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Title	'An analysis of the ongoing erosion of the presumption of innocence in Irish law'
Authors(s)	Mc Namara, Michael
Publication date	2022
Publication information	Mc Namara, Michael. "'An Analysis of the Ongoing Erosion of the Presumption of Innocence in Irish Law'." University College Dublin. School of Law, 2022.
Publisher	University College Dublin. School of Law
Item record/more information	http://hdl.handle.net/10197/12936

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'An analysis of the ongoing erosion of the presumption of innocence in Irish law'

By

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This thesis is submitted to University College Dublin in fulfilment of the requirements for the degree of Doctor of Philosophy in Law

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January, 2022

TABLE OF CONTENTS

Statement of Original Authorship 6

Acknowledgements 7

Abstract 8

Introduction 11

Chapter 1 - Presumption of Innocence: Scholarly Debates 21

1.1 Definition 21

1.1.1 Competing Value Systems 23

1.2 Rationale for the Presumption of Innocence 26

1.2.1 Right not to be wrongfully convicted and punished 26

1.2.2 Fragility of fact-finding at trials 30

1.2.3 State and individual relationship - Imbalance of resources and power 32

1.2.4 Criminal Standard of Proof 34

1.2.5 Other rationales for the Presumption of Innocence 36

1.3 Scope of the Presumption of Innocence 39

1.3.1 Narrow view - Burden of Proof at Trial 40

1.3.2 Broad view – Presumption of Innocence beyond the trial stage 44

1.3.3 Substantive reading of the Presumption of Innocence 53

1.4 Limitations on the Presumption of Innocence 55

1.5 Conclusion 56

Chapter 2 – Judicial Conceptions of the Presumption of Innocence 58

2.1 English Law and the Presumption of Innocence 58

2.2 English Position Pre - 1935 59

2.2.1 1729 – 1799 59

2.2.2 1800 – 1899 59

2.2.3 1900 – 1934 62

2.2.4 1935 64

2.3 Irish Position 70

2.3.1 1853–1921 – Significant Engagement with the Presumption of Innocence 71

2.3.2 1922 – 1936 - Pre Constitution 76

2.3.3 1937 – 2021 – Role of the Presumption of Innocence in the Constitution 77

2.3.4 Constitutional Sources of the Presumption of Innocence 83

2.3.5 Reflections on the Presumption of Innocence in the Constitutional Order 88

2.4 European Convention on Human Rights 89
2.4.1 Reflections on the Presumption of Innocence in Article 6(2) European Convention on Human Rights 96
2.5 European Union Sources of the Presumption of Innocence 97
2.5.1 Presumption of Innocence in Primary European Union Law 99
2.5.2 Presumption of Innocence in Secondary European Union Law 102
2.5.3 Common Minimum Standards 102
2.5.4 Suspects and Accused Persons 105
2.5.5 Public Statements Referring to Guilt 105
2.5.6 Burden of Proof 106
2.6 Conclusion 108
Chapter 3 - Reverse Onus Provisions 111
3.1 Burden of Proof - Terminologies Explained 112
Stage 1 – Unclear Judicial Guidance 115
3.2 O'Leary v Attorney General 116
3.2.1 Constitutional challenge in High Court 116
3.2.2 Appeal to Supreme Court 120
3.2.3 Interpretation in Academic Literature 122
3.3 Hardy v Ireland 123
3.3.1 Application under Article 40.4.2 of the Constitution to High Court 123
3.3.2 Appeal to Supreme Court 124
3.3.3 Disputed Interpretation in Academic Literature 128
Stage 2 –Confusing Judicial Guidance 131
3.4 DPP v Smyth 132
3.4.1 Appeal to Court of Criminal Appeal 132
3.4.2 Interpretation in Academic Literature 138
Stage 3 – General Judicial Guidance 139
3.5 DPP v Forsey 140
3.5.1 Appeal to Court of Appeal 140
3.5.2 Reasoning 140
3.5.3 Appeal to Supreme Court 144
3.5.4 Reasoning 145
3.5.5 Interpretation in Academic Literature 148
3.6 Judicial Developments Post Forsey 150
3.7 Non-Core/Non-Essential Elements 152

3.8 Reflections on the General Principles 159
3.9 Conclusion 161
Chapter 4 - Criminalising Silence 163
4.1 Right to Silence Explained 164
4.2 Relationship between the Right to Silence and the Presumption of Innocence 166
4.2.1 Link between the Right to Silence and the Presumption of Innocence contested 167
4.2.2 Support for link between the Right to Silence and the Presumption of Innocence 169
4.3 Criminalising Silence 174
4.3 Heaney v Ireland 175
4.3.1 High Court 175
4.3.2 Supreme Court 181
4.3.3 European Court of Human Rights 183
4.3.4 Reflecting on the Irish and European courts and Heaney 187
4.4 Re National Irish Bank Ltd 191
4.4.3 Supreme Court 194
4.4.4 Reflecting on the Irish courts and Re National Irish Bank Ltd 196
4.5 Sweeney v Ireland 200
4.5.1 High Court Proceedings 201
4.5.2 Supreme Court Proceedings 205
4.5.3 Reflecting on the Irish courts and Sweeney 210
4.6 Reflections 212
4.7 Conclusion 216
Chapter 5 – Adverse Inferences from Failure to Account 218
5.1 Adverse Inferences Explained 218
5.2 The Impact of Adverse Inference Provisions on the Presumption of Innocence 223
5.3 Introduction of Adverse Inference Provisions in Irish Law 230
5.3.1 Enactment of sections 18 and 19 of the 1984 Act 239
5.3.2 Review of sections 18 and 19 of the 1984 Act 240
5.3.3 Substitution of sections 18 and 19 of the 1984 Act 242
5.4 Significant Erosion of the Right to Silence and the Presumption of Innocence 249
5.4.1 Rock v Ireland 249
5.4.2 Reflections on Rock 256
5.4.3 Judicial Developments Post Rock 257

5.4.4 Finnerty v Ireland 266
5.4.5 Reflections on Finnerty 271
5.5 Reflections 274
5.6 Conclusion 276
Chapter 6 – Adverse Inferences from Failure to Mention a Fact 277
6.1 Further Erosion of the Right to Silence and Presumption of Innocence 277
6.1.1 Balance in the Criminal Law Review Group Report 2007 278
6.1.2 Review Group Draft Head 2 - Failure to Mention a Fact 285
6.1.3 Lack of Debate at Bill Stage- Failure to Mention a Fact 289
6.1.4 Implementation of Review Group Head 2 into Section 19A 297
6.1.5 Confusion – Absence of Utterance and Silence Caution 304
6.2 Presumption of Innocence and Right to Silence under the EU Presumption of Innocence Directive 315
6.2.1 Impact Assessment 316
6.2.2 Explanatory Memorandum to the Presumption of Innocence Directive 320
6.2.3 The EU Presumption of Innocence Directive 322
6.3 Reflections 330
6.4 Conclusion 331
Chapter 7 – Explanation of the broader context in which the erosion of the Presumption of Innocence has occurred 334
7.1 Administration of Justice Explained 334
7.2 Hierarchy of Rights v Harmonious Interpretation 341
7.4 Reflection 357
7.5 Conclusion 359
Conclusion 361
Appendix A 367
Appendix B 369
Bibliography 372

Statement of Original Authorship

I hereby certify that the submitted work is my own work, was completed while registered as a candidate for the degree stated on the Title Page, and I have not obtained a degree elsewhere on the basis of the research presented in this submitted work.

Acknowledgements

I would like to thank my supervisor Dr Mark Coen. I wish to acknowledge his excellent mentoring and attention to detail. His sound advice and feedback helped to develop my thoughts and enabled me to enrich this thesis. I would also like to acknowledge the late Dr Paul Anthony McDermott, Senior Counsel for his supervision of this research prior to his untimely passing. His advice and support were thought provoking and also helped to develop my ideas which are reflected in this thesis.

I would like to thank my Research Studies Panel, Dr Niamh Howlin and Dr T.J. McIntyre. Their advice and support has been tremendous.

I gratefully acknowledge that this thesis was generously funded primarily by my employer An Garda Síochána. I must acknowledge that this thesis is written in my personal capacity and should not be taken to represent the views of the Garda Commissioner, the Office of Garda Commissioner or indeed the Garda Service. I also wish to acknowledge funding received from University College Dublin in the form of a scholarship for the final year of this research.

My colleagues in An Garda Síochána who have been very supportive in my endeavours. I thank them for their understanding of my availing of leave at critical moments to allow this research to be completed.

My wife Amanda and daughters Sophie, Isobel and Darcey, I would not have completed this research without your unending support and patience. Thank you so much.

My father Pat and my late mother Bridget were always supportive and interested in my educational endeavours and particularly updates on the progress of this research. I gratefully acknowledge their advice and encouragement.

Abstract

This thesis provides a comprehensive overview of the presumption of innocence in Irish law. It argues that the presumption of innocence continues to be eroded both by legislation and judicial findings. It supports this by analysing case law from Ireland, the European Court of Human Rights and England and Wales. While a comprehensive Irish book on the presumption of innocence was published by Hamilton in 2007[1] this study complements the work of Hamilton in two ways – by conducting historical research on the treatment of the presumption of innocence in Ireland prior to *Woolmington v DPP*[2] and by analysing the ongoing erosion of the presumption of innocence in Irish law in the period from 2007 to 2021, which is not covered by Hamilton's book.

A number of different methodologies are employed in the thesis. Doctrinal legal analysis is the main method employed. The reasoning in judgments concerned with particular aspects of the presumption of innocence is analysed and critiqued. The best source of material for identifying the existence, application and effect of the presumption of innocence at a judicial level is reported judgments. This research involved a search for specific references to the presumption of innocence. Where judges did not specifically refer to it the research involved a search for traces of the application of the presumption of innocence. Comparative law methodology is also used in the thesis with a specific focus on case-law and academic commentary from England and Wales. This informed the discussion on whether the presumption of innocence extends beyond the trial stage to include the pre trial investigation stage. The approach in other jurisdictions illuminated the consideration of the presumption of innocence. One of the issues investigated by the thesis is whether the presumption of innocence is a narrow principle that applies as a rule of evidence during trial or whether it has more broad application beyond the trial setting. The thesis argues for a broad application of the presumption. The thesis incorporates relevant scholarly debates on the presumption of innocence in diverse areas.

[1] Hamilton, C, *The Presumption of Innocence and Irish Criminal Law* (Irish Academic Press 2007). See also C Hamilton, 'Threats to the Presumption of Innocence in Irish Criminal Law: An Assessment' (2011) 15 The International Journal of Evidence & Proof 181. Hamilton, Dr C, 'The Presumption of Innocence in Irish Criminal Law: Recent Trends and Possible Explanations' (2011) 2 Irish Journal of Legal Studies.

[2] *Woolmington v DPP* [1935] AC 462.

Historical research is also used to trace the evolution of the presumption of innocence. Primary sources such as reported judgments, parliamentary debates, and policy documents as well as secondary materials were researched.

Chapters 1 and 2 are foundational. Chapter 1 engages with the great debates about the presumption of innocence. It does this by examining scholarly debates in this area. It will examine the extent to which the definition of the presumption of innocence is contested before discussing its rationale and scope. Chapter 2 conducts a historical survey of the presumption of innocence in England and Ireland and the degree to which the courts have interacted with the presumption. Chapters 1 and 2 provide an overview of the constitutional and legal framework within which the presumption of innocence operates. This overview forms the backdrop to the detailed analysis of discrete issues which is conducted in succeeding chapters. Chapter 3 examines the extent to which the presumption of innocence is under significant threat of erosion by reverse onus provisions and the degree to which the courts have interacted with them. It does this by focusing on relevant statutory provisions which have been a fertile source of appellate judgments in recent years.

Chapter 4 argues that the right to silence is a key dimension of the presumption of innocence. It does this by conducting a detailed analysis of the scholarly debates. It argues that the presumption of innocence is eroded by legislation that criminalises silence and that it has not been accorded sufficient status by the Irish courts. In Chapter 5 the problem of drawing adverse inferences at trial from an accused person's failure to account during Garda questioning is discussed. Dáil debates and key reported cases are analysed. The 'failure to account' provisions effectively reallocate a de facto burden of proof to the accused to answer questions contrary to the narrow view of the presumption of innocence that the burden of proof remains on the prosecution at all times. They shift the focus of the trial onto the accused to provide an innocent explanation. Chapter 6 analyses the more general abridgment of the right to silence and the presumption of innocence by the introduction of 'failure to mention' provisions for ordinary criminal offences. The legal situation in England and Wales in these respects is examined. It will be shown that a similar provision does not go so far as to provide that an adverse inference amounts to corroborative evidence and secondly, its implementation is aided by a prescribed caution unlike

the Irish ‘failure to mention’ provision. Dáil debates, expert reports and key reported cases are analysed. The European Union Directive on the presumption of innocence is also examined. The broader trend of weighing up competing interests in the administration of justice is analysed in Chapter 7 to explain the broader context in which the erosion of the presumption of innocence has occurred.

The thesis concludes by arguing that the scope of the presumption of innocence is not confined to narrow evidential rules at criminal trials but is a broader right extending beyond the trial setting to Garda investigations. It is argued that the use of legislative devices such a reveres onus provisions, criminalisation of silence and the operation of the adverse inferences provisions continue to significantly erode the presumption of innocence.

Introduction

This thesis investigates the presumption of innocence as the 'bedrock of our criminal justice system'[3] and the extent to which it continues to be eroded by modern criminal law. This question is explored primarily in an Irish context but also from a comparative perspective. The thesis relies on material from other jurisdictions, in particular England and Wales, in order to assess how the courts have interacted with the presumption of innocence. The material examined includes case-law from Ireland, the European Court of Human Rights and England and Wales.

Doctrinal legal analysis is the main research methodology employed in this thesis. The effect of certain legislative provisions on particular aspects of the presumption of innocence is explored by examining reported judgments interpreting and applying those provisions. This involves an analysis and critique of the reasoning in judgments. The presumption of innocence is not always explicitly referred to in judgments. Therefore, the research involved searching for traces of its application by judges. This thesis also sets the presumption of innocence in context, using scholarly and historical research to do so. This research focused on primary materials such as judgments, Dáil debates and original expert reports as well as secondary sources.

Comparative law methodology is also employed in this thesis. In particular, this involved specific concentration on case-law and academic commentary from England and Wales. This included an examination of almost 1, 400 Irish and English reported cases for references to the presumption of innocence and to identify how the courts treated it in practice. As the presumption of innocence comes from the English common law system, which continues to be highly influential in Irish law, the material on the presumption of innocence in England and Wales is particularly valuable. It is not possible to make a comprehensive list of all publications from either jurisdiction, given that material is published on many aspects of the presumption of innocence including those that extend beyond the scope of this thesis. The published material on the presumption of innocence shows that there is an increase in academic interest in the presumption in Ireland particularly in the past three decades. However, in most publications the presumption of innocence is

[3] *DPP v Heffernan* [2017] 1 IR 82, [84] per O'Donnell J.

considered briefly in the context of the evidential requirements at trial including in relation to the reverse onus and adverse inference provisions.[4] In contrast, in England and Wales the presumption of innocence has been the subject of much more academic debate.[5]

This erosion of the presumption of innocence has been theorised by Hamilton in her text book in 2007[6] and two articles subsequently published in 2011.[7] Hamilton's book endeavours to take stock of the law affecting the presumption of innocence up to the year 2007. It primarily addresses the presumption in the context of its erosion by legislation. Hamilton argues that judges, in common with legislators, 'must accept their share of the responsibility'.[8] She examines whether the presumption of innocence is a 'very real thing and not simply a procedural rule taking effect only at trial'[9] and considers its value in light of the legislative landscape at the time of her publication in 2007. One of the main concerns for Hamilton was to explore whether the presumption of innocence had been subverted through legislative developments. She refers to the raft of criminal legislation introduced since 1984 including enhanced police and prosecution powers and the move to the use of civil mechanisms to deal with criminal matters. Hamilton remarks that the backlash against due process rights is not a once off citing the introduction of the Criminal Justice Act 2006 (2006 Act) and measures introduced in 1996 following the murders of Veronica Guerin and Jerry McCabe and indeed well before that period. The 2006 Act introduced some controversial measures in response to rising crime rates, for example, a new provision for participation in an organised crime gang,[10] provisions to permit the electronic monitoring of offenders[11] and provisions on civil orders.[12] She argues that the presumption of innocence is increasingly placed in question as a result of increased police powers, the use of silence as evidence and acceptance of preventative detention. Hamilton observes Ashworth's acknowledgement that the threat of erosion by reverse onus provisions presents one of the greatest challenges

[4] See Appendix A.
[5] See Appendix B.
[6] Hamilton, C (n 1).
[7] Hamilton (n 1). Hamilton, Dr C (n 1).
[8] Hamilton, C (n 1), 37.
[9] *People (AG) v O'Callaghan* [1966] IR 501, 513.
[10] Section 72 of the Criminal Justice Act 2006.
[11] Section 102 of the Ibid.
[12] Section 115 of the Ibid.

to the presumption of innocence in addition to adverse inference provisions.[13] She discusses the Irish constitutional development of the presumption of innocence[14] and distinguishes between a legal and evidential presumption. She acknowledges that the book does not examine the causes underlying the erosion of the presumption of innocence or provide a theoretical framework within which this development can be examined.[15] She nevertheless questions whether the presumption of innocence in Ireland forms 'an empty boast'[16] and whether we can 'really lay claim to a presumption that is more than merely theoretical or illusory?'[17]

The presumption of innocence has not been adequately fleshed out or discussed with reference to current Irish law since Hamilton's publication almost fifteen years ago. This thesis undertakes this task and argues that the erosion of the presumption of innocence in Irish law is ongoing. It builds on Hamilton's publication.[18] It does this by focusing on a number of discrete aspects of the presumption of innocence and providing original up to date analysis and perspectives on their impact on the presumption. The first task in this thesis is to set the scene in Chapters 1 and 2 in relation to the status of the presumption of innocence. It does this by discussing the scholarly debates on the presumption in Chapter 1 and judicial conceptions of the presumption in Chapter 2. Chapter 1 discusses the scholarly debates with particular reference to the definition, rationale and scope of the presumption of innocence and tries to establish whether the presumption of innocence deserves its privileged position as a fundamental right to protect against miscarriages of justice. The presumption of innocence is quite contested in academic discourse. This thesis agrees with Hamilton's argument that the presumption of innocence extends beyond the trial setting as the majority of defendants never experience trial and therefore the benefits would only be available to a few. This thesis also argues that the pre-trial investigative stage is intimately connected with the trial process. The investigation stage is the evidence gathering stage which informs the testing stage at trial. Both stages are part of the one continuum and are therefore part of the overall trial

[13] Hamilton (n 1), 183; Hamilton, Dr C (n 1), 2.
[14] *O'Leary v Attorney General* [1993] 1 IR 102, 254.
[15] Hamilton, C (n 1), xv refers Kilcommins, S, O'Donnell, I, O'Sullivan, E, and Vaughan, B, Punishment and the search for Order in Ireland (IPA, 2004) for an analysis on this area.
[16] Ibid, xvii.
[17] Ibid, xvii.
[18] Ibid. See also Hamilton (n 1); Hamilton, Dr C (n 1).

process. Moreover, the investigation stage is the point at which there is no judicial oversight and the stage at which a suspect is most vulnerable.

Chapter 2 brings a new perspective to our understanding of the presumption of innocence in Irish law by conducting a historical survey of judicial engagement with the presumption. It suggests that judicial discussion of the underpinning rationale for the presumption of innocence may have been stronger in Ireland than in England in the period prior to *Woolmington v DPP.*[19] It shows that in Ireland the presumption of innocence and the burden and standard of proof played an important role in preventing miscarriages of justice. Chapter 2 also conducts a survey of the constitutional source of the presumption of innocence. It will be shown that the presumption of innocence is a substantive right as an aspect of the right to trial in due course of law in Article 38.1. The elevation of the presumption as a higher principle of law bound up in Article 40.4.1° (liberty) and Article 40.3.2° (good name) will also be argued. The presumption of innocence as guaranteed by the European Convention on Human Rights and the European Union Presumption of Innocence Directive are also analysed.

This thesis analyses legislative and judicial developments since the publication of Hamilton's book in 2007 regarding reverse onus statutory provisions and the use of silence as evidence impacting on the presumption of innocence. Chapter 3 offers original research by examining the extent to which the presumption of innocence is currently eroded by reverse onus statutory provisions and the degree to which the courts have interacted with them. Statutory presumptions primarily take the form of presuming a certain fact(s) unless the contrary is proved or shown.[20] These presumptions have been the subject of much judicial scrutiny.[21] This chapter is an in-

[19] *Woolmington v DPP* (n 2).

[20] Section 4(1) of the Explosive Substances Act 1883; Section 24 of the Offences Against the State Act 1939; Section 29(2) of the Misuse of Drugs Act 1977; Section 50 of the Safety, Health and Welfare at Work Act 1999; Section 41(1) of the Criminal Justice Act 1999; Section 4 of the Prevention of Corruption (Amendment) Act 2001; Section 38(1) of the Road Traffic Act 2010; Section 11(2) of the Proceeds of Crime Act 2010.

[21] *Hardy v Ireland* [1994] 2 IR 550; *DPP v Heffernan* (n 3); *Convening Authority v Doyle* [1996] 2 ILRM 213; *People (DPP) v Byrne* [1998] 2 IR 417; *DPP v Smyth* [2010] IECCA 34; *DPP v PJ Carey (Contractors) Limited* [2011] IECCA 63; *O'Leary v Attorney General* [1995] 1 IR 254; *DPP v Tuma* [2015] IECA 63; *DPP v Forsey* [2016] IECA 233; *O'Byrne & Neville v DPP* [2019] IEHC 715; *DPP v Alinta* Court of Appeal 10 December 2019 McCarthy J; *DPP v Galvin* Court of Appeal 19 November 2020 Collins J.

depth case study of four key cases namely *O'Leary v Attorney General,*[22] *Hardy v Ireland,*[23] *DPP v Smyth*[24] and *DPP v Forsey*[25] on how the courts interpreted different statutory exceptions in light of the presumption of innocence. This chapter argues that the interpretation of reverse onus provisions has evolved over three stages. In stage 1, there was no general guidance laid down by the courts. In stage 2 confusing judicial guidance emerged while in stage 3 general guidance was laid down by the Supreme Court in *DPP v Forsey* as regards the weight to be accorded to the presumption of innocence when considering reverse onus provisions. It will also be shown that the general guidance set out in stage 3 was formulated when the presumption of innocence was turned on its head by the Court of Appeal case in *DPP v Forsey* arising from confusion and lack of coherent general guidance as to the protective nature of the presumption. It will nonetheless be argued that there is a fundamental weakness in the Supreme Court guidance. It will also be shown that the indications from the post-*Forsey* cases suggest there is a continuing threat to the presumption of innocence by reverse onus clauses which are exacerbated by confusion and inconsistency of interpretation by the courts. Confusion exists amongst the judiciary, lawyers and academics alike. Insanity and diminished responsibility are key aspects of the presumption of innocence. Nonetheless, it will not be possible to examine these aspects due to the time and space available.

Chapter 4 analyses the extent to which the presumption of innocence is eroded by legislation that criminalises silence. This chapter argues that the right to silence is a key dimension of the presumption of innocence and has not been accorded sufficient status by the Irish courts. The first part will consider various judicial and academic definitions of the right to silence. It will consider the right to silence both at the pre-trial and trial stages. The chapter will then explore leading Irish and English academic commentary on the relationship between the right to silence and the presumption of innocence. This chapter will show that some academic commentators are not convinced that there is a clear relationship between the right to silence and the presumption of innocence. However, the thesis argues that there

[22] *O'Leary v Attorney General* (n 21); *O'Leary v Attorney General* [1991] ILRM 454.
[23] *Hardy v Ireland* (n 21).
[24] *DPP v Smyth* (n 21). Also considered are *DPP v P.J. Carey (Contractors) Limited* (n 21); *DPP v Tuma* (n 21); *DPP v Heffernan* (n 3).
[25] *DPP v Forsey* [2018] IESC 55.

are two reasons to support a link between the right to silence and the presumption of innocence which is supported by a range of leading commentators in this area. The first is that a legislative measure that either directly or indirectly requires a suspect to answer questions involves a de facto reallocation of the burden of proof. As a result, a suspect is required to explain their innocence and to provide answers to assist the prosecution in their case against the accused, which erodes the presumption of innocence. Secondly, the objective of the right to silence is to prevent a wrongful conviction which is a core rationale for the presumption of innocence. For these reasons, it is argued that it is clear that the right to silence is an expression of the presumption of innocence.

The originality of this chapter primarily lies in the second part of the chapter which examines the treatment of the right to silence under Irish law and the consequences for the presumption of innocence through the operation of compulsory disclosure provisions that require an individual to answer questions on pain of legal/penal sanction. It does this by conducting an in-depth case study of three key cases namely, *Heaney v Ireland*,[26] *Re National Irish Bank*[27] and *Sweeney v Ireland*[28] which considered statutory provisions that criminalise silence where there is a failure to speak. The Canadian caselaw is particularly rich in this area. In particular, the Canadian test on limitations to the right to silence was set down in *R v Chaulk.*[29] It is also of direct relevance to Irish law as it was discussed in the Irish case of *Heaney v Ireland* and has been the subject of analysis by Irish academics. Nonetheless, it will not be possible to examine the Canadian caselaw due to the time and space available. The analysis in this chapter suggests that the courts have continued to tolerate the criminalisation of silence which arguably assists the prosecution in discharging its burden of proof and erodes the presumption of innocence. The evidence suggests that there is a continued threat of erosion to the presumption of innocence caused in part by over reliance on the voluntariness principle where the admissibility of coerced answers is left to the courts to consider on a case by case basis. There is no automatic exclusion of compelled answers in these circumstances. There is a continued reluctance by the Irish courts to be influenced

[26] *Heaney and McGuinness v Ireland* [1994] 3 IR 593.
[27] *Re National Irish Bank Ltd* [1999] 1 ILRM 321.
[28] *Sweeney v Ireland* [2019] IESC 39.
[29] *R v Chaulk* [1990] 13 SCR 1303.

by the European Court of Human Rights case of *Heaney.* It is argued that an express legislative provision excluding compelled answers would remove discretion away from the courts on the admissibility of such answers. This would provide for their automatic exclusion. The chapter will show that the courts are paying lip service to the presumption of innocence due to the lack of discussion of the presumption when considering legislation that criminalises silence. It will be argued that this stance does not augur well for the respect shown to the presumption of innocence in Irish law as a bedrock constitutional principle as compared to the protection available to the presumption of innocence under the European Convention on Human Rights. The apparent consequence of this approach by the Irish courts is that unfortunately the legislators appear to be taking the lead from these judicial pronouncements as the legislation has not been amended to provide for the automatic exclusion in evidence of compelled answers.

The chapter also provides a strong argument that the Irish courts continue to locate the right to silence in Article 40.6.1 (freedom of expression) which arguably provides greater latitude for interference with the right to silence and the presumption of innocence on the grounds of proportionality. The chapter argues that locating the right to silence within the realm of Article 38.1 as extended to the pre-trial interview setting, as distinct from Article 40.6.1 freedom of expression, would be preferable. It is argued that locating the right to silence in Article 38.1 would place the right on a firmer basis where the proportionality principle does not apply. Statements made by judges about the application of the presumption of innocence in the pre-trial setting do not appear to have influenced the protection of the right to silence. Judges repeatedly place significant reliance on the right of the State to protect its interests. It will be shown that the evidence suggests that the public interest in the protection of State interests is clearly preferred over due process.

Chapter 5 examines the impact on the presumption of innocence and the right to silence by adverse inference provisions. The originality of this chapter lies in an in-depth examination of sections 18 and 19 of the Criminal Justice Act 1984 which permit the drawing of adverse inferences at trial from an accused person's 'failure to account' during Garda questioning. These provisions permit the drawing of adverse inferences from silence in two specific situations which are limited to when a suspect

is required to account for possession of certain objects and presence at a particular place.

This chapter conducts an original in-depth case analysis of two key Supreme Court decisions, *Rock v Ireland*[30] and *Finnerty v Ireland*[31] and other recent key decisions concerning the manner in which the courts have since considered the status of the right to silence, the use of pre-trial silence in evidence at trial and the impact on the presumption of innocence. This chapter argues that despite the limited nature of the provisions, the use in evidence at trial of silence obtained at the pre-trial questioning stage continues to significantly erode the right to silence and the presumption of innocence. It will be argued that they effectively impose a de facto reallocation of the burden of proof on an accused contrary to the requirement of the presumption of innocence that the burden of proof remains on the prosecution at all times.

It will also be shown that the Supreme Court in *DPP v A McD*[32] has shifted its view that the right to silence at the pre-trial setting is now protected by Article 38.1, particularly so when an adverse inference provision is invoked. Nonetheless, it will be argued that the presumption of innocence and the right to silence are treated less favourably when exercised at the pre-trial questioning stage than at trial even though these rights are protected by Article 38.1 in both settings. The thesis will support this argument with specific reference to the prohibition on the use of silence of an accused person at trial being used in evidence[33] which is aimed at protecting the presumption of innocence. This chapter argues that the presumption remains under significant threat of erosion by the continued use of the inference provisions.

Chapter 6 analyses the operation of the 'failure to mention' provision in section 19A of the Criminal Justice Act 1984[34] as it applies to ordinary criminal offences, and the manner in which it erodes the presumption of innocence and the right to silence. It provides a strong argument that this provision is further evidence of a backlash against due process rights in response to rising crime rates. It also analyses how the

[30] *Rock v Ireland* [1997] 3 IR 484.
[31] *DPP v Finnerty* [1999] 4 IR 364.
[32] *DPP v A McD* [2017] 1 ILRM 176, [79] per McKechnie J.
[33] Section 1(b) of the Criminal Justice (Evidence) Act, 1924.
[34] Inserted by section 30 of the Criminal Justice Act 2007.

erosion of the presumption of innocence by section 19A is compounded by the absence of a caution. The chapter explores and discusses the Balance in Criminal Law Review Group Report[35] in relation to the adverse inferences provisions, Dáil debates and compares the approach in England and Wales. This chapter concludes by analysing the protection afforded to the presumption of innocence by the European Union Directive on the presumption of innocence in relation to the use of silence as evidence. It will provide a strong argument that the failure of Ireland to opt-in to the EU Directive represents another example of the ongoing erosion of the presumption of innocence in Irish law.

Chapter 7 identifies a general trend in the diminution of the status of the right to a fair trial to explain the broader context in which the erosion of the presumption of innocence has occurred. It will be shown that the presumption is not considered in isolation in the administration of justice, notwithstanding the fundamental nature of this right. This research focuses on the various rights bearers and the perceived need to balance the rights of others against the rights of a suspect and accused to the presumption of innocence and a fair trial. This involves an analysis of the concept of constitutional construction when courts are considering competing rights. The hierarchy of rights and harmonious interpretation are examined. This chapter will show that there is an increasing trend by the courts across a range of areas to give greater weight to some rights at the expense of the right to a fair trial and the presumption of innocence in particular. It will be shown that the erosion of the presumption of innocence cannot be discussed without reflecting on the changed attitude of the courts to the administration of justice and right to a fair trial more generally.

In conclusion, the thesis identifies the application of the presumption of innocence as a broad pre trial right extending beyond the narrow evidential rules at criminal trials. It is argued that the presumption of innocence is under significant threat of erosion by the continued use of reverse onus provisions and the confusion arising amongst the judiciary, lawyers and academics alike as to how they should be interpreted. It is also argued that the use of legislative devices which criminalise silence and provide

[35] 'Balance in the Criminal Law Review Group Final Report' (2007); 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (2007).

for the drawing of adverse inferences from silence during pre trial questioning continue to erode the presumption of innocence in Irish law. The ongoing erosion of the presumption of innocence is further suggested by Ireland's position on the EU Directive on the presumption of innocence.

