, not to confess guilt under compulsion.

[2] See for example *Funke v. France* (1993) 16 E.H.R.R. 297; *Murray v. United Kingdom* (1996) 22 E.H.R.R. 29; *Saunders v. United Kingdom* (1996) 23 E.H.R.R. 313.

improperly coerced out of fear of sanction, or in the hope of a favourable disposition of any potential action against him/her. By conferring a right on a suspect to refrain from proffering any information against his/her will, not only does it confer a direct benefit on the suspect, it also assists the state, in having a direct bearing on the credibility of any such statement voluntarily made by the suspect and in helping to secure justice and ensure the avoidance of potential miscarriages of justice.[3] The veracity of any statement must be shrouded in significant doubt where it is proffered in circumstances involving some degree of compulsion. Secondly, on a broader level, the existence of a right to remain silent is a necessary feature of a criminal justice system which operates on the basis of a presumption of innocence, and which imposes an onus on the prosecution to prove the guilt of the accused beyond a reasonable doubt, without compelling a suspect to assist by way of self-incrimination.[4] In addition to the above, the *Balance in the Criminal Law Review Group: Final Report*[5] draws together cogent and strongly persuasive arguments for the

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[3]See *Murray v. United Kingdom* (1996) 23 E.H.R.R. 29, at para. 45. See also Hogan, "The Right to Silence after *National Irish Banks* and *Finnerty*" (1999) 6 D.U.L.J. 176, 179, where it is suggested, quite correctly, that encroachments upon the privilege against self-incrimination/right to silence present risks to the innocent in the form of potential miscarriages of justice, particularly the inarticulate and/or socially vulnerable accused.

[4] The maxim of medieval canonical-roman law, *nemo tenetur accusare seipsum* (no one is obliged to accuse oneself), is one of the earliest statements of the principle upon which the privilege against self-incrimination was based, of which the right to silence as we now recognise it is a particular extension. Though (as discussed in note 2 above and the accompanying text) the ECtHR has positioned the right to silence under Article 6(1) of the ECHR, reference has also been made by the court in this context to Article 6(2), which protects the presumption of innocence and prosecutorial burden of proof – see *Saunders v. United Kingdom* (1996) 23 E.H.R.R. 313, at 368, where the right not to incriminate oneself, which prohibits the prosecution resorting to oppression or coercion in obtaining evidence involuntarily from a suspect, is described as being "closely linked to the presumption of innocence contained in [Art. 6(2) of] the Convention". Berger points out, however, that this link between the right to silence and Art. 6(2) has not been subsequently endorsed by the ECtHR, who have declined to rule on the matter – "Europeanizing Self-Incrimination: The Right to Remain Silent in the European Court of Human Rights" (2006) 12 *Columbia Journal of European Law* 339, 344.

[5] (Dublin: Stationery Office, 2007).

continuing existence of a substantive right to silence which, notwithstanding the constraints imposed by the Constitution and Article 6(1) ECHR, according to the authors, inhibit them in recommending any general relaxation of the right.[6]

The four grounds advanced by the Review Group, which all tend to put paid to the traditional argument advanced that the innocent have nothing to gain and in fact betray any notion of innocence by remaining silent, can be summarised as follows. First, an accused may be shocked and overwhelmed by the situation in which he finds himself; distressed, upset and unable to think clearly as to cogent facts or reasons evidencing innocence. Secondly, the revelation of an exculpatory fact may be undesirable due to the personal embarrassment which may ensue therefrom, such as, for example, confirmation of an alibi in the form of a mistress. Thirdly (and it is submitted of most persuasive value in this regard) is the fact that the significance, implications and constituent elements of the alleged offence and/or situation may not be at all clear to the suspect, requiring at the very least prior legal advice to become better appraised of the situation. Fourthly, the suspect may of course be uneducated, inarticulate and/or vulnerable, and feel that silence is preferable given those particular characteristics.[7] Any analysis therefore of the legislative encroachments upon the parameters of the right to silence must, in considering the legitimacy of same, bear in mind the underlying rationale for the existence and protection of the right in the first instance.

It is quite clear that the common law has recognised a right to silence for many centuries, with Shanley J. in the High Court in *Re National Irish Banks Ltd*[8] tracing it back to the 17th Century in England.[9] Indeed, the application of this common law

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[6] (Dublin: Stationery Office, 2007) at p. 23.

[7] (Dublin: Stationery Office, 2007) at pp. 20-23.

[8] [1999] 3 I.R. 145.

[9] [1999] 3 I.R. 145, at 153. There is some dispute regarding the exact origins of the right to silence at trial as we now understand it, with John Langbein asserting quite persuasively that it can be traced to 18th century England as a particular consequence of, *inter alia*, the advent of defence lawyers in the criminal trial – see generally Langbein, "The Historical Origins of the Privilege Against Self-Incrimination at Common Law" (1993-94) 92 *Michigan Law Review* 1047.

rule to Ireland was confirmed by what has been termed "the classic decision on the position of the right to silence at common law and under the Constitution of the Irish Free State",[10] being the case of *The State (McCarthy) v. Lennon*[11] of 1936. It was held in that case that the common law right to silence was effectively incorporated into Ireland under the old Article 73 of the Free State Constitution of 1922.[12] However, a key point here is that the right was not granted, nor confirmed as having attained, constitutional status in *The State (McCarthy) v. Lennon*, but was merely confirmed as forming part of the *common law* of Ireland *by* that Free State Constitution. However, it is clear from this early judgment that the common law right to silence, though recognised for centuries, was not absolute even at that juncture, and was capable of being restricted by legislation, which is effectively what had happened in that case. The government having enacted a law[13] to amend the constitution[14] to provide, *inter alia*, for the complete abrogation of the right to silence in certain situations, with failure to respond to questions put by the police during interrogation being punishable by up to and including death. The legislation was upheld by the court.

We can see from the above that the right to silence was a common law creation, and continued to be treated and to exist as such in Ireland for the following 60 years, until the case of *Heaney and McGuiness v. Ireland*,[15] where its status was elevated to that of constitutional right. In the High Court,[16] Costello J. opined that the right to silence came within the protection of Article 38.1 of the Irish Constitution, the right to a fair trial, though the Supreme Court[17] located the right under the auspices of Article 40.6, as a corollary to the right of freedom of expression. Notwithstanding the disagreement on the exact

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[10] [1999] 3 I.R. 145, at 173-174, per Barrington J. in the Supreme Court.
[11] [1936] I.R. 485.
[12] [1936] I.R. 485, at 499, per Fitzgibbon J.
[13] Constitution (Amendment No. 17) Act, 1931.
[14] Inserting a new Article 2A into the Free State Constitution 1922. Note that at the time of the amending Act, the Oireachtas had the power, in practice, of constitutional amendment without recourse to a referendum.
[15] [1994] 3 I.R. 593; [1996] 1 I.R. 580.
[16] [1994] 3 I.R. 593.
[17] [1996] 1 I.R. 580.

location of the right within the Constitution, in the event, its constitutional status was confirmed.[18] As we have seen above, the right to silence as it existed under the common law was capable of restriction by legislation. However, given the elevation of the right to constitutional status, was the newly recognised constitutional right not henceforth immune from legislative encroachment and, even if such encroachment be allowable, presumably that will only have been in the most exceptional and infrequent circumstances? Unfortunately, that is not so. We will discover from the following analysis that the legislature has consistently sought to infringe upon the scope of the constitutional right to silence, from shortly after the entry into force of the current Constitution, *Bunreacht na hÉireann*, in 1937, to the present day. The effect of this pattern of encroachment is to progressively reduce the opportunities for and potential benefit of reliance on a substantive right to silence. Some of the more significant examples of this legislative encroachment will now be analysed.