Chapter 1 - Presumption of Innocence: Scholarly Debates

The purpose of this chapter is to engage with the foundational debates about the presumption of innocence. It does this by examining scholarly debates in this area. It will examine the extent to which the definition of the presumption of innocence is contested before discussing its rationale and scope.

The first section will consider various definitions given for the presumption of innocence with particular reference to Packer's Model which identifies two competing value systems; the Due Process Model and the Crime Control Model. The rationale for the presumption of innocence is then examined within a framework of four supporting reasons identified by Ashworth. Its scope will then be explored in relation to whether the presumption of innocence only applies in the trial setting or whether it extends beyond the trial stage.

1.1 Definition

The presumption of innocence 'has a legendary pedigree in the Irish System of Criminal Justice'.[36] However, the general consensus of commentators is that the presumption of innocence is not easily defined. Picinali observes that the 'meaning of the presumption is hotly debated'.[37] It varies from its application as a procedural rule applying at trial to affording protection beyond the trial setting. Hamilton observes the presumption of innocence 'is difficult to define...as it is often used to denote different things'.[38] Interestingly, Stuckenberg notes that the content of the presumption of innocence 'is far from being clear and universally agreed'.[39] Similarly, Schwikkard states 'there is little consensus regarding, its contents and scope leading to considerable variation in respect of its normative value'.[40] Healy also refers to a

[36] Heffernan, L, 'Statutory Presumptions Affecting the Burden of Proof: DPP v Forsey [2018] IESC 55' (2020) 2 Irish Supreme Court Review 101, 1.
[37] Picinali, F, 'The Presumption of Innocence: A Deflationary Account' (2021) 84 Modern Law Review 708, 710.
[38] Hamilton, C (n 1), 1.
[39] CF Stuckenberg, 'Who Is Presumed Innocent of What by Whom?' (2014) 8 Criminal Law and Philosophy 301, 314. See also T Weigend, 'Assuming That the Defendant Is Not Guilty: The Presumption of Innocence in the German System of Criminal Justice' (2014) 8 Criminal Law and Philosophy 285, 303; PR Ferguson, 'The Presumption of Innocence and Its Role in the Criminal Process' (2016) 27 Criminal Law Forum 131, 131.
[40] Schwikkard, PJ, 'The Presumption of Innocence: What Is It?' (1998) 11 South African Journal of Criminal Justice 396, 396. See also Hamilton, C (n 1), 1.

definitional problem with the presumption of innocence.[41] He remarks that 'for those who acknowledge its force'[42] as an expansive concept, the 'presumption of innocence is impervious to positive definition and incapable of prescriptive formulation or consistent application'.[43] He describes the expansive definition of the presumption of innocence as 'indeterminate in scope'[44]. He remarks that a broad notion of the presumption of innocence creates ambiguity as to the potential wide range of situations in which the presumption of innocence would apply and this for him creates a problem. He states for example, that it 'could be invoked as a reason for any decision or rule that seeks to control the jeopardy of the accused by minimising the risks of prejudice, unfairness, error or miscarriage of justice'.[45]

This view of the presumption of innocence provides a strong argument in favour of the reach of its protection in that it extends beyond a procedural rule applying at trial. Indeed, Healy suggests that such a broad notion of the presumption of innocence would make it into a 'vaporous euphemism for fairness in the administration of criminal justice...and as such it would lose any practical utility or coherence'.[46] Stumer identifies three aspects of the presumption of innocence in Article 6(2) of the European Convention on Human Rights as defined by the European Court of Human Rights. He characterises the European Court of Human Rights view of the presumption of innocence as follows:

> (1) a principle prohibiting official decisions reflecting guilt in the absence of a prior judicial determination; (2) a principle placing the burden of proof on the prosecution and giving the defendant the benefit of any doubt; and (3) a principle requiring presumptions of fact or law to be confined within reasonable limits.[47]

He notes that the second formulation accords with the common law appreciation of the presumption of innocence.[48] He argues that its concept as a procedural rule, confined to the prosecutorial burden of proving every matter necessary for

[41] Healy, P, 'Proof and Policy: No Golden Threads' [1987] Criminal Law Review 355, 365.
[42] Ibid, 365.
[43] Ibid, 365.
[44] Ibid, 365.
[45] Ibid, 365.
[46] Ibid, 365. See also Stumer A, *The Presumption of Innocence: Evidential and Human Rights Perspectives*, vol 8 (Hart Publishing Ltd 2010), xxxix; Schwikkard, PJ (n 40), 404.
[47] Stumer A (n 46), 89-90.
[48] Ibid, 90.

conviction, 'has a more clearly definable legal content'.[49] He observes that English cases decided under Article 6(2) of the European Convention on Human Rights primarily concern challenges to the 'practice of imposing burdens of proof on defendants'.[50]

1.1.1 Competing Value Systems

Packer identifies two competing value systems that 'compete for priority in the operation of the criminal process'.[51] He named these 'the Due Process Model and the Crime Control Model'.[52] The crime control values are that 'the repression of criminal conduct is by far the most important function to be performed by the criminal process'.[53] On the other hand, due process values are 'very much like an obstacle course. Each of its successive stages is designed to present formidable impediments to carrying the accused any further along the process'.[54] Packer observes that the Due Process Model is 'basically a negative model, asserting limits on the nature of official power and on the modes of its exercise, its validating authority is judicial'.[55] He states:

> The Due Process Model encounters its rival on the Crime Control Model's own ground in respect to the reliability of fact finding processes. The Crime Control Model...places heavy reliance on the ability of investigative and prosecutorial officers, acting in an informal setting in which their distinctive skills are given full sway, to elicit and reconstruct a tolerable account of what actually took place in an alleged criminal event. The Due Process Model rejects this premise and substitutes for it a view of informal, nonadjudicative fact finding that stresses the possibility of error.[56]

Packer observes through the operation of the Crime Control Model 'an early determination of probable innocence or guilt emerges'.[57] Those who are 'probably innocent are screened out'.[58] He remarks that those who are 'probably guilty'[59] are

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[49] Ibid, xxxix.
[50] Ibid, xxxix.
[51] Packer, HL, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press 1969), 153.
[52] Ibid, 153.
[53] Ibid, 158. See Garland, D, *The Culture of Control* (1st edn, Oxford University Press 2002) for a comprehensive analysis of crime control and criminal justice in Britian and America.
[54] Packer, HL (n 51), 163.
[55] Ibid, 173.
[56] Ibid, 163.
[57] Ibid, 160.
[58] Ibid, 160.
[59] Ibid, 160.

bestowed with a 'presumption of guilt'[60] and are processed through the criminal justice system. He states that the presumption of guilt is neither 'a thing'[61] nor a 'rule of law in the usual sense'[62] nor is it the opposite of the presumption of innocence.[63] However, it is 'the consequence of a complex of attitudes, a mood'.[64] He notes that the 'presumption of innocence...occupies an important position in the Due Process Model'.[65] Packer distinguishes between the presumption of innocence and the presumption of guilt saying they are different rather than opposite.[66] By way of illustration, he describes a situation of a murder that occurs in full view of a number of witnesses. The suspect admits the killing to the police. According to Packer:

> Under these circumstances, which may seem extreme but which in fact characterize with rough accuracy the evidentiary situation in a large proportion of cases, it would be absurd to maintain that more probably than not the suspect did not commit the killing. But that is not what the presumption of innocence means. It means that until there has been an adjudication of guilt by an authority legally competent to make such an adjudication, the suspect is to be treated, for reasons that have nothing whatever to do with the probable outcome of the case, as if guilt is an open question.[67]

He observes that the objective of the Due Process Model is 'as much to protect the factually innocent as it is to convict the factually guilty.[68] He states that the presumption of innocence in the Due Process Model is as follows:

> The Presumption of innocence is a direction to officials how they are to proceed, not a prediction of the outcome. The presumption of guilt, however, is purely and simply a prediction of outcome. The presumption of innocence is, then, a direction to authorities to ignore the presumption of guilt in their treatment of the suspect.[69]

In these respects and in reference to the Crime Control Model and the Due Process Model, Packer states that the 'presumption of guilt is descriptive and factual; the

[60] Ibid, 160.
[61] Ibid, 160.
[62] Ibid, 160.
[63] Ibid, 161.
[64] Ibid, 160.
[65] Ibid, 161.
[66] Ibid, 161.
[67] Ibid, 161.
[68] Ibid, 165.
[69] Ibid, 161.

presumption of innocence is normative and legal'[70] respectively. 'Determinations of legal guilt'[71] may only occur by a competent court and by such authority. Having regard to the range of submissions that may be made in the Due Process Model to show the accused is not guilty, on the basis of non compliance with legal and procedural requirements, 'it cannot be said with confidence that more probably than not he will be found guilty'.[72] Nevertheless, Packer states that the Due Process Model provides a functioning reason to observe the presumption of innocence therefore requiring the prosecution to prove its case.[73] Indeed, Packer remarks that the tensions between the two models are resolved by deference to the Due Process Model'.[74]

The tension between the Crime Control Model and Due Process Model has been the subject of academic commentary. Hamilton observes 'it is necessary to assume innocence as the concept is defined in a legal sense rather than a factual one at trial'.[75] She notes that the presumption of innocence and the high standard of proof create a social cost in the acquittal of the guilty undermining the principles of deterrence and punishment.[76] Notwithstanding this, she argues that if the presumption of innocence is weakened there is likely to be an increase in convictions of the innocent which would be imposed in the name of us all as members of society.[77] Roberts and Zuckerman state that the burden and standard of proof are the 'twin evidentiary pillars of the presumption of innocence'[78] and together they are part of the state's machinery by which it 'seeks to mediate this fundamental tension'.[79] This position indicates that the pursuit of fact finding and the truth is subject to higher values. This section strongly suggests there is tension between Packer's Crime Control Model and Due Process Model. The issue he identified with the Crime Control Model in respect of the presumption of guilt bestowed on

[70] Ibid, 161-162; Tribe, LH, '"Trial by Mathematics: Precision and Ritual in the Legal Process"' (1971) 84 Harvard Law Review 1329, 1371; Roberts, P, and Zuckerman, A, *Criminal Evidence* (2nd edn, Oxford University Press 2012), 265.
[71] Packer, HL (n 51), 167.
[72] Ibid, 167.
[73] Ibid, 167.
[74] Ibid, 73.
[75] Hamilton, C (n 1), 5.
[76] Ibid, 24.
[77] Ibid, 25.
[78] Roberts, P, and Zuckerman, A (n 70), 244.
[79] Ibid, 244.

suspects, supports a strong argument for a broad interpretation of the presumption of innocence to extend to protect suspects at the investigative stage in police custody.

1.2 Rationale for the Presumption of Innocence

The presumption of innocence has been justified by scholars on a number of different bases. These will be encapsulated within a framework lead by Ashworth's 'four supporting reasons'[80] for the presumption of innocence. He states these reasons 'may be advanced for recognising it today and into the foreseeable future'[81] as a 'widely recognised fundamental right'.[82] Hamilton acknowledges Ashworth's 'four supporting reasons' for the presumption of innocence as 'Ashworth's eloquent defence of the presumption of innocence'.[83] This section will analyse the rationale for the presumption of innocence utilising Ashworth's four supporting reasons as a framework for doing do.

1.2.1 Right not to be wrongfully convicted and punished

As a rationale for the presumption of innocence the right not to be wrongfully convicted and punished has received the most attention by Ashworth and other scholars. Ashworth observes that accused persons on trial risk the public censure of conviction and deprivation of liberty.[84] As a basic principle the innocent should be protected from conviction and punishment.[85] In that regard, the high degree of certainty associated with the prosecutorial burden and standard of proof insists on the high value placed on the right of the innocent not to be wrongfully convicted.[86] Convicting and punishing the innocent is viewed as causing more harm than a factually guilty person escaping liability.[87] Indeed, Ashworth remarks that a wrongful acquittal does not affect any person in the same way as a wrongful conviction.[88]

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[80] Ashworth, A, 'Four Threats to the Presumption of Innocence' (2006) 10 The International Journal of Evidence & Proof 241, 246-252.
[81] Ibid, 246-252.
[82] Ibid, 246-252.
[83] Hamilton (n 1), 185; Hamilton, Dr C (n 1), 6.
[84] Ashworth, A, 'Four Threats to the Presumption of Innocence' (n 80), 246-247. See also Ashworth, A, 'Is the Criminal Law a Lost Cause?' (2000) 116 Law Quarterly Review 225, 234.
[85] Ashworth, A, 'Four Threats to the Presumption of Innocence' (n 80), 247.
[86] Ibid, 247.
[87] For further reading see Ibid; L Campbel, 'Criminal Labels, The European Convention on Human Rights and the Presumption of Innocence' (2013) 76 Modern Law Review 681, 683.
[88] Ashworth, A, *Human Rights, Serious Crime and Criminal Procedure* (Sweet and Maxwell 2002), 113. Also cited in Hamilton, C (n 1), 23.

Nonetheless, this position is arguably changing in Irish law in light of the rights bestowed on victims under Irish[89] and EU law.[90] Ashworth states that the justification for the presumption of innocence 'may be found in the social and legal consequences of being convicted of a crime, in which context the principle constitutes a measure of protection against error in the process'.[91] He notes that a wrongful conviction is a 'deep injustice and a substantial moral harm'[92] the avoidance of which underlies respect for 'the presumption of innocence'.[93] The presumption of innocence is therefore a 'vital protection'[94] against wrongful conviction and punishment. Ashworth argues this position, while strong in respect of any conviction, is 'overwhelming when imprisonment is possible'.[95]

Hamilton has given this rationale much consideration. She states that the presumption of innocence is 'closely affiliated with the constitutional right of the innocent in English and Irish law not to suffer criminal conviction and punishment'.[96] She argues that the presumption of innocence may be justified by the terrible wrong committed on an individual in the event of a wrongful conviction.[97] She observes that a wrongful conviction unjustly restricts one's right to liberty and property and may result in 'social stigma...anger and frustration at the situation'[98] and the infliction of a 'moral wrong'.[99] While a wrongful conviction may undermine public confidence in the justice system the same may also be said in relation to wrongful acquittal.[100]

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[89] Criminal Justice (Victims of Crime) Act 2017.
[90] European Parliament and Council of the European Union, 'Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA' (2012) L 315 Official Journal of the European Union 57.
[91] Ashworth, A, *Principles of Criminal Law* (5th edn, Oxford University Press 2006), 83; Ashworth, A, *Principles of Criminal Law* (6th edn, Oxford University Press 2009), 2; Walsh, DPJ, *Walsh on Criminal Procedure* (2nd edn, Round Hall 2016), 14 [1-29].
[92] Ashworth, A, 'Four Threats to the Presumption of Innocence' (n 80), 247. See also Dennis, I, *The Law of Evidence* (5th edn, Sweet & Maxwell 2013), 39 [2-012]; O'Sullivan, C, Kilcommins, S, Campbell, L, *Criminal Law in Ireland* (Clarus Press 2010), 46 [1-36].
[93] Ashworth, A, 'Four Threats to the Presumption of Innocence' (n 80), 247.
[94] Ibid, 247.
[95] Ibid, 247-248.
[96] Hamilton, C (n 1), 21.
[97] Ibid, 31.
[98] Ibid, 21. See also Jenkins S, 'Miscarriages of Justice and the Discourse of Innocence: Perspectives from Appellants, Campaigners, Journalists, and Legal Practitioners' (2013) 40 Journal of Law and Society 329; *R v Oakes* [1986] 1 SCR 103, 131.
[99] Hamilton, C (n 1), 22 citing Ronald Dworkin, 'Principle, Policy, Procedure' in Crime, Proof and Punishment: Essays in Honour of Sir Rupert Cross (London: Butterworths 1981), 193.
[100] Stumer A (n 46), 39.

Hamilton notes that a wrongful acquittal is effectively a wrong to society as a whole in that a prosecution is taken on their behalf and society is affected in the same way as the conviction of an innocent person.[101] Indeed, the special legal status accorded to victims under Irish[102] and EU law[103] may be said to equate the value of a victim's rights to victims as to the value of the presumption of innocence is to an accused. Therefore, it is now foreseeable that the effect on a victim of a wrongful acquittal may be seen to equate to the effect on an accused of a wrongful conviction. Hamilton observes the 'criminal justice system aims to avoid both forms of miscarriage of justice and that these aims are not necessarily irreconcilable'.[104]

Hamilton raises concerns that an increase in convictions will not necessarily lead to an increase in guilty verdicts. For example, if an accused is acquitted on the basis that he/she did not in fact commit the offence a conviction will never be acceptable regardless of the public outcry that may subsequently follow. The actual offender will be at large in any event. Hamilton observes that the presumption of innocence is important for every individual and it should not be assumed that the innocent will not suffer or that it is only the criminals that suffer.[105] She states that 'we are all at risk of unjust conviction'.[106] She argues that an increase in convictions would not necessarily lead to an increase in convictions of the guilty or more accurate outcomes.[107] This is a very important point. Indeed, the public has an interest in ensuring that the innocent are not convicted and that only the guilty are convicted, thereby ensuring the maintenance of public confidence in the administration of justice.[108] These interests must be carefully balanced by ensuring respect for the relationship between the State and the citizen thereby securing the individual's right not to be placed at an increased risk of wrongful conviction. It may therefore be argued that an acquittal for want of due process, which includes the presumption of innocence, is the price we must pay in a democratic society committed to the common good, justice, charity and the rule of law.

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[101] Hamilton, C (n 1), 23.
[102] *Criminal Justice (Victims of Crime) Act 2017* (n 89).
[103] European Parliament and Council of the European Union (n 90).
[104] Hamilton, C (n 1), 23.
[105] Hamilton (n 1), 185; Hamilton, Dr C (n 1), 7.
[106] Hamilton, C (n 1), 25.
[107] Ibid, 25-26.
[108] Law Reform Commission of Ireland, 'Report on an Examination of the Law on Bail' (1995), 177. See also Roberts, P, and Zuckerman, A, *Criminal Evidence* (Oxford University Press 2004), 344.

Similar views are voiced by a range of other scholars. Hamilton supports the view of Roberts and Zuckerman[109] that the presumption of innocence is 'closely affiliated with the constitutional right of the innocent in English and Irish law not to suffer criminal conviction and punishment'.[110] Roberts and Zuckerman take a similar view to Ashworth and Hamilton, stating:

> Wrongful censure and punishment of the innocent constitute profound moral harms which, moreover, are inflicted by the state in the name, and on the authority, of each and every member of the political community. Every citizen is therefore implicated in a miscarriage of justice.[111]

Indeed, Hamilton supports their view, noting that if miscarriages of justice were a frequent occurrence, public confidence in the justice system would be adversely affected and it would represent a failure on the State to take individuals rights seriously.[112] Furthermore, Roberts and Zuckerman remark that the presumption of innocence would be undermined if the jury failed to appreciate its function of 'protecting the innocent from the profound moral harm of wrongful conviction'.[113]

Denis observes that the right against wrongful conviction is 'generally agreed to be a fundamental safeguard of the liberty of an individual'.[114] Packer notes the 'heaviest deprivation'[115] that can be inflicted by the State on an individual is a combination of a loss of liberty and stigma.[116] Cross observes that it is assumed it is never morally acceptable to convict an innocent person.[117] Similarly, Tribe's fundamental view was that it is wrong for a person to be punished where guilt is unclear.[118] Indeed, he states that conviction of an innocent person is 'morally and constitutionally

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[109] Hamilton, C (n 1), 21 citing Paul Roberts and Adrian Zuckerman, Criminal Evidence (Oxford University Press 2004), 344-345.
[110] Ibid, 21. See also Hadjimatheou, K, 'Surveillance Technologies, Wrongful Criminalisation, and the Presumption of Innocence' (2017) 30 Philosophy and Technology 39, 40.
[111] Roberts, P, and Zuckerman, A (n 70), 251.
[112] Hamilton, C (n 1), 21; Roberts, P, and Zuckerman, A (n 108), 240-252.
[113] Roberts, P, and Zuckerman, A (n 70), 258.
[114] Dennis, I (n 92), 38 [2-012].
[115] Packer, HL (n 51), 165.
[116] Ibid, 165.
[117] Cross, ARN, 'The Right to Silence and the Presumption of Innocence - Sacred Cows or Safeguards of Liberty?' (1970) 11 Society of Public Teachers of Law 66, 74.
[118] Tribe, LH (n 70).

reprehensible'[119] which undermines 'society's commitment to the dignity of the individual as an end in himself'.[120] This reflects Dworkin's theory that each person is entitled to equal respect.[121] Stumer argues that a consequence of wrongful convictions and wrongful acquittals is that the whole justice system risks being undermined.[122] Notably, under the common law system there is always a risk of convicting an innocent person, which cannot be eliminated, and the presumption of innocence serves to 'minimize that risk'.[123] This reason for the presumption of innocence serves as a reminder of the type of society we are or want to strive towards and in particular, the importance of treating accused persons as innocent until found guilty.[124]

1.2.2 Fragility of fact-finding at trials

Ashworth's second supporting reason for the presumption of innocence relates to the quality of evidence and the fact finding process in establishing the truth at trial. It receives less discussion by Ashworth and is discussed by fewer scholars. Notwithstanding this, it is arguably closely related to the right not to be wrongfully convicted, as discussed above. Ashworth accords it equal weight to his supporting reasons on the right not to be wrongfully convicted and the State and individual relationship. He observes that establishing the truth cannot be guaranteed based on oral evidence given months or even years after the incident or by eye witness testimony.[125] Evidence can be unreliable and Jurors can get it wrong. On this point Ashworth recalls that the risk of error at trial is known. There is always a risk that evidence in support of a charge may not stand up to scrutiny. He considers the choice 'between maximising the chances of acquitting the innocent and maximising the chances of convicting the guilty'.[126] He examines the extent to which the risk should 'be allocated to the prosecution or the defence'[127] relying on the burden of

[119] Tribe, LH, 'An Ounce of Detention: Preventive Justice in the World of John Mitchell' (1970) 56 Virginia Law Review 371, 386.
[120] Ibid, 386.
[121] Dworkin, R, *Taking Rights Seriously* (London: Duckworth 1977), 180.
[122] Stumer A (n 46), 39.
[123] Cross, ARN (n 117), 74; Roberts, P, and Zuckerman, A (n 70), 249. See also Hamilton (n 1), 185; Hamilton, Dr C (n 1), 6.
[124] Tribe, LH (n 70), 1392; Myers NM, 'Eroding the Presumption of Innocence: Pre-Trial Detention and the Use of Conditional Release on Bail' (2017) 57 British Journal of Criminology 664, 665.
[125] Ashworth, A, 'Four Threats to the Presumption of Innocence' (n 80), 248.
[126] Ibid, 248.
[127] Ibid, 248.

proof ‘as a device for allocating the risk of misdecision’.[128] He observes that the extent to which the risk of error is allocated to the prosecution or accused ought to ‘favour protection of the innocent’[129] from wrongful conviction. In this respect, he states that the ‘criminal justice system ought to adopt what Paul Roberts has termed a ‘principled asymmetry’’.[130] He observes that ‘[i]t is there that the highest injustice-convicting an innocent person may be risked’.[131] He argues that regard must be given to the reasoning as outlined in relation to the right of the innocent not to be convicted and punished and the fact that while the guilty ought to be convicted no one has an interest in convicting the innocent including victims.[132]

Similarly, Hamilton explores issues relating to the fallibility of evidence and the difficulty in establishing the truth. She states that the prosecution case does not represent the truth and that ‘seemingly infallible evidence...may, upon closer inspection, be less reliable’[133] for example ‘visual identification’.[134] Indeed, the lawfulness of evidence obtained as part of an investigation has often come under the spotlight of the courts and, on occasion, has been deemed inadmissible when found that it has been unlawfully obtained. Hamilton notes that the ‘truth itself is an inherently contestable notion’.[135] The prosecution case is constructed from various lines of enquiry where all lines may not have been pursued with equal vigour.[136] She observes that ‘an interpretation is put on...selected facts by several actors within the system, from police officers, to solicitors in the DPP’s office to counsel for the prosecution’.[137] These matters arguably contribute to the fragility of the fact-finding at trial and therefore the risk of wrongful conviction.

[128] Ibid, 248.
[129] Ibid, 248.
[130] Ibid, 248. See also Roberts P, ‘Double Jeopardy Law Reform: A Criminal Justice Controversy’ (2002) 65 Modern Law Review 393, 402-404.
[131] Ashworth, A, ‘Four Threats to the Presumption of Innocence’ (n 80), 248.
[132] Ibid, 248.
[133] Hamilton, C (n 1), 26.
[134] Ibid, 26.
[135] Ibid, 26.
[136] Ibid, 26.
[137] Ibid, 26.

1.2.3 State and individual relationship - Imbalance of resources and power

Ashworth's third supporting reason for the presumption of innocence concerns the imbalance of resources and power between the state and the citizen and the respect that a state should have for its citizens as a consequence. While this reason receives a lot of discussion by Ashworth, it is discussed by fewer scholars. Ashworth accords it equal weight to his other supporting reasons already discussed above. He argues that there is very good reason to suggest that the presumption of innocence is inherent in the concept of the state citizen relationship and therefore the citizen should be treated as innocent by the state until proven guilty.[138] He continues:

> The state is invested with far-reaching powers of investigation, prosecution, trial and sentencing, but in a democratic society it is expected to exercise these powers according to certain standards that show respect for the dignity and autonomy of each individual.[139]

He states that this means that when a coercive power is triggered over a person, prior to conviction, they must only be exercised in a manner that respects the 'dignity and autonomy'[140] of each person. It requires the 'state to provide acceptable reasons for exercising such powers'[141] for example that there are reasonable grounds to suspect involvement of a person in a crime. Moreover, he observes that, in the absence of reasonable suspicion, no one is expected to respond to accusations as a 'basic moral and political principle'.[142]

Similarly, prosecutors must be satisfied there is sufficient evidence available prior to charging a person with an offence.[143] Ashworth argues that this rationale means that the prosecution bears the burden of proof, which the accused should not have to answer a charge until the prosecution establish a *prima facie* case, and the accused is liable to conviction when guilt is proven by the prosecution beyond a reasonable doubt.[144]

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[138] Ashworth, A, 'Four Threats to the Presumption of Innocence' (n 80), 249.
[139] Ibid, 249.
[140] Ibid, 249.
[141] Ibid, 249.
[142] Ibid, 249.
[143] Ibid, 249.
[144] Ibid, 249.

He argues that the presumption of innocence is not a 'factual presumption'[145] in either the broad or narrow view of the presumption of innocence, discussed below.[146] Indeed, he observes that there is 'no rational connection between being prosecuted and being innocent'[147] in that most of those prosecuted are guilty.[148] He states the presumption of innocence is a 'moral and political principle, based on a widely shared conception of how a free society...should exercise the power to punish'.[149] He notes that there are two elements of this concept. The first being the high value placed on the right not to be convicted wrongfully and the second element deriving from the imbalance of resources between the State agencies and the accused.[150] State resources and power include that of the Gardaí, prosecution, courts, prisons and probation services. Ashworth notes that an accused is unlikely to obtain the range of investigatory resources or services available to the prosecution.[151] This 'adversarial deficit'[152] requires the State to treat people as innocent unless proven guilty beyond a reasonable doubt to redress the imbalance of the accused's position as compared to that of the State.[153] Ashworth observes that the imbalance in resources is 'potentially productive of wrongful convictions'.[154] He argues that this supports the need for the presumption of innocence to redress this imbalance by requiring the prosecutorial burden and standard of proof thereby treating the person as innocent until guilt is proven.[155] He rejects the alternative presumption of guilt as it would fail to respect the 'liberty and autonomy'[156] of each person.

Hamilton argues that the imbalance of resources and power between the State and the individual demand respect by the State for its 'citizens in a democratic society'.[157] She states that a presumption of guilt would seriously undermine respect for

[145] Ibid, 249.
[146] Ibid, 249.
[147] Ibid, 249.
[148] Ibid, 249. Ashworth citing statistics on guilty pleas and convictions.
[149] Ibid, 249.
[150] Ibid, 250. See also Ashworth, A, *Principles of Criminal Law* (n 91), 83; Ashworth, A, *Principles of Criminal Law* (n 91), 2; Walsh, DPJ (n 91), 14 [1-29].
[151] Ashworth, A, 'Four Threats to the Presumption of Innocence' (n 80), 250.
[152] Roberts, P, and Zuckerman, A (n 108), 15. Also cited in Ashworth, A, 'Four Threats to the Presumption of Innocence' (n 80), 250.
[153] Ashworth, A, 'Four Threats to the Presumption of Innocence' (n 80), 249-250. See also Hamilton, C (n 1), 31.
[154] Ashworth, A, 'Four Threats to the Presumption of Innocence' (n 80), 250.
[155] Ibid, 250.
[156] Ibid, 250.
[157] Hamilton (n 1), 185; Ashworth, A, 'Four Threats to the Presumption of Innocence' (n 80), 249.

individuals' freedom to go about their daily business freely and without undue interference from the state'.[158] Roberts observes that the vast resources of the state place it in a better position to seek out evidence of guilt rather than imposing a burden on the accused to prove innocence.[159] The alternative, presumption of guilt, would be unthinkable given the State's commitment to, 'promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured'[160] and its commitment to 'freedom and the rule of law'.[161] It is clearly the case that this supporting reason for the presumption of innocence, while a distinct reason in itself, is also closely related to the right not to be wrongfully convicted, as discussed above.