II. LEGISLATIVE ENCROACHMENTS ON THE RIGHT TO SILENCE – "DIRECT" PROHIBITIONS ON SILENCE, AND THE RESPONSE OF THE EUROPEAN COURT OF HUMAN RIGHTS (ECtHR)

The first and one of the more significant attempts to circumvent the common law right to silence occurred in the guise of section 52 of the Offences Against the State Act, 1939. This provided that whenever a person is detained under Part IV of the Act, a full account of that person's movements during a specified period and any information he/she may have relating to the commission of an offence under the Act or a scheduled offence by any other person may be demanded by a member of the Gardaí.[19] Should the person fail to account for his or her movements or provide such information, in other words exercise a "right to silence", then he is guilty of an offence, and is liable to

[18] See Section II below for a discussion of the ECtHR jurisprudence on the right to silence, including several cases from Ireland where the impugned legislative provisions were found incompatible with Art. 6(1) of the ECHR.
[19] Section 52(1) of the Offences Against the State Act, 1939.

be imprisoned for a term of up to six months.[20] Clearly, a constitutionally protected right is of very little practical benefit indeed if the exercise of same will expose the "perpetrator" to imprisonment. Nonetheless, the constitutionality of this provision was confirmed by both the High Court and Supreme Court in *Heaney and McGuiness v. Ireland*.[21] Thus, whilst both courts recognised the right to silence as having attained constitutional status, though under different provisions,[22] it was confirmed that the right was not absolute but could be restricted by legislation under a proportionality test, where the encroachment constituted a proportionate interference in the right which was rationally connected to its objective and impaired the right to as little a degree as possible.[23] In the Supreme Court, O'Flaherty J. stated that, having situated the right under Article 40.6 as a corollary to the right of freedom of expression, "it is clear that the right to freedom of expression is not absolute. It is expressly stated in the Constitution to be subject to public order and morality. The same must hold true of its correlative right – the right to silence".[24]

This judgment effectively holds that due to the seriousness of the offences covered under the 1939 Act, the encroachment on the constitutional right to silence is justified. Therefore, by implication, the more serious the offence in general, the greater the scope for legislative interference with the right to silence. However, this is an extremely undesirable development, due to the fact that the extent of and ability to exercise a right as important as the right to silence is potentially of much more value to a person suspected of serious criminal behaviour, given the hugely significant consequences following a conviction. Notwithstanding such an assertion, it would appear that the more serious the offence with which a suspect is charged, the greater

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[20] Offences Against the State Act, 1939, s. 52(2).
[21] [1994] 3 I.R. 593 (H.C.); [1996] 1 I.R. 580 (S.C.).
[22] Costello J. in the High Court opined that the right to silence came within the protection of Art. 38.1, the right to a fair trial; whilst the Supreme Court viewed the right as a corollary to the right of freedom of expression under Art. 40.6.
[23] [1994] 3 I.R. 593, at 607.
[24] [1996] 1 I.R. 580, at 589.

the encroachment on his/her ability to freely exercise a right to silence.[25]

For those favouring an individual rights-based approach to the criminal justice system, and despairing at the progressive dismantling of the right to silence in Ireland, the ECtHR has offered some solace. Following the Supreme Court decision in *Heaney*, the case was subsequently brought before the ECtHR.[26] The issue to be determined by the ECtHR was whether requiring the provision of information in response to questioning under section 52 on pain of criminal sanction was an impermissible encroachment on the detained suspects' right to remain silent.[27] The Court was of the view that the degree of compulsion inherent in section 52 most certainly interfered with the suspects' right to silence, to such an extent so as to "destroy the very essence of .. their right to remain silent".[28] Consequently, such an encroachment was held not to be proportionate, notwithstanding the accepted objective of protecting public order against the threat posed by terrorism. Similarly, in a further case concerning the same section 52 of the 1939 Act, *Quinn v. Ireland*,[29] the ECtHR unsurprisingly found that the impugned provision breached the applicant's rights under Article 6(1) of the ECHR, as it again destroyed the very essence of the right to remain silent. This was so notwithstanding the fact that in *Quinn*, unlike *Heaney*, the suspect had consulted with his solicitor. It is submitted that it is extremely difficult to advance a sustainable argument against the findings of the ECtHR in these cases. How can one speak of a

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[25] With regard to legislative provisions specifically criminalising silence in certain circumstances, ss. 15 and 16 of the Criminal Justice Act, 1984, are further examples. Failure to provide information with respect to the possession of a firearm and information with respect to possession of stolen property respectively within the circumstances detailed in those sections constitute a criminal offence.

[26] *Heaney and McGuinness v. Ireland* (2001) 33 E.H.R.R. 12.

[27] The ECtHR had found some years previously that the right to silence, though protected under the fair trial provisions of Art. 6(1), was not absolute, and could be restricted in certain circumstances – see *Murray v. United Kingdom* (1996) 23 E.H.R.R. 29 at para. 47. This case concerned the validity of certain adverse inference provisions in the U.K. and will be considered further in Section III below.

[28] (2001) 33 E.H.R.R. 12, at para. 55.

[29] App. No. 36887/97 (2001).

substantive legal right in particular circumstances where the exercise of same will expose the person so exercising to criminal sanction in the form of imprisonment? In such circumstances its value to a suspect is set at nought.

Some months after the Supreme Court judgment in *Heaney* in Ireland, the ECtHR had to consider, aside from the legitimacy in itself of a statutorily-compelled response to police questioning which later fell to be considered by the court in *Heaney and McGuinness*, whether the use of such a compelled statement in a subsequent criminal trial against the accused was permissible. In *Saunders v. United Kingdom*,[30] the ECtHR confirmed that such use infringed Article 6(1) ECHR and could not be justified on the grounds of public interest.[31] Having no

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[30] (1996) 23 E.H.R.R. 313.

[31] While the *Heaney*, *Quinn* and *Saunders* judgments of the ECtHR each evidence an unwillingness to countenance the grounds of public interest or public policy to justify an infringement which essentially extinguishes the right to silence as protected by Art. 6(1) ECHR, a recent judgment of the ECtHR appears to depart from the firmly established trajectory of the ECtHR jurisprudence in this regard. The decision in *Francis and O'Halloran v. United Kingdom* (2008) 28 E.H.R.R. 21 has again emphasised the non-absolute nature of the right to silence and privilege against self-incrimination as confirmed by the ECtHR in *Murray*. In *Francis and O'Halloran* it was held that in deciding whether there has been an infringement of an applicant's right to silence and/or privilege, "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" (at para. 55). In that particular case, which concerned alleged speeding offences and the procedure utilised to obtain evidence for and initiate prosecution in respect thereof, the degree of compulsion, though direct and criminal in nature in the form of an obligation to provide information as to the driver of a motor vehicle in certain circumstances, was justified on the basis that those who own and operate motor vehicles subject themselves to various obligations and responsibilities as part of the regulatory regime applicable to motor vehicles, given their capacity to cause serious injury. Moreover, adequate safeguards existed, in that liability will not be imposed on a vehicle owner where he did not and could not with reasonable diligence have known who the driver of the vehicle was. In addition, quite interestingly, the Court also found nothing objectionable in the fact that the information obtained as to the identity of the driver of the vehicle from the vehicle owner was admissible in a subsequent criminal trial for speeding, on the basis that the identity of the driver was only one factor in the offence of speeding, it was not possible to base a conviction solely on the information compulsorily obtained, and the

doubt been influenced by this judgment amongst others, the Irish Supreme Court similarly found that the use of evidence obtained on foot of a statutory demand in subsequent criminal proceedings was unconstitutional.[32] However, the use of such evidence in subsequent civil proceedings, and significantly the validity in itself of compelling a statement/confession on pain of criminal sanction, were found unobjectionable.[33] Whilst Hogan asserts that *Re National Irish Banks* represented a "distinctly more liberal line on the right to silence issue"[34] on the part of the Supreme Court, and, along with the decision in *D.P.P. v. Finnerty*,[35] "moved decisively to re-establish the importance of the right to silence",[36] it is submitted that the recognition of the unconstitutionality of the subsequent use of a compelled confession in criminal proceedings merely clarified a pre-existing uncertainty in the law,[37] and moreover did so on the basis of impending pressure from the ECtHR by virtue of the *Saunders* decision. Undoubtedly, while confirmation of the unconstitutionality of the use of a compelled confession as evidence in a subsequent criminal trial is of course welcome, it only ensures however the most basic of

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onus was still on the prosecution to prove all other elements of the crime alleged. It is submitted that this is a worrying development, and constitutes a significant retreat from the previous trajectory of ECtHR jurisprudence, specifically in the context of the acceptance of public policy or public interest concerns (specifically in this context the potential for serious harm inherent in the use of motor vehicles) as a justification for the infringement of the right to silence and privilege against self-incrimination.