1.2.4 Criminal Standard of Proof

Ashworth's fourth supporting reason for the presumption of innocence reinforces the above three supporting reasons by providing a higher standard of proof at criminal trials which takes account of the values underlying respect for the right against wrongful conviction, the fallibility of evidence at trial and the imbalance of resources. This reason receives the least discussion by Ashworth and other scholars. Ashworth accords it less weight to his other supporting reasons already discussed above. Nonetheless, he notes Tapper's contention that there is a close connection between the presumption of innocence and the criminal standard of proof and that they are 'in no way separate'[162] from the presumption of innocence. He states that it is possible to conceive of a lesser standard of proof on the balance of probabilities and therefore it is worth according a short discussion to the need for a higher standard of proof in criminal cases.[163] He notes the higher standard of proof beyond a reasonable doubt at criminal trial recognises the previous three values of 'proper respect for the right not to be wrongly convicted, the fragility of fact-finding and the disparity of

[158] Hamilton (n 1), 185.
[159] P Roberts, 'Taking the Burden of Proof Seriously' [1995] Criminal Law Review 783, 787. See also Hamilton, C (n 1), 28.
[160] Preamble of Constitution of Ireland 1937.
[161] Preamble of the European Convention on Human Rights. The European Convention on Human Rights was incorporated into Irish Law by virtue of the European Convention on Human Rights Act 2003. It is noteworthy that it has been incorporated at sub-constitutional level. Also cited in Ashworth, A, 'Four Threats to the Presumption of Innocence' (n 80), 250.
[162] Ashworth, A, 'Four Threats to the Presumption of Innocence' (n 80), 250; Ashworth cites Tapper, C, *Cross and Tapper on Evidence* (10th edn, Butterworths 2004), ch. III.
[163] Ashworth, A, 'Four Threats to the Presumption of Innocence' (n 80), 250.

resources'.[164] He observes that the reasonable doubt standard takes 'seriously the fundamental moral harm of a wrongful conviction, by requiring the jury or magistrates to be 'satisfied so that they feel sure' of the defendant's guilt before they proceed to convict'.[165] In support of this view he cites the United States Supreme Court where it stated that, 'a society that values the good name and freedom or every individual should not condemn a man for commission of a crime where there is reasonable doubt about his guilt'.[166]

Farmer argues that the importance of the presumption of innocence is reinforced by the standard of proof.[167] He argues that unless guilt is proved beyond reasonable doubt individuals should be presumed to be 'without reproach' or in 'good standing''[168] to ensure consistency of the presumption of innocence with a 'liberal legal order'.[169] Tribe states that 'guilt beyond a reasonable doubt represents...a standard that seeks to come as close to certainty as human knowledge allows - one that refuses to take a deliberate risk of punishing any innocent man'.[170] He observes:

> The jury is charged that any "reasonable doubt," of whatever magnitude, must be resolved in favor of the accused. Such insistence on the greatest certainty that seems reasonably attainable can serve at the trial's end, like the presumption of innocence at the trial's start, to affirm the dignity of the accused and to display respect for his rights as a person–in this instance, by declining to put those rights in deliberate jeopardy and by refusing to sacrifice him to the interests of others.[171]

Picinali observes that the reasons that justify the burden of proof also justify the high standard of proof particularly the 'need to protect the innocent from conviction'.[172] However, he argues that this goal cannot be exclusively used to justify this standard as there are many competing goals such as 'conviction of the guilty, the protection of

[164] Ibid, 250. See also Hamilton (n 1), 185; Hamilton, Dr C (n 1), 6.
[165] Ashworth, A, 'Four Threats to the Presumption of Innocence' (n 80), 251.
[166] *In Re Winship* 397 US 358 (1970), 365.
[167] L Farmer, 'Innocence, the Burden of Proof and Fairness in the Criminal Trial: Revisiting Woolmington v DPP (1935)' in John D Jackson and Sarah J Summers (ed), *Obstacles to Fairness in Criminal Proceedings: Individual Rights and Institutional Forms* (Oxford: Hart Publishing 2018), 69.
[168] Ibid, 68.
[169] Ibid, 68.
[170] Tribe, LH (n 119), 388.
[171] Tribe, LH (n 70), 1374.
[172] Picinali, F (n 37), 725.

the polity from crime, the fairness of the trial'.[173] Nonetheless, it is clear that one of its aims is to protect the innocent. Similarly, Stumer argues that the burden and standard of proof protects the innocent by reducing the risk of wrongful conviction, stating:

> (1) it allocates the burden of proof to the party with the greatest resources; (2) it acts to counter a tendency in criminal trials to assume the guilt of the defendant and to discount the defendant's evidence; and (3) it allocates the risk of non-persuasion to the prosecution.[174]

This fourth supporting reason for the presumption of innocence may be characterised as recognising the values underpinning the previous three reasons of wrongful conviction, the fragility of fact finding and the disparity of resources arguably taking account of the moral harm and adverse risks for accused persons associated with wrongful conviction. In the words of Picinali '[o]ne should expect that at the outset of the trial every reasonable fact finder should believe that the defendant has not been proven guilty according to applicable standard of proof'.[175]

1.2.5 Other rationales for the Presumption of Innocence

In addition to his four supporting reasons for the presumption of innocence, Ashworth observes separately, that the presumption of innocence is 'widely recognised as a human or constitutional right'.[176] Tribe states that the presumption of innocence, amongst other values, affirms 'respect for an accused as a human being'.[177] Lippke supports this approach. He argues that the presumption of innocence not only serves to protect the innocent but also serves to protect the rights of autonomy, privacy and liberty of convicted persons which are restricted by punishment upon conviction.[178] This argument is proffered on the basis that the intrusive consequence of '[c]riminal conviction, with its associated stigma and hard treatment, curtails the exercise and enjoyment of basic rights'.[179] Therefore a conviction must be justified in the first place, which the presumption of innocence serves to ensure. In this context, Picinali characterises the presumption of innocence

[173] Ibid, 726.
[174] Stumer A (n 46), 33.
[175] Picinali, F (n 37), 729.
[176] Ashworth, A, 'Four Threats to the Presumption of Innocence' (n 80), 257.
[177] Tribe, LH (n 70), 1370-1372, 1392.
[178] Lippke RL, *Taming the Presumption of Innocence* (Oxford University Press 2016), Chapter 2, 34.
[179] Ibid, Chapter 2, 52.

as the 'status quo...that our polity has agreed upon'[180] which must be preserved unless guilt is proved.[181]

Tadros observes that the presumption of innocence serves as 'a human right that is grounded in the moral importance of defendants, not in some other set of values'.[182] He notes '[t]he distinctive force of the presumption of innocence...is grounded in the attitudes that we manifest towards others when we treat them as liable to certain kinds of treatment on an inadequate evidential basis'.[183] Tadros and Tierney take the view that it is difficult to think of a higher right than the presumption of innocence.[184] Stumer observes that the presumption of innocence in Article 6(2) of the European Convention on Human Rights is 'one of the most fundamental human rights'[185] and it is essential for public confidence in the criminal justice system.[186] Stewart states that the 'innate juridical rights that one has just in virtue of being a person include the right to be presumed innocent'.[187] He argues that the presumption of innocence is a 'basic human right' and thus continues:

> Specifications of and limitations on the right should therefore be justified not primarily in terms of their instrumental effectiveness in fact-finding or crime control but in terms of the role of the criminal process in a liberal legal order.[188]

Hamilton notes the presumption of innocence has received strong international endorsement in the 'constitutions of most common law systems'.[189] Indeed, she observes that the presumption of innocence is probably more closely associated with Article 38.1 of the Constitution though it should also be considered in light of the concept of charity in the Preamble to secure the freedom and dignity of the individual where it can be 'viewed as an embodiment of an essentially positive view of

[180] Picinali, F (n 37), 715.
[181] Ibid, 715.
[182] Tadros V, 'The Ideal of the Presumption of Innocence' (2014) 8 Criminal Law and Philosophy 449, 456. See also Walsh, DPJ (n 91), 13 [1-27].
[183] V (n 182), 458.
[184] Tadros, V and Tierney, S, 'The Presumption of Innocence and the Human Rights Act' (2004) 67 The Modern Law Review 402.
[185] Stumer A (n 46), x1.
[186] Ibid, 38.
[187] H Stewart, 'The Right to Be Presumed Innocent' (2014) 8 Criminal Law and Philosophy 407, 409.
[188] Ibid, 407.
[189] Hamilton, C (n 1), 30-31.

humankind'.[190] Notably, the Canadian Supreme Court held that the presumption 'confirms our faith in human-kind; it reflects our belief that individuals are decent and law-abiding members of the community' until guilt is proven beyond all reasonable doubt.[191] Similarly, the notion of humankind was endorsed in Ireland when the concepts of charity, justice and prudence[192] were invoked in *State (Healy) v Donoghue*[193] to maintain the court's observation of fair procedures.

Hamilton states that the right to liberty and the moral wrong associated with a wrongful conviction justify the presumption of innocence and prosecutorial burden and standard of proof beyond all reasonable doubt.[194] Hamilton notes the views of Roberts[195] in relation to the close relationship of the burden of proof to the presumption of innocence. Roberts argues that the presumption of innocence would be replaced with a presumption of guilt if the burden of proof rested on the accused.[196] Such a situation would make 'people presumptive criminals'[197] which would be 'utterly corrosive of liberty'[198] and undermine the freedom of individuals to move without undue police interference.[199] Roberts also argues that the structure of the criminal process is not conducive to fairness when endeavouring to prove innocence, in that the accused is always responding to and never instigating the prosecution agenda.[200] Hamilton states that the prosecutorial burden of proof is therefore necessary to 'redress the balance in the criminal process which is tipped overwhelmingly in its favour'.[201]

Hamilton notes media commentary concerning a social cost to the presumption of innocence and the standard or proof when accused persons are acquitted and

[190] Ibid, 29.
[191] *R v Oakes* (n 98), 120.
[192] As per the preamble of the *Constitution of Ireland 1937* (n 160).
[193] *State (Healy) v Donoghue* [1976] IR 325.
[194] Hamilton, C (n 1), 23, 31. See also A Duff, 'Who Must Presume Whom to Be Innocent of What?' (2013) 42 Netherlands Journal of Legal Philosophy 170, 174.
[195] Hamilton, C (n 1), 26-28 citing Paul Roberts, 'Taking the Burden of Proof Seriously' [1995] Criminal Law Review 783, 787.
[196] Roberts (n 159), 786.
[197] Ibid, 786.
[198] Ibid, 786.
[199] Ibid, 786. See also Hamilton, C (n 1), 27.
[200] Roberts (n 159), 787. See also Hamilton, C (n 1), 28.
[201] See also Hamilton, C (n 1), 28.

released.[202] She observes that these standards protect abuses by the State which are much more problematic than individual criminal conduct.[203]

Stumer's central argument is that there is a dual rationale for the presumption of innocence in that it protects two values, that is to say, protection of the innocent from wrongful conviction and punishment, as already discussed, and promotion of the rule of law.[204] He argues that the rule of law ensures that criminal sanctions are not applied unless guilt has been established to a sufficient standard of certainty.[205]

Overall this section on rationales for the presumption of innocence provides a strong arguement that commentators tend to concentrate on the rationale of the right not to be wrongfully convicted and punished. Indeed, Ashworth and Hamilton tend to concentrate on this rationale more that on other rationales. This is not to say that all the rationales are not of equal weight and are not distinct from each other. However, they tend to overlap in that they all contribute to the right not to be wrongfully convicted and punished and ultimately protect against miscarriages of justice. These values reflect the notable expression by Blackstone that it is 'better that ten guilty go free than one innocent be convicted'.[206] Interestingly, Farmer observes that these expressions illustrate that an accused should be given the benefit of the doubt where uncertainty is identified as distinct from illustrating a 'general expression of the presumption of innocence'.[207] Nonetheless, it is argued that the presumption of innocence deserves its privileged position as a fundamental right to protect against wrongful conviction and punishment having regard to the reasons as outlined.

1.3 Scope of the Presumption of Innocence

Scholars have expressed various views on the scope of the presumption of innocence and as a result it does not yet seem to be clearly defined.[208] Ashworth

[202] Hamilton (n 1), 185; Hamilton, Dr C (n 1), 6.
[203] Hamilton (n 1), 186; Hamilton, Dr C (n 1), 6.
[204] Stumer A (n 46).
[205] Ibid, 27.
[206] Blackstone, W, *Commentaries on the Laws of England* (Oxford: Clarendon Press 1753), (Volume 4 Chapter 27).
[207] Farmer (n 167), 65.
[208] Hamilton, C (n 1), 1 citing P.J. Schwikkard, 'The Presumption of Innocence: What Is It?' (1998) 11 South African Journal of Criminal Justice 396; Ashworth, A, *Human Rights, Serious Crime and Criminal Procedure* (n 88), 14; Ashworth, A, 'Four Threats to the Presumption of Innocence' (n 80).

notes that the presumption of innocence 'points in at least two different directions'.[209] Interestingly, Roberts warns that one is not seeking an 'outright winner'[210] in a 'tournament between rival conceptions'[211] of the presumption of innocence. Allen adopts '"thick" and "thin" notions of presumption of innocence'.[212] This section investigates whether the presumption of innocence only applies in the trial setting (narrow view) or whether it extends beyond the trial stage (broad view).

1.3.1 Narrow view - Burden of Proof at Trial

The narrow view of the presumption of innocence seeks to confine the scope of the presumption of innocence to evidential rules at criminal trials, primarily the burden of proof on the prosecution to prove its case to the standard beyond a reasonable doubt. Allen refers to this narrow view as a 'thin' notion of the presumption of innocence.[213] On a narrow view of the presumption, Hamilton observes that the presumption of innocence gives expression to the evidential rules that the burden of proof is on the prosecution to prove guilt beyond reasonable doubt in respect of all elements of the offence and any defence raised.[214] Hamilton relies on Morton and Hutchinson[215] who state that a consequence of the prosecutorial burden of proof is that an accused is not compelled to contribute to the trial or give evidence in his defence, and in this regard the presumption of innocence and the right to silence interact by placing the prosecution on proof.[216] The onus of proof has been described as 'a central feature of our criminal justice system and an important bulwark against miscarriages of justice'.[217] The prosecution at all times bears the legal burden of proving all facts relevant to guilt, except for the defence of insanity and diminished

[209] Ashworth, A, *Human Rights, Serious Crime and Criminal Procedure* (n 88), 14. See also Hamilton, C (n 1), 1.
[210] Roberts P, 'Presumptuous or Pluralistic Presumptions of Innocence? Methodological Diagnosis towards Conceptual Reinvigoration' (2020) 198 Synthese 8901 <https://doi.org/10.1007/s11229-020-02606-2>, 8903. See also Allen, J, 'Rethinking the Relationship between Reverse Burdens and the Presumption of Innocence' (2021) 25 International Journal of Evidence and Proof 115, 118.
[211] P, 'Presumptuous or Pluralistic Presumptions of Innocence? Methodological Diagnosis towards Conceptual Reinvigoration' (n 210), 8903. See also Allen, J (n 210), 118.
[212] Allen, J (n 210), 118.
[213] Ibid, 118.
[214] Hamilton, C (n 1), 1-3 citing S. Summers, 'Presumption of Innocence' (2001) 1 Juridical Review 37, 42-44. See also SM and SÓT McIntyre, TJ, *Criminal Law* (Roundhall 2012), 35; Tapper, C (n 162), 135; JC Hutchinson, SC, Morton, *The Presumption of Innocence* (Carswell 1987).
[215] Hutchinson, SC, Morton (n 214).
[216] Hamilton, C (n 1), 1-2 citing JC Morton and SC Hutchinson, The Presumption of Innocence (Carswell 1987).
[217] 'Balance in the Criminal Law Review Group Final Report' (n 35), 84; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 39.

responsibility. The accused is not required to prove his/her innocence. However, the accused may be required to satisfy the evidential burden by adducing sufficient evidence to raise a reasonable doubt for example the defence of self defence, though the onus remains on the prosecution to disprove the defence beyond a reasonable doubt.[218] Prendergast observes that the burden and standard of proof requirement of the presumption of innocence 'is a central part of trial in due course of law under the Irish Constitution'.[219] Indeed, Walsh observes that the criminal trial in Irish law is characterised by the presumption of innocence guaranteed in Article 38 of the Constitution.[220] He states that 'there is no obligation on the accused to establish his own innocence'.[221] Therefore, there is no requirement on the accused to 'explain or justify his actions'.[222]

Hamilton observes that the narrow conception of presumption of innocence includes a requirement of 'neutrality for fact finders'[223] which is well recognised in Irish law. The presumption of innocence in the narrow context requires that proof is based solely on the evidence before the court and disregards any indicators of guilt arising pre-trial.[224] This is where the jury is told to base their decision on the evidence before the court; the fact that the Director of Public Prosecutions has chosen to institute proceedings is of no moment in relation to the guilt of the accused.[225] In Hamilton's view, this feature of the presumption of innocence may become more relevant as Irish society diversifies[226] and therefore she notes the views of Laufer in the United States that a jury should be told at the start of a trial to assume the accused did not commit the offence charged in order to give real meaning to the presumption of innocence.[227]

[218] Hamilton, C (n 1), 2.
[219] D Prendergast, 'The Presumption Pertaining to Murder Mens Rea in Section 4(2) of the Criminal Justice Act 1964' (2018) 60 Irish Jurist 2018, 171.
[220] Walsh, DPJ (n 91), 1321 [22-03].
[221] Ibid, 13 [1-24].
[222] Ibid, 1323 [22-07].
[223] Hamilton, C (n 1), 3.
[224] Ibid, 3.
[225] Ibid, 3.
[226] Ibid, 3.
[227] Ibid, 3-4 citing William S. Laufer, 'The Rhetoric of Innocence' (1995) 70 Washington Law Review Association 329.

Many other scholars discuss the narrow conception of the presumption of innocence. Ashworth and Blake are of the view that the principle arising from *Woolmington* applies only in the context of the 'legal or persuasive burden'.[228] Indeed, Picinali argues that the presumption of innocence should be understood as encompassing exclusively a rule on the allocation of the burden of proof'.[229] He argues that the presumption may only be altered where the prosecution 'is successful in establishing guilt'.[230] Similarly, Easton states the prosecutorial burden 'constitutes the symbolic and practical expression'[231] of the presumption of innocence. Indeed, Roberts and Zuckerman expand on this view stating:

> The Presumption of innocence demands that at all stages of the criminal proceedings prior to verdict the accused is treated for official purposes *as though he were* innocent, unless and until proven otherwise, and in particular that the jury approaches its task with a firm commitment to affording the accused the benefit of any reasonable doubt.[232]

Phibson states that 'in the absence of evidence, innocence of crime is usually said to be presumed by law; in all events the burden of proof is always cast upon the party asserting criminality'.[233] The burden therefore rests on the State in matters of criminal prosecutions.

Stumer exclusively examines the narrow conception of the presumption of innocence.[234] He decided on this approach for two reasons. Firstly, that the narrow conception 'has a more clearly definable legal content'.[235] Secondly, that 'English cases so far decided under Article 6(2) have been primarily concerned with this aspect',[236] principally used to challenge the practice of imposing burdens of proof on defendants. However, while he 'does not address the second, broader facet of the

[228] Blake, M, and Ashworth, A, 'The Presumption of Innocence in English Criminal Law' [1996] Criminal Law Review 306, 310. See also Tapper, C (n 162), 135.
[229] Picinali, F (n 37), 709.
[230] Ibid, 712.
[231] Easton, S, *The Case for the Right to Silence (Avebury Series in Philosophy)* (2nd edn, Ashgate Publishing Limited 1999), 181.
[232] Roberts, P, and Zuckerman, A (n 70), 265.
[233] *Phibson on Evidence* (17th edn, Sweet & Maxwell 2010), 161-162, [6.20].
[234] Stumer A (n 46), xxxvix.
[235] Ibid, xxxvix.
[236] Ibid, xxxvix.

presumption of innocence',[237] he makes a distinction within the narrow conception of the presumption of innocence. He investigates and discusses two procedural approaches within the narrow conception of the presumption of innocence, the broad procedural approach and narrow procedural approach.[238]

The broad procedural approach identified by Stumer is not to be confused with the 'broad view' to be discussed later. It is confined within the narrow conception of the presumption of innocence. Stumer argues that the broad procedural approach is preferable over the narrow procedural approach. He states that the broad procedural approach provides the innocent with maximum protection as it requires the prosecution to prove 'all matters necessary for criminal conviction'[239] thereby enhancing respect for the rule of law.[240] The broad procedural approach is premised on the notion that criminal prohibition is defined entirely to include 'elements, defences, excuses and justifications'.[241] The prosecution must prove every matter, both core and peripheral, necessary for conviction. Stumer argues however that the narrow procedural approach requires the prosecution to prove only the 'core' elements of an offence.[242] In that case the burden of proof in respect of peripheral matters is borne by the accused.[243] These are matters relevant to conviction with respect to which the burden of proof is placed on the accused. In other words, this concerns the reversal of the legal burden of proof. Stumer notes that there is no satisfactory way of distinguishing core aspects of an offence from peripheral aspects.[244] He argues that where an accused bears the persuasive burden he/she 'may be convicted in the absence of proof that his conduct was within the criminal prohibition'.[245]

Stumer's argument accords with the first stage of the Canadian 'final effect' theory as described by Ashworth where the presumption of innocence is infringed whenever the accused has to prove some fact on the balance of probabilities in order to avoid

[237] Ibid, xxxvix.
[238] Ibid, xxxvix.
[239] Ibid, 82.
[240] Ibid, 82.
[241] Ibid, 76, 82.
[242] Ibid, 68.
[243] Ibid, 68.
[244] Ibid, 87.
[245] Ibid, 76, 82.

conviction.[246] It is the effect that is determinative that is to say, that the accused may be convicted in spite of a reasonable doubt as to his/her guilt.[247] In this respect, Stumer's broad procedural approach is appealing to protect the presumption of innocence absolutely. However, the presumption of innocence is not absolute. Ashworth notes that the second stage of the Canadian theory measures the exceptions 'against the constitutional test for justifiable limitations'.[248] Therefore, the presumption of innocence may be limited by the principle of proportionality as provided for under the Constitution and the European Convention on Human Rights.

1.3.2 Broad view – Presumption of Innocence beyond the trial stage

This section discusses the broad conception of the presumption of innocence in the context of its effect beyond the evidential rules of a criminal trial. Allen refers to this broad view as a 'thick' notion of the presumption of innocence.[249] This section will also discuss the extent to which it protects against treatment inconsistent with the presumption of innocence pre-trial and during trial. Hamilton[250] examines whether the presumption of innocence is a 'very real thing and not simply a procedural rule taking effect only at trial'.[251] She argues that the golden thread prosecutorial burden of proof in *Woolmington*[252] is acknowledged as a fundamental postulate of Irish criminal law with constitutional protection as part of the right to a fair trial and not just a procedural rule taking effect at trial.[253] Influenced by Packer, Irish law and that of the European Convention on Human Rights, Hamilton argues the presumption of innocence extends beyond the rule of evidence and the criminal trial to police investigations.[254] Farmer expresses a similar view and states that the presumption of innocence has therefore 'become central to understandings of how state power might be limited in a range of areas connected with criminal justice'.[255]

[246] Ashworth, A, 'Four Threats to the Presumption of Innocence' (n 80), 259 citing Dickson CJ in the case In Whyte (1998) 64 CR (3d) 123 at 134-5.
[247] Ibid, 259.
[248] Ibid, 259.
[249] Allen, J (n 210), 118.
[250] Hamilton, C (n 1).
[251] *People (AG) v O'Callaghan* (n 9), 513.
[252] *Woolmington v DPP* (n 2).
[253] Hamilton, C (n 1), xiii.
[254] Ibid, 30.
[255] Farmer (n 167), 67.

It is arguable that the presumption of innocence in Article 38.1 extends, at least, to the point of arrest. The point in time of an arrest is an important juncture in the criminal justice process which is 'intimately connected with a potential criminal trial rather than being one at a pure investigative stage'.[256] As such 'the fundamental requirement of basic fairness does apply from the time of arrest such that any breach of that requirement can lead to an absence of a trial in due course of law'.[257] However, that statement appears to be somewhat tempered by Charleton J's judgment in *DPP v Doyle.*[258] Charleton J remarked that during questioning while under arrest, where other safeguards are in place that 'it does not necessarily follow that the rights which are typical of and fundamental to the fairness of a criminal trial under Article 38.1 of the Constitution...apply'.[259] It is noteworthy however, that he did not state the presumption of innocence did not apply. This is relevant in relation to the relationship of the presumption of innocence with the right to silence and privilege against self-incrimination.

As noted earlier, Hamilton observes that the presumption of innocence is closely connected to the right to silence in its broadest sense in 'preventing wrongful conviction'.[260] Walsh observes that the presumption of innocence is closely connected with the 'right to silence and privilege against self incrimination'.[261] Indeed, Ashworth argues there is a 'relation of kinship between'[262] the presumption of innocence and the right to silence 'even if there is no direct link or derivation'.[263] This argument is based on the view that adverse inferences should not be drawn from conduct at a stage when a case against the accused had not been made and there was a significant power differential between the suspect and the police.[264] This arises at the pre-trial investigation stage during police questioning. Easton argues that the evidential significance of silence increases the pressure on suspects to speak and 'effectively being asked to establish his own innocence'.[265] It is arguable that the

[256] *DPP v Gormley* [2014] IESC 17, [8.8] per Clarke J.
[257] Ibid, [8.8] per Clarke J.
[258] *DPP v Doyle* [2017] IESC 1.
[259] Ibid, [44].
[260] Hamilton, C (n 1), 77.
[261] Walsh, DPJ (n 91), 1322 [22-04].
[262] Ashworth, A, 'Four Threats to the Presumption of Innocence' (n 80), 256.
[263] Ibid, 256.
[264] Ibid, 256.
[265] Easton, S (n 231), 181.

drawing of adverse inferences from pre trial silence interferes with the right to silence and privilege against self incrimination by requiring an accused to assist the prosecution in their case against him.

Some scholars discuss procedural fairness in the context of the broad conception of the presumption of innocence and the importance of ensuring that punishment is not administered before the procedure comes to an end. Roberts and Zuckerman note that the presumption of innocence is 'rightly regarded as a cornerstone of legitimate criminal procedure'.[266] Stuckenberg observes that '[t]he legal consequences typically ascribed to a presumption of innocence presuppose an ordered process of fact-finding, viz. a procedure'.[267] Stuckenberg notes that the presumption of innocence is an 'expression that a procedure is a necessary condition of punishment'[268] and that it protects the openness of procedure 'against all kinds of interference'.[269] She states:

> Theoretically, the function to protect the integrity of a procedure against compromise is not restricted to criminal proceedings but exists in any type of procedure...The main consequence of this understanding of the presumption of innocence is the forbidden anticipation of punishment before the procedure has come to the determined end.[270]

On this basis and because guilt cannot be presumed, punishment cannot be administered until the procedure has come to an end. In addition, punishment will be precluded where the methods or procedures are considered unfair.[271] Roberts argues that the right to 'procedural accuracy is one to which all defendants in a criminal trial are entitled...as an aspect of the presumption of innocence'.[272] He argues that this connection to the presumption of innocence requires the 'state to do as much as it can to protect individuals from wrongful conviction'.[273] It is arguable therefore that the criminal procedures discussed in this commentary are not solely confined to criminal trial procedures but also include pre-trial criminal procedures. This is a convincing position in that the most accurate procedures will contribute to protecting the

[266] Roberts, P, and Zuckerman, A (n 70), 554.
[267] Stuckenberg (n 39), 310.
[268] Ibid, 312.
[269] Ibid, 312.
[270] Ibid, 312.
[271] Walsh, DPJ (n 91), 14 [1-27].
[272] AJ Roberts, 'The Frailties of Human Memory and the Accused's Right to Accurate Procedures' (2019) 11 Criminal Law Review 912, 914.
[273] Ibid, 916.

innocent from conviction and in turn will protect the presumption of innocence from erosion. Duff observes that the presumption of innocence 'protects us against becoming defendants'[274] and is rooted in the concept of 'civic trust that we owe our fellow citizens'.[275] Furthermore, Duff argues that if the accused is acquitted he/she will enjoy the presumption of innocence as it has not been defeated.[276] However, Duff remarks that the 'civic POI...is qualified when a person is charged with a criminal offence'[277] in that 'it is to treat him as someone who simply cannot be trusted'.[278] It is worth noting that the reference to "POI" is a reference to the presumption of innocence. This implies the presumption of innocence may be rebutted at the charge stage thereby treating the accused as though he was guilty which is contrary to the majority opinion. Stewart rejects Duff's view stating that 'Duff's rule...is...in tension with the right to be without reproach, if and to the extent that it would permit the legally innocent...to be treated as if they were guilty.[279] He continues by presenting a strong supporting argument for a broad conception of the presumption of innocence in the following passage.

> Because every person has the innate right to be without reproach, the presumption of innocence is a principle that conditions the criminal process as a whole, from the moment an offence is alleged to have occurred until a verdict of guilty or not guilty is rendered. In other words, the right to be without reproach goes beyond the right not to be punished in the absence of wrongdoing; it must also affect the content of the procedural rights that apply in the determination of whether the person has done wrong.[280]

Similarly, Allen advocates that the presumption of innocence is a 'thick' concept which plays an important role in relation to 'how the state ought to treat its citizens'.[281] Stewart comments on the pre-trial effect of the presumption of innocence stating, that if the presumption of innocence 'has no application before the trial, it is very hard to see why it should apply at trial'.[282] Tribe takes a similar position to Stewart on the broad conception of the presumption of innocence stating that 'the presumption of

[274] Duff (n 194), 180.
[275] Ibid, 180.
[276] Ibid, 177.
[277] Ibid, 184.
[278] Ibid, 184.
[279] Stewart (n 187), 415.
[280] Ibid, 411-412.
[281] Allen, J (n 210), 120.
[282] Stewart (n 187), 414.

innocence...represents far more than a rule of evidence'.[283] He makes a convincing argument for his stated position:

> It represents a commitment to the proposition that a man who stands accused of crime is no less entitled than his accuser to freedom and respect as an innocent member of the community. Only those deprivations necessary to assure the progress of the proceedings pending against him-deprivations which do not rest on any assumption of guilt-may be squared with this basic postulate of dignity and equality.[284]

Owusu-Bempah also advocates for a broad interpretation of the presumption of innocence arguing that it 'operates throughout the criminal process, as a direction to officials to treat the accused as if he were innocent, until guilt is proved'.[285]

The connection of the presumption of innocence to the right to liberty has received attention. Hogan et al discuss the interaction of the presumption of innocence with the evidential rules as to burden of proof and state that the presumption of innocence, 'as one of the fundamental principles of the criminal justice system, has broader effects also'.[286] In particular, Hogan et al observe that it underpins bail applications regarding the importance of the right to liberty, and it extends beyond Article 38 to the right to liberty in Article 40.4 and personal rights in Article 40.3.[287]

Some scholars discuss the presumption of innocence and its relationship with the right to one's good name. Hogan et al note that the presumption of innocence has been considered in the context of the right to ones good name.[288] Duff states:

> Perhaps it would be more accurate to say that this presumption of innocence protects those suspected of crime (for in any non-corrupt legal system, only those suspected of crime face the prospect of becoming defendants); but it can best be understood, I will argue, as expressing a broader POI that protects all citizens.[289]

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[283] Tribe, LH (n 119), 404.
[284] Ibid, 404.
[285] Owusu-Bempah, A, *Defendant Participation in the Criminal Process* (Routledge 2017), 7, 8.
[286] Hogan, GW, Whyte, GF, Kenny, D, Walsh, R, *Kelly: The Irish Constitution* (5th edn, Bloomsbury Professional 2018), 1296 [6.5.84].
[287] Ibid, 1296 [6.5.84]. Hogan et al refers to Edwards J in *Minister for Justice & Equality v Nolan* [2012] IEHC 249, [124].
[288] Hogan, GW, Whyte, GF, Kenny, D, Walsh, R (n 286), 1296 [7.3.62]. Hogan et al refers to *State (O'Rourke and White) v Martin* [1984] ILRM 333, 338.
[289] Duff (n 194), 176.

It will be noted that the reference to "POI" is a reference to the presumption of innocence. It is suggested that these comments are particularly relevant in the context of protection against remarks by a judge or a public official as to the guilt of an individual prior to conviction.

As noted above, Stumer does not take a position on the extent to which the presumption of innocence applies outside the trial process as he exclusively examines the narrow concept of the presumption of innocence. However, he remarks that in the European Court of Human Rights 'a common and influential formulation of the presumption of innocence states that an official decision should not reflect the opinion that a defendant is guilty, unless the guilt of the defendant has previously been determined according to law'.[290] Furthermore, he observes that decisions by courts and public authorities reflecting a finding of guilt breach the presumption of innocence whereas decisions voicing continuous suspicions will not.[291] Stumer notes that while it is 'far removed from the situation of a reverse burden of proof in a criminal trial',[292] that '[t]hese decisions relate to very specific circumstances in which the defendant is treated as guilty despite the absence of a conclusive judicial determination'.[293] This commentary clearly suggests that the presumption of innocence within the meaning of Article 6(2) of the European Convention on Human Rights extends beyond the trial setting to protect individuals from adverse commentary as to their guilt in the absence of such a finding by a court of law. The next section will explore treatment consistent with innocence as an aspect of the broad conception of the presumption of innocence.