[32] *Re National Irish Banks Ltd* [1999] 3 I.R. 145.

[33] *Re National Irish Banks Ltd* [1999] 3 I.R. 145, at 188.

[34] See Hogan, "The Right to Silence after *National Irish Banks* and *Finnerty*" (1999) 6 D.U.L.J. 176, 186.

[35] [1999] 4 I.R. 364. For an analysis of this case and its suggested impact on the Irish position in this area, see Section III below.

[36] Hogan, "The Right to Silence after *National Irish Banks* and *Finnerty*" (1999) 6 D.U.L.J. 176.

[37] At the time of the *Heaney* judgment in the Irish Supreme Court, uncertainty existed as to whether use of such a statement under s. 52 in a subsequent criminal trial was permissible – see Berger, "Europeanizing Self-Incrimination: The Right to Remain Silent in the European Court of Human Rights" (2006) 12 *Columbia Journal of European Law* 339, 354, citing the Court of Criminal Appeal decision of *D.P.P. v. McGowan* [1979] I.R. 45, which seemed to suggest support for such a proposition, though the Supreme Court in *Heaney* reserved judgment on the issue.

protections to an accused notwithstanding the constitutional status of the right. For the right to silence to have any substance at all, let alone be accorded constitutional status, such a conclusion was imperative. However, in particular by finding unobjectionable the compulsion to proffer a statement on pain of criminal sanction, the Supreme Court did little to repair the adverse impact on both the substance and perception of the right to silence which ensued from its previous decision in *Heaney*. The contention that in fact little of substance was achieved by the Supreme Court in *Re National Irish Banks* in re-establishing the importance of the right to silence is supported by the subsequent ECtHR decisions in *Heaney* and *Quinn.* In these cases, as aforementioned, it was the degree of compulsion inherent in a statutory demand for information, on pain of criminal sanction, which destroyed the essence of the right to remain silent, quite apart from any potential use in subsequent criminal proceedings.[38]

Therefore, notwithstanding any gloss put on *Heaney* by virtue of the Supreme Court decision in *Re National Irish Banks*,[39] the right to silence was, in effect, still destroyed under that provision. The unconstitutionality of the use of a compelled statement in subsequent criminal proceedings is the only facet of the right as it currently exists which can be said to have any real and valuable substance, given the forensic legislative dismantling of other elements of the right, through, in particular, the drawing of adverse inferences from an accused's silence in certain circumstances.

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[38] Moreover, the contention that little of practical substance was achieved by this clarification on the part of the Supreme Court is further supported by a brief analysis of other similar provisions which criminalise silence on the part of the accused. For example, ss. 15 and 16 of the Criminal Justice Act (note 25 above), while requiring answers from the suspect on pain of criminal sanction, do not permit such answers to be used in evidence at a subsequent trial. The Supreme Court in *Re National Irish Banks* merely confirmed that a similar situation pertained with regard to s.52 of the 1939 Act, and given the trajectory of the ECtHR jurisprudence, such a development was, it is submitted, inevitable. However, as discussed above, such a gloss on s.52 would still not save it from contravening Art. 6(1) ECHR.

[39] Hogan, "The Right to Silence after *National Irish Banks* and *Finnerty*" (1999) 6 D.U.L.J. 176, 187.

III. LEGISLATIVE ENCROACHMENTS ON THE RIGHT TO SILENCE – "INDIRECT" ADVERSE INFERENCE PROVISIONS

Another facet of the legislative encroachment on the right to silence, and of perhaps more substantial impact thereon, can be observed with regard to the so-called "inference provisions", as opposed to those provisions under which silence constitutes a criminal offence, as under section 52 of the 1939 Act. Under these provisions, the fact that an accused maintained silence during interrogation could allow the trier of fact to draw inferences from such silence at trial. The first such provisions enacted in Ireland[40] were sections 18 and 19 of the Criminal Justice Act, 1984, which concern inferences which may be drawn from, respectively, failure to account for objects, marks or substances on the person or in his or her possession and presence at a particular place in or around the time of the commission of the offence under investigation. Under both sections, such inferences as appear proper may be drawn from the failure to account for the objects, marks, substances or presence at a particular place and may be treated as corroboration, or capable of amounting to corroboration, of any evidence in respect of which the failure to account is material. The constitutionality of these provisions was impugned in *Rock v. Ireland*, but, again, both the High Court[41] and Supreme Court[42] approved the *Heaney* decision and upheld the inference provisions as a proportionate interference with the right to silence, given that the inferences, and only those that appear proper, could only amount to corroboration and could not serve to convict an accused in the absence of any other form of evidence. Thus, in addition to those provisions which criminalise silence, such as section 52 of the 1939 Act, all inference provisions which do not do so but which could significantly influence the trial of an accused person and have serious repercussions for the presumption of innocence would all appear to have been given the judicial stamp of

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[40] See Daly, "Silence and Solicitors: Lessons Learned from England and Wales?" (2007) 17 I.C.L.J. 2a, 4.
[41] *Rock v. Ireland* (High Court, unreported, Murphy J., 10 November 1995).
[42] *Rock v. Ireland* [1997] 3 I.R. 484.

approval; upheld as constitutional provided the "proportionality test" has been passed, which, as is asserted above, will largely be dependent on the degree of seriousness of the alleged offence.[43]

A further very significant inroad into the right to silence was achieved by virtue of section 7 of the Criminal Justice (Drug-Trafficking) Act, 1996, which provided[44] that inferences could be drawn from failure to mention when questioned a fact which is later relied upon in defence at trial and such inferences, as is the case under sections 18 and 19 of the Criminal Justice Act, 1984[45] as discussed above, can amount to corroboration. This provision quite clearly goes further than those inference provisions under the 1984 Act, however, in that it is not a failure to account for objects, marks, substances or presence at a particular place *when questioned by the police specifically in relation to those items or that presence*, but a failure to mention when questioned *any fact* which may be later relied on in court as part of the accused's defence. Thus, not only are suspects expected to jettison the right to silence in response to questioning, they are, under section 7, supposed to proactively volunteer facts which later happen to form part of their defence – as no doubt framed by solicitors and

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[43] In addition to ss. 18 and 19 of the Criminal Justice Act, 1984, another example of similar legislative provisions which allow for the drawing of adverse inferences from an accused's refusal to respond to specific questions is s. 2 of the Offences Against the State (Amendment) Act, 1998 (as amended by s. 31 of the Criminal Justice Act, 2007). This section provides for inferences to be drawn from a failure to respond to questions regarding the suspect's movements, actions, activities or associations during a specified period in a case involving alleged membership of an illegal organisation. Inferences are permitted provided a reasonable opportunity to consult with a solicitor is afforded to the suspect and the interview is electronically recorded. For a discussion of the adequacy of these safeguards in the context of the amended Criminal Justice Act, 1984, see Section IV below. Similarly, s.72A of the Criminal Justice Act, 2006 (as inserted by s. 9 Criminal Justice Act, 2009), provides for the drawing of adverse inferences in cases involving organised crime, where the suspect has refused to respond to questions regarding his/her movements, actions etc.

[44] This section has now been repealed by Part IV of the Criminal Justice Act, 2007 – see the discussion below.

[45] These provisions have been amended by ss.28-29 of the Criminal Justice Act, 2007.

barristers with years of collective experience in the legal profession.

Whilst section 7 requires the disclosure of a fact which could "reasonably" have been expected to be mentioned during interrogation, by what standard is this reasonableness to be measured? What about the suspect possessing a less than average level of intelligence? Clearly, requiring such a person, or even a man of average intelligence with no legal knowledge or background, to consider what may or may not be relevant to his defence, and further to consider the merits or otherwise of foregoing his "right" to silence and mentioning such a fact, all within the context of the "pressure-cooker atmosphere" that is the police station during police interrogation and detention, which, under the 1996 Act,[46] can last for up to seven days, is extremely unfair and imbalanced. As Daly has quite accurately surmised,

> a defence to a criminal charge is a legal construct. Defences such as self-defence, provocation, duress, insanity and so on have legal meanings which may not be readily apparent to the layman. It seems harsh then to place a burden upon a suspect in the police station to mention at that point any fact which he thinks may be of relevance to a later defence. At this point, he may not be aware of what sort of a defence might be appropriate in his case and he may have no idea what sort of facts would form part of that defence.[47]

Given the fact therefore that a defence is a legal construct, can it not be asserted that access to legal advice in such a situation will resolve the problem and act as an adequate safeguard? If a suspect is not aware of a fact which may later be relevant to his defence at trial, clearly his solicitor will, or at least should be. However, as we will discover below, the circumstances surrounding legal advice in a garda station in Ireland significantly hamper both the detained suspect and indeed the advising solicitor in this regard and undermine exponentially the value of

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[46] Ss. 2(2)(a)-(h) of the Criminal Justice (Drug Trafficking) Act, 1996.

[47] Daly, "Silence and Solicitors: Lessons Learned from England and Wales?" (2007) 17 I.C.L.J. 2a, 4.

such advice as a safeguard against the undue encroachment on the right to silence of the inference provisions under Irish law.

The combined impact on the right to silence of the 1996 Act, together with the 1939 and 1984 Acts discussed above, led Ryan to proclaim that "the right to silence arguably no longer forms part of Irish law".[48] If that statement could be confidently asserted in 1997, it is submitted that it must now command even greater authority, by virtue of the Criminal Justice Act, 2007, and in particular section 30 thereof. This Act repeals, *inter alia*, section 7 of the Criminal Justice (Drug Trafficking) Act, 1996, but section 30 actually widens the incursion into what was left of the right to silence following the 1996 Act, and does this by inserting a new section 19A into the Criminal Justice Act 1984. The wording of this new section 19A is very similar to the repealed section 7 of the 1996 Act, but its application is much broader in that it now applies to all arrestable offences, being of course those punishable by imprisonment of 5 years or more. Moreover, it applies to a failure to mention a fact later relied on in a defence which "in the circumstances existing at the time clearly called for an explanation",[49] as opposed to the previous requirement of having been reasonably expected to be mentioned. It is unclear exactly what was being attempted by the legislature by the inclusion of the phrase "clearly called for an explanation"; though it is submitted that the origins of this form of wording stemmed from the ECtHR decision in *Murray v. United Kingdom*,[50] where that exact phrase was used.[51] However, in any event, it is submitted that it will not avoid the difficulties detailed above regarding the determination of the appropriate standard for reasonableness under the 1996 Act; the problems associated with the compulsion to effectively formulate a defence during police interrogation have not been dissipated by the new phraseology. The 2007 Act may very well lead to very vulnerable suspects/ defendants, in the words of one commentator, "having their guilt

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[48] Ryan, "The Criminal Justice (Drug-Trafficking) Act, 1996: Decline and Fall of the Right to Silence" (1997) 7 I.C.L.J. 22.
[49] Criminal Justice Act, 2007, s.30.
[50] (1996) 22 E.H.R.R. 29.
[51] (1996) 22 E.H.R.R. 29, at 47.

assumed because their defence was presented in court by counsel and not in the interview suite of the Garda Station".[52]

Even if one were to concede that there may be certain circumstances where in particular cases an explanation from a detained suspect is clearly called for, then upon whose judgement can such circumstances be defined? Again, it is very onerous to expect a suspect detained in the pressure-cooker atmosphere of garda custody to differentiate circumstances clearly calling for an explanation from those not so calling; particularly if one accepts the validity of the argument of a defence at trial being a legal construct. However, following several recent Court of Appeal judgments in England (discussed in detail below), that is precisely the position, at least in that jurisdiction. It is the suspect who will bear ultimate responsibility for deciding whether particular circumstances clearly call for him to forego his right to silence, even where in such circumstances his solicitor is advising the maintenance of silence. The drawing of adverse inferences from silence in circumstances where the suspect has remained so by virtue of legal advice puts that suspect in an invidious position which it is submitted cannot be objectively justified on the basis of any sustainable argument. The article will return to this issue below.

The Supreme Court had a further opportunity to consider the right to silence generally and the validity of the drawing of adverse inferences in particular cases in the case of *D.P.P. v. Finnerty*.[53] In that case, the suspect was arrested on suspicion of rape and when confronted with the allegation during the circumstances of his arrest in a motor vehicle, the suspect stated that he did not rape the complainant but that they did have consensual sexual relations. Following his arrest and during interrogation at the garda station, the suspect remained silent and did not respond to garda questioning regarding the alleged incident. At his subsequent trial for rape, the prosecution sought and was granted leave to cross-examine the accused as to the circumstances of his interrogation, particularly the fact of his

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[52] Coen, "The Decline of Due Process and the Right to Silence's Demise" (2008) 18 I.C.L.J. 10, 18.
[53] [1999] 4 I.R. 364.

remaining silent during formal interrogation.[54] The Supreme Court in a unanimous verdict allowed the appeal, quashed the applicant's conviction and ordered a re-trial. The Court held that in the absence of specific legislative authority, no adverse inferences could be drawn from the maintenance by a suspect of his constitutional right to remain silent during police interrogation. In this regard, no cross-examination with regard to the refusal to answer police questions during detention under section 4 of the Criminal Justice Act, 1984 should be permitted and moreover, in general no reference to such refusal should be made by the trial judge in his/her charge to the jury.[55]

While Keane J. acknowledged that the right to silence had been abridged in so far as the aforementioned sections 18 and 19 of the 1984 Act are concerned, he categorically stated that no general abridgement occurred under any other provision of that Act. Aside from the specific circumstances provided for in sections 18 and 19, the right to silence was generally left

[54] The prosecution had contended that, due to the fact that the applicant intended giving evidence which would contradict the account given by the complainant, cross-examination should be permitted on the basis that his refusal to proffer any such statement while being interviewed by gardaí would impact on his credibility with the jury when giving evidence. The trial judge accepted this submission and permitted the cross-examination. This scenario is more akin to the new s.19A of the Criminal Justice Act, 1984 (as inserted by s.30 of the Criminal Justice Act, 2007), discussed above, which provides for the drawing of adverse inferences from the failure to mention when questioned a fact later relied on in a defence which in the circumstances existing at the time clearly called for an explanation. However, at the time of the *Finnerty* trial court and Supreme Court decision, such a "general" provision did not exist in the context of the Criminal Justice Act, 1984. It would appear that it was on the basis of the absence of such a "general" inference provision under legislation that the Supreme Court permitted the applicant's appeal. In fact, the court was interestingly quite critical of the effect such a provision would potentially have on the right to silence. However, as aforementioned, such a provision now exists in the form of s.19A.

[55] [1999] 4 I.R. 364, at 381. Obviously, however, on this reasoning, where legislative authority does exist for the drawing of adverse inferences, comment on the maintenance of silence by way of prosecutorial cross-examination and judicial comment is permissible.

unaffected by the 1984 Act.[56] Interestingly, Keane J. then proceeded to discuss the potential effect of a "general inference provision", such as is now contained in the new section 19A of the 1984 Act. In this regard, the learned judge's views are particularly instructive. He states

> [t]hat right [to silence] would, of course, be significantly eroded if at the subsequent trial of the person concerned, the jury could be invited to draw inferences adverse to him from his failure to reply to [questions put to him by the gardaí] and, specifically, to his failure to give questioning gardaí an account similar to that subsequently given by him in evidence. It would also render virtually meaningless the caution required to be given to him under the Judges' Rules.[57]

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[56] [1999] 4 I.R. 364, at 380. As is now clear, that assertion no longer holds true, given the insertion of the new s.19A into the 1984 Act by s.30 of the Criminal Justice Act, 2007.