1.3.2.1 Treatment consistent with Innocence

The purpose of this section is to explore treatment consistent with innocence as an aspect of the broad conception of the presumption of innocence. Walsh states that the 'investigative stage is often the most important stage in practice'.[294] Stewart notes

[290] Stumer A (n 46), 90. See *Minelli v Switzerland* (1983) 5 EHRR 554.
[291] Stumer A (n 46), 90-91. See *Sekanina v Austria* (1994) 17 EHRR 221; *Allenet de Ribemont v France* (1995) 20 EHRR 557.
[292] Stumer A (n 46), 92.
[293] Ibid, 92.
[294] Walsh, DPJ (n 91), 2. See also Aida Popa, R, 'Aspects Concerning The Presumption Of Innocence in The Light Of The Case Law Of The European Court Of Human Rights' [2018] Challenges of the Knowledge Society, Criminal Law, 165.

that a process is required for determining whether any particular allegation of unlawful behaviour can be justified. He continues:

> And that process must be conditioned by the presumption of innocence because without that presumption, it would tend to collapse into the view that everyone is guilty, that a mere allegation of wrong-doing (or even less) can expose a person to penal consequences. [295]

Weigend observes that the presumption of innocence is triggered when the criminal justice process is initiated, that is, when suspicion of a criminal offence is raised by a State official.[296] Applying the presumption of innocence at the investigative stage may, on its face, seem quite difficult to reconcile in circumstances where investigators are in possession of sufficient information to ground an arrest and detention or obtain a warrant. In some cases it may be that the suspect was caught red handed. Nevertheless, it must be noted that irrespective of the time spent in police detention, it is likely to affect the detainee's life to some degree.[297]

Hamilton states that the presumption of innocence is a 'key principle underpinning the criminal process'[298] which 'extends beyond the criminal trial itself and requires that treatment of suspects and defendants at the pre-trial stages is consistent with the presumption'.[299] She observes that the presumption of innocence protects against 'treatment inconsistent with innocence prior to and throughout the trial as well as dilution of the requirement that guilt is proved beyond all reasonable doubt.[300] Stewart states that if a presumption of guilt applied before trial the practical implications would be that the criminal justice system 'might begin to justify various forms of hard treatment as forms of punishment'.[301] In such a case he argues that 'the right to be without reproach would be hollow'.[302] Indeed, Stewart observes:

> [F]or the right to be without reproach to have any real meaning, it's not enough to have a commitment to the presumption of innocence at trial; there

[295] Stewart (n 187), 415.
[296] Weigend (n 39). See also Duff (n 194), 171-182.
[297] See NM (n 124), 667 regarding pre-trial detention of accused persons.
[298] Hamilton, C (n 1), 30.
[299] Ibid, 19.
[300] Ibid, 30.
[301] Stewart (n 187), 414.
[302] Ibid, 413, 419.

> must also be limits on the coercive measures that the state can take in the investigation of crime.[303]

It is argued that the coercive nature of the powers of the State at the investigative stage requires that the presumption of innocence ought to apply at that stage to ensure there is a principled reason to exercise them with restraint.[304] The presumption of innocence would seem to be completely eroded if this is not the case. It would permit the State to do less that its best to ensure accurate procedures are in place and followed thereby exposing individuals to be treated as guilty in the absence of proof of guilt before a court of law.

1.3.2.2 Meaning of 'guilt' and 'innocence'

The application of the presumption of innocence at the investigative stage can be rationalised by understanding the meaning of 'guilt' and 'innocence'. Ferguson argues that the presumption of innocence should apply to persons suspected of committing a criminal offence reflecting the State citizen relationship.[305] She notes that suspicion is not to be equated with guilt.[306] She states the following:

> A distinction can be drawn between 'factual guilt' (the accused did, as a matter of fact, perform the criminal act with the requisite mens rea), and 'legal guilt' (the prosecution was able to establish beyond a reasonable doubt and in conformity with due process that the accused performed the criminal act, etc.).[307]

Similarly, Laudan suggests that the meaning of innocence is twofold. He argues that a person is factually innocent where the person did not in fact commit the crime or is deemed innocent upon acquittal which may not mean the person did not in fact perpetrate the crime.[308] Moreover, Packer suggests that, as the 'factually guilty may...be legally innocent they should therefore be given a chance to qualify for that kind of treatment'.[309] Picinali acknowledges that viewing the presumption of innocence from the perspective that 'some suspects/accused are...innocent, and

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[303] Ibid, 413.
[304] Ibid, 414.
[305] Ferguson (n 39), 132.
[306] Ibid, 141.
[307] Ibid, 137.
[308] Lauden, L, 'Truth, Error, and Criminal Law: An Essay in Legal Epistemology' [2006] New York: Cambridge University Press, 12-133. See also Stuckenberg (n 39).
[309] Packer, HL (n 51), 167.

that, therefore, any decision affecting the development of the process should be taken with due care',[310] serves as a valuable reminder of this kind. However, he states that the 'presumption needs to be understood as such reminder'.[311] He doubts that this is likely to be the case. He does not consider it as a reminder of the value of the presumption of innocence 'because neither the name nor the formulation of the presumption seem designed to provide it'.[312] He argues that a reminder should be in more clearly express terms unlike the 'uncertain doctrine'[313] of the presumption of innocence. Nonetheless, to take a constructive perspective and to ensure the State does it's best to protect suspects and accused persons, it is arguable that the State is required to treat suspects as legally innocent at the investigative stage and that they are entitled to be presumed innocent irrespective of the strength of the material against the person.[314] Therefore, the starting point for investigating suspects must be through the lens of innocence and not of guilt. The legal standard trumps personal belief. This approach has important ancillary benefits, in that, if a presumption of guilt applied, the criminal justice system 'might begin to justify various forms of hard treatment as forms of punishment'.[315] Campbell observes that when one considers the difference between legal and factual innocence the presumption of innocence is not infringed when a person is arrested on reasonable suspicion and charged.[316] This procedure does not encroach on legal innocence.

While Farmer observes that both the narrow and broad conceptions of the presumption of innocence protect the presumptively innocent,[317] overall there is a fundamental reason for rejecting the narrow conception of the presumption of innocence as confined to the evidential rules at trial. The evidence suggests that the whole of the criminal process is conditioned by the presumption of innocence from the moment a suspect is identified to the exercise of coercive powers during investigation, the treatment of suspects and respect for their right to a good name. A criminal investigation is intimately connected with the trial process and therefore

[310] Picinali, F (n 37), 736.
[311] Ibid, 737.
[312] Ibid, 737.
[313] Ibid, 737.
[314] Weigend (n 39).
[315] Stewart (n 187), 414.
[316] Campbel (n 87), 696.
[317] Farmer (n 167), 71.

involves a broad conception of the presumption of innocence. In addition, Hamilton makes a very persuasive argument in favour of the broad interpretation of the presumption of innocence. She argues that it would only be available to a few if it is understood as limited to a rule of evidence at trial as the 'vast majority of defendants will not experience trial'.[318] Indeed, Farmer observes that the broad approach aims to secure the rights of all and maximise liberty.[319]

It is arguable that the perception of arrest, detention and charging of suspects threatens the concept of legal innocence of suspects and accused persons. Reform by way a name change to that of *'innocent suspects'* and *'innocent accused'* would mitigate the risk to both suspects and accused persons and would give real meaning to the presumption of innocence from the moment the right is triggered until guilt is proven. It would reaffirm their innocence and encourage police, juries and the public alike to view the person from the starting point of innocence as opposed to guilt. As the phrase is constructed with the word 'innocent' as the first word, it reinforces the fundamental principle of legal innocence.

1.3.3 Substantive reading of the Presumption of Innocence

The moral quality of the law is another key consideration.[320] Some scholars argue that the presumption of innocence should be construed even more broadly and should apply to, effectively control the scope of criminal liability on substantive grounds 'including principles requiring sufficient precision in the drafting of offences and a sufficient degree of culpability and wrongful conduct'.[321] Hamilton argues that the presumption of innocence may impact on substantive criminal law. She states that it is dangerous to consider the presumption of innocence in isolation from substantive criminal law.[322] On one hand she observes the views of Roberts and Zuckerman on the effect of the application of the presumption of innocence in Article 6(2) of the European Convention on Human Rights to substantive law in that it may trigger the creation of offences of strict or absolute liability.[323] On the other hand and

[318] Hamilton, C (n 1), 9.
[319] Farmer (n 167), 71.
[320] Walsh, DPJ (n 91), 7 [1-12]. See also O'Malley T, *The Criminal Process* (Dublin: Round Hall 2009), [5-09]-[5-16].
[321] Stewart (n 187), 418.
[322] Hamilton, C (n 1), 9-10.
[323] Ibid, 10.

in support of her argument she relies on Tadros and Tierney[324] who consider a substantive reading of the presumption of innocence is 'necessary in order to adequately protect individuals from wrongful conviction'.[325] By way of example, Hamilton notes the argument of Tadros and Tierney for a purposive approach to Article 6(2) whereby a court must consider both the form and purpose of the legislative provision as distinct from its form only, to ensure that the presumption of innocence in Article 6(2) is not evaded by 'criminalising a mere evidential requirement of what would be an incompatible offence'.[326] On their view of the purposive approach, the prosecution must prove all the elements of the offence in order to show that the behaviour of the accused is in line with the purpose of the offence. By way of illustration, they consider the offence of possession of drugs with intent to supply. If payment was made to a known drug dealer and the legislation required the accused to prove that no drugs came into his possession, that would breach the presumption of innocence. However, if a new Act titled 'Making Payment to Known Drug Dealer Act' was created and made it an offence to make a payment to a known drug dealer this would not breach the presumption of innocence even though the effect is essentially the same.[327] Furthermore, Hamilton states that a substantive reading of the presumption of innocence works in tandem with the presumption of *mens rea* as it requires that fault be proved by the prosecution as well as the *actus reus*.[328] This view is supported by Ashworth and Blake.[329] Hamilton argues that strict or absolute liability offences offend the reasonable doubt rule as they permit conviction where there is a reasonable doubt as to moral culpability. She observes therefore that the presumption of innocence should not be viewed as 'operating solely within the confines of procedural law'.[330]

Stewart rejects the substantive view and argues that 'it is better to make substantive normative arguments for that position than to argue that the failure of the legislature to provide for those defences violates the presumption of innocence'.[331] Stumer also

[324] Tadros, V and Tierney, S (n 184).
[325] Hamilton, C (n 1), 10.
[326] Ibid, 9-10.
[327] Ibid, 11.
[328] Ibid, 12.
[329] Ibid, 12 citing Meredith Blake and Andrew Ashworth, 'The Presumption of Innocence in English Criminal Law' [1996] Criminal Law Review 306, 317.
[330] Ibid, 30.
[331] Stewart (n 187), 419.

rejects the substantive view of the presumption of innocence.[332] He observes that the presumption of innocence under European Convention on Human Rights law and interpreted by the English courts does not extend to the substance of criminal law, for example to strict liability offences, where the prosecution is not required to prove blameworthiness or criminal culpability on the part of the accused.[333] However, he notes that supporters of the substantive approach argue that this is a breach of the presumption of innocence.[334] He argues that it would be outside the constitutional competence of the courts to extend the scope of the presumption of innocence to substantive criminal law.[335]

1.4 Limitations on the Presumption of Innocence

The importance of the presumption of innocence has been discussed in detail. However, notwithstanding the importance of the presumption of innocence in Irish law, this thesis argues that it is under significant threat of erosion. Walsh observes that the presumption of innocence is not absolute and therefore may be limited by legislative restrictions subject to the principle of proportionality.[336] Having regard to limitations that may restrict the presumption of innocence, Ashworth identifies threats to the presumption of innocence arising from four sources as follows:

> [C]onfinement, by defining offences so as to reduce the impact of the presumption; erosion, by recognising more exceptions; evasion, by introducing civil law procedures in order to circumvent the rights conferred on accused persons; and side-stepping, by imposing restrictions on the liberty of unconvicted persons that fall only slightly short of depriving them of their liberty.[337]

Hamilton adopts a framework akin to that of Ashworth's four threats to measure the threats to the presumption of innocence in Irish law '[g]iven the importance of the principle in Irish law and the existence of trends in Irish society' similar to English society.[338] While each of these may be seen as a potential threat to the proper operation of the presumption of innocence, the side-stepping category is not a threat

[332] Stumer A (n 46), 87.
[333] Ibid, 54.
[334] Ibid, 52.
[335] Ibid, 87.
[336] Walsh, DPJ (n 91), 1323 [22-05].
[337] Ashworth, A, 'Four Threats to the Presumption of Innocence' (n 80), 242.
[338] Hamilton (n 1), 183, 187; Hamilton, Dr C (n 1), 7-8.

due to an absence of Irish legislation.[339] Against the backdrop of Ashworth's four threats to the presumption of innocence and Hamilton's similar framework, this thesis is investigating how the presumption of innocence as 'the bedrock of our criminal justice system'[340] is under threat of ongoing erosion in current Irish law by legislative devices that assist in the investigation and prosecution of offences.

1.5 Conclusion

The purpose of this chapter has been to review the academic literature on the presumption of innocence with a view to establishing its meaning, its rationale and its scope. It has been strongly argued that the presumption of innocence deserves its privileged position as a fundamental right to protect against wrongful conviction. Avoidance of miscarriages of justice is the dominant rationale for the presumption of innocence in that they all contribute to this rationale.

The presumption of innocence is the central tenet of what is regarded as a fair trial by scholars. It has been strongly argued that the presumption of innocence applies to the trial setting and to the pre-trial investigation stage from the moment a suspect is identified. The coercive nature of the powers of the State at the investigative stage requires that the presumption of innocence ought to apply at that stage to ensure there is a principled reason to exercise them with restraint. However, the presumption of innocence is quite contested. There are many perspectives among scholars on its definition, its underlying rationale and its scope.

This chapter concludes by agreeing with the broad conception of the presumption of innocence and rejecting the narrow view that the presumption of innocence only applies at trial. The evidence suggests that the whole of the criminal process is conditioned by the presumption of innocence from the moment a suspect is identified to the exercise of coercive powers during investigation, the treatment of suspects and respect for their right to a good name. There is a strong argument therefore for the proposition that a criminal investigation is intimately connected with the trial process. The investigation stage is the evidence gathering stage which moves to the testing stage, which is the trial. Both stages are part of the one continuum. It would

[339] Hamilton (n 1), 187; Hamilton, Dr C (n 1), 8.
[340] *DPP v Heffernan* (n 3), [84] per O'Donnell J.

therefore be absurd to think that the presumption of innocence would only apply at the trial stage and not apply at the investigation stage when both stages are part of the overall process. Moreover, the investigation stage is a point at which there is no judicial oversight and when a suspect is most vulnerable.

Having discussed academic commentary on the presumption of innocence, the current study will now proceed to survey the degree to which the courts have interacted with the presumption of innocence.

Chapter 2 – Judicial Conceptions of the Presumption of Innocence

The purpose of this chapter is to conduct a survey of the degree to which the courts have interacted with the presumption of innocence. This is a historical survey of the presumption of innocence in England and Ireland which analyses patterns and whether there is an increasing appreciation and entrenchment of the presumption of innocence in judicial decision making over time. An in-depth survey of 1,382 reported and unreported English and Irish cases containing the terms 'presumption of innocence' was conducted. A breakdown of cases returned using these search terms is as follows:

Irish Reports **Justis**	**Irish Law Reports Monthly** **Westlaw.ie**	**Frewen** **Three Volumes**	**Unreported cases** **Westlaw.ie**	**Pre 1935** **Westlaw.uk**	**European Human Rights Reports** **Westlaw.ie**
592	69	1	360	45	315

**Note a small number of the cases reported in ILRM were also reported in the IRs. Similarly, a small number of the unreported cases were reported in ILRM or the IRs.*

This chapter also conducts a survey of how the courts define the presumption of innocence in terms of what it is, what its effects are and what it sources are. This piece of work identifies references to the presumption of innocence in case law dating back as far as 1729. In many cases the presumption of innocence was referenced as a matter of course without any discussion as to its value or meaning. This section examines key cases identified. This chapter also explores the source and scope of the presumption of innocence in the European Convention on Human Rights and in European Union law.

2.1 English Law and the Presumption of Innocence

This chapter will consider the English position first. The principle of the presumption of innocence comes from the English common law system, which continues to be highly influential in Irish law. The English position will be examined up to 1935 when the important case of *Woolmington v DPP*[341] was decided.

[341] *Woolmington v DPP* (n 2).

2.2 English Position Pre - 1935

2.2.1 1729 – 1799

In the period 1729 – 1799 the term 'presumption of innocence' is mentioned in four reported English cases.[342] Some reference is also made to 'proof of guilt' and 'possibility of innocence'.[343] However, there is no discussion as to where the presumption of innocence emanated from or indeed where the onus of proof lay. Nothing turns on the references in any of the cases identified though it is interesting to note that the evidence suggests the presumption of innocence was considered by the courts to some extent in this period.

2.2.2 1800 – 1899

In the period 1800 - 1899 the term 'presumption of innocence' is mentioned in twenty seven English cases.[344] Significant statements were made in some cases during this period. In 1820 the Court of King's Bench stated the principle that 'the presumption is always in favour of innocence, until guilt be proved...that in a criminal case a fact is not to be presumed, if such a presumption would contravene the presumption of innocence'.[345]

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[342] *Castell Vid v Bambridge et Corbet* (1729) 2 Strange 854 93 E.R. 894; *Sutherland of Rearquhar, v Mr Francis Robertson, Minister at Clyne* (1736) Mor. 13979; *Mrs Rose Anderson, Wife of Thomas Hay Marshall, Merchant in Perth v The said Thomas Hay Marshall* (1799) VII Brown 612 3 E.R. 396; *Rex v Spragg and Another* (1760) 2 Burrow 930 97 E.R. 637.

[343] *Mrs. Rose Anderson, Wife of Thomas Hay Marshall, Merchant in Perth v The said Thomas Hay Marshall* (n 342).

[344] *Doe, on the several demises of Devine and another v Felix Wilson and Others* (1855) X Moore P.C. P.C. 502 14 E.R. 581; *Ashford v Thornton* (1818) 1 Barnewall and Alderson 405 106 E.R. 149; *Wargent v Hollings and Others* (1832) 4 Haggard Ecclesiastical 245 162 E.R. 1436; *Gleadow and Others, Executors of Gleadow v Atkin and Another, Executors of Atkin* (1833) 1 Crompton and Meeson 410 149 E.R. 459; *The King v The Inhabitants of Harborne* (1835) 2 Adolphus and Ellis 540 111 E.R. 209; *John Smith* (1838) 2 Swin. 28; *M'Innerney v Simpson* (1841) 2 Swin. 590; *Earl of Buchan v Lady Cardross* (1842) 4 D. 1268; *Ross v M'Bean* (1845) 8 D. 250; *Macaulay v Buist & Co* (1846) 9 D. 245; *Robert Lapsley and Others v James Grierson* (1848) I House of Lords Cases (Clark's) 498 9 E.R.; *Muir v Stevenson* (1850) 12 D. 512; *John Cameron* (1850) J. Shaw 295; *George Lillie Smith and v Robert Campbell* (1855) 2 Irvine 1; *The King v Sir Francis Burdett, Bart* (1820) 3 Barnewall and Alderson 717 106 E.R. 823; *Guild v Orr, Ewing, & Co* (1858) 20 D. 392; *Anonymous v Anonymous* (1852) 3 Swabey and Tristram 234 164 E.R. 1264; *Angus M'Kinnon* (1863) 4 Irvine 398; *Codrington v Codrington and Anderson* 164 E.R. 1367; *Muir v Ross' Executors* (1866) 4 M. 820; *Campbell v Campbell* (1866) 4 M. 867; *The Bishop of Norwich v Pearse* (1867 to 69) L.R. 2 A. and E. 281; *The Queen v Lumley* (1865 to 72) L.R. 1 C.C.R. 196; *Spill v Maule* (1868 to 69) L.R. 4 Ex. 232; *Alfred Nelson Laughton v The Hon and Right Reverend the Lord Bishop of Sodor and Man* (1871 to 73) L.R. 4 P.C. 495; *Cassidy v North British Railway Co* (1873) 11 M. 341; *Scott v Hart* (1890) 2 White 570; *Alexander Scott v Her Majesty's Advocate* (1890) 18 R. (J.) 15; *Mackenzie v Macfarlane* (1898) 5 S.L.T. 292.

[345] *The King v Sir Francis Burdett, Bart* (n 344), 745, 833.

In 1841 in *M'Innerney v Simpson*[346] there was discussion around a statutory provision[347] that required an accused to provide a 'satisfactory account' for possessing materials and where same was forthcoming no presumption of guilt remained against the accused.[348] The court's assessment of the value of the presumption of innocence was ambiguous and this is illustrated in the following passage:

> The act, stringent as it is, never intended to put a party on a proof of his innocence under a mere random accusation, which would be a stretch of injustice, of which it may safely be affirmed, that no consideration of public policy would justify it. It holds the inability to account to be conclusive against the accused, unless he can demonstrate his innocence: but it does not say, and does not intend, that if he does account satisfactorily, he shall be bound also to prove it. On the contrary, if a presumption of guilt arises under it, from the failure to account, the presumption of innocence returns whenever the satisfactory account is given.[349]

Nevertheless, this case is one which imposes a hefty burden on the accused to discharge and appears to equate a requirement to provide a satisfactory account to a reverse burden of proof. However, two years later in *Robert Lapsley and Others v James Grierson*[350] Lord Campbell said that 'the law presumes innocence, not guilt'.[351]

In a case in 1852 for judicial separation, evidence was given on one charge of acts of cruelty and violence by a husband against his wife.[352] The court observed there was a lack of corroborating evidence on either side and stated:

> In all cases where a crime is imputed, the presumption of innocence must prevail until guilt has been proved; and in proportion to the gravity of the charge and the rare occurrence of the crime imputed, it is reasonable to require more cogent evidence to overthrow the legal presumption of innocence.[353]

[346] *M'Innerney v Simpson* (n 344).
[347] Section 10 of The Frauds by Workmen Act, 1777. See also Ibid, 596-597.
[348] Ibid, 600-601.,
[349] Ibid, 601.
[350] *Robert Lapsley and Others v James Grierson* (n 344).
[351] Ibid, 499, 854.
[352] *Anonymous v Anonymous* (n 344), 238, 1265.
[353] Ibid, 237, 1265.

This statement provides strong support for the presumption of innocence in circumstances where a crime is imputed. The presumption of innocence was vested in the accused and therefore it appears the accused was not required to produce evidence to prove his innocence. The requirement was on the party making the charge to produce cogent evidence to rebut the presumption of innocence.

There is evidence that the practice of judges was well established by 1865 to inform juries of the obligation on the prosecution to prove their case beyond any reasonable doubt. This is illustrated in *R v White*[354]:

> Martin, B., in summing up the case to the jury, told...them that, in order to enable them to return a verdict...against the prisoner, they must be...satisfied, beyond any...reasonable doubt, of his guilt; and this as a conviction...created in their minds, not merely as a matter of probability; and if it was only...an impression of probability, their duty was to acquit.[355]

In another case, *The Bishop of Norwich v Pearse*,[356] a criminal suit against a clergyman, Sir Robert Phillimore stated:

> The accused clerk is...entitled to the full benefit of those legitimate presumptions of innocence which arise from his character, his social position, and still more, his holy calling. These presumptions are to be constantly borne in mind by the Court, and to be weighed in the same scale against the inducements to perjury, which, on the assumption of guilt, the fear of detection and of punishment would suggest.[357]

The onus of proof by the prosecution was clearly addressed in *The Queen v Lumley,*[358] a case of bigamy, where it was noted the presumption of innocence applied and it was 'for the prosecution to prove affirmatively that the crime of bigamy had been committed'.[359] Moreover, crime with the ingredient of malice and its relationship with the presumption of innocence were discussed by Cockburn CJ in

[354] *R v White* (1865) 4 Foster and Finlason 383.
[355] Ibid, 384–388.
[356] *The Bishop of Norwich v Pearse* (n 344).
[357] Ibid, 288.
[358] *The Queen v Lumley* (n 344).
[359] Ibid. Note commentary on a French case in a news article in the Western Mail which remarked that the presumption of innocence as a 'wholesome doctrine that an accused person is to be presumed innocent till proved guilty.' 'The Criminal Cases of Paris and the Late Conflagration' *The Western Mail* (1871) Thursday September 21, 3.

the Court of Exchequer Chamber in *Spill v Maule.*[360] He remarked that the presumption of law was in favour of the absence of malice in the defendant and even where there was evidence of malice the case must start with the presumption of innocence in his favour.[361]

It is apparent from the English case law of the 1800s that the presumption of innocence was very much considered and seen as the starting point in the reported criminal cases. Indeed, it gained momentum in terms of its importance though there was no discussion as to its rationale. In some reported cases there is evidence suggesting the onus of proof was reversed onto the defendant. Nevertheless, the latter part of the 1800s appeared to firm up on the prosecutorial onus of proof and the requirement for acquittal if not satisfied an offence was proved beyond all reasonable doubt.[362]

2.2.3 1900 – 1934

The term 'presumption of innocence' is mentioned in seven reported English cases in the period 1900 – 1934.[363] During this period the importance of the presumption of innocence continued to emerge in the case law. This is borne out by various statements made in some of these cases. In 1909 in *J. Lee*[364] the Lord Chief Justice stated 'that the presumption of innocence can only be rebutted by evidence of the specific offence charged'.[365]

Thirteen years later the requirement of proof beyond all reasonable doubt was referenced more frequently in conjunction with the presumption of innocence. In particular, the Privy Council case *The King Appellant; v NAT Bell Liquors, Limited*

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[360] *Spill v Maule* (n 344).

[361] Ibid, 237. This case was relied upon in *Alfred Nelson Laughton v The Hon. and Right Reverend the Lord Bishop of Sodor and Man* (n 344).

[362] A similar theme is observed in a number of the Scottish cases, *Muir v Stevenson* (n 344), 516; *George Lillie Smith and v Robert Campbell* (n 344), 58-59. In 1866 the presumption of innocence was explicitly marshalled in *Campbell v Campbell* (n 344), 988. The Court of Session stated: '[p]erhaps the strongest and most precious, I might say most sacred presumption is the presumption of innocence. But it is beyond question—it is a matter of familiar experience—that the presumption of innocence is overcome by circumstances creating a stronger presumption of guilt''

[363] *J Lee* (1909) 1 Cr. App. R. 5; *Lyal v Henderson* [1916] S.C. (H.L.) 167; *AB v XY* 1917 S.C. 15; *Adam v Ward* [1917] A.C. 309; *Streletz, Kessler and Krenz v Germany* (2001) 33 EHRR 31; *The King v NAT Bell Liquors, Limited* [1922] 2 A.C. 128; *Statham, J T v Statham, J C* [1929] 131.

[364] *J. Lee* (n 363).

[365] Ibid, 6.

Respondents[366] concerned proceedings upon a motion for a writ of certiorari to quash a conviction for unlawfully keeping liquor for sale. In delivering his judgment, Lord Sumner noted a statement by Beck J on appeal:

> Had the charge been one not of keeping for sale but even for the lesser offence of selling, it seems clear to me that, had the case been before a judge and a jury, the judge ought to have withdrawn the case from the jury, or at the very least to have pointed out to the jury the danger of convicting upon such evidence, in view of the presumption of innocence, and the necessity for excluding all reasonable doubt, and in the event of a verdict of guilty to have given leave to appeal on the weight of evidence. [367]

In 1929 in *Statham, J. T. v Statham,*[368] a case which concerned divorce proceedings based on sodomy, the Court of Appeal remarked that the same cogent evidence was required to overcome the presumption of innocence as in a criminal case.[369] The Court of Appeal stated that a jury must be warned of the dangers of convicting on uncorroborated evidence and therefore cogent evidence proved beyond reasonable doubt was required to overcome the presumption of innocence.[370] Notably, in 1933 in the Privy Council case *Lawrence v The King,*[371] which concerned the stealing of sums of money and falsifying accounts, Lord Atkin made a clear statement as regards the standard of proof in criminal cases as a fundamental principle in the following passage where he said:

> [S]peaking generally, it is an essential principle of our criminal law that a criminal charge has to be established by the prosecution beyond reasonable doubt: and it is essential that the tribunal of fact should understand this. Unless the judge makes sure that the jury appreciate their duty in this respect his omission is as grave an error as active misdirection on the elements of the offence, and a verdict of guilty given by a jury who have not taken this fundamental principle into account is given in a case where the essential forms of justice have been disregarded.[372]

[366] *The King v NAT Bell Liquors, Limited* (n 363).
[367] Ibid, 142.
[368] *Statham, J. T. v Statham, J. C.* (n 363).
[369] Ibid,131.
[370] Ibid, 132-139.
[371] *Lawrence v The King* [1933] AC 699.
[372] Ibid, 707.

Lord Akin's statement in this case recognises the fundamental importance of a trial judge informing a jury about the standard of proof which is informed by the presumption of innocence.

The evidence suggests that there is no reported English authority for the proposition that an accused was not required to prove his innocence prior to 1935. There is some evidence to suggest that the presumption of innocence and the requirement for acquittal where a reasonable doubt was found emerged as an important aspect of the trial process prior to 1935.[373] However, there is no judicial commentary in the reported cases as to why the presumption of innocence existed. Indeed, there is a lack of reflection on the underlying rationale of the presumption of innocence by the judges. However, some clarity was brought to bear on this legal landscape in the seminal case of *Woolmington v DPP.*[374]

2.2.4 1935

The 'great case'[375] of *Woolmington v DPP*[376] is 'widely regarded as one which introduced a new fundamental principle in the law of criminal evidence'.[377] In that case Reginald and Violet Woolmington were married for a few months after which she left her husband and returned to her mother. Reginald apparently was anxious to have her back however she did not return. On the morning on which Violet was killed, Reginald had gone to his mother in law's house to see his wife. He had a sawn-off double barrel shotgun with him which on his account was for the purpose of frightening Violet to go back to him. His story was that he was going to tell her that he was going to commit suicide thereby causing her to think this was going to happen. A shot was heard. When he left the house Violet was found dead. He was subsequently charged with murder. He claimed that when he was bringing the gun across his waist to show it to her it somehow went off accidentally, shooting Violet, and that he had no intention of killing or causing harm to anybody. In summing up at the end of the trial, Swift J directed the jury as follows:

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[373] It is interesting to note a statement in a 1928 Scottish case *Slater v HM Advocate* [1928] J.C. 94, 105 that '[t]he presumption of innocence is fundamental to the whole system of criminal prosecution...'
[374] *Woolmington v DPP* (n 2).
[375] Metcalfe, NP, 'Trial: Unfitness to Plead' [2000] Criminal Law Review 621, 624.
[376] *Woolmington v DPP* (n 2).
[377] Stein, A, 'From Blackstone to Woolmington: On the Development of a Legal Doctrine' (1993) 14 Journal of Legal History 14, 15 citing G. Fletcher, 'Two Kinds of Legal Rules: A Comparative Study of Burden – of-Persuasion Practices in Criminal Cases', (1968) 77 Yale Law Journal 880 at 903 and J.C. Smith, 'The Presumption of Innocence', (1987) 38 Northern Ireland Legal Quarterly 223.

> The Crown has got to satisfy you that this woman Violet Woolmington died at the prisoner's hands. They must satisfy you of that beyond any reasonable doubt. If they satisfy you of that, then he has to show that there are circumstances to be found in the evidence...which alleviate the crime so that it is only manslaughter or which excuse the homicide altogether by showing that it was a pure accident.[378]

The accused was found guilty of murder and was facing the death penalty. He appealed to the Court of Criminal Appeal, substantially on the ground that the jury was misdirected when told 'that in the circumstances of the case he was presumed in law to be guilty of the murder unless he could satisfy the jury that his wife's death was due to an accident'.[379] The Court of Criminal Appeal refused him leave to appeal against his conviction.