[57] [1999] 4 I.R. 364, at 379. In this regard, note the Final Report of the *Review Group on Balance in the Criminal Law* (Dublin: Stationery Office, 2007) at pp.32-34. This refers to and agrees with the opinion of Keane J. in *Finnerty* in relation to the effect of general inference provisions on the caution to be administered under the Judges' Rules. In this regard, it notes that it is unsatisfactory that changes to same had not already occurred as a result of s.7 of the Criminal Law (Drug-Trafficking) Act, 1996 amongst other legislative provisions. The Report was published prior to the entry into force of s.30 of the Criminal Justice Act, 2007, which created a general inference provision in respect of all arrestable offences. However, s.19A(3)(a) of the 1984 Act as inserted makes it clear that the section will not apply unless the accused has been told in ordinary language of the effect of failure to mention a fact when questioned or on being charged later relied on in defence. In addition, provision is made under s.32 of the 2007 Act for the Minister for Justice to make regulations concerning the administration of cautions to suspects by gardaí during questioning. This is broadly in line with recommendations to that effect by the Review Group – see p. 31. However, no Regulations under s.32 have, as of yet, been made. In addition, notwithstanding the concerns and warnings of the Review Group in this regard, no formal revision of the Judges' Rules has occurred. Gardaí therefore are faced with the task of perhaps administering different cautions at particular stages of the interrogation process, without formal guidance in the form of the Judges' Rules etc. Moreover, on the other side, suspects are potentially faced with endeavouring to understand the technicalities of various cautions being administered at different stages of interrogation in a highly pressurised environment, with potentially crucial consequences ensuing as a result. This

It is clear that Keane J. is referring to such a general inference provision as is now contained in section 19A of the 1984 Act, as he goes on to refer as an example of such a provision to section 34 of the (English) Criminal Justice (Public Order) Act, 1994, the wording of which is very similar to section 19A. On its own, this judgment and the reasoning adopted by Keane J. are a hugely welcome boost to the proponents of an individual rights-based approach to the criminal justice system, evidenced, for example, by a substantive and effective right to remain silent. However, of huge regret in this regard, is that as already mentioned, the legislature has now introduced a general inference provision by virtue of the Criminal Justice Act, 2007 in the form of section 19A of the 1984 Act. Clearly, the concerns of Keane J. with respect to such a provision continue to be as valid and persuasive today as they were at the time of the *Finnerty* judgment in 1999. However, to be fair and in order to complete the picture, Keane J. did confirm that the door was open to such a general provision on foot of statutory authority, notwithstanding the significant erosion which would ensue as a result to the right to silence. However, the legislature appears not to have been unduly concerned by the stated concerns of Keane J., ultimately disregarding same in favour of the ubiquitous and populist concept of the "public interest".

A further extremely disappointing factor in the introduction of section 30 of the 2007 Act must also be considered. It must be noted that a recommendation to introduce a provision along the lines of section 30 was made by the *Review Group on Balance in the Criminal Law* in its Final Report,[58] with some significant differences, however, between the provision recommended and that introduced. The Review Group recommended that a provision allowing for adverse inferences to be drawn from failure to mention a defence when questioned upon which the accused subsequently relies at trial. Moreover, the extension of such a provision to cover all arrestable offences was also proposed. The Review Group quite specifically, however,

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situation is most unsatisfactory, as the potential for confusion to reign in this area is enormous.

[58] See Final Report of the *Review Group on Balance in the Criminal Law*, (Dublin: Stationery Office, 2007) at pp. 84-90.

disfavoured the use of such inferences as corroboration of the evidence against the accused; favouring the use of such inferences as a means only of undermining the credibility of the defence subsequently put forward in court. While it may seem on first perusal a mere difference in terminology, between an inference amounting to corroboration or merely undermining the credibility of the defence at trial, the difference in fact in certain circumstances could be very significant. Were the suspect, for example, to refrain from giving evidence at trial, the Review Group recommended non-application of the general inference provision.[59] The legislature has decided, however, that under the new section 19A, failure to mention when questioned a fact later relied on in defence in circumstances clearly calling for an explanation can not only lead to inferences being drawn, but such inferences can amount to corroboration. In addition, such a situation would pertain notwithstanding the fact that the defendant exercised his right not to give evidence personally at the trial.

IV. ADEQUACY OF RIGHT OF ACCESS TO LEGAL ADVICE AS A SAFEGUARD AGAINST ABOLITION OF THE SUBSTANTIVE RIGHT TO SILENCE

It must be noted however that in addition to expanding the encroachment into the remnants of the right to silence, some apparent safeguards were introduced into the amended sections 18 and 19, as well as the new section 19A, in an, at least apparent, attempt to mitigate the harshness of the new approach. These include the provision that the accused person has to be afforded a reasonable opportunity to consult with a solicitor before an inference can be drawn from his/her failure to account for a fact later relied on his/her defence. In addition, such an inference cannot be drawn unless the interview has been electronically recorded or the suspect has signed a written consent to the non-recording of the interview.[60] A further safeguard, namely that the

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[59] Final Report of the *Review Group on Balance in the Criminal Law* (Dublin: Stationery Office, 2007), at p. 85.

[60] Inserted into the amended ss. 18 and 19 and the new 19A of the Criminal Justice Act, 1984, by ss. 28, 29 and 30 respectively of the Criminal Justice Act,

accused be told in ordinary language that failure to mention a fact later relied on in his/her defence could actually harm that defence, is nothing new and was contained in the old sections 18 and 19.[61] In addition, its efficacy is, at the very least, strongly debatable. The remainder of this paper will concentrate on legal advice as a safeguard under the new legislation.

The requirement that the suspect be afforded a reasonable opportunity to consult with a solicitor as a pre-requisite to the drawing of an inference from silence would appear to be quite a significant protection for that suspect. However, in practice, this significance may be diluted quite considerably. First, let us look at the wording of the protection, being "a reasonable opportunity to consult with a solicitor". This phraseology is very vague indeed: what about a situation where the suspect's solicitor is delayed in getting to the station and offering advice: how much time should be allowed to elapse before the "reasonable opportunity to consult" can be said to have elapsed? In order to ascertain whether the new phraseology actually effectuates a change regarding questioning in the absence of legal advice in Ireland, let us take a look at some of the existing case-law in the area. First, notwithstanding the fact that the constitutional right of access to legal advice in Ireland was established in *People (D.P.P.) v. Healy*,[62] it would appear settled that a suspect detained in Garda custody can be questioned in the period following a request for a solicitor but prior to the solicitor's attendance at the station or consultation with the client, where reasonable attempts were either continuing to be made or had been unsuccessfully made to contact a solicitor.[63] In *People*

2007. See also the discussion above for other legislative provisions providing for the drawing of adverse inferences only where such a reasonable opportunity to consult with a solicitor is afforded to the suspect and where the interview is electronically recorded.

[61] See Daly, "Silence and Solicitors: Lessons Learned from England and Wales?" (2007) 17 I.C.L.J. 2a, 4.

[62] [1990] 2 I.R. 73.

[63] See *People (D.P.P.) v. Buck* [2002] 2 I.R. 268; *People (D.P.P.) v. Reddan* [1995] 3 I.R. 560. For further exploration of this point, see McGillicuddy, "Restrictions on the Right to Silence under the Criminal Justice Act 2007 – Part 2" (2008) 18 I.C.L.J. 112, 113.

(D.P.P.) v. Reddan,[64] the Court of Criminal Appeal held admissible admissions made by a detained suspect following unsuccessful attempts having been made to contact a solicitor. Similarly, the Supreme Court in *People (D.P.P.) v. Buck*[65] upheld as constitutional the questioning of a detained suspect while attempts were being made to contact a solicitor on his behalf. More recently, in *People (D.P.P.) v. Gormley*[66] the Court of Criminal Appeal held that, relying on *Buck,* once bona fide attempts are being made by the gardaí to contact a solicitor on behalf of a detained suspect, there is no prohibition on the questioning of the suspect proceeding in the interim.

Can it now be said that the terminology used in the 2007 Act, "reasonable opportunity to consult", will alter that position and that questioning will not now be permitted until such a reasonable opportunity has been afforded? If so, it would clearly be a welcome step, however, even if that were to be the correct interpretation, it still leaves open the question of what constitutes a "reasonable opportunity"? Moreover, and of significance, is the fact that following the lapse of that reasonable opportunity, whatever period of time that may entail, it would appear clear from the wording that questioning of the detained suspect can proceed and any admissions made or silence maintained can be introduced in evidence at the subsequent trial of the accused.

The above analysis caters for some of the significant difficulties inherent in the process prior to the solicitor's arrival at the police station. However, following such arrival at the station, the position in Ireland regarding the permitted opportunities to consult and circumstances of legal advice is quite prejudicial to the accused. At present, a solicitor is not entitled to information regarding the interview or to see notes taken during the interrogation up to that point, and of most significance, is not entitled to be present during the interview.[67] This scenario has potentially very serious implications for the suspect detained in

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[64] [1995] 3 I.R. 560.
[65] [2002] 2 I.R. 268.
[66] [2009] I.E.C.C.A. 86.
[67] *Lavery v. Member in Charge, Carrickmacross Garda Station* [1999] 2 I.R. 390, at 396, cited in McGillicuddy, "Restrictions on the Right to Silence under the Criminal Justice Act 2007 – Part 2" (2008) 18 I.C.L.J. 112, 114.

police custody, particularly where adverse inferences are possible from the maintenance of silence. How informed can the solicitor's advice to remain silent or otherwise be in this context? How "reasonable", in the words of the English Court of Appeal, would a client's decision be to rely on legal advice to remain silent in circumstances where the solicitor himself/herself may have very little information upon which to base that advice? As McGillicuddy has succinctly summarised,

> Can effective and informed advice be given where the solicitor may not have any information to explain whether the situation clearly calls for an explanation [as per the wording of the new s.19A, 1984 Act] rather than providing abstract legal advice in a factual vacuum?[68]

This point in turn, as explained by McGillicuddy, harps back to the purpose of legal advice in the first instance. The twin purpose, in the view of Finlay C.J. in *People (D.P.P.) v. Healy*,[69] is to ensure "some measure of equality" between the detained suspect and the interrogators, and also to allow the suspect to make a "truly free decision as to his attitude to interrogation or to the making of any statement".[70] Given the potential gravity of the consequences of the drawing of adverse inferences at trial for the suspect, it is suggested that Ireland should at the very least fall into line with the position as currently pertains in England, namely that the suspect's solicitor is entitled to be present during police interrogation of the accused.[71] As Keane notes,

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[68] *Ibid.*

[69] [1990] 2 I.R. 73.

[70] [1990] 2 I.R. 73, at 81.

[71] The Police and Criminal Evidence Act, 1984 Code of Practice C, ("The detention, treatment and questioning of persons by police officers"), at para. 6.5. Note however the Final Report of the *Review Group on Balance in the Criminal Law*, at p. 90, which recommends against the introduction of a right to have a lawyer present during police interview as a safeguard against the effect of the general inference provision recommended for introduction, on the grounds of it being too restrictive on the police. It is respectfully submitted that this is a highly questionable and most unsatisfactory justification for prohibiting the presence of lawyers during garda interrogation in Ireland.

> given the complexity of the statutory incursions upon the right to remain silent during [periods of detention in garda custody], and the acknowledged psychological pressure that detainees experience, it is suggested that a very strong argument can be made to the effect that the presence of one's legal advisor during interrogation is a necessary contribution towards equality between the detained person and his interrogators.[72]

It is submitted that equality is certainly not achieved in the context of the interrogation of suspects detained in garda custody in Ireland, for the reasons stated above and to follow, and the suspect is certainly not in a position to make a properly informed and free decision as to the maintenance of silence or otherwise.

Moreover, and of potentially huge detriment to the detained suspect, is the fact that even following such consultation, were it to take place, a suspect may not be allowed to rely solely on the advice proffered by the solicitor in preventing inferences from his silence to be drawn but may have to demonstrate that, notwithstanding such advice, the fact later relied on in defence, did not, from an objective viewpoint, "clearly call for an explanation". The potential difficulties for suspects in preventing the drawing of inferences from silence while relying solely on the advice of their lawyers to remain silent have been evident in the English case law and will be explained in some detail below. There is nothing to suggest that such difficulties will not arise in this jurisdiction.

Therefore, it is submitted that, given the significance of the encroachment on the constitutionally-protected right to silence, the intended safeguards are wholly inadequate and merely pay lip-service to the continued existence of the right to silence, which, on an objective analysis of the aforementioned case law and legislation, no longer offers real protection to a suspect in the context of all arrestable offences in Ireland. How can one speak of a "right" to remain silent, if the exercise of such a "right" will itself incriminate you or, at the very least, significantly enhance your chances of being convicted at trial?

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[72] Keane, "Detention Without Charge and the Criminal Justice (Drug-Trafficking) Act, 1996" (1997) 7 I.C.L.J. 1, 9.

V. ADEQUACY OF THE SAFEGUARD OF LEGAL ADVICE IN ENGLAND AND WALES

As referred to above, the right to silence is effectively an English common law creation, with Shanley J. in *Re National Irish Banks Ltd*[73] tracing it back to the 17th Century.[74] One would therefore imagine that the right would be far more entrenched and impenetrable in that jurisdiction than all others, occupying a special place at the heart of the criminal justice system. However, that is not the case – in fact, far from it. England and Wales has not proven immune from the general trend toward legislative encroachment upon this right, and may actually be at the forefront in such a trend, largely by virtue of the promulgation of a seminal piece of legislation in the form of the Criminal Justice and Public Order Act, 1994, and, for the most part, the judicial interpretation thereof in subsequent years. Whilst, as is the case in Ireland, there are many examples of legislation which impinge on the right to varying degrees across different areas of law,[75] none can be said to have the momentous impact of the 1994 Act, and in particular section 34[76] thereof. It is on that provision and the judicial interpretation thereof, both in England and Wales, and by virtue of several ECtHR decisions, that this section will focus. It will, it is submitted, offer a clear analysis of the dismantling of the substantive right to silence in England and Wales, perhaps even more definitively than in Ireland.

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[73] [1999] 3 I.R. 145, at 153.

[74] Though note the persuasive argument of Langbein, "The Historical Origins of the Privilege Against Self-Incrimination at Common Law" (1993-94) 92 *Michigan Law Review* 1047 that that the right to silence owes its origins to the eighteenth century and the advent of adversarialism in the criminal trial.

[75] See for example, Companies Act, 1985, ss. 432 and 434; Insolvency Act, 1986, ss.235 and 236.

[76] Several other provisions of the 1994 Act impinge on the right to silence also, such as s. 35 (concerning failure to testify at trial), as well as ss. 36 and 37, which are in essence identical to ss. 18 and 19 of the (Irish) Criminal Justice Act, 1984. However, s. 34 is by far the most far-reaching and sweeping incursion into the realms of the right to silence, and has provoked an enormous amount of commentary and criticism.