This case reached the House of Lords on a further appeal on a point of law of exceptional public importance certified by the Attorney General. In the House of Lords, Viscount Sankey observed that the judges in the Court of Criminal Appeal satisfied themselves that Swift J 'laid down the law applicable to a case of murder'.[380] He noted their statement: 'No doubt there is ample authority for that statement of the law[381] as laid down by Swift J. Viscount Sankey agreed with the Court of Criminal Appeal that there was 'apparent authority for the law'.[382] Notably, Block and Hostettler[383] argue that the statement in *Lawrence v The King*[384] regarding the prosecutorial burden and standard or proof, applied to all cases except for murder where the onus shifted to the accused to prove his innocence and therefore Swift J's charge to the jury 'could not be faulted'.[385] However, Viscount Sankey stated that the House of Lords had the benefit of conducting a deeper exploration of the law which was not available to either the trial court or the Court of Criminal Appeal. The House

[378] *Woolmington v DPP* (n 2), 473.
[379] Ibid, 470.
[380] Ibid, 473.
[381] Ibid, 473.
[382] Ibid, 473.
[383] Block, BP, and Hostettler, J, *Famous Cases: Nine Trials That Changed the Law* (Waterside Press 2002).
[384] *Lawrence v The King* (n 371).
[385] Block, BP, and Hostettler, J (n 383), 34.

of Lords examined many authorities[386] from earliest to modern times in text books and cases. A key authority examined was Foster's statement of the law in 1762, which appeared in most text-books up to modern times, that in a charge of murder when killing is first proved, the circumstances including that of accident must be proved by the prisoner.[387]

Viscount Sankey observed that the cases cited were concerned with the meaning of malice and did not seem to be concerned with the onus of proof.[388] However, he acknowledged that it cannot be doubted that evidence law in England was in a fluid condition at the time of Fosters writings.[389] Viscount Sankey noted that in 1902 the presumption and onus began to be discussed in the courts.[390] Terms such as 'presumption of guilt' and 'prima facie evidence of guilt' were used in relation to possession of stolen goods and were held to mean that on proof of certain facts a jury was warranted to convict.[391] He observed that the 'word 'onus' was used indifferently throughout the books, sometimes meaning the next move or next step in the process of proving or sometimes the conclusion of the whole matter'.[392]

Viscount Sankey noted the summing-up in *Rex v Greenacre*[393] which was heard by Tindal CJ, a distinguished judge.[394] The summing-up in that case was contained in the prosecution's submission in *Woolmington* in the following terms:

> [W]here it appears that one person's death has been occasioned by the hand of another, it behoves that other to show from evidence, or by inference from the circumstances of the case, that the offence is of a mitigated character, and does not amount to the crime of murder.[395]

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[386] *Woolmington v DPP* (n 2), 474 citing Sir Michael Foster, Crown Law (1762), Stephen's Digest of the Criminal Law, 7th Ed., (1926), Archbold, Criminal Pleading, Evidence and Practice 29th Ed., (1934), Russell on Crimes, 8th Ed., (1923) and Halsbury's Laws of England (1933), Vol. 9.
[387] Ibid, 474.
[388] Ibid, 477-478.
[389] Ibid, 478.
[390] Ibid, 478 citing The State v Brady (1902) Ia. 91 N. W. 801, Rex v Stoddart 2 Cr. App. R. 217, 233.
[391] Ibid, 478 citing The State v Brady (1902) Ia. 91 N. W. 801, Rex v Stoddart 2 Cr. App. R. 217, 233.
[392] Ibid, 479.
[393] *Rex v Greenacre* 8 C & P. 35 cited in Ibid, 480.
[394] Ibid, 480.
[395] *Rex v Greenacre* 8 C & P. 35 cited in Ibid, 480.

In these respects, Viscount Sankey identified that the summing up in *Rex v Greenacre*[396] and the authority in Foster[397] were usually relied upon for requiring the prisoner to prove his innocence.[398] He did not lay much weight on Foster's statement of the law. He remarked that although Foster was a distinguished judge, his doctrine was not laid down in any judgment he delivered and therefore he was to be regarded for this purpose as a text-book writer.[399] He stated that the presumption of innocence was strong and he doubted whether the summing-up in *Rex v Greenacre*[400] and Foster's[401] statement of the law meant that an accused must prove his innocence.[402] Viscount Sankey observed that there was no authority cited in any of the text books for the proposition that an accused must prove his innocence.[403] Indeed, he stated that he did not find any statement on the presumption of innocence, including the summing-up in *Rex v Greenacre*[404] and Foster's statement of the law, to mean that the onus does not remain on the prosecution.[405] Furthermore, Viscount Sankey remarked that this must also be seen in its historical context, particularly when accused persons remained disqualified from giving sworn evidence until 1898[406] and that the Court of Criminal Appeal was only set up in 1907.[407]

Viscount Sankey referred to the case *Rex v Abramovitch*[408] where he noted that juries were told that the prosecution must prove its case beyond reasonable doubt in order to convict which could not mean that an accused must satisfy a jury in order to be acquitted.[409] Furthermore, he noted that this law was laid down in the Court of Criminal Appeal in *Rex v Davis.*[410] In that case, it was held that there was no onus on an accused to prove the alleged act was accidental where intent was an ingredient of

[396] 8 C. & P. 35 cited in Ibid, 474-475.
[397] Sir Michael Foster, *Crown Law* (1762), 255, 290 cited in Ibid, 474-475.
[398] Ibid, 480.
[399] Ibid, 474.
[400] 8 C. & P. 35 cited in Ibid, 474-475.
[401] Sir Michael Foster, *Crown Law* (1762), 255, 290 cited in Ibid, 474-475.
[402] Ibid, 475.
[403] Ibid, 475.
[404] *Rex v Greenacre* 8 C & P. 35 cited in Ibid, 480.
[405] Ibid, 479-480.
[406] Section 1 and 7(1) of the Criminal Evidence Act, 1898 [61 & 62 Vict.] [Ch. 36]. A similar provision was enacted in Ireland in 1924 in section 1 of the *Criminal Justice (Evidence) Act, 1924* (n 33).
[407] *Woolmington v DPP* (n 2), 475-477.
[408] *Rex v Abramavitch* (1914) 11 Cr. App. R. 45 cited in Ibid, 481.
[409] Ibid, 481.
[410] *Rex v Davis* 29 Times L.R. 350: 8 Cr. App. R. 211 cited in Ibid, 481.

a crime. Against this backdrop, a statement described as the 'poetic flourish of Lord Sankey',[411] declared:

> Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to...the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the Common Law of England and no attempt to whittle it down can be entertained.[412]

Farmer questions the meaning of this statement. He states that this 'ringing declaration...is one of the most famous statements of the presumption of innocence...[y]et for all its prominence it remains a puzzling claim'.[413] Applying the law, Viscount Sankey stated that the summing-up by Swift J in this case was not the law of England in a criminal case and he disapproved the authorities in *Rex v Greenacre*[414] and Foster.[415] The House of Lords ruled that the burden of proof was on the prosecution to prove the killing and intent. This declaration extends beyond the offence of murder, irrespective of the charge or trial venue subject to the exceptions as outlined by Viscount Sankey. The House of Lords quashed the conviction and reversed the order of the Court of Criminal Appeal.

Judicial commentary on *Woolmington*'s case suggests that it is concerned with the rules of evidence at all criminal trials:

> *Woolmington's* case is concerned with explaining and reinforcing the rule that the prosecution must prove the charge it makes beyond reasonable doubt, and, consequently, that if, on the material before the jury, there is a reasonable doubt, the prisoner should have the benefit of it. The rule is of general application in all charges under the criminal law. The only exceptions arise, as explained in *Woolmington's case*, in the defence of insanity and in offences where the onus of proof is specially dealt with by statute.[416]

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[411] Hamilton (n 1), 182.
[412] *Woolmington v DPP* (n 2), 481-482.
[413] Farmer (n 167), 57.
[414] *Rex v Greenacre* 8 C. & P. 35 cited in *Woolmington v DPP* (n 2), 482.
[415] Sir Michael Foster, *Crown Law* (1762), 255 cited in Ibid, 482.
[416] *Mancini v DPP* [1942] A.C. 1, 11; *People (AG) v Byrne* [1974] IR 1, 5.

Interestingly, Farmer argues that there was 'extensive authority to support the rule that'[417] where an unlawful killing was proved by the prosecution that the burden of proof lay on the defendant to prove it was an accident or unintentional.[418] He therefore argues that the 'golden thread' statement suggests that the 'House of Lords was changing the law by presenting it as unchanged'.[419] He remarks that one of the House of Lords judges, Lord Hewet LCJ, who sat on the appeal, wrote an article in the Sunday Times following the House of Lords decision which 'recognised that the law was being changed by the decision, and suggests...the court was well aware of the significance of its decision'.[420] On the other hand, he observes that Viscount Sankey's statement can be read as articulating 'an existing older tradition in the common law of respect for the presumption of innocence'.[421] He argues that the central aspect of the decision was about 'dismantling presumptions around *mens rea*, particularly in relation to murder'.[422] Farmer thus argues that *Woolmington* was a 'reformulation of what the burden of proof entailed'[423] taking account of the close link between the burden of proof and the presumption of innocence when the presumption of innocence is conceived 'in terms of a link between proof of mental state and guilt'.[424]

Block and Hostettler[425] take the view that the repercussions of *Woolmington* were 'momentous'.[426] They state that 'it was established once and for all where the burden of proof lay when one is tried for murder, and nailed down in memorable words as to where the burden lay in all criminal cases.[427] This suggests that *Woolmington* clarified the law. However, in similar vein to Farmer, Stein[428] observes that the commonly held view is that this case changed the law on allocating the burden of

[417] Farmer (n 167), 57.
[418] Ibid, 57.
[419] Ibid, 57, 58.
[420] Ibid, 60, 61.
[421] Ibid, 58.
[422] Ibid, 61.
[423] Ibid, 63.
[424] Ibid, 63.
[425] Block, BP, and Hostettler, J (n 383).
[426] Ibid, 34.
[427] Ibid, 34.
[428] Stein, A (n 377).

proof in criminal trials, particularly the legal burden of proof.[429] This is considered on the basis that while Blackstone emphasised the burden of proof remained on the prosecution to prove the ingredients of an offence, the burden was reversed in respect of any defence raised which Stein contends is arbitrary.[430]

It will be noted though, that there is some evidence which suggests that the presumption of innocence was developing prior to 1935 as discussed earlier. *Woolmington* has been described in colourful terms such as a 'classic statement'[431] and a 'magisterial statement'[432] which recognises the 'age-old and time-honoured rule'[433] that was steadily developing in the decades before *Woolmington.* However, there is a lack of evidence to suggest that the presumption of innocence and the requirement for acquittal where a reasonable doubt existed was a meaningful aspect of the trial process prior to 1935. There is no commentary in the reported cases by the judges as to why the presumption of innocence existed. There is a lack of reflection on the underlying rationale of the presumption of innocence by the judges. Indeed, while *Woolmington v DPP*[434] is the stand out case of this period, it is notable that *Woolmington* also does not contain any judicial discussion of the reasons underpinning the presumption of innocence.

2.3 Irish Position

This section addresses the presumption of innocence in Irish law. In *Minister for Justice & Equality v Nolan*[435] Edwards J remarked that while the origins of the presumption of innocence have been traced back to Roman laws there is uncertainty as to when the presumption of innocence became part of common law as there is little express mention of it prior to the early 19th century.[436] Hamilton observes that very little has been written on the origins of the presumption of innocence.[437] Indeed,

[429] Ibid, 15.
[430] Ibid, 15.
[431] *DPP v DO'T* [2003] 4 IR 286, 293.
[432] Laird, K, 'Mens Rea: Nurse v Republic of Trinidad and Tobago; Canserve Ltd v Republic of Trinidad and Tobago' (2020) 6 Criminal Law Review 541, [543].
[433] Cole, RJ V., 'Determining the Constitutionality of Reverse Onus Clauses in Botswana' (2008) 16 African Journal of International and Comparative Law 236, 236. See also Blaxland, H, QC, 'Sappers and Underminers: Fresh Evidence Revisited' (2017) 7 Criminal Law Review 537, 538.
[434] *Woolmington v DPP* (n 2).
[435] *Minister for Justice & Equality v Nolan* (n 287).
[436] Ibid, [127]. See also *Minister for Justice v Balmer* [2017] 3 IR 562, [34].
[437] Hamilton, C (n 1), 16.

Hogan et al[438] note it has been 'intermittently explored by the courts'.[439] Hamilton explains that it is possible to say that the presumption of innocence only really emerged in the 'twentieth century in tandem with a growing awareness of civil liberties and human rights'.[440]

In the period 1853-2020 a total of 992 Irish reported cases have been identified where the 'presumption of innocence' is mentioned. In many cases the term is merely mentioned as a matter of course without any discussion as to its meaning or from where it is derived or located in the Constitution. The key cases are examined in general terms to identify trends as to what the Irish courts have said about the presumption of innocence and where they have located it.

2.3.1 1853–1921 – Significant Engagement with the Presumption of Innocence

In the period 1853-1921 references to the evidential requirements of the burden and standard of proof and their close connection with the presumption of innocence are identified in a number of reported cases. In particular, Pigot CB engaged significantly with the presumption of innocence in this period.[441] In 1853 in *The Queen v Redmond,*[442] a prosecution for stealing mutton, the majority of the Court of Criminal Appeal[443] took the view that there was sufficient evidence to go to the jury. However, Pigot CB dissented. He formed the view that there was no evidence of guilt apart from circumstantial evidence which might lead to the supposition of concealment of the goods by the accused.[444] He remarked that a presumption of innocence, instead of a presumption of guilt, was 'well-known...so that the *corpus delicti* must be proved, before the accused person is called on to defend himself'.[445] He cited Hale[446] for the

[438] Hogan, GW, Whyte, GF, Kenny, D, Walsh, R (n 286).
[439] Ibid, 1270, [6.5.73].
[440] Hamilton, C (n 1), 17.
[441] David Richard Pigot C.B. was appointed Chief Barron of the Exchequer in 1846 and remained in that position until his death in 1873. See Ball FE, *Judges in Ireland 1221-1921* (4th edn, London, J Murray 1927), 290-304.
[442] *The Queen v Redmond* 3 ICLR 494.
[443] The Court for Crown Cases reserved was created in 1848 by the Crown Cases Act 1848. While there was no Court of Criminal Appeal, it appears that the Court for Crown Cases reserved became known as the Court of Criminal Appeal. See Handler P, *The Court for Crown Cases Reserved, 1848-1908*, vol 29 (2011), 264 referring to The Times (13 Nov. 1848), 7b, commenting, 'The new Court also had power to quash convictions, whereas previously the judges had only been able to recommend a pardon...The Court's jurisdiction was confined to points of law...It was, as The Times commented, by "some extraordinary perversion of terms" that the Court became known to many contemporaries as the Court of Criminal Appeals'.
[444] *The Queen v Redmond* (n 442), 501.
[445] Ibid, 501.

principle that ‘it is better five guilty persons should escape unpunished, than one innocent person should die’.[447] Pigot CB was clearly a judge who emphasised the existence of the presumption of innocence at that time. He understood its importance and he gave the presumption of innocence full effect by recognising that there ‘was not sufficient evidence to warrant conviction’[448] of the accused. His commitment to the presumption of innocence is also evident in other cases in this period.

Seven years later the impact of the presumption of innocence in a criminal context was again described by Pigot CB, in 1860 in the civil case of *Bell v Park.*[449] This case concerned an action for slander imputing on the plaintiff an attempt to commit an offence. The majority held that the rule on admissibility of evidence ‘does not let in evidence of a general reputation that the plaintiff was guilty of the particular offence charged by the slander’.[450] However, Pigot CB dissented. He stated that he did not see a distinction between the admissibility of evidence of ‘bad character, and...evidence of a general reputation of the particular crime alleged, in the imputed slander, to have been committed by the plaintiff’.[451] In support of his view he gave an example of a case of murder whereby there was strong evidence of suspicion attaching to an individual and while he was subsequently acquitted, there was a moral conviction of guilt in the community. He continued:

> [A] moral conviction that the rejection of a piece of evidence perfectly persuasive, if admitted, but, by a wise rule of law held inadmissible on general grounds, has led to the acquittal. He is entitled to the benefit of his acquittal, and to the presumption of innocence which the law casts around one whose guilt has not been proved. No man can be justified in calling him a murderer-nay, the general impression may, if the truth were clearly known, be unjust. But rightly or wrongly, he has lost his good name: and there exists a general reputation that he was guilty of the specific offence which I have described.[452]

This passage again indicates Pigot CB’s drive and commitment to emphasis the existence of the presumption of innocence and its importance at the time, in respect of individuals acquitted of the offence charged.

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[446] Ibid, 501, Pigot J citing 2 Hale, 289.
[447] Ibid, 501.
[448] Ibid, 504.
[449] *Bell v Parke [Exchequer]* 11 ICLR 413.
[450] Ibid, 413.
[451] Ibid, 425.
[452] Ibid, 425.

Pigot CB again discussed the presumption of innocence in the 1861 case of *Magee v Mark.*[453] This case related to a bribery action to recover penalties under the Corrupt Practices Act 1854. Pigot CB was the trial judge in that case. There was a query from the jury as to whether the case was to be treated as a criminal case. Pigot CB directed the jury to treat the case as a civil one and stated that giving the benefit of the doubt to the defendant did not apply. The defendant subsequently obtained a 'conditional order to set aside the verdict, and for a new trial, on the ground of misdirection'.[454] Somewhat surprisingly, Pigot CB also sat in the Court of Exchequor that heard the appeal. He gave the majority opinion that the jury was rightly directed and that his verdict at trial should not be disturbed. At the appeal he distinguished between civil cases and criminal cases and provided a rationale for the presumption of innocence in criminal cases. Interestingly, he drew a link between the presumption of innocence and the standard of proof when he stated:

> The law of evidence is unquestionably the same in criminal and in civil cases; but in criminal cases, Judges, in favour of life and liberty (one or the other of which is involved in every criminal prosecution), are in the habit of advising a stricter view to be taken of the evidence than in civil trials; and, accordingly, in favour of the presumption of innocence, with which the law invests every person accused of a crime, until he is proved to be guilty, and for the protection of a party who cannot be heard in his own defence, and in order to provide all reasonable safeguards against erroneous convictions, which, in some cases, may be followed by irrevocable sentences, Judges have been in the habit of advising juries to acquit the accused if they have a reasonable doubt of guilt.[455]

Pigot CB considered various authorities on the rationale for the presumption of innocence and the consequences flowing from erroneous convictions and observed[456]

> The serious consequences of an erroneous condemnation, both to the accused and to society, the immeasurably greater evils which flow from it than from an erroneous acquittal, have induced the laws of every wise and civilized nation to lay down the principle, though often lost sight of in practice, that the persuasion of guilt ought to amount to a moral certainty; or, as an eminent

[453] *Magee v Mark [Exchequer]* 11 ICLR 449.
[454] Ibid, 450.
[455] Ibid, 463.
[456] Ibid, 464.

> Judge, still living, expressed it, such a moral certainty as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt.[457]

These quotes are really significant because they are an early example of an Irish reported case of a judge explaining the rationale for the presumption of innocence and identifying the prevention of miscarriages of justice as the rationale. Fitzgerald B dissented and held that Pigot CB had misdirected the jury.[458] He stated:

> As an answer to the question of the jury, it tells them they were not to give the defendant the benefit of a doubt, as they ought to do in a criminal case...It is plain that the main object of the jury was to know whether the acknowledged rule in criminal cases was to be applied for the benefit of the defendant.[459]

One point of agreement that can be gleaned from the statements of Pigot CB and Fitzgerald B is that the standard of proof beyond reasonable doubt in criminal cases was an acknowledged rule of law at that time. Pigot CB also articulated a very clear rationale for the presumption of innocence and linked it with the need to prevent against miscarriages of justice. As was seen in Chapter 1, this remains the leading rationale for the presumption of innocence today. It is very noteworthy that Pigot CB did this at a time when judges were not in the habit of explaining the rationales for the presumption of innocence. Even in *Woolmington v DPP*[460] no attempt is made to do so.

These cases suggest that as far back as the mid 1800s, approximately eighty years prior to *Woolmington v DPP*[461] and the enactment of the 1937 Constitution, the judiciary in Ireland considered advising juries on the presumption of innocence and the burden and standard of proof at trial. This indicates that the Irish judges valued the presumption of innocence and regarded the burden and standard of proof as important safeguards against erroneous convictions.

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[457] Ibid, 464 citing 'Mr. Best's Principles of the Law of Evidence, p. 120' and Parke B., in Regina v Sterne (Surrey Summer Assizes 1843). See also referenced Greenleaf on Evidence, s. 13.
[458] Ibid, 475.
[459] Ibid, 475.
[460] *Woolmington v DPP* (n 2).
[461] Ibid.

In the 1873 case of *The Queen v Cavendish,*[462] the accused was indicted for the manslaughter of a woman by his negligent and improper management of the horse and cab he was driving. His defence was that he had used due and proper care in driving the cab at the time in question. On appeal, the court held the burden of proving negligence did not lie on the Crown but that, upon the fact of the killing being proved, it was cast upon the accused to show that he had used due and proper care in driving the cab over the woman.[463] O'Brien J dissenting observed 'according to the general rule in criminal cases, the onus of proving his guilt would lie upon the Crown'.[464] He relied on the following passage in *Taylor on Evidence*:

> The legal presumption of innocence is so strong, that no evidence will be sufficient to repel it unless it be distinct and positive, so as to prove the criminality of the accused beyond all reasonable doubt. And even where the guilt can be established only by proving a negative, that negative must, in most cases, be proved, though the general rule of law devolves the burden of proof on the party holding the affirmative.[465]

The authority in that passage is based on the proposition in a number of cases including *Williamson v The East India Cumpalty*[466] where the rule of law was described by Lord Ellenborough in the following terms:

> [W]here any act is required to be done on the one part, so that the party neglecting it would be guilty of a criminal neglect of duty in not having done it, the law presumes the affirmative, and throws the burden of proving the contrary (that is, in such cases of proving a negative) on the other side.[467]

In explaining these authorities, O'Brien J stated that where the party is sought to be made responsible for criminal neglect of duty for not using due care and caution in driving his horse '[t]he result...would be, that although the allegation of the prisoner's negligence involves a negative (namely, that he had not used due care and caution), the burden of proving that negative should be thrown upon the Crown'.[468] He analysed the two methods of presenting the case to the jury, that is to say, on one

[462] *The Queen v Cavendish* [1873] Ir 8 Cl 178.
[463] Ibid, (Monahan C.J., Fitzerald, Deasy BB., Morris, Lawson JJ., Dowse B).
[464] Ibid, 187.
[465] Ibid, 188 citing Taylor on Evidence.
[466] Williamson v The East India Cumpalty 3 East, 132 as cited in Ibid, 188-189.
[467] Williamson v The East India Cumpalty 3 East, 132 as cited in Ibid, 188-189.
[468] Ibid, 189.

hand that the burden rested on the prosecution to prove criminal neglect or on the other hand that the accused had to prove he exercised due and proper care, and stated the distinction was not 'a technical or immaterial one'.[469] In particular, he stated:

> If the evidence was not sufficient in the opinion of the jury to satisfy them affirmatively that the prisoner had due care and caution, then, according to the argument of the Crown, the jury should have found him guilty, even though upon that evidence they were not satisfied that he was guilty of negligence, but considered it a matter of reasonable doubt whether he was or was not.[470]

O'Brien J noted that the directions to the jury in this case 'implied that they need not consider upon what party the burden of proof lay...that his acquittal by the jury depended upon their being satisfied that he had exercised such care and caution'.[471] He stated that this meant the question was determined without reference to the requirement that the 'guilt of the accused be proved beyond all reasonable doubt'[472] which he remarked as a 'general rule of our common law'.[473]

2.3.2 1922 – 1936 - Pre Constitution

In this period one important reported case is identified in 1931. In *Attorney General v O'Shea,*[474] a murder case, Kennedy CJ noted the trial judge's charge to the jury. He observed that Judge Hanna stated in his charge, '[o]f course you have to consider and determine whether that man, David O'Shea, the man in the dock you see before you, beyond any reasonable doubt, was the man who committed this act'.[475] Kennedy CJ continued by stating that Judge Hanna 'gave the jury a clear and strong instruction on the presumption of innocence, and as to the prisoner's right to the benefit of any reasonable doubt in the mind of the jury'[476] and that no ground of objection was lodged to the Court of Criminal Appeal to the charge of the trial judge.[477] The grounds of appeal related to the trial judge's answer to the jury's query as to evidence of character and the trial judge's observations as to "sadism' and

[469] Ibid, 189.
[470] Ibid, 189.
[471] Ibid, 189-190.
[472] Ibid, 190.
[473] Ibid, 187.
[474] *Attorney General v O'Shea* [1931] IR 713.
[475] Ibid, 726.
[476] Ibid, 726.
[477] Ibid, 726.

"necrophilia".[478] It did not relate to the trial judge's charge to the jury on the presumption of innocence and standard of proof. Therefore, a reasonable inference may be drawn from the strong emphasis by Kennedy CJ in this case on the charge of the trial judge to the jury. For one he is telling us that a judge gave a clear and strong instruction on the presumption of innocence. This indicates that some judges were doing it at the time, and also that the Court of Criminal Appeal regarded that as an important thing to do. Moreover, this judgment was delivered four years prior to the *Woolmington* decision and indeed six years before the enactment of the 1937 Constitution.

2.3.3 1937 – 2021 – Role of the Presumption of Innocence in the Constitution

This section will analyse post 1937 Irish case law that discusses the importance of the presumption of innocence, its underlying purpose, its effects and it sources. The survey of cases in the period 1937 – 2021 using the terms 'presumption of innocence' reveal that following the enactment of the 1937 Constitution the presumption of innocence received significant attention in over 30 reported cases in the decades up to and including the 1980's. The figure significantly increased in the 1990's to approximately 80 reported cases. In the 2000's the presumption of innocence was discussed in the region of 200 cases and in excess of 250 cases between 2010 – 2021. In many cases the presumption of innocence is referenced as a matter of course. In others, the presumption of innocence is described in colourful terms.

2.3.3.1 Importance of the Presumption of Innocence

The importance of the presumption of innocence has been described in glowing terms by Irish judges. In *People (AG) v O'Callaghan*[479] Ó Dálaigh CJ stated '[t]he courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until tried and duly found guilty'.[480] In concurring with Ó Dálaigh CJ, Walsh J observed that the presumption of innocence is a 'very real thing and is not simply a procedural rule taking effect only at the trial'.[481] The Supreme Court approved these *dicta* in *Ryan v Director of Public*

[478] Ibid, 713.
[479] *People (AG) v O'Callaghan* (n 9).
[480] Ibid, 509.
[481] Ibid; *Hill v DPP* [2018] IEHC 226, [29] per Binchy J.

Prosecutions.[482] It has been characterised as being 'paramount'[483] and 'fundamental'[484] to a criminal trial, '[f]undamental to our criminal procedure',[485] a 'central part in our juridical system'[486] and 'an axiomatic and indispensable aspect of our legal system, not lightly to be treated with or abrogated'.[487] Its importance was re-emphasised in *P.O'C v DPP*[488] by Denham J stating:

> The presumption of innocence is a core principle of the criminal law. It is part and parcel of a fair trial. It has received constitutional affirmation. It is a kernel principle of the criminal law that a person is presumed innocent until proved guilty. Thus, in a criminal trial the burden is on the prosecution to prove the case beyond a reasonable doubt.[489]

Hardiman J reinforced the point in *DPP v D.O'T*[490] where he stated that it 'is not only a right in itself: it is the basis of other aspects of a trial in due course of law at common law'.[491] He remarked that the prosecutorial burden of proving guilt is a 'corollary of the presumption',[492] that the presumption of innocence is the 'basis of the rule as to the burden of proof and not merely an alternative way of stating it',[493] and it is 'an essential feature of the criminal trial'[494] which is a 'constitutional and universally recognised human right'.[495] In the foreword to Hamilton's book[496] he described the presumption of innocence as 'the foundation of the rule that guilt must be established beyond reasonable doubt, and that the onus of proof normally rests on the prosecution'.[497] He said that the presumption of innocence 'is not a mere shibboleth' and he quoted with approval the statement of O'Dalaigh CJ in *People (AG) v*

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[482] *Ryan v DPP* [1989] IR 399. See also *Declan Broderick v DPP* [2006] 1 IR 629, [13], [15]; *DPP v Wharrie* [2017] IESC 47.
[483] *Cahalane v Judge Murphy* [1994] 2 IR 262, 270; *O'Leary v Attorney General* (n 21), 266. Also affirmed by Hamilton C.J. in *Rock v Ireland* (n 30), [82]; *The Employment Equality Bill 1996* [1997] 2 IR 321, 531; *MJ v DPP* [2005] IEHC 113.
[484] *DPP v Pringle* (No. 2) [1997] 2 IR 225, 237.
[485] *Garvey v Minister for Justice & Governor of MountJoy Prison* [2003] IEHC 130, [92]; *McCarthy v Commissioner Garda Síochána* [1993] 1 IR 489, 498 per Flood J.
[486] *DPP v Ferris & Vearer* [1997] 3 JIC 1102, [29] per Ó Caoimh J.
[487] *Murphy v Garda Commissioner* [2021] IEHC 354, [12] per Barrett J.
[488] *PO'C v DPP* [2000] 3 IR 87.
[489] Ibid, 52. See also *PC v DPP* [1999] 2 IR 25, 58 per Denham J and 77 per Lynch J.
[490] *DPP v D.O'T* (n 431).
[491] Ibid, 290.
[492] Ibid, 290.
[493] Ibid, 290.
[494] Ibid, 291.
[495] Ibid, 293.
[496] Hamilton, C (n 1).
[497] Ibid, viii.

O'Callaghan[498] that every person enjoys innocence until guilty is proven and that punishment only begins after conviction.[499] Edwards J acknowledged this description of the presumption of innocence by Hardiman J in *DPP v Heffernan*[500] as 'having an almost totemic status in our system of justice'.[501] In *Rattigan v DPP*[502] Hardiman J expressed agreement with a statement of the Attorney General, which he observes was made in 'the 1988 case of Fr. Patrick Ryan, whose extradition to the United Kingdom on terrorist charges including murder was sought'.[503] It stated the presumption of innocence 'is not a procedural rule governing the onus of proof at trial. It is a fundamental principle of substantive law'.[504] More recently the burden and standard of proof were described by the Court of Appeal as 'anchored'[505] in the presumption of innocence and characterised by the Supreme Court as the 'concomitant principle'[506] of the presumption of innocence.

It will be noted in *P.O'C v DPP*[507] Murray J remarked that prior to the constitutional affirmation of the presumption of innocence by Costello J in *O'Leary v AG,*[508] the presumption of innocence 'has been a fundamental one in the common law system which this State inherited'.[509] It is clear from the evidence that the presumption of innocence forms a crucial role in the Constitutional framework of this country inherited from the common law. While there is no express reference to the presumption of innocence in the Constitution it has nevertheless been implied in certain provisions in certain circumstances.

2.3.3.2 Underlying Purpose of the Presumption of Innocence

The underlying purpose of the presumption of innocence has been considered in a number of cases. In *McCarthy v Commissioner Garda Síochána*[510] Flood J observed that the presumption of innocence is fundamental to individual liberty and that a

[498] *People (AG) v O'Callaghan* (n 9).
[499] Ibid, 509.
[500] *DPP v Heffernan* [2015] IECA 310.
[501] Ibid, [61].
[502] *Rattigan v DPP* [2008] 4 IR 639.
[503] Ibid, [27].
[504] Ibid, [29].
[505] *DPP v Henry* [2015] 4 IR 217, [29].
[506] *DPP v Forsey* (n 25), [130].
[507] *P.O'C v DPP* (n 488).
[508] *O'Leary v Attorney General* (n 14).
[509] *P.O'C v DPP* (n 488), 103; *O'Leary v Attorney General* (n 14), 107; *Ryan v DPP* (n 482), 409.
[510] *McCarthy v Commissioner Garda Síochána* (n 485).

finding of not guilty is ‘a certificate of the person's uninterrupted innocence’.[511] The concept of personal liberty and the avoidance of preventative detention in anticipation that one might commit further offences have recently been restated. In particular, they are considered ‘just as important today...always...borne in mind in the course of any bail application’.[512] In *P.O'C v DPP*[513] Murray J stated:

> The presumption of innocence is personal to the dignity and status of every citizen. It means that he or she is entitled to the status of a person innocent of criminal charges until such has been proven in a trial conducted in accordance with law. It is not something which can be set aside until guilt has been so established.[514]

This view reflects the commitment of the State in the Preamble of the Constitution to promote the common good with due observance of the concepts of charity, justice and prudence.[515] It suggests humanity in securing society’s acknowledgement whereby individuals are deemed compliant with the law until proven guilty. Binchy J more recently stated that ‘[i]ts principal purpose is to avoid the conviction of innocent persons’[516] and not to underestimate its importance to the ‘proper administration of justice’.[517]

2.3.3.3 Effects of the Presumption of Innocence

The effects of the presumption of innocence received much discussion by Irish judges. The first significant reported judicial statement on the presumption of innocence was made in 1946 by Maguire P in the Court of Criminal Appeal in *People (AG) v McMahon.*[518] The accused was convicted of murder and sentenced to death. He applied to the Court of Criminal Appeal for leave to appeal against his conviction on a number of grounds including:

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[511] Ibid, 498.
[512] *DPP v David Mulvey* [2014] 1 IR 119, [42]. See also *DPP v K (G)* [2008] IECCA 110, [31].
[513] *P.O’C v DPP* (n 488).
[514] Ibid, 60.
[515] As per the preamble of the *Constitution of Ireland 1937* (n 160). Endorsed in *State (Healy) v Donoghue* (n 193).
[516] *Hill v DPP* (n 481), [29].
[517] Ibid, [29].
[518] *People (AG) v McMahon* [1946] IR 267.