Essentially, section 34 of the 1994 Act, in its original form,[77] provided that failure to mention, when questioned something "which in the circumstances existing at the time the accused could reasonably be expected to mention",[78] later relied on as part of the accused's defence, could result in the trier of fact drawing such adverse inferences from such failure as appear proper. This provision is very similar to the wording of the now repealed section 7 of the Irish Criminal Justice (Drug-Trafficking) Act, 1996, and its replacement, section 30 of the Criminal Justice Act, 2007, though with the latter provision requiring explanation of a fact clearly calling for such an explanation, as opposed to one that would reasonably be expected to be mentioned. One of the first cases to deal with the inference provisions of the type under consideration under section 34 of the 1994 Act was the ECtHR decision of *Murray v. United Kingdom.*[79] This case concerned similar provisions under a Northern Ireland statute,[80] whereby an individual was convicted, with the aid of inference provisions, in circumstances in which he was denied access to legal advice for the first 48 hours of police questioning. The ECtHR held, on the one hand, that the right to silence was not absolute but was capable of restriction in certain circumstances, such as by the drawing of adverse inferences in appropriate circumstances. However, on the other hand, it held that there had been a violation of Article 6 of the ECHR in this particular case, due to the denial of access rights to a lawyer for 48 hours of police detention in circumstances where the drawing of adverse inferences from an accused's silence was possible.[81] Thus, a very strong connection would appear to have been drawn in this case between the permissibility of inference provisions and access to legal advice. According to one commentator, "legal advice was seen [by the

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[77] It has since been amended by s. 58 of the Youth Justice and Criminal Evidence Act, 1998, which will be discussed below.
[78] S.34(1)(b) of the Criminal Justice and Public Order Act, 1994.
[79] (1996) 22 E.H.R.R. 29.
[80] Criminal Evidence (Northern Ireland) Order, 1988, Arts. 4 and 6.
[81] (1996) 22 E.H.R.R. 29, at para. 69.

court in this case] as taking on particular importance in cases where inferences could be drawn from silence".[82]

Indeed, such was the impact of this judgment in England that new legislation was introduced, namely section 58 of the Youth Justice and Criminal Evidence Act, 1998,[83] which provided that adverse inferences from an accused's pre-trial silence could not be taken unless the accused was afforded an opportunity to access legal advice. Thus, the essential link between the drawing of adverse inferences and access to legal advice, as a type of balancing act between the public interest and the individual rights of an accused, was apparently cemented under English law. One would therefore be reasonably entitled to assume that, given this apparent recognition of the enormous value and utility of such legal advice to those suspects in respect of whom adverse inferences may be drawn, such suspects would be entitled to rely completely on such advice without the possibility of adverse inferences being drawn. However, such an assumption would not be correct. A series of Court of Appeal decisions have dealt with the relationship between the right to silence and the right to legal advice with the result, as we shall see, that what was introduced as a counterweight to the effects of the incursion into the right to silence is of very little practical assistance at all, rendering the accused exposed to the full rigours of the criminal justice system without a substantive right to silence.

Another ECtHR case which further explored the right to silence, and influenced subsequent Court of Appeal decisions,

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[82] Ashworth and Redmayne, *The Criminal Process* (3rd ed., 2005) p. 95. Similarly, in *Magee v. United Kingdom* (2001) 31 E.H.R.R. 822, the ECtHR found that denial of access rights to a solicitor for the first 48 hours of police detention, in circumstances where the drawing of adverse inferences from the suspect's silence later occurred at trial, violated Art. 6(1) of the ECHR; also, in *Averill v. United Kingdom* (2001) 31 E.H.R.R. 839, at para. 60, the ECtHR found that "the rights of the defence may well be irretrievably prejudiced" where adverse inferences are drawn from the silence of the accused during a period in which that accused is not afforded the opportunity to access legal advice.

[83] Inserting a new subsection 2A into s.34 of the Criminal Justice and Public Order Act, 1994.

was that of *Condron v. United Kingdom*,[84] which involved an appeal concerning a direction by the trial judge to a jury which allowed for the drawing of an adverse influence notwithstanding the possible plausibility of the accused's reasons for the exercise of the right to silence. The court held that such a direction amounted to a breach of Article 6(1) of the ECHR. It held that adverse inferences could only be drawn where the *only* sensible explanation for the accused's silence was that he had no answer or none that would stand up to scrutiny.[85] In other words, where there was *another* sensible explanation, adverse inferences could not be drawn. Moreover, and of significance for the concept of silence due to reliance on legal advice, the court held that "the very fact that an accused is advised by his lawyer to maintain his silence must be given appropriate weight by the domestic court".[86] Thus, combining these two strands of the judgment, it would appear that reliance on legal advice to remain silent, where this constitutes a sensible explanation for such silence, would prevent adverse inferences being drawn.

In *R v. Betts and Hall*,[87] it appeared that the Court of Appeal followed this line of reasoning, with Kay L.J. stating that if an accused genuinely relies on legal advice to remain silent, then adverse inferences cannot be drawn against that silence.[88] It is submitted that this interpretation of *Betts and Hall*, being a subjective approach, would be the preferable course for the law to follow if the right to silence, and the related right to legal advice, is to have any meaning whatever, and would represent a correct interpretation of the ECtHR decision in *Condron*. This would not be advocating the non-drawing of adverse inferences in every case where there is legal advice to remain silent, but only where the reason for maintaining such silence in a particular case is genuinely because of the legal advice to do so. If legal advice in the context of remaining silent is considered essential, surely a

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[84] (2001) 31 E.H.R.R. 1.
[85] (2001) 31 E.H.R.R. 1, at para. 61.
[86] (2001) 31 E.H.R.R. 1, at para. 60.
[87] [2001] 2 Cr. App. R. 257.
[88] This interpretation is supported by Ashworth and Redmayne, *The Criminal Process* (3rd ed., 2005) p. 96; see also Daly, "Silence and Solicitors: Lessons Learned from England and Wales?" (2007) 17 I.C.L.J. 2a, 2.

corollary of that is genuine reliance on that advice should be encouraged in all cases? Or if not actively encouraged, then at least not punished by the drawing of adverse inferences notwithstanding its genuine nature?

VI. THE ENGLISH COURT OF APPEAL'S APPROACH

The English Court of Appeal has regrettably taken a different view. The first case showing a movement toward punishing reliance in certain circumstances is *R v. Howell*,[89] which effectively approved of an objective test of reliance on legal advice to remain silent, based on reasonableness, and expressly disagreed with the reasoning of *Betts and Hall* as detailed above, *i.e.* that genuineness is sufficient. As per Laws L.J.:

> [w]e do not consider, *pace* the reasoning in *Betts and Hall*, that once it is shown that the advice (of whatever quality) has genuinely been relied on .. adverse comment is .. disallowed … There must always be soundly based objective reasons for silence, sufficiently cogent and telling to weigh in the balance against the clear public interest in an account being given by the suspect to the police.[90]

This decision has been described as "extraordinary" and "unfortunate",[91] but such criticism has not tempered the entrenchment of this position in Court of Appeal jurisprudence. In *R v. Hoare and Pierce*,[92] the appeal concerned a direction by the trial judge to the jury that the only circumstance in which they would not be entitled to draw adverse inferences from the accused's silence would be if they were satisfied that the reliance on the legal advice to remain silent was reasonable, *the genuine nature of such reliance not being determinate in itself* – in other words, the objective test advocated in *Howell*. The Court of

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[89] [2005] 1 Cr. App. R. 1.
[90] [2005] 1 Cr. App. R. 1, at 24.
[91] See Ashworth and Redmayne, *The Criminal Process* (3rd ed., 2005) pp. 96-97.
[92] [2005] 1 W.L.R. 1804; [2004] E.W.C.A. Crim. 784.