> That the trial Judge was wrong in asking the accused to explain how the deceased caught fire, and in framing his charge to the jury in such a way as to suggest that an onus lay to offer an explanation of the manner of her death.[519]

Maguire P applied what he described as the 'famous dictum'[520] in *Woolmington,*[521] which is regarded as the 'leading case affirming the centrality of the presumption of innocence in criminal trials'.[522] He remarked that *Woolmington* 'laid down that in a prosecution for murder the onus lies upon the prosecution to prove every element which is necessary to constitute guilt leaving aside the exceptional case of insanity'.[523] He stated '[t]he Court is of opinion that this principle is the true one, and, as applicable to the facts of this case, imposes on the prosecution the necessity of negativing every supposition consistent with the innocence of the accused'.[524] In concluding there was no obligation on the accused to show the death was accidental, Maguire P stated '[o]n consideration the Court is of opinion that the questions and charge may have led the jury to believe that the accused had an onus to discharge which is not warranted by law'.[525] On this ground the murder conviction was quashed and a new trial directed.[526]

The *Woolmington* principle[527] was subsequently characterised as 'a cardinal principle of the administration of the criminal law in this country'[528] in 1960. In this context Murnaghan J stated that there is 'no onus on a person charged with an offence to prove his innocence, the onus at all times being on the State to prove his guilt.[529] To this rule certain exceptions have been introduced by statute'.[530] This position was

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[519] Ibid, 270-271.
[520] Bacik, I, 'Incorporation of the European Convention on Human Rights' (2011) 11 Irish Criminal Law Journal 18.
[521] *Woolmington v DPP* (n 2), 481-482.
[522] Ní Raifeartaigh, U, 'Reversing the Burden of Proof in a Criminal Trial: Canadian and Irish Perspectives on the Presumption of Innocence' (1995) 5 Irish Criminal Law Journal 135.
[523] *People (AG) v McMahon* (n 518), 273.
[524] Ibid, 273.
[525] Ibid, 275.
[526] Ibid, 275-276.
[527] *Woolmington v DPP* (n 2), 481-482.
[528] *McGowan v Carville* [1960] IR 330, 345 (Murnaghan J).
[529] While not specifically referring to the presumption of innocence, it is noted that the evidential requirements of the prosecutorial burden and standard or proof and the point that an accused is not required to prove his innocence is referenced, without more, in *People (AG) v Kelly and Robinson* (1953) 1 Frewen 147, 152; *People (AG) v Reynolds* (1958) 1 Frewen 184, 190; *People (AG) v McGrath* (1960) 1 Frewen 192, 198; *People (AG) v Saunders* (1963) Frewen 283, 288; *DPP v Mulligan* (1980) 2 Frewen 16, 33; *DPP v O'Shea* (1989) 3 Frewen 203, 209.
[530] *McGowan v Carville* (n 528), 345-346.

affirmed by Maguire CJ and Lavery J in the Supreme Court with specific reference to the prosecutorial burden of proving the ingredients of an offence.[531] Five years later this was clarified to include the prosecutorial burden of 'negativing the possible defence of self-defence which has arisen'.[532]

In 1974 in *People (AG) v Byrne*[533] in the Court of Criminal Appeal Kenny J observed that it was established law for judges to inform the jury of the prosecutorial duty to prove guilt beyond reasonable doubt.[534] The Court of Criminal Appeal considered the trial judge's charge to the jury which included a statement: 'there is a presumption of innocence on every person who stands accused of crime: he is innocent until proved guilty...The presumption of innocence can be rebutted by evidence sufficient to satisfy a jury of guilt'.[535] Kenny J noted the trial judge's remarks to the jury in this case:

> The judge thus told the jury that they had to be satisfied of the guilt of the accused, and he equated "satisfied" with "beyond a reasonable doubt." He did not tell the jury that the accused were entitled to the benefit of the doubt.[536]

In considering the precise wording of the charge to the jury the Court of Criminal Appeal agreed with the views of the House of Lords in *Woolmington*[537] and the Privy Council in *Lawrence v The King,*[538] though not making an explicit link between the presumption of innocence and the burden and standard of proof, and stated:

> The correct charge to a jury is that they must be satisfied beyond reasonable doubt of the guilt of the accused, and it is helpful if that degree of proof is contrasted with that in a civil case. It is also essential, however, that the jury should be told that the accused is entitled to the benefit of the doubt and that when two views on any part of the case are possible on the evidence, they should adopt that which is favourable to the accused unless the State has established the other beyond reasonable doubt.[539]

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[531] Ibid, 350-351, 356. See also *People (AG) v Quinn* [1965] IR 366; *People (AG) v Oglesby* [1966] IR 162; *DPP v Heffernan* (n 500).
[532] *People (AG) v Quinn* (n 531), 382 per Walsh J.
[533] *People (AG) v Byrne* (n 416).
[534] Ibid., 4-5; citing *R v White* (n 354), 384–388 and Woolmington v DPP [1935] AC 462.
[535] *People (AG) v Byrne* (n 416), 3.
[536] Ibid, 3.
[537] *Woolmington v DPP* (n 2).
[538] *Lawrence v The King* (n 371), 707.
[539] *People (AG) v Byrne* (n 416), 8-9.

Similarly, Gannon J in the High Court in *State (Brady) v McGrath*[540] held that an accused prosecuted with an offence is 'entitled to the legal presumption of innocence until the onus of proof to establish the offence has been discharged beyond reasonable doubt'.[541] Indeed, a year later in the Court of Criminal Appeal he stated that the 'Court should be alert to prevent the course of cross-examination being used in a manner inconsistent with the presumption of innocence'.[542] In *O'Leary v AG*[543] Costello J restated the burden of proof, as a matter of substantive law, which 'remains on the prosecution from the beginning to the end of the trial. It is this burden which arises from the presumption of the accused's innocence'.[544]

2.3.4 Constitutional Sources of the Presumption of Innocence

The courts have discussed the constitutional status of the presumption of innocence on many occasions and there is some diversity of opinion in the case law regarding the constitutional provision from which the principle is derived. Unsurprisingly, Article 38.1 has featured strongly in judicial discussion of the constitutional status of the presumption of innocence. However, the courts have also referred to other constitutional provisions as being relevant for example the right to a good name. This section reviews the relevant case law.

2.3.4.1 Article 38.1 of the Constitution

Article 38.1 is the fair trial provision of the Constitution. It states that '[n]o person shall be tried on any criminal charge save in due course of law'. In the Supreme Court in *People v O'Shea*[545] Henchy J observed that there are a number of characteristics arising from decided cases which 'must be present and respected before a jury trial in conformity with the implied requirements of Art. 38, s. 5, can be said to have taken place'.[546] In this regard, he explained that '[w]hile the accused is normally entitled to a rebuttable presumption of innocence right up to the point when the jury return their verdict of not guilty, from that point onwards that presumption

[540] *State (Brady) v McGrath* [1979] 5 JIC 2501.
[541] Ibid, [7].
[542] *DPP v Cull* 2 Frewen 36, 40.
[543] *O'Leary v Attorney General* (n 14).
[544] Ibid, 109; *Attorney General v Marques* [2015] IEHC 798, [5.34].
[545] DPP v O'Shea [1982] IR 384.
[546] Ibid, 431.

stands irrebutable'.[547] While not explicitly stating so, it is apparent that Henchy J located the presumption of innocence within Article 38.1.

In *O'Leary v AG*[548] Costello J stated that the presumption of innocence 'has been so long a fundamental postulate of every criminal trial in this country...that a criminal trial held otherwise than in accordance with this presumption would, *prima facie*, be one which was not held in due course of law.[549] He observed that the presumption of innocence was universally recognised including in international instruments to which the State is a party.[550] He stated that the presumption of innocence 'is to be implied from Article 38, which provides that trials are to be held "in accordance with law" and it seems...it is not to be regarded as an absolute right'.[551] O'Flaherty J in the Supreme Court affirmed that the presumption of innocence in a criminal trial is implicit in Article 38.1.[552] In *Hardy v Ireland*[553] Hederman J remarked that the well-established jurisprudence on the fair trial right in Article 38.1 protects the presumption of innocence in requiring the prosecution to prove its case beyond reasonable doubt and it does not prohibit the drawing of inferences from established facts in certain circumstances.[554] Murphy J stated that the existence of a reasonable doubt as to the guilt of an accused and the requirement to acquit in such circumstances flow from the presumption of innocence in Article 38.1.[555]

In *Heaney v Ireland*[556] Costello J observed that the principle that an accused is entitled to the presumption of innocence amongst other rights 'are all principles

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[547] Ibid, 432.
[548] *O'Leary v Attorney General* (n 14).
[549] Ibid, 107.
[550] Ibid, 107. Costello referred to Article 11 of the Universal Declaration of Human Rights 1948; Article 6(2) of the European Convention on Human Rights (incorporated into Irish Law by virtue of the *European Convention on Human Rights Act 2003* [n 161]); Article 8(2) of the American Convention on Human Rights 1978; Article 7 of the African Charter on Human and Peoples' Rights. Similar guarantees are found in Article 14(2) of the International Covenant on Civil and Political Rights; section 11(d) of the Canadian Charter of Rights and Freedoms. The presumption of innocence is not expressly provided for in the United States Constitution however, it has been held to be implied by the 5th, 6th and 14th amendments, see *Coffin v US* 156 US 432 (1895); *In Re. Winship* (n 166).
[551] *O'Leary v Attorney General* (n 14), 110.
[552] *O'Leary v Attorney General* (n 21), 263; *Rock v Ireland* (n 30), 496; *Minister for Justice and Equality v Jason Patrick Buckley* [2014] IEHC 321, [62]; *McNulty v Ireland and Attorney General* [2015] 2 IR 592, [23]; *DPP v Forsey* (n 21), [72].
[553] *Hardy v Ireland* (n 21).
[554] Ibid, 565.
[555] Ibid, 568; *DPP v Burke* [2014] 2 IR 651, [46].
[556] *Heaney and McGuinness v Ireland* (n 26).

which are so basic to the concept of a fair trial that they obtain constitutional protection from Article 38.1'.[557] MacMenamin J affirmed the presumption of innocence as 'a constitutionally enshrined value implicit in the requirements of Article 38'[558] in *McNally v Ireland.*[559] In *Gifford v DPP*[560] Ní Raifeartaigh J remarked that the presumption of innocence is a 'key principle of criminal due process under Article 38'.[561] Moreover, O'Donnell J in *DPP v Heffernan*[562] stated that 'Article 38.1...encompasses the presumption of innocence'[563] which is a 'fundamental principle of the criminal justice system'.[564] He concluded that the presumption of innocence 'whether construed in terms of the Constitution, Common law or the European Convention on Human Rights, is the bedrock of our criminal justice system'.[565]

2.3.4.2 Article 40 of the Constitution

This section will strongly argue that the presumption of innocence is not solely derived from Article 38.1. It is open to broader interpretation and its significance has been elevated as a higher principle of law in its own right. The position of a person who is suspected of an offence, but not charged was considered by Gannon J in the High Court in *O'Flynn v District Justice Clifford.*[566] He stated '[b]efore any charge of a criminal offence is preferred against a person there is a presumption of innocence...[h]e is entitled as a matter of fundamental right, antecedent to the constitution, to the freedom of his person'.[567] He further stated the presumption of innocence 'is not simply a mere legal formality; it is a necessary corollary of the constitutional rights in Article 40 of the Constitution and of those basic human rights which are anterior to the Constitution'.[568]

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[557] Ibid, 605.
[558] *McNally v Ireland* [2011] 4 IR 431, 176.
[559] Ibid.
[560] *Gifford v DPP* [2017] 2 IR 761.
[561] Ibid, [29]. See also *O'Brien v DPP* [2014] IESC 39, [30].
[562] *DPP v Heffernan* (n 3).
[563] Ibid, [48].
[564] Ibid, [56].
[565] Ibid, [84].
[566] *O'Flynn v District Justice Clifford* [1988] IR 740.
[567] Ibid, 744.
[568] Ibid, 745. Cited also in *Blood v DPP* [2005] IESC 8, [88]. This passage was also relied upon by the Supreme Court in *McFarlane v DPP* [2007] 1 IR 134.

In this context, Gannon J explained that any expressed suspicions of a criminal offence, in the absence of a charge laid, 'could give rise to breach of the constitutional guarantee of a good name and reputation (Article 40, s. 3, sub-s. 2) and might provide a cause of action for damages for defamation'.[569] He remarked that an accused is protected by the right to a fair trial.[570] Budd J in *McCormack v DPP*[571] agreed with Gannon J that the presumption of innocence applied before any charge is preferred 'and the person is entitled as a matter of fundamental right to the freedom of his person'.[572] However, he did not locate the right within any specific Article of the Constitution.

The location of the presumption of innocence was considered in surrender proceedings under European Arrest Warrant Act 2003 in the High Court case *Minister for Justice v Shannon.*[573] A European Arrest Warrant was issued by the United Kingdom authorities and endorsed by the Irish High Court for execution. The respondent was arrested on foot of the European Arrest Warrant and brought before the High Court. He refused to consent to his surrender to the United Kingdom as was his entitlement. The High Court was asked by the applicant to make an Order directing the respondent be surrendered to the United Kingdom. The High Court inquired into certain matters including an objection by the respondent that his surrender would 'be in breach of his constitutional and convention rights, in particular his right to a fair trial'.[574]

The respondent submitted that there was a real risk that evidence of his previous convictions could be put in evidence at any trial in the United Kingdom in order to show his criminal propensity. He argued that this created a real and substantial risk that he would not receive a fair trial in the event that he was surrendered, contrary to his fair trial right under Article 38. The applicant submitted that this argument was a supposition that Article 38 was intended to apply with extra-territorial effect. Edwards

[569] *O'Flynn v District Justice Clifford* (n 566), 745.
[570] Ibid, 745.
[571] McCormack v DPP [1997] IEHC 53.
[572] Ibid, [93].
[573] *Minister for Justice v Shannon* [2012] IEHC 91.
[574] Ibid, [1].

J held that Article 38 could not be invoked in surrender proceedings as it only applied to a trial before an Irish court and did not have extraterritorial effect.[575] He stated:

> It is clear from the terms of the article that this cannot be so...It is difficult to see why it should be the case that fair procedure rights under Article 38 should apply beyond the national territory whilst other rights such as the right to trial by jury should not.[576]

Reading that statement in conjunction with his later statement that the 'universally held notions of what constitutes fairness and fair procedures e.g. the presumption of innocence'[577] suggests that he observed the presumption of innocence as an aspect of Article 38 procedural rights.

More recently, this position was affirmed and developed by Edwards J in *Minister for Justice & Equality v Nolan.*[578] This case also concerned proceedings in the High Court under the European Arrest Warrant Act 2003 for the surrender of the respondent to the United Kingdom authorities. The High Court inquired into certain matters including an objection by the respondent that if he was surrendered he might resume serving an indefinite imprisonment for public protection (IPP) sentence, in circumstances where he had already served the punitive element of the IPP sentence, which he would be subjected to preventative detention. He argued this would breach his right under Article 40.4.1° of the Constitution not to be deprived of his personal liberty save in accordance with law.[579] The applicant's counter-contention was set out by Edwards J in the following passage:

> He contends that the reason that preventative detention is repugnant to the Constitution of Ireland is not because it is inconsistent with Article 40.4.1° but rather because it is inconsistent with Article 38 which requires that a person should only be punished in the criminal law context following a trial in due

[575] Ibid, [6].
[576] Ibid, [6].
[577] Ibid, [7].
[578] *Minister for Justice & Equality v Nolan* (n 287), [132]. See also *Minister for Justice and Equality v Marjasz* [2012] IEHC 233, [144]; *Minister for Justice and Equality v Jason Patrick Buckley* (n 552), [103], [104]. Note that O'Donnell J in *Minister for Justice v Balmer* (n 436) states that the distinction between the rights guaranteed in Article 38 (limited to Ireland) and rights guaranteed as personal rights is a superficial distinction.
[579] *Minister for Justice v Shannon* (n 573), [19], [30], [95], [114].

> course of law, an important aspect of which is the presumption of innocence.[580]

Edwards J noted that while the presumption of innocence is an aspect of the right to trial in due course of law in Article 38 it is also a higher principle of law in its own right and as such it is inextricably bound up with the fundamental rights in Article 40.4.1° (liberty) and Article 40.3.2° (good name).[581] While Article 38 was deployed in this case Edwards J stated that the presumption of innocence 'is in itself a higher legal principle of universal application'.[582] He found that the word 'law' in the phrase 'save in accordance with law' in Article 40.4.1° is to be construed as referring to the fundamental norms of the legal order postulated by the Constitution[583] and that the presumption of innocence is one of those fundamental norms.[584] He remarked that the presumption of innocence 'is much more than a mere procedural trial right. It is recognised in the vast majority of the world's legal systems as being a fundamental principle of the justice to which every person is entitled as an aspect of their humanity'.[585] Edwards J pointed out that in addition to the 'golden thread' which was characterised by Viscount Sankey in the *Woolmington case*[586] *as* 'running through the web of the criminal law',[587] the presumption of innocence is 'one of the means by which the State seeks by its laws "to protect as best it may from unjust attack and, in the case of injustice done, vindicate the...good name...of every citizen", as guaranteed in Article 40.3.2° of the Constitution'.[588]

2.3.5 Reflections on the Presumption of Innocence in the Constitutional Order

The presumption of innocence was clearly established in Ireland before independence in 1922. As discussed above, there is evidence indicating that as far back as the mid 1800s, the judiciary in Ireland considered advising juries on the presumption of innocence and the burden and standard of proof at trial. Indeed as discussed earlier, the case of *Magee v Mark*[589] is identified as an early example of a

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[580] *Minister for Justice & Equality v Nolan* (n 287), [80], see also [114].
[581] Ibid, [131]. See also *Attorney General v NSS* [2015] IEHC 349, [306], [307].
[582] *Minister for Justice & Equality v Nolan* (n 287), [124].
[583] Ibid, [124].
[584] Ibid, [125].
[585] Ibid, [125].
[586] *Woolmington v DPP* (n 2).
[587] *Minister for Justice & Equality v Nolan* (n 287), [129].
[588] Ibid, [131] affirmed State (O'Rourke and White) v Martin [1984] ILRM 333, 337 per Gannon J.
[589] *Magee v Mark. [Exchequer.]* (n 453).

reported Irish case which acknowledges a rationale for the presumption of innocence as preventing miscarriages of justice. The presumption of innocence was not often discussed in the Irish reported cases of the Irish Free State. However, there is evidence in the case of *Attorney General v O'Shea,*[590] which suggests that the presumption of innocence and the burden and standard of proof continued to play an important role in Irish law in the period of the Irish Free State some seventy years later and prior to *Woolmington* and the enactment of the 1937 Constitution. With the advent of the Constitution the presumption of innocence was in place already.

The evidence from the post 1937 case law clearly suggests that the presumption of innocence is not merely a procedural rule, applying only during trial but a substantive right as an aspect of the right to trial in due course of law in Article 38.1. In addition, its significance has been elevated as a higher principle of law in its own right which is inextricably bound up with the fundamental rights in Article 40.4.1° (liberty) and Article 40.3.2° (good name) having regard to the fact that it is specifically provided for or implied by many human rights instruments worldwide. The practical implications of the decision in *Nolan* are that the presumption of innocence arguably extends to all inquiries, including tribunals and commissions of investigation, where the good name of an individual is in question.

2.4 European Convention on Human Rights

This section explores the presumption of innocence in Article 6(2) of the European Convention on Human Rights to examine how it has been interpreted by the European Court of Human Rights. Indeed, decisions of the European Court of Human Rights are quoted extensively in Irish court judgments. It is worth noting that the European Convention on Human Rights was only incorporated into Irish law in 2003[591] and became part of the domestic legal order in Ireland. Notwithstanding this, prior to 2003, where individuals ran the risk of being directly affected by a law that violated their rights, they were entitled to contend before the European Court of Human Rights that the law violated their rights by itself in the absence of an

[590] *Attorney General v O'Shea* (n 474).

[591] *European Convention on Human Rights Act 2003* (n 161). It will be noted from the long title of the Act that it was incorporated at sub-constitutional level in that it is 'subject to the constitution'. This means that where there is a conflict between a constitutional and corresponding European Convention on Human Rights based interpretation of a legislative provision, the constitutional interpretation will prevail.

individual measure of implementation. An individual could claim to be a victim within the meaning of Article 25(1) of the European Convention on Human Rights.[592] Since 2003, individuals are able to complain before an Irish court if they feel their rights under the European Convention on Human Rights have been infringed.[593] Individuals may only take their case directly to the European Court of Human Rights in Strasbourg when all domestic remedies have been exhausted.[594]

Many phrases can be gleaned from the jurisprudence of the European Court of Human Rights to express the high value it places on the presumption of innocence. The presumption of innocence is expressly provided for in Article 6(2) of the European Convention on Human Rights that '[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law'.[595] The seminal European Convention on Human Rights case on this right is *Salabiaku v France.*[596] In that case the European Court of Human Rights observed that the phrase 'in accordance with law' should not be 'construed exclusively with reference of domestic law' as the 'object and purpose of Article 6...in particular the right to be presumed innocent, is intended to enshrine the fundamental principle of the rule of law'.[597]

Applying the fundamental principle, Article 6(2) is deemed to mean that 'no person may be treated as guilty of an offence by the representatives of the State until this is established according to law by a competent court'.[598] The European Court of Human Rights affirmed this position in *Wemhoff v Federal Republic of Germany*[599] stating that the presumption of innocence is 'one of the basic principles of the English criminal law and this principle has been introduced into the Convention by Article 6(2)'.[600] In *Kyprianou v Cyprus*[601] Judge Costa dissenting stated that the presumption

[592] *Norris v Ireland* (1991) 13 EHRR 186, [28], [31]-[34].
[593] Article 34 of the European Convention on Human Rights.
[594] Article 35 of the European Convention on Human Rights.
[595] Article 6(2) of the European Convention on Human Rights.
[596] Salabiaku v France (1991) 13 EHRR 379.
[597] Ibid, [28].
[598] *Hentrich v France* (1994) 18 EHRR 440, [81].
[599] Wemhoff v Federal Republic of Germany (1980) 1 EHRR 55.
[600] Ibid, [16].
[601] Kyprianou v Cyprus (2007) 44 EHRR.

of innocence is a 'fundamental principle of fairness'.[602] In *O'Neill v United Kingdom*[603] the European Court of Human Rights stated:

> Viewed as a procedural guarantee in the context of a criminal trial itself, the presumption of innocence imposes requirements in respect of, inter alia, the burden of proof, legal presumptions of fact and law, the privilege against self-incrimination, pre-trial publicity and premature expressions, by the trial court or by other public officials, of a defendant's guilt.[604]

Indeed, until conviction the presumption of innocence is considered to be 'no empty formula. It is a very real thing and not simply a procedural rule taking effect only at the trial'.[605] The European Court of Human Rights consistently restates that the presumption of innocence enshrined in Article 6(2) is 'one of the elements of a fair criminal trial that is required by art.6(1)'.[606] It is considered a 'specific element of the wider concept of a fair trial in criminal proceedings'.[607] It applies to criminal proceedings in respect of the 'particular offence with which a person has been "charged"'.[608] The point at which a person is charged is a critical point at which the presumption of innocence comes into effect. The European Court of Human Rights in *Deweer v Belgium*[609] stated 'the English text of Article 6 (1)...employs the term 'charge' which is very wide in scope'.[610] In this respect, the expression 'charge' has been defined in general terms to mean 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence'[611] and 'substantially affecting' the person's situation.[612] Referring to previous

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[602] Ibid, [O-IV6] per dissenting opinion of Judge Costa.
[603] *O'Neill v United Kingdom* (2019) 68 EHRR SE8.
[604] Ibid, [36]; *Sofia v San Marino* (2017) 65 EHRR SE7, [58]; *Allen v United Kingdom* (2016) 63 EHRR 10, [93]; *G v United Kingdom* (2011) 53 EHRR SE25, [26]; *Capeau v Belgium* (2008) 46 EHRR 25, [25].
[605] *W v Switzerland* (1994) 17 EHRR 60, [5] dissenting opinion of Judges Walsh and Loizou.
[606] *Poletan v Former Yugoslav Republic Of Macedonia* (2017) 65 EHRR 25, [63]; *Janosevic v Sweden* (2004) 38 EHRR 22, [96]; *Daktaras v Lithuania* (2002) 34 EHRR 60, [41]; *Bernard v France* (2000) 30 EHRR 808, [37]; *Allenet de Ribemont v France* (n 291), [35]; *Minelli v Switzerland* (n 290), [27]; *Deweer v Belgium* (1980) 2 EHRR 439, [56].
[607] *Price v United Kingdom* (2017) 64 EHRR 17, [86]; *Ekbatani v Sweden* (1991) 13 EHRR 504, [30]; *Deweer v Belgium* (n 606), [56].
[608] *Sofia v San Marino* (n 604), [54]; *Geerings v Netherlands* (2008) 46 EHRR 49, [43].
[609] *Deweer v Belgium* (n 606).
[610] Ibid, [42].
[611] *Silickiené v Lithuania* (2016) 63 EHRR 16, [51]; *Peruzzo v Germany* (2013) 57 EHRR SE17, [52]; *GK v Poland* (38816/97) 20 January 2004, [98]; *Heaney and McGuinness v Ireland* (2001) 33 EHRR 12, [41]; *Serves v France* (1999) 28 EHRR 265, [42]; *Eckle v Federal Republic of Germany* (1983) 5 EHRR 1, [73]; *Deweer v Belgium* (n 606), [46].

cases, the European Court of Human Rights in *Deweer v Belgium*[613] stated the starting point at which a person is 'charged' is the 'moment of arrest, the moment when the person was officially notified that he would be prosecuted and the moment when preliminary investigations were opened'.[614] Therefore, by inference it is clear that an arrest is not necessary to trigger the operation of the presumption of innocence. The fact that the presumption of innocence applies when preliminary investigations are opened, it is arguable that it also applies from the moment a person is informed that a criminal allegation is made against him/her.

The European Court of Human Rights reiterated in *Krauss v Austria*[615] that the presumption of innocence enshrined in Article 6(2) is closely linked with the right to silence and the privilege against self-incrimination protected by Article 6(1).[616] It held that this close alliance 'reflects the expectation that the State bear the general burden of establishing the guilt of an accused'.[617] Indeed, it is stated they are 'safeguarded by Article 6(2) as a corollary of the presumption of innocence'[618] or that the 'privilege...and the presumption of innocence are the two sides of the same coin'.[619] The presumption of innocence in Article 6(2) requires that the perspective of a court is extremely important. The European Court of Human Rights held that a court 'should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution and any doubt should

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[612] *Silickiené v Lithuania* (n 611), [51]; *Peruzzo v Germany* (n 611), [52]; *Šubinski v Slovenia (19611/04) 18 January 2007* (19611/04) 18 January 2007, [62]; *Heaney and McGuinness v Ireland* (n 611), [41]; *Serves v France* (n 611), [42]; *Eckle v Federal Republic of Germany* (n 611), [73]; *Deweer v Belgium* (n 606), [46].

[613] *Deweer v Belgium* (n 606).

[614] Ibid, [42]; *Wemhoff v Germany* (1968) 1 EHRR 55, 78 [19]; *Neumeister v Austria* (1968) 1 EHRR 91, 130 [18]; *Ringeisen v Austria* (2614/65) 16 July 1971, 45 [110].

[615] Krauss v Austria (2018) 67 EHRR SE13.

[616] Ibid, [24]; *Weh v Austria* (2005) 40 EHRR 37, [39], [46]; *Saunders v United Kingdom* (1997) 23 EHRR 313, [[68]-[69]; *Jalloh v Germany* (2007) 44 EHRR 32 [O-II14] per concurring Opinion of Judge Zupanĉciĉ; *Heaney and McGuinness v Ireland* (n 611), [40], [59]; *Serves v France* (n 611), [48].

[617] *Saunders v United Kingdom* (n 616), [56] citing Commission Opinion [72].

[618] *Averill v United Kingdom* (2001) 31 EHRR 839, [O-I2] per partly concurring and partly dissenting Opinion of Judge Loucaides; *Saunders v United Kingdom* (n 616), [56] citing concurring opinion of Mr Loucaides in Commission.

[619] *Saunders v United Kingdom* (n 616), [56] citing concurring opinion of Mr Loucaides in Commission.

benefit the accused'.[620] A judge 'is forbidden to start from the conviction or supposition that the accused is guilty'.[621]

As a principle of European Convention on Human Rights law, the presumption of innocence must be interpreted so as to ensure that it is 'practical and effective' as opposed to 'theoretical and illusory'.[622] It has long been considered a 'cardinal principle of the modern criminal trial'.[623] More recently in *Bok v Netherlands*[624] Judge Power concurring observed that the presumption of innocence 'when charged with a criminal offence is a sacrosanct principle of Convention law'.[625] It is well settled that the presumption of innocence in Article 6(2) contributes to the 'avoidance of miscarriages of justice and to the fulfilment of the aims of Art.6'[626] due to its close connection with the right to silence and the right not to incriminate oneself.[627] It has been observed that the presumption of innocence 'aims at the protection of the innocent against abuses by law-enforcing agencies. Therefore, it is particularly important to secure this right during pre-trial police detention'.[628]

However, the sanctity of the right is open to question. As a general principle in considering the existence of a genuine requirement of public interest in departing from the rule to respect individual liberty, courts may only have 'due regard'[629] to the

[620] *Poletan v Former Yugoslav Republic Of Macedonia* (n 606), [64]; *Janosevic v Sweden* (n 606), [97]; *Smirnova v Russia* (2003) 36 EHRR CD10, [3]; *Telfner v Austria* 34 EHRR 207, [15]; *Lavents v Latvia* (58442/00) 28 November 2002, [125]; *Barbera v Spain* (1989) 11 EHRR 360, [77].
[621] *Fressoz and Roire v France* (2001) 31 EHRR 2, [CO-I5] per partially dissenting Opinion of Mr J. C. Geus, joined by Mm. A. S. Gözübüyük, I. Békés, E. A. Alkema and A. Arabadjiev.
[622] *O'Neill v United Kingdom* (n 603), [37]; *Allen v United Kingdom* (n 604), [94]. Other authorities include *Allenet de Ribemont v France* (n 291), [35]; *Artico v Italy* (1981) 3 EHRR 1, [33]; *Soering v United Kingdom* (1989) 11 EHRR 439, [87]; *Cruz Varas v Sweden* (1992) 14 EHRR 1, [99].
[623] *Englert v Germany* (1991) 13 EHRR 392, [2] per dissenting opinion of Judge Cremona; *Nölkenbockhoff v Germany* (1988) 10 EHRR 163, [3] per dissenting opinion of Judge Cremona.
[624] *Bok v Netherlands* (45482/06) January 18 2011; *Ashendon v United Kingdom and Jones v United Kingdom* (2012) 54 EHRR 13, [0-I4] per Separate Opinion of Judge De Gaetano.
[625] *Bok v Netherlands* (n 624), [1].
[626] *Gafgen v Germany* (2011) 52 EHRR 1, [95]; *Jalloh v Germany* (n 616), [100]; *Weh v Austria* (n 616), [39]; *Allen v United Kingdom* (2002) 35 EHRR CD289, [1]; *Heaney and McGuinness v Ireland* (n 611), [40]-[41]; *Serves v France* (n 611), [46]; *Saunders v United Kingdom* (n 616), [68]; *Murray v United Kingdom* (1996) 22 EHRR 29, [45].
[627] *Gafgen v Germany* (n 626), [95]; *Jalloh v Germany* (n 616), [100]; *Weh v Austria* (n 616), [39]; *Allen v United Kingdom* (n 626), [1]; *Heaney and McGuinness v Ireland* (n 611), [40]-[41]; *Serves v France* (n 611), [46]; *Saunders v United Kingdom* (n 616), [68]; *Murray v United Kingdom* (n 626), [45].
[628] *Murray v United Kingdom* (n 626), [37] citing dissenting opinion of Mr Loucaides in Commission.
[629] *Magee v United Kingdom* (2016) 62 EHRR 10, [87]; *Ananyev v Russia* (2012) 55 EHRR 18, [197]; *Titarenko v Ukraine* (2015) 61 EHRR 12, [73]-[74]; *Piruzyan v Armenia* (2015) 61 EHRR 31, [92];

presumption of innocence. For example, in *Zherebin v Russia*[630] the European Court of Human Rights remarked that in pre-trial detention proceedings judicial authorities must pay 'due regard to the principle of the presumption of innocence, examine all the facts arguing for or against the existence of the public interest which justifies a departure from the rule in art. 5'.[631] This is to ensure 'the pre-trial detention of an accused person does not exceed a reasonable time'.[632] In that case, the European Court of Human Rights reiterated its position as follows:

> Continued detention...can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in art.5 of the Convention.[633]

On its face, this position weakens the value of the presumption of innocence in the absence of a clear statement of what the presumption of innocence actually means. In order to consider the public interest in the first instance, the facts as alleged against the accused, or the pertinent facts at least, must be considered by the competent court as to the strength of the evidence in support of a prosecution. If the strength of the evidence is in fact consistent with innocence, continued detention would not be justified. However, if the strength of the evidence in fact suggests guilt, continued detention may be justified having regard to all the circumstances including matters of public safety should liberty be granted. On this analysis the statement appears to indicate that inherent in the genuine reasons of public interest, which outweighs respect for individual liberty, following an assessment of all the facts, is a reversal of the presumption of innocence to one of presumption of guilt.

Furthermore and notwithstanding its important status, the presumption of innocence is not absolute 'since presumptions of fact or law operate in every criminal-law

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Sutyagin v Russia (2015) 61 EHRR 19, [141]; *Ismail v United Kingdom* (2014) 58 EHRR SE6, [29]; *O'Dowd v United Kingdom* (2012) 54 EHRR 8, [68]-[70]; *Zherebin v Russia* (2018) 66 EHRR 5, [49]-[54]; *Khodorkovskiy v Russia* (2011) 53 EHRR 32, [184]-[185]; *Aleksanyan v Russia* (2011) 52 EHRR 18, [179]; *Kalashnikov v Russia* (2003) 36 EHRR 34, [114]; *Bykov v Russia* (Application no. 4378/02) 10 March 2009, [61]-[64]; *Labita v Italy* (2008) 46 EHRR 50, [152]; *McKay v United Kingdom* (2007) 44 EHRR 41, [41]; *Matznetter v Austria* (1979 to 80) 1 EHRR 198, [9].

[630] *Zherebin v Russia* (n 629).

[631] Ibid, [53].

[632] Ibid, [53].

[633] Ibid, [51]; *Magee v United Kingdom* (n 629), [87]; *Titarenko v Ukraine* (n 629), [73].

system'[634] which are not in principle prohibited. In relation to the substantive aspect of the presumption of innocence, the European Court of Human Rights found that it requires member States to confine presumptions of fact or law in criminal cases 'within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence'.[635] This appears to be a rather loose interpretation and therefore allows for a wide margin of appreciation. For example, the case of *Salabiaku v France*[636] was concerned solely with smuggling herbal and seed cannabis.[637] The European Court of Human Rights observed that this offence under Article 392(1) of the French Criminal Code:

> does not necessarily require possession. However, where possession is established, 'the person in possession…is deemed liable for the offence', without prejudice to any penalties which may be incurred by other persons, for example any accomplices or 'persons with an interest in the offence'.[638]

In his appeal on points of law, Mr. Salabiaku submitted that this presumption of accountability had the following effect:

> [B]y placing upon him an 'almost irrebuttable presumption of guilt', which 'operated in favour of the customs authorities', the Court of Appeal had violated both his right to a fair trial and his right to be presumed innocent until proved guilty.[639]

The European Court of Human Rights acknowledged that '[r]ead strictly this provision would appear to lay down an irrebuttable presumption, but, in any event, its severity has been to some extent moderated by the decisions of the courts'.[640] While Mr. Salabiaku was not charged with possession of unlawfully imported prohibited goods, a legal presumption of accountability was inferred from the possession of the goods leading to a finding of guilt.[641] The European Court of Human Rights stated that '[u]nder this provision a conclusion is drawn from a simple fact'.[642] Nevertheless,

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[634] *Sofia v San Marino* (n 604), [58].
[635] *Salabiaku v France* (n 596), [28]; *Sofia v San Marino* (n 604), [58]; *Grayson v United Kingdom* (2009) 48 EHRR 30, [40].
[636] *Salabiaku v France* (n 596).
[637] Ibid, [16], [17].
[638] Ibid, [19].
[639] Ibid, [15].
[640] Ibid, [19].
[641] Ibid, [27].
[642] Ibid, [27].

the European Court of Human Rights observed that Mr. Salabiaku could obtain his acquittal under the law stating:

> The competent court may accord him the benefit of extenuating circumstances, and must acquit him if he succeeds in establishing a case of force majeure...the French courts thus do enjoy a genuine freedom of assessment in this area and the accused may…be accorded the benefit of the doubt, even where the offence is one of strict liability.[643]

The European Court of Human Rights was persuaded by the fact that the French courts 'were careful to avoid resorting automatically to the presumption laid down in Article 392(1) of the Customs Code'.[644] This indicates the French courts did not treat the relevant provision as a reverse legal burden and afforded Mr Salabiaku the benefit of the doubt. The European Court of Human Rights therefore held that the presumption of accountability as stated was consistent with Article 6(2) of the European Convention on Human Rights.

2.4.1 Reflections on the Presumption of Innocence in Article 6(2) European Convention on Human Rights

This section examined the presumption of innocence in Article 6(2) of the European Convention on Human Rights and how it has been interpreted by the European Court of Human Rights. This chapter strongly argues that the presumption of innocence in Article 6(2) of the European Convention on Human Rights extends to the pre trial investigation stage protecting individuals from the moment of charge. It has developed to include a situation when a suspect is informed he/she is under criminal investigation. The presumption of innocence has been considered to be both 'a cardinal principle of the modern criminal trial'[645] and 'a sacrosanct principle of Convention law'[646] which contributes to the avoidance of miscarriages of justice. However, it is not absolute. The presumption of innocence has further developed to provide that no person may be treated as guilty of an offence by public officials.

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[642] Ibid, [27].
[643] *Salabiaku v France* (n 596), [29].
[644] Ibid, [30].
[645] *Englert v Germany* (n 623), [2] per dissenting opinion of Judge Cremona; *Nölkenbockhoff v Germany* (n 623), [3] per dissenting opinion of Judge Cremona.
[646] *Bok v Netherlands* (n 624), [1].

2.5 European Union Sources of the Presumption of Innocence

This section explores the presumption of innocence in the context of emerging primary and secondary European Union law to identify how the presumption is understood in the EU and how it compares to the presumption of innocence in Irish law. European Union law seeks to reduce erosion of the presumption by elevating the standards for its protection. The presumption of innocence is recognised as a general principle of European Union law and within the Charter of Fundamental Rights of the European Union. The presumption in these contexts, in addition to Article 6(2) of the European Convention on Human Rights all complement each other and are said to 'coexist simultaneously'.[647]

In the European Union the principle of 'mutual recognition'[648] is the cornerstone in the creation of an 'area of freedom, security and justice'[649] and primarily, judicial cooperation in criminal matters.[650] In this context, Article 82(2) of the Treaty on the Functioning of the European Union provides the legal basis for facilitating mutual recognition and enforcement of court judgments and judicial and police cooperation in criminal matters in European Union member states by means of Directives.[651] Integration and harmonisation was enhanced firstly through the European Union Roadmap on procedural rights in 2009.[652] Indeed, having regard to the European Convention on Human Rights, the European Council in 2009 stated:

> For the purpose of enhancing mutual trust within the European Union, it is important that, complementary to the Convention, there exist European Union standards for the protection of procedural rights which are properly implemented and applied in the Member States.[653]

[647] Wolfgang Weiß, *Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights after Lisbon*, vol 7 (2011), 66.
[648] Jackson and Summers state that this principle 'has been developed whereby decisions taken in one Member State are accepted as valid in other Member states' - Jackson, JD, & Summers, SJ, 'Introduction' in Jackson, JD, & Summers, SJ (ed), *Obstacles to Fairness in Criminal Proceedings: Individual Rights and Institutional Forms* (Oxford: Hart Publishing 2018), 1.
[649] Article 6 of Treaty of European Union (Consolidated Version) 2016 OJ C 202.
[650] European Commission, 'Green Paper The Presumption of Innocence', 3.
[651] See 'Programme of Measures to Implement the Principle of Mutual Recognition of Decisions in Criminal Matters' 10.
[652] 'Resolution of the Council on a Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings 2009/C 295/01' 01.
[653] Ibid, [8].

The use of the word 'complementary' is vague in terms of what the intentions of the European Council were in relation to the proposed EU standards. Nonetheless, the European Union Roadmap on procedural rights aims to strengthen suspect's and accused person's procedural rights[654] and trust among member states, by introducing common minimum standards on the basis of Article 82(2) of the Treaty on the Functioning of the European Union and secondly, in 2010 when the European Council invited the European Commission to examine the presumption of innocence[655] as a minimum procedural right for suspects and accused persons to promote better cooperation in this area. However, as a result of Protocol 21 of the Treaty on European Union there is no automatic requirement for Ireland to participate in European Union criminal justice measures. Ireland may therefore 'opt-in' to matters concerning the area of freedom, security and justice.[656] Notably, while Ireland has adopted a number of European Union Directives on criminal procedural rights for example in relation to the right to information[657] and the right to interpretation and translation,[658] it has not yet adopted the European Union Directive on the presumption of innocence.[659]

[654] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the Right to Interpretation and Translation in Criminal Proceedings 2010 (26102010 Official Journal of the European Union L 280/1); Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the Right to Information in Criminal Proceedings 2012 (162012 Official Journal of the European Union L142/1); Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the Right to a Lawyer in Criminal Proceedings and in European Arrest Warrant Proceedings and on the Right to Have a Third Party Informed upon Deprivation of Liberty 2013 (6112013 Official Journal of the European Union L 294/1); Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on Legal Aid for Suspects and Accused Persons in Criminal Proceedings and for Requested Persons in European Arrest Warrant Proceedings 2016; Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on Procedural Safeguards for Children Who Are Suspects or Accused Persons in Criminal Proceedings.

[655] Council of the European Union, 'The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens' 1, [2.4]. See also Bîrzu B, 'The Right to Interpretation and Translation within Criminal Proceedings in the European Union. Comparative Examination. Critical Opinions' (2016) 6 Juridical Tribune, 139.

[656] Protocol No. 21 of the *Treaty of European Union (Consolidated Version)* (n 649), on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice.

[657] *Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the Right to Information in Criminal Proceedings* (n 654).

[658] *Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the Right to Interpretation and Translation in Criminal Proceedings* (n 654).

[659] Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the Strengthening of Certain Aspects of the Presumption of Innocence and of the Right to Be Present at the Trial in Criminal Proceedings.

2.5.1 Presumption of Innocence in Primary European Union Law

The Lisbon Treaty imposed a duty on the European Union to accede to the European Convention on Human Rights.[660] Moreover, as recognised by Article 6(3) of the Treaty on European Union, it introduced the fundamental rights of the European Convention on Human Rights as 'general principles' of European Union law[661] which apply when implementing EU law. Therefore, the presumption of innocence as recognised by the European Convention on Human Rights is a general principle of European Union law though it is applicable in an Irish context, only when implementing EU law. The Charter of Fundamental Rights of the European Union appears to strengthen this position. It is a binding European constitutional instrument containing constitutional rights and principles since 2009.[662] Similar to the Treaty as discussed, the Charter is applicable in an Irish context, only when implementing EU law. It may also be used to test the validity of European Union secondary legislation.[663] The right to the presumption of innocence is enshrined in Article 48 of the Charter.[664] Article 48(1) provides that '[e]veryone who has been charged shall be presumed innocent until proved guilty according to law'.[665] Notably, where there are corresponding rights in the European Convention on Human Rights the meaning and scope of the Charter rights shall be the same as those in the European Convention on Human Rights.[666] Indeed, in a 1985 opinion of Advocate-General Lenz for the European Court of Justice, he stated:

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[660] Article 6(2) of the *Treaty of European Union (Consolidated Version)* (n 649). Until accession by the EU to the European Convention on Human Rights it will not be part of the EU legal order. See 'Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECLI: EU:C:2014:2454'.

[661] Article 6(3) of the *Treaty of European Union (Consolidated Version)* (n 649).

[662] Kerikmäe T, 'EU Charter: Its Nature, Innovative Character, and Horizontal Effect' [2014] Protecting Human Rights in the EU: Controversies and Challenges of the Charter of Fundamental Rights, 10-12.

[663] *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others* ECLI:EU:C:2014:238.

[664] Charter of Fundamental Rights of the European Union 2016 OJ C 202.

[665] For the purpose of Article 6(1) of the European Convention on Human Rights the expression 'charge' has been interpreted to mean when a person's situation has been 'substantially affected' which corresponds with 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence'; *Deweer v Belgium* (n 606), [46]; *Eckle v Federal Republic of Germany* (n 611), [73]; *Serves v France* (n 611), [42]; *Heaney and McGuinness v Ireland* (n 611), [41].

[666] Article 52(3) of the *Charter of Fundamental Rights of the European Union* (n 664). See also the preamble of the Charter and the 'Explanations Relating To the Charter of Fundamental Rights 2007/C 303/02' concerning references to European Court of Human Rights case law and that the presumption of innocence in Article 48 of the Charter has the same meaning and scope as the right guaranteed by the European Convention on Human Rights; Weiß (n 647), 80.

> In the area of fundamental rights the Court has certainly drawn guidelines from the Convention, in the sense that it has treated the Convention as supplying common minimum standards.[667]

Nonetheless, the European Union is permitted to elevate standards above those provided for by the European Convention on Human Rights, however, they may not be lowered.[668] As a result, the right to the presumption of innocence under Article 48(1) of the Charter is elevated by the Lisbon Treaty to primary European Union law status which is legally binding, and it has the same legal value as the Treaties.[669] It is applicable in an Irish context, only when implementing EU law.

The presumption as recognised in Article 6(2) of the European Convention on Human Rights corresponds with Article 48(1) of the Charter which is a fundamental right[670] that is said to be protected and 'absorbed' into the European Union legal order.[671] This does not presently affect the presumption of innocence in Irish law. However, when the European Union accedes to the European Convention on Human Rights the status of the Convention will change in Irish law. This is likely to have implications in an Irish context where a conflict arises between the protections afforded by the presumption of innocence under Article 6(2) of the European Convention on Human Rights and the Constitution.

It appears that the presumption of innocence under Article 6(2) of the European Convention on Human Rights is imported into European Union primary law status by Article 6(3) of the Treaty on European Union and Article 52(3) of the Charter which has primacy[672] over domestic law[673] if there is conflict in the context of implementing

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[667] *Case C-137/84 Minstère Public v Mutsch* ECLI:EU:C:1985:156, 2690 per opinion of Advocate-General Lenz.

[668] Article 52(3) and 53 of the *Charter of Fundamental Rights of the European Union* (n 664); O'Neill A, 'The EU and Fundamental Rights – Part 2' (2011) 16 Judicial Review 216, 386 [32]; *Case C-400/10 PPU McB* ECLI:EU:C:2010:582, [53]; Weiß (n 647), 72, 74.

[669] Article 6(1) of the *Treaty of European Union (Consolidated Version)* (n 649). The treaties governing the EU are given binding legal effect by the European Union Act 2009 subject to the limitations provided for by section 3 of that Act; European Union Act 2009 (Commencement) Order 2009 (S.I. No. 451 of 2009); *Case C-400/10 PPU McB* (n 668), [50]. See also Weiß (n 647), 64; Lenaerts K, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 European Constitutional Law Review 375, 375.

[670] *Case C-199/92 Hüls v Commission* ECLI:EU:C:1999:358, [149].

[671] Weiß (n 647), 67.

[672] *CASE 6/64 Costa v ENEL* ECLI:EU:C:1964:66.

[673] Article 29 of the *Constitution of Ireland 1937* (n 160); European Communities Act 1972 as Amended.

European Union law. In addition, it is directly enforceable before domestic courts[674] provided it is sufficiently clear, precise and justiciable.[675] Moreover, when the European Union accedes to the European Convention on Human Rights it will become part of the European Union legal order. Consequently, it appears that the European Convention on Human Rights will be directly applicable in Irish law as a matter of European Union law. This is because it will be given effect in Irish law through the European Convention on Human Rights Act 2003. Therefore, each time reliance is placed on the presumption of innocence in Article 6(2) of the European Convention on Human Rights, such reliance will effectively be implementing EU law. It is arguable that this will elevate the presumption of innocence under Article 6(2) of the European Convention on Human Rights in an Irish context from its sub-constitutional status[676] to one of primary European Union law. If this interpretation is accepted, it will thus enjoy supremacy of European Union law in the event of a conflict with the presumption of innocence under Irish constitutional law. It remains likely that the EU will accede to the European Convention on Human Rights as both the European Parliament in February 2019 and the European Commission in October 2018 reiterated their commitment for EU accession to the European Convention on Human Rights.[677] However, there is no indication as to when accession will occur.

In addition to the presumption of innocence in primary European Union law, the relevant secondary European Union law in the context of the presumption of innocence is the European Union Directive on the presumption of innocence[678] which is discussed in the next section.

[674] Weiß (n 647), 72, 88-90.2.
[675] Weatherill, S, *Law and Values in the European Union* (1st ed., Oxford University Press 2016), 170, 174, 193.
[676] Preamble to the *European Convention on Human Rights Act 2003* (n 161).
[677] European Parliament, 'Legislative Train 12.2021 Completion of EU Accession to the European Convention on Human Rights'. Rafał Mańko, 'EU Accession to the European Convention on Human Rights (ECHR)' (2017) 607298_EN, 1.
[678] *Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the Strengthening of Certain Aspects of the Presumption of Innocence and of the Right to Be Present at the Trial in Criminal Proceedings* (n 659).

2.5.2 Presumption of Innocence in Secondary European Union Law

The presumption of innocence in primary European Union law as discussed above is supplemented by secondary legislation in the form of a European Union Directive.[679] Ireland has not opted-in to this Directive. This Directive came into effect on 1 April 2018.[680] It was part of the European Council's Roadmap of legislative measures concerning procedural rights for suspects and accused persons taking account of the objective of Article 82(2) of the Treaty on the Functioning of the European Union. It is largely a codification of European Convention on Human Rights law. It applies to natural persons only.[681] The Directive recognises a link between the right to be presumed innocent and other fair trial rights such as the burden of proof, right to remain silent and the right not to incriminate oneself.[682] This section will therefore be primarily confined to discrete areas of the Directive in Chapters 1 which addresses subject matter and scope, and 2 which includes the presumption of innocence, public references to guilt and the burden of proof as they are directly relevant in respect of the matters discussed in this thesis. The right to silence and the right against self incrimination will be discussed in detail in Chapter 6 of this thesis.

2.5.3 Common Minimum Standards

This Directive is designed to impose common minimum standards on particular aspects of the presumption of innocence in criminal proceedings for the purpose of enhancing the right to a fair trial.[683] The common minimum standards do not envisage a lowering of standards. They must never fall below Charter or European Convention on Human Rights standards as interpreted by the Court of Justice of the European Union and European Court of Human Rights respectively; the Directive allows for higher standards to be implemented.[684] Indeed, it was contended by the Commission in its proposal that the outcome would confirm existing rights in the

[679] Ibid. See also Recital 9.
[680] Article 14 and Recital 12 and 13 of Ibid.
[681] Article 2 of Ibid.
[682] See also European Commission, 'Green Paper The Presumption of Innocence' (n 650), 7.
[683] Article 1 and Recital 9 of *Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the Strengthening of Certain Aspects of the Presumption of Innocence and of the Right to Be Present at the Trial in Criminal Proceedings* (n 659). See also Explanatory Memorandum of Proposal for a Directive of the European Parliament and of the Council on the Strengthening of Certain Aspects of the Presumption of Innocence and of the Right to Be Present at Trial in Criminal Proceedings 2013, [2].
[684] Recital 48 of *Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the Strengthening of Certain Aspects of the Presumption of Innocence and of the Right to Be Present at the Trial in Criminal Proceedings* (n 659).

European Convention on Human Rights and 'should not lead to an intolerable burden for Member States'.[685] Nonetheless it is notable that the non-regression provision in Article 13 expressly provides:

> Nothing in this Directive may be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the Charter, ECHR or other relevant provisions of international law or the law of any Member State which provides a higher level of protection.

This seems to indicate a clear move to ensure that higher domestic or international standards are not eroded by this European Union Directive. Indeed, in the Commission's proposal for common minimum standards, the Commission stated that '[i]t is unthinkable that Member States, bound by Article 6(2) Treaty on European Union to respect fundamental rights, would use that as a basis to "level down" where current provisions exceed the European Union requirements'.[686] This statement further represents a clear view of the Commission that higher national rules and constitutional standards should not be lowered where they exist.

The Directive is designed to facilitate the application of the principle of mutual recognition which includes the protection of the rights of suspects and accused persons.[687] In addition, the Commission in its Impact Assessment found that certain aspects of the presumption of innocence for suspects and accused persons in the European Union were insufficiently protected.[688] Indeed, Villamarín López argues that as a result of the rise in terrorism and organised crime, the effectiveness of the presumption of innocence has been diminished by the introduction of measures restricting rights and freedoms in the majority of European Union countries.[689] Interestingly, Weiß observes that the European Union courts do not always 'feel

[685] 'Proposal for a Council Framework Decision on Certain Procedural Rights in Criminal Proceedings throughout the European Union', [22].
[686] Ibid, [21].
[687]Recital 4 of *Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the Strengthening of Certain Aspects of the Presumption of Innocence and of the Right to Be Present at the Trial in Criminal Proceedings* (n 659). See also 'Resolution of the Council on a Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings 2009/C 295/01' (n 652); 'Proposal for a Council Framework Decision on Certain Procedural Rights in Criminal Proceedings throughout the European Union' (n 685), [20].
[688] European Commission, 'Commission Staff Working Document Impact Assessment Accompanying the Document Proposal for Measures on the Strengthening of Certain Aspects of the Presumption of Innocence and on the Right to Be Present at Trial in Criminal Proceedings', 4, 13.
[689] M López, V, Lusia, 'The Presumption of Innocence in Directive 2016/343/EU of 9 March 2016' (2017) 18 ERA Forum 335.

legally obliged to follow' the European Convention on Human Rights and Convention case law.[690] Notably, the Commission in its Impact Assessment observed that between 2007 and 2012, the European Court of Human Rights found a breach of Article 6(2) of the European Convention on Human Rights in EU Member States in 26 cases, with at least 10 countries found in breach of the presumption of innocence in the previous five years.[691] Moreover, the Commission found that the European Convention on Human Rights and the Charter were not sufficient to ensure the protection of the presumption of innocence in the European Union.[692] It stated that '[e]ven if the legal situation is *prima facie* satisfactory, there are still serious problems which are in general more linked with the operation of the presumption in practice'.[693] The Commission observed:

> The system of protection granted by the ECtHR is ex-post only. Ensuring justice in individual cases ex-post serves a different purpose from laying down generally applicable rules ex-ante and cannot be said to be equivalent...A proper exercise of minimum rules at EU level on the various aspects of the presumption of innocence principle is essential in order to secure all other fair trial rights and to reduce the risks of a miscarriage of justice.[694]

The Commission was anxious to point out the weakness in the European Convention on Human Rights standards and the benefits of minimum rules at EU level. Hodgson argues that Article 6 of the European Convention on Human Rights is broad and flexible in the manner in which it might be interpreted by different member states whereas the EU minimum rules 'were more prescriptive to guarantee greater uniformity, thus enabling states to have greater confidence in one another's procedures'.[695] Against this backdrop, the next sections will discuss the EU Directive as it applies to suspects and accused persons, public references to guilt and the burden of proof.

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[690] Weiß (n 647), 77.

[691] European Commission, 'Commission Staff Working Document Impact Assessment Accompanying the Document Proposal for Measures on the Strengthening of Certain Aspects of the Presumption of Innocence and on the Right to Be Present at Trial in Criminal Proceedings' (n 688), 27.

[692] Ibid, 4.

[693] Ibid, 14.

[694] Ibid, 16. See also Explanatory Memorandum of *Proposal for a Directive of the European Parliament and of the Council on the Strengthening of Certain Aspects of the Presumption of Innocence and of the Right to Be Present at Trial in Criminal Proceedings* (n 683), [47].

[695] Hodgson J, 'Safeguarding Suspects' Rights in Europe A Comparative Perspective' (2011) 14 New Criminal Law Review: An International and Interdisciplinary Journal, 649; J Hodgson, *Research Handbook on EU Criminal Law - Criminal Procedure in Europe's Area of Freedom, Security and Justice: The Rights of the Suspect* (2016), 174.

2.5.4 Suspects and Accused Persons

The presumption of innocence as set out at Article 3 of the Directive provides that, 'suspects and accused persons should be presumed innocent until proven guilty according to law'. This mirrors Article 6(2) of the European Convention on Human Rights, Article 48(1) of the Charter and the Irish constitutional protection. It is intended to apply at:

> all stages from the moment a person is suspected or accused of having committed a criminal offence, or an alleged criminal offence, until the final determination of the question whether the person has committed the offence concerned and that decision has become definitive.[696]

It applies only to criminal proceedings, as interpreted in the case-law of the Court of Justice of the European Union, without prejudice to the case-law of the European Court of Human Rights.[697] While the presumption of innocence in Article 6(2) of the European Convention on Human Rights applies from the moment of official notification of commission of a criminal offence, this Directive extends protection of the presumption of innocence to suspects even before they are made aware of the criminal allegation against them.[698] This protection is also broader than the protection afforded to the presumption of innocence under Article 38.1 of the Constitution which appears to be triggered at the point of arrest, as discussed in Chapter 1.

2.5.5 Public Statements Referring to Guilt

The Directive effectively codifies the jurisprudence of the European Court of Human Rights in relation to public statements referring to guilt as discussed above. It also reflects the jurisprudence of the Court of Justice of the European Union in *Yves Franchet and Daniel Byk*[699] which took account of the presumption of innocence in Article 6(2) of the European Convention on Human Rights as interpreted by the European Court of Human Rights. It recalled that the presumption is a fundamental right as per Article 6(2) of the European Convention on Human Rights and Article 48(1) of the Charter that 'confers rights on individuals which are enforced by the

[696] Article 2 and Recital 12 of *Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the Strengthening of Certain Aspects of the Presumption of Innocence and of the Right to Be Present at the Trial in Criminal Proceedings* (n 659).
[697] Recital 12 of Ibid.
[698] Article 2 and Recital 12 of Ibid.
[699] *Case T-48/05 Yves Franchet and Daniel Byk v Commission* ECLI:EU:T:2008:257.

Community courts'.[700] It found that the European Anti-Fraud Office breached the presumption of innocence where it leaked information to the press during its investigations which identified certain individuals as guilty of an offence. It stated that '[i]t is clear that that statement breaches the principle of the presumption of innocence in that it reflects the view that the applicants are guilty and encourages the public to believe in their guilt'.[701] This position is confirmed in the Directive. It provides that no public statements, subject to certain procedural exceptions as set out in the Directive, may be made by a public authority as to the guilt of a person as long as the person has not been proven guilty in accordance with law.[702] The exception includes[703] the sharing of objective information publicly, where it is deemed strictly necessary in situations in which it would be reasonable and proportionate to do so in the interest of the criminal investigation or in the public interest, to assist in establishing the identity of the alleged offender or to inform the public of an alleged environmental crime or to prevent a public order disturbance. However, no impression shall be given as to the guilt of a person before guilt has been proven in accordance with law.

2.5.6 Burden of Proof

The burden of proof is provided for in Article 6 of the Directive. It is notable that there is no express reference to the standard of proof in Article 6. Article 6 was formerly labelled as Article 5 in the proposed Directive. It is noted that the Commission proposal in Article 5 of the proposed Directive explicitly provided for both the burden and standard of proof required in the Directive. The title read as 'Burden of proof and standard of proof required' and paragraph 3 was in the following terms:

> Member States shall ensure that where the trial court makes an assessment as to the guilt of a suspect or accused person and there is reasonable doubt as to the guilt of that person, the person concerned shall be acquitted.

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[700] Ibid, [209]; *Case T-321/05 AstraZeneca v Commission* ECLI:EU:T:2010:266, [476]; *Case T-193/04 Tillack v Commission* ECLI:EU:T:2006:292, [121]; *Joined Cases T-67, 68, 71 and 78/00 JFE Engineering Corp, Nippon Steel Corp, JFE Steel Corp and Sumitomo Metal Industries Ltd v Commission* ECLI:EU:T:2004:221, [178]; *Case C-235/92 Montecatini v Commission* ECLI:EU:C:1999:362, [175].

[701] *Case T-48/05 Yves Franchet and Daniel Byk v Commission* (n 699), [216], see also [217], [219], [309]-[311], [314]; *Case T-134/04 Caló v Commission* ECLI: EU: T: 2007: 37, [155], [157]; *Case T-339/03 Clotuche v Commission* ECLI: EU: T: 2007: 36, [219].

[702] Article 4 and Recital 16 of *Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the Strengthening of Certain Aspects of the Presumption of Innocence and of the Right to Be Present at the Trial in Criminal Proceedings* (n 659).

[703] Recital 18 of Ibid.

Article 5 was the subject of debate during the Italian Presidency in September 2014 in order to get agreement acceptable to all member states.[704] Following meetings with the working parties, the majority of member states considered the proposal 'would be too intrusive'.[705] The result of this debate was as follows:

> Paragraph 3 was deleted because there was almost perfect consensus among Member States that this provision would be too intrusive. As a consequence, in the title the words "and standard of proof required" have also been deleted.[706]

It is unclear how this conclusion was formed. Villamarín López therefore argues that the Directive does not 'introduce any common standard of proof'.[707] Nonetheless, the burden of proof under Article 6 of the Directive requires member states to 'ensure that the burden of proof in establishing the guilt of suspects and accused persons is on the prosecution' and that 'any doubt as to the question of guilt is to the benefit of the suspect or accused person'.[708] It will also be noted that Recital 22 of the Directive provides: 'The burden of proof for establishing the guilt of suspects and accused persons is on the prosecution, and any doubt should benefit the suspect or accused person'.[709] This suggests that the standard of proof under the Directive mirrors the Irish and European Convention on Human Rights standard of proof beyond reasonable doubt.

The Commission in its proposal sought to make provision for reversal of the burden of proof. During discussions with the working parties most member states identified that they were familiar with the concept of presumptions of fact or law which member states were satisfied that they worked 'in the way that a fact is considered proven by

[704] Proposal for a Directive of the European Parliament and of the Council on the Strengthening of Certain Aspects of the Presumption of Innocence and of the Right to Be Present at Trial in Criminal Proceedings-Orientation Debate on Article 5(Burden of Proof), [7].
[705] Ibid, [12] and FN 11.
[706] Ibid, [12] and FN 11.
[707] López, V, Lusia (n 689), 351.
[708] Article 6 and Recital 22 of *Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the Strengthening of Certain Aspects of the Presumption of Innocence and of the Right to Be Present at the Trial in Criminal Proceedings* (n 659).
[709] Recital 22 of Ibid.

a reasoning that infers the existence of an unknown fact from a known fact'.[710] However, it will be noted that neither reversal of the burden nor the concept of the presumptions are addressed in Article 6 of the Directive. Nonetheless, Recital 22 identifies that presumptions of fact and of law may be used so long as they are:

> confined within reasonable limits, taking into account the importance of what is at stake and maintaining the rights of the defence, and the means employed should be reasonably proportionate to the legitimate aim pursued. Such presumptions should be rebuttable and in any event, should be used only where the rights of the defence are respected.