Appeal, whilst expressly affirming a test of reasonableness, also opined that there was in fact no inconsistency between the decisions of *Betts and Hall* and *Howell*. Per Auld L.J.:

> it is plain from Kay L.J.'s judgment [in *Betts and Hall*] that, even where a solicitor has in good faith advised silence and a defendant has genuinely relied on it in the sense that he .. believed .. he was entitled to follow it, a jury may still draw an adverse inference if it is sure that the true reason for his silence is that he had no or no satisfactory explanation consistent with innocence to give. That is of a piece with Laws L.J.'s reasoning in *Howell.*[93]

This interpretation of *Betts and Hall* quite clearly contradicts the interpretation discussed above and supported by Ashworth and Redmayne.[94] Thus, according to this view, *Betts and Hall* had never advocated genuineness of the reliance on legal advice as the sole determinant of whether adverse inferences could be drawn from an accused's silence, but only as a component part in the ultimate test of reasonableness. How though, on this interpretation, can one square this with the dicta of Kay L.J. in *Betts*, to the effect that it is the genuineness of the decision to remain silent that it important? According to one commentator, the reference to genuineness in *Betts* related to the accused's true motivation for maintaining silence, not the genuineness of the reliance on legal advice.[95]

In any event, notwithstanding the disagreement as to the correct interpretation of *Betts*, the reasonableness test undoubtedly holds sway in English law at present, such a test having been re-iterated in *R v. Beckles*,[96] and confirmed by the specimen direction issued by the Judicial Studies Board in 2005.[97] *R v. Beckles* has actually come before the Court of

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[93] [2004] E.W.C.A. Crim. 784, at para. 51.
[94] Ashworth and Redmayne, *The Criminal Process* (3rd ed., 2005).
[95] See Malik, "Silence on Legal Advice: Clarity but not Justice: *R v. Beckles*", (2005) 9 *International Journal of Evidence and Proof* 211, 214.
[96] [2005] 1 All E.R. 705; [2005] 1 Cr. App. R. 23.
[97] Judicial Studies Board, *Crown Court Bench Book*, Specimen Directions, Section IV, 40 – "Defendant's Failure to Mention Facts when Questioned or

Appeal on two separate occasions. In the first instance, the court rejected an appeal again brought against the direction of the trial judge to the jury under section 34 of the 1994 Act. The trial judge in this case had merely advised the jury that they could not draw adverse inferences from the accused's silence if they thought that the reason given for such silence was a good one.[98] The applicant then brought his case before the ECtHR,[99] which held that the trial judge's section 34 direction had been inadequate and thus violated his right to a fair trial under Article 6(1) of the ECHR. The "second" appeal[100] was a referral to the Court of Appeal by the Criminal Cases Review Commission under section 9 of the Criminal Appeal Act, 1995.[101] In this instance, the Court of Appeal allowed the applicant's appeal against conviction, as the trial judge had not directed the jury to consider both the reasonableness and the genuineness of the applicant's reliance on the legal advice to remain silent. In delivering the judgment of the court, Woolf C.J. stated:

> If the jury consider that the defendant genuinely relied on the advice, that is not necessarily the end of the matter. It may still not have been reasonable for him to rely on the advice, or the advice may not have been the true explanation for his silence.[102]

It is clear therefore from the foregoing cases that genuinely relying on the legal advice of a solicitor will not suffice to prevent adverse inferences from being drawn against an accused on its own; the court will look beyond that to try and

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Charged, Section 34 CJPOA 1994" – see jsboard.co.uk/criminal_law/cbb/index.htm.

[98] See Cooper, "Legal Advice and Pre-Trial Silence – Unreasonable Developments", (2006) 10 *International Journal of Evidence and Proof* 60, 64.

[99] *Beckles v. United Kingdom* (2003) 36 E.H.R.R. 13.

[100] [2005] 1 All E.R.

[101] This section allows the Criminal Cases Review Commission to refer any case to the Court of Appeal where a person has been convicted on indictment in England and Wales, in order to review the conviction itself and/or the sentence and such a reference shall be treated as an appeal by the convicted person.

[102] [2005] 1 All E.R. 705, at 719-720.

establish whether the reliance on the legal advice was reasonable in all the circumstances. This represents the current state of the law in England and Wales with regard to the drawing of adverse inferences from an accused's silence, and, as stated above, has been incorporated into the specimen direction of the Judicial Studies Board in this area.

VII. IMPLICATIONS FOR RIGHT TO SILENCE AND GARDA ACCOUNTABILITY IN IRELAND

We have already seen above how the effect of the inference provisions of the Irish Criminal Justice Act, 2007, is to substantially diminish the benefit of reliance on the substantive right to silence under Irish law. Given the fact that the English provision under section 34 of the Criminal Justice and Public Order Act, 1994, is very similar, and the fact that the Court of Appeal has gone further in rendering one of the purported safeguards, namely access to legal advice prior to the drawing of adverse inferences, practically impotent as such, the future, or indeed the present, of the substantive right to silence as a useful, fundamental constitutional right would appear very bleak indeed. It is submitted that it is a hugely regrettable and retrograde step to punish the maintenance of silence during police questioning in circumstances where an accused has done so genuinely as a result of the advice of his/her solicitor. Whilst critics may argue that such an interpretation would allow solicitors to advise silence in all situations, surely the motivation and genuineness of the accused's reliance is the determining factor, not the motives and perhaps unethical conduct of his/her solicitor? In such situations, it is arguable that it is the solicitor who should perhaps face appropriate punishment and censure, not the accused who has hired the solicitor for the very purpose of providing advice upon which he/she can rely.[103] One commentator has put the issue thus:

> If, having been advised to remain silent, the accused himself has to second-guess this advice and consider whether or not a particular fact still needs to be

[103] See Malik, "Silence on Legal Advice: Clarity but not Justice: *R v. Beckles*" (2005) 9 *International Journal of Evidence and Proof* 211, 215.

> mentioned or explained, what use is the legal advice or the right [to same] in the first place?[104]

Another like-minded commentator states:

> If defendants can never be sure that they are acting reasonably in relying on the advice of their lawyer, then they can never be sure that they should accept their lawyer's advice. If they cannot be sure about that, then it raises the fundamental question of the utility of legal advice at the police station.[105]

Thus, given the *de facto* requirement to second-guess a lawyer's advice, the utility of such advice is, it is submitted, therefore set at nought. Where then does this leave the substantive right to silence under the inference provision of section 34 (and its Irish equivalent of section 30)? This is a classic example of the state paying lip-service to the promotion of individual rights, through the introduction of apparent safeguards etc., whilst at the same time so narrowing the scope of such rights as to render them toothless in practice.

It is clear from the foregoing that legal advice to a suspect detained in police custody is an essential component of a properly functioning and rights-respecting criminal justice system. Indeed as aforementioned, the ECtHR has emphasised such on many occasions. In addition, the availability of legal advice to such a detained suspect operates as a key counter-weight to the power of the police during interrogations, particularly where a suspect is faced with the daunting prospect of the "pressure-cooker" atmosphere of police interrogation in circumstances where deciding whether to remain silent or volunteering information, and if so, what type of information, may very well seal that suspect's fate at a subsequent criminal trial. If such a suspect can be punished for maintaining his "right" to silence, notwithstanding the receipt of legal advice to so remain, who is

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[104] See Daly, "Silence and Solicitors: Lessons Learned from England and Wales?" (2007) 17 I.C.L.J. 2a, 7.

[105] Cape, "Sidelining Defence Lawyers: Police Station Advice After *Condron*" (1997) 1 *International Journal of Evidence and Proof* 386, 402.

he to rely on for guidance? The utility of legal advice is set at nought by virtue of having to second-guess the reasonableness of same, so the next step is for the vulnerable suspect to look to the "advice" of his police interrogators – who may be only too willing to advise the suspect of the dangers of relying on legal advice to remain silent. To whom are these interrogators accountable in the circumstances of the interrogation? We have already established above that in Ireland the solicitor is not entitled to be present during interrogation. Therefore, where we might ask is the "equality" referred to by Finlay C.J. in *People (D.P.P.) v. Healy* between the suspect and the interrogators? Has the imbalance in fact been redressed at all? It is submitted that it certainly has not, given the inability of the suspect to confidently assert a right to silence, and the ineffectual nature of legal advice in such circumstances: the police in fact hold all the cards.