The intention of Article 6 of the Directive as outlined in Recital 22 appears to reflect the case law of the European Court of Human Rights in respect of the presumptions of fact or law catered for by Article 6 European Convention on Human Rights.[711] This is the subject of in-depth analysis in Chapter 3.

2.6 Conclusion

This chapter has conducted a historical survey of judicial engagement with the presumption of innocence in England and Ireland. The chapter also considers the case law of the European Court of Human Rights on the presumption of innocence. The chapter provides a strong argument in favour of an increasing appreciation and entrenchment of the presumption of innocence in the courts over time. Many of the earliest reported cases only made references to the presumption of innocence without any discussion as to its value or meaning. It is apparent from the English case law during the 1800s that the presumption of innocence was very much considered and seen as the starting point in the reported criminal cases. While there is some evidence that the presumption of innocence started to emerge in the 1800s in terms of its importance there was little discussion as to its rationale.

There is some evidence to suggest that the presumption of innocence and the requirement for acquittal where a reasonable doubt existed, emerged as an important aspect of the trial process prior to 1935. However, there is little judicial

[710] *Proposal for a Directive of the European Parliament and of the Council on the Strengthening of Certain Aspects of the Presumption of Innocence and of the Right to Be Present at Trial in Criminal Proceedings-Orientation Debate on Article 5(Burden of Proof)* (n 704).
[711] *Salabiaku v France* (n 596), [28] and as interpreted by the English courts in R v Lambert [2002] 2 AC 545, [88]. See also *Asbingdane v United Kingdom* (1985) 7 EHRR 528.

commentary in the reported cases as to why the presumption of innocence existed. Indeed, there is a lack of reflection on the underlying rationale of the presumption of innocence by the judges. The case of *Woolmington v DPP*[712] is celebrated as a major statement of the importance of the presumption of innocence but it also does not discuss its rationale.

It is interesting to note that the position in Ireland was different prior to independence in 1922 and indeed prior to the *Woolmington* case in 1935. The chapter provides a strong argument that the presumption of innocence and the burden and standard of proof played an important role in Irish law. The rationale for the presumption of innocence as preventing miscarriages of justice was discussed by Pigot CB as was the link between the presumption of innocence and the standard of proof. *Woolmington* did not introduce new law in an Irish context apart from clarifying the exceptions to the burden and standard of proof.

The common law position was elevated to constitutional status post 1937 and has increasingly been developed in Irish judicial discourse. While the courts have largely located the presumption of innocence in Article 38.1 of the Constitution, the presumption of innocence has also been said to be derived from Article 40.4.1° (liberty) and Article 40.3.2.° (good name) of the Constitution. The presumption of innocence as protected under the European Convention on Human Rights is also an important consideration particularly since 2003 where the Convention can be relied upon before the Irish courts.

This chapter provides a strong argument that the presumption of innocence in European Union law seeks to reduce erosion of the presumption of innocence. It suggests that this is likely to occur when the European Union accedes to the European Convention on Human Rights when the presumption of innocence in the Convention will enjoy supremacy of European Union law. Secondly, it provides a strong argument that the presumption of innocence in the EU Directive on the presumption of innocence has broader application than the presumption under Article 6(2) of the European Convention on Human Rights and the Constitution as it will apply to suspects before they are made aware of the criminal allegation against

[712] *Woolmington v DPP* (n 2).

them when Ireland ‘opts-in’ to the Directive. It will also afford protection to individuals from statements by public officials encouraging the public to believe their guilt before being proven in accordance with law.

The research will now conduct a detailed analysis of discrete aspects of the presumption of innocence in succeeding chapters beginning with reverse onus provisions at Chapter 3.

Chapter 3 - Reverse Onus Provisions

The purpose of this chapter is to examine the extent to which the presumption of innocence as a bedrock constitutional right is under significant threat of erosion by reverse onus provisions and the degree to which the courts have interacted with them. As we have seen in Chapters 1 and 2 the presumption of innocence requires that the prosecution bears the legal burden of proof to prove its case beyond a reasonable doubt. We now understand that the right to the presumption of innocence is not absolute. There are three exceptions namely, statutory exceptions, the peculiar knowledge principle and insanity. This chapter focuses on the statutory exceptions which have been a fertile source of appellate judgments in recent years. This is an important area as such provisions risk eroding the presumption of innocence depending on how they are calibrated. The presumption of innocence could soon lose its cogency if parliament was able to reverse the onus of proof at will. This chapter conducts an in-depth case study of four key cases, namely *O'Leary v Attorney General,*[713] *Hardy v Ireland,*[714] *DPP v Smyth*[715] and *DPP v Forsey*[716] on how the courts interpreted different statutory exceptions in light of the presumption of innocence.

This chapter argues that the interpretation of reverse onus provisions by the courts has evolved over three stages. In stage 1 there was no general guidance laid down by the courts in the early 1990's in *O'Leary* and *Hardy* for considering reverse onus provisions in light of the presumption of innocence. This is concerning for the value accorded by the courts to the presumption of innocence as a fundamental constitutional right as described in Chapters 1 and 2.

In stage 2 confusing guidance emerged in *Smyth* in 2010 around the meanings ascribed by the Court of Criminal Appeal to the term 'evidential burden'. This was despite the fact that some progress was made where the Court clarified that the

[713] *O'Leary v Attorney General* (n 21); *O'Leary v Attorney General* (n 22).
[714] *Hardy v Ireland* (n 21).
[715] *DPP v Smyth* (n 21). Also considered are *DPP v P.J. Carey (Contractors) Limited* (n 21); *DPP v Tuma* (n 21); *DPP v Heffernan* (n 3).
[716] *DPP v Forsey* (n 25).

presumption of innocence would not tolerate a reverse legal burden requiring an accused to discharge it on the balance of probabilities.

In stage 3 the Supreme Court in *Forsey* laid down general guidance as regards the weight to be accorded to the presumption of innocence when considering reverse onus provisions. However, the chapter will strongly argue that despite the general guidance laid down in stage 3, it nonetheless falls short of providing effective protection to the presumption of innocence. It will be argued that the courts have merely focused on essential elements of an offence across the three stages and have not clearly defined what they are. The thesis will argue that this situation allows for the continued erosion of the presumption of innocence by reversing the legal burden in respect of elements that are not essential elements, thereby requiring an accused to prove their innocence in these circumstances.

3.1 Burden of Proof - Terminologies Explained

This section explains common terminologies used in this chapter. The task of interpreting the meaning of reverse onus provisions has not been made easy having regard to various terms that have been interpreted differently by both the courts and commentators. Notably, O'Malley J in *DPP v Forsey*[717] adopted terminology used by McGrath.[718] She stated that the legal burden 'is a burden of proof "properly so called" and is the burden fixed by law on a party to satisfy the tribunal of fact as to the existence or non-existence of a fact or matter'.[719] Hamilton describes a presumption that embodies a legal burden on the accused as one that requires him to 'prove or disprove a fact on the balance of probabilities'[720] which is the civil standard or lower standard of proof '(more likely than not)'.[721] Where an accused fails to discharge the legal burden he will be convicted.[722] This could include circumstances where 'an accused has established a reasonable doubt as to their guilt'.[723] This therefore increases the risk of wrongful conviction as an accused could be convicted

[717] Ibid.
[718] McGrath, D, *Evidence* (2nd edn, Round Hall 2014), Chapter 2.
[719] *DPP v Forsey* (n 25), [81].
[720] Hamilton, C (n 1), 48; Heffernan, L, with Ní Raifeartaigh, U, *Evidence in Criminal Trials* (Bloomsbury 2014), [1.33]; McGrath, D, and Egan McGrath, E, *McGrath on Evidence* (3rd edn, Round Hall 2020), [2-65]; *DPP v Forsey* (n 25), [82]; *Hardy v Ireland* (n 21), 559 per Flood J.
[721] Heffernan, L, with Ní Raifeartaigh, U (n 720), 10, [1.33].
[722] Hamilton, C (n 1), 48.
[723] Ibid, 48.

notwithstanding the existence of a reasonable doubt as to their guilt.[724] This provides a strong argument in favour of the serious consequences of a reverse legal burden which clearly erodes the presumption of innocence by requiring an accused to prove their innocence. A presumption that embodies an evidential burden is seen as less onerous.[725] Where legislation imposes an evidential burden on an accused in a criminal trial it requires the accused to adduce sufficient evidence to raise a reasonable doubt as to a fact in issue.[726] Where an accused discharges the evidential burden the legal burden of proof remains on the prosecution to prove its case beyond a reasonable doubt.[727] Notably, Stumer argues that 'far from being consistent with Article 6(2), the evidential burden usually represents a solution to the problem posed by a reverse persuasive burden'.[728]

Statutory presumptions are considered to 'involve a controversial interference with the presumption of innocence but nevertheless have been upheld by the Irish courts'.[729] They are presumptions of law.[730] They are described as 'a procedural device that affects the allocation of the burden of proof; once a primary fact has been proved, a secondary fact is presumed'.[731] Heffernan notes that they require the 'defence to displace the presumption by adducing some degree of evidence that negates the prosecution's version of the facts'.[732] McGrath observes that they relieve the prosecution of the burden of proving 'every fact necessary to establish the guilt of the accused'.[733] O'Malley J in *DPP v Forsey*[734] expressed a similar view.[735] Hamilton persuasively observes that 'both presumptions arguably offend the presumption of innocence as the prosecution is no longer required to prove certain matters'.[736]

[724] For further reading see Allen, J (n 210), 124.
[725] Heffernan, L, with Ní Raifeartaigh, U (n 720), 9, [1.29].
[726] Ní Raifeartaigh, U (n 522), 2, 3. See also Heffernan, L, with Ní Raifeartaigh, U (n 720), 9, [1.29]. *DPP v Forsey* (n 25), [83].
[727] Hamilton, C (n 1), 48.
[728] Stumer A (n 46), 19.
[729] Heffernan, L, with Ní Raifeartaigh, U (n 720), 10, [1.32].
[730] Ní Raifeartaigh, U (n 522), 3.
[731] Heffernan, L, with Ní Raifeartaigh, U (n 720), 9, [1.29]. See also Hamilton, C (n 1), 48.
[732] L Heffernan, *Evidence in Criminal Trials* (2nd edn, Bloomsbury Professional 2020), [1.47].
[733] McGrath, D, and Egan McGrath, E (n 720), [2-22]; McGrath, D (n 718), 21, [2-16]; Heffernan (n 732), [1.47].
[734] *DPP v Forsey* (n 25).
[735] Ibid, [33], [34], [134].
[736] Hamilton, C (n 1), 48.

A wide range of statutory presumptions curtail the presumption of innocence. A search of Acts of the Oireachtas in the Irishstatutebook database, using search terms "contrary is proved", returned 581 matches. Despite the fact that they are commonly engineered as a legislative device 'their relationship with the burden of proof and the presumption of innocence has been addressed relatively infrequently in the 21st century case law'.[737] They arise in contexts as diverse as 'incitement to hatred',[738] disclosure of confidential information,[739] possession of excisable products,[740] certificates in relation to psychoactive substances,[741] European Arrest Warrant,[742] drunkenness on licensed premises,[743] child begging,[744] possession of archaeological object detection device[745] and the Criminal Law (Sexual Offences) Act 2017[746] to name a few.

Ní Raifeartaigh[747] remarks that the compatibility of reverse onus provisions[748] with the constitutionally protected presumption of innocence only seemed to arise for the first time in *O'Leary v Attorney General*[749] and *Hardy v Ireland.*[750] These provisions were a pre-independence device to aid the prosecution.[751] They are problematic in the context of constitutional fair trial rights, which did not exist when the presumptions in the Offences Against the State Act 1939 and Explosive Substances Act 1883 were introduced. Indeed, the phrase 'shall, without more, be evidence' in the Offences Against the State Act 1939 created some confusion in the Seanad in 1939 as to its meaning. The Minister for Justice, Mr Ruttledge attempted to address the confusion and stated that '[i]t put the onus on him to prove that he did not know'.[752]

[737] Heffernan, L (n 36), 101.
[738] Section 2(2) of the Prohibition of Incitement to Hatred Act 1989.
[739] Section 62M(3) of the Garda Síochána Act 2005 as inserted by section 44 Garda Síochána (Policing Authority and Miscellaneous Provisions) Act 2015.
[740] Section 131(3)(b),(c) and (d) of the Finance Act 2001 as amended by section 93 Finance Act 2010.
[741] Section 18(4) and (5) of the Criminal Justice (Psychoactive Substances) Act 2010.
[742] Section 21A of the European Arrest Warrant Act 2003 as inserted by section 79 of the Criminal Justice (Terrorist Offences) Act 2005.
[743] Section 4(3) of the Intoxicating Liquor Act 2003.
[744] Section 247(2) of the Children Act 2001.
[745] Section 2(6) of the National Monuments (Amendment) Act 1987.
[746] Criminal Law (Sexual Offences) Act 2017.
[747] Ní Raifeartaigh, U (n 522), 10.
[748] Section 24 of the *Offences Against the State Act 1939* (n 20); Section 4(1) of the *Explosive Substances Act 1883* (n 20).
[749] *O'Leary v Attorney General* (n 21); *O'Leary v Attorney General* (n 22).
[750] *Hardy v Ireland* (n 21).
[751] Ní Raifeartaigh, U (n 522), 3, 4.
[752] Seanad Eireann Debates 17 May 1939 Vol. 22, No 19 (Mr Ruttledge)

Nevertheless, it is unclear as to whether Mr Ruttledge viewed this was a legal or evidential burden. In the United Kingdom, until the enactment of the Human Rights Act 1998, parliamentary supremacy constrained the courts when interpreting fair trial rights including the presumption of innocence. This meant that prior to 1998 the English courts were bound to give effect to the intention of Parliament including where the intention was contrary to the presumption of innocence.[753] Heffernan argues that *O'Leary* and *Hardy* have created a high threshold to satisfy a reverse legal burden and as a result the courts have tended to read down reverse legal burdens as mere evidential burdens using the double construction rule.[754] She observes that the reading down of reverse onus provisions as an evidential burden 'in borderline cases could facilitate legislative modification of the burden of proof "through the back door"'.[755] Fennell expresses a related concern in relation to O'Malley J's judgment in *DPP v Forsey,*[756] that it:

> comes in the aftermath of a series of legislative moves and judicial accommodations which have rendered the...constitutional...basis for the placement of the burden of proof in criminal cases and related presumption of innocence much weakened, as the relatively recent historical account demonstrates.[757]

This is a helpful backdrop for the analysis that follows which will strongly argues that the interpretation of reverse onus provisions has evolved over three stages.

Stage 1 – Unclear Judicial Guidance

This stage will explore and analyse the first judicial examination of reverse onus provisions in *O'Leary* and *Hardy.* The judgments are short and do not provide clear guidance on how to interpret reverse onus provisions consistent with the constitutional presumption of innocence. This supports the view expressed by Hamilton.[758] This stage will argue that *Hardy* has even given rise to disagreement among scholars as to what was decided.

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https://www.oireachtas.ie/en/debates/debate/seanad/1939-05-17/3/

[753] *DPP v Forsey* (n 25), [130] per O'Malley J.

[754] Heffernan (n 732), [1.50].

[755] Heffernan, L (n 36), 113.

[756] *DPP v Forsey* (n 25).

[757] Fennell, C, *The Law of Evidence in Ireland* (4th edn, Bloomsbury Publishing Plc 2020), [3.230].

[758] Hamilton, C (n 1), 49.

3.2 O'Leary v Attorney General

O'Leary v Attorney General[759] concerned a statutory presumption in the Offences Against the State Act 1939. The accused was convicted by the Special Criminal Court of possession of incriminating documents[760] and membership of an unlawful organisation, namely the IRA.[761] On the membership charge, the prosecution relied on the legal effect of possession by the accused of incriminating documents under section 24 of the 1939 Act which provided that 'proof...that an incriminating document relating to the organisation was found on such person or in his possession...shall, without more, be evidence until the contrary is proved'.[762]

3.2.1 Constitutional challenge in High Court

The plaintiff applied for leave to appeal his conviction but it was refused by the Court of Criminal Appeal. He subsequently challenged the constitutionality of section 24 of the 1939 Act in the High Court[763] on the ground that it violated his constitutional right to trial in due course of law. He submitted that the section reversed the burden of proof onto him to disprove his guilt and unconstitutionally deprived him of the protection of the presumption of innocence. Costello J dismissed the plaintiff's claim holding that the section did not infringe the plaintiff's right to the presumption of innocence. He held that the section did not shift the burden of proof but shifted the evidential burden which would not be unconstitutional.

Costello J observed that the section provided that once a fact is established, a court is required to draw an inference as provided for in the section and that it was the nature and effect of the inference that needed to be carefully analysed.[764] He observed 'that when it is said that a statute 'shifts' the burden of proof onto the accused this may mean two entirely different things'.[765] He distinguished between a reverse legal burden and a reverse evidential burden. From the State's perspective, he explained that the burden of proof has two meanings. First, he explained that the burden of proof is used to describe the legal or persuasive burden of proof fixed by

[759] *O'Leary v Attorney General* (n 21); *O'Leary v Attorney General* (n 22).
[760] Section 12 of the *Offences Against the State Act 1939* (n 20). *"Incriminating document"* is defined in section 2 of the Ibid.
[761] Section 21 of the *Offences Against the State Act 1939* (n 20).
[762] Section 24 of the Ibid.
[763] *O'Leary v Attorney General* (n 22); *O'Leary v Attorney General* (n 14).
[764] *O'Leary v Attorney General* (n 22), 460.
[765] Ibid, 460.

law on the prosecution to prove its case beyond reasonable doubt arising from the presumption of innocence.[766] He stated that it's 'removal...by statute...may involve a breach of the accused's constitutional rights'.[767] It is interesting that he chose to use the word 'removal' as distinct from the word 'shift'. It appears that he was pointing towards its removal from the prosecution and its shifting to the accused though this is not specifically stated.

Secondly, Costello J said that the burden of proof is also used to describe the evidential burden on the State to adduce sufficient evidence against an accused to raise a *prima facie* case.[768] He remarked that once the State has satisfied the evidential burden, the evidential burden shifts to the accused who may elect to call any evidence.[769] He observed that the legal burden remains on the prosecution at all times to prove its case beyond a reasonable doubt.[770] Where the prosecution fail to do so, the accused must be acquitted.[771] On this basis, Costello J found that '...if a statute is to be construed as merely shifting the evidential burden no constitutional infringement occurs'.[772] He continued by setting out the test in general terms to determine whether a legal or evidential burden is shifted by a statute as follows:

> [I]t is clear that if the effect of the statute is that the court *must* convict an accused should he or she fail to adduce exculpatory evidence then its effect is to shift the legal burden of proof (thus involving a possible breach of the accused's constitutional rights) whereas if its effect is that notwithstanding its terms the accused *may* be acquitted even though he calls no evidence because the statute has not discharged the prosecution from establishing the accused's guilt beyond a reasonable doubt then no constitutional invalidity could arise...The presumption of the accused's innocence is therefore rebutted not by the statute but by the inference...As the inference exists apart from the statute I do not think that the statute can thereby be invalidated by the Constitution...[773]

He then examined the presumption of innocence in Article 38.1. He noted that trials are to be held 'in accordance with law'. On this basis, he stated that the presumption

[766] Ibid, 460.
[767] Ibid, 460.
[768] Ibid, 460.
[769] Ibid, 460.
[770] Ibid, 460.
[771] Ibid, 460.
[772] Ibid, 460.
[773] Ibid, 460, 461.

of innocence implied from Article 38.1 is not an absolute right.[774] Unfortunately, he did not discuss the circumstances in which it may be restricted. Nevertheless, he was influenced by the European Commission opinion in *X v United Kingdom*[775] which examined a UK reverse onus provision in the context of the presumption of innocence in Article 6 of the European Convention on Human Rights. In that case the Commission observed that:

> [T]his form of provision could, if widely or unreasonably worded, have the same effect as a presumption of guilt. It is not therefore sufficient to examine only the form in which the presumption is drafted. It is necessary to examine the substance and effect.[776]

Costello J focused on the fact that Article 6 was not infringed in that case due to the restrictive nature of the statutory presumption and that 'it was neither irrebutable nor unreasonable'.[777] Applying this test to section 24 of the 1939 Act, he concentrated on the wording of the section and observed that it:

> [E]nables an inference to be drawn if certain facts are established...I think that this section does not infringe the plaintiff's constitutionally protected rights. It is important to appreciate how the section is drafted. It is necessary to examine the substance and effect.[778]

He observed that a failure by an accused to contribute in their case allows for reasonable inferences to be drawn from the facts which the prosecution establish in order to rebut the presumption of innocence.[779] Nonetheless, this approach requires an accused to displace the inferences by contributing in circumstances where the presumption of innocence requires the prosecution to prove their case without assistance from the accused. He continued his analysis stating that strong or slight inferences may be drawn based on the nature of the incriminating document and the

[774] Ibid, 461.
[775] Ibid, 461 citing X v United Kingdom Collection of Decisions 42, 135, referred to in Jacobs, The European Convention on Human Rights, 113–114]. He was also influenced by the restrictions on the presumption of innocence in Article 29 of the UN Declaration on Human Rights, section 1 of the Canadian Charter of Rights and Freedoms and the 5th Amendment to the US Constitution.
[776] Ibid, 461 citing X v United Kingdom Collection of Decisions 42, 135, referred to in Jacobs, The European Convention on Human Rights, 113–114.
[777] Ibid, 461.
[778] Ibid, 463.
[779] Ibid, 461.

circumstances in which it was possessed.[780] This reasoning is problematic as the inference is intimately connected to the section and would not be given legal effect but for section 24 of the 1939 Act including by any failure to offer an explanation by way of oral evidence. Therefore, it is unclear as to how it can be concluded that the inference existed apart from the statute as stated above by Costello J. He placed significance on the manner in which the section was drafted, observing:

> As actually drafted it seems to me that the court may evaluate and assess the significance of the evidence of possession and if it has a reasonable doubt as to the accused's guilt of membership of an unlawful organisation it must dismiss the charge, even in the absence of exculpatory evidence.[781]

However, this is not the end of the matter. If the accused fails to provide evidence it does not necessarily mean the court is in fact satisfied as to guilt.[782] If it is the case that the prosecution adduces sufficient evidence in respect of the incriminating document and circumstances of its possession to establish a *prima facie* case, that evidence shall be evidence of the offence of membership. Notwithstanding that it is not proof of the offence, it nevertheless automatically becomes proof of the offence when taken together with the inference drawn from a failure to offer any exculpatory evidence, and a court will be obliged to convict if it is satisfied the evidence proves the offence beyond a reasonable doubt.[783] On this reading of the provision it is arguable that the section indirectly obliges an accused to contribute some form of exculpatory evidence in order to avoid conviction. While there would be a variety of ways that counsel for the defence could assail the prosecution evidence about the accused's standard, it is conceivable that in some cases that the only way it could convincingly be done is for the accused to take the stand.[784] It does require the defence to be more proactive in a system where we should expect an accused should never have to prove their innocence.

It is remarkable that Costello J said that the phrase 'shall, without more, be evidence

[780] Ibid, 463.
[781] Ibid, 463.
[782] For further discussion see Stumer A (n 46), 40.
[783] For further discussion see *McNulty v Ireland* [2015] IESC 2, [40] per Denham CJ relying on Earl of Halsbury in The Laws of England by the (Butterworth & Co., 1910), 419 noted that 'Proof is that which leads to a conclusion as to the truth or falsity of alleged facts which are the subject of inquiry. Evidence, if accepted and believed, results in proof, but it is not necessarily proof of itself...'
[784] This position was also stated in *DPP v Forsey* [2018] IESC 55 McMenamin dissenting, [36].

until the contrary is proved'[785] does not oblige 'an accused to give evidence so as to avoid a conviction'[786] and only shifts an evidential burden on to an accused. This interpretation was not preferred by the Court of Criminal Appeal in England in the case of *R v Carr Briant*[787] where a statute or common law provides that some fact is presumed against an accused 'unless the contrary is proved'.[788] It was stated to require 'that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish'.[789] In that case the phrase was considered to impose a legal burden on the accused. Notably, this case is not mentioned by Costello J in his judgment and it may have influenced his decision had it been considered. In conclusion Costello J's application of the general principles on the reverse burden of proof by section 24 of the 1939 Act is not entirely convincing.

3.2.2 Appeal to Supreme Court

The accused appealed this decision to the Supreme Court. O'Flaherty J gave the judgment of the Supreme Court.[790] The accused submitted that the words 'until the contrary is proved' reversed the burden of proof onto the accused to prove that he was not a member of an unlawful organisation and therefore to prove he was not guilty of the offence.[791] O'Flaherty J rejected his submission. He upheld Costello J's reasoning in the High Court and found that the section merely provided that proof of possession of an incriminating document only amounts to evidence and not proof.[792] He stated that the probative value of possession may be challenged in various ways for example, 'by cross-examination; by pointing to the mental capacity of the accused or the circumstances by which he came to be in possession of the document'.[793] He continued:

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[785] Section 24 of the *Offences Against the State Act 1939* (n 20); *O'Leary v Attorney General* (n 22), 463.
[786] *O'Leary v Attorney General* (n 22), 463.
[787] *R v Carr Briant* [1943] KB 607.
[788] Ibid, 612.
[789] Ibid, 612. It will also be noted that Lamer CJ in the Canadian Supreme Court in *R v Chaulk* (n 29), 1317 adopted a contrary interpretation of a similar phrase. In his view, 'the words "until the contrary is proved" cannot be interpreted as requiring an accused merely to discharge an evidentiary burden (i.e., raise a reasonable doubt as to insanity); the words...clearly impose a persuasive burden on the accused'.
[790] Hamilton CJ, Egan, Blaney and Denham JJ concurred.
[791] *O'Leary v Attorney General* (n 21), 264, 265.
[792] Ibid, 265.
[793] Ibid, 265.

> The important thing to note about the section is that there is no mention of the burden of proof changing, much less that the presumption of innocence is to be set to one side at any stage.[794]

While this may be so, the fact that the section does not explicitly say that it changes the burden of proof does not mean that the burden is not shifted. It is the substance and effect of the section that is critical. O'Flaherty J continued and gave an example that a jury would be entitled to convict if they were satisfied the prosecution had proved its case beyond a reasonable doubt but they were not bound to convict.[795] However, it is unfortunate that O'Flaherty J did not explain this remark. It is unclear as to when a jury would not be bound to convict as distinct from being entitled to convict in these circumstances as outlined above. It is arguable that a jury would be bound to convict. In the circumstances, the prosecution would have raised a *prima facie* case that the offence was disclosed. If satisfied this reached the level of proof of guilt beyond reasonable doubt, in the absence of exculpatory evidence, a jury would be bound to convict. Nevertheless, O'Flaherty J observed that in this case 'the evidentiary burden would have shifted to the accused'.[796] He noted that the statute in *Hardy v Ireland*[797] is an example of one that shifts the evidential burden to an accused.[798]

In contrast, one year later in 1996 O'Flaherty J in *Convening Authority v Private Doyle*[799] adopted a different interpretation of a similarly worded statutory presumption, 'unless the contrary is proved'[800] in respect of an offence of deserting the defence forces. He relied on the decision of the Court of Criminal Appeal in England in *R v Carr Briant*[801] which found that a similar phrase imposed a legal burden of proof on the accused. He then held that the similar phrase imposed a legal burden on the appellant to prove that he had not absented himself with the intention not to return.[802] This is different to his interpretation of similar wording that he interpreted in *O'Leary*. O'Flaherty J attempted to distinguish his reasoning in *O'Leary*

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[794] Ibid, 265.
[795] Ibid, 265.
[796] Ibid, 265.
[797] *Hardy v Ireland* (n 21). O'Flaherty J referred to the Supreme Court decision on this point.
[798] *O'Leary v Attorney General* (n 21), 265, 266.
[799] *Convening Authority v Doyle* (n 21).
[800] Section 135(2)(b) of the Defence Act 1954.
[801] *R v Carr Briant* (n 787).
[802] *Convening Authority v Doyle* (n 21), 215, 216.

when he remarked, 'that case was not concerned with the shifting of the burden of proof in the strict sense but rather with how evidence should be assessed in the light of the relevant statutory provisions'.[803] Nevertheless, the interpretation of the specific phrasing 'unless the contrary is proved' was given two different meanings which are unhelpful. Nonetheless, in 2017 O'Malley J in the Supreme Court reaffirmed the Supreme Court finding in *O'Leary* 'that proof of possession of the document amounted to evidence only and not proof of membership'[804] and that section 24 of the 1939 Act did 'not displace the presumption of innocence'.[805] This suggests the adoption of an incoherent approach by the courts to protect the presumption of innocence in circumstances where the substance and effect of the provision effectively require an accused to prove their innocence.

3.2.3 Interpretation in Academic Literature

The academic commentary on *O'Leary* is consistent, pointing to the fact that its reasoning is questionable, confusing and is not persuasive. It has been described as a 'watershed'[806] because of the constitutional position of the presumption of innocence. Heffernan argues that there is a 'possible questionable assumption in *O'Leary* that a statutory shifting of a mere evidential burden is invariably consistent'[807] with the presumption of innocence. Ní Raifeartaigh observes that the judgments in *O'Leary* in both the High Court and Supreme Court suggest some confusion between the evidential burden shift and the presumption of fact arising from the provision.[808] She argues that this 'constitutes a somewhat shaky foundation for future jurisprudence in the area'.[809] She states that the fact of possession shall be evidence suggests the section provides for a presumption of fact only and does not shift any burden.[810] However, she notes that the phrase 'until the contrary is proved' 'tends to suggest that a legal burden of proof is transferred to the defendant'[811] but yet the courts found that it shifted an evidential burden to the accused. Indeed, she went further and stated: 'It might have been helpful if the Court had deleted the phrase 'until the contrary is proved' to underline its conclusion that the legal burden

[803] Ibid, 216.
[804] *DPP v Heffernan* (n 3), [53].
[805] Ibid, [53]. See also Heffernan (n 732), 1.49]-[1.50].
[806] Heffernan, L (n 36), 105.
[807] Ibid, 106.
[808] Ní Raifeartaigh, U (n 522), 13.
[809] Ibid, 13.
[810] Ibid, 12.
[811] Ibid, 12, 13.

was not shifted'.[812] An unsatisfactory view is suggested by Fennell where she argues that the reasoning of the Supreme Court in *O'Leary* is 'not persuasive'[813] and that its aim to save the statutory presumption is 'questionable'.[814] She states that it sets the scene that the presumption of innocence and the burden of proof are no longer absolute in that they can shift to an accused giving rise to a 'plethora of such legislative provisions thereafter'.[815] Interestingly, Heffernan argues that *O'Leary* set such a 'high bar on the creation of a legal presumption and encouraged a jurisprudential trend of 'reading-down' reverse burdens as mere evidential presumptions'.[816] It is difficult to disagree with this analysis given that there are presently in excess of 500 reverse onus provisions on the Irish statute book.

3.3 Hardy v Ireland

In the intervening period between the High Court and Supreme Court decisions in *O'Leary,* the Supreme Court also considered a reverse onus provision in *Hardy v Ireland.*[817] This case concerns a statutory presumption in the Explosive Substances Act 1883 (1883 Act). The accused was charged and convicted of two counts of possession of sodium chlorate which was deemed to be an explosive substance[818] under the 1883 Act. He was sentenced to five years penal servitude. The offence was in the following terms:

> Any person who...knowingly has in his possession...any explosive substance, ...as to give rise to a reasonable suspicion that he...does not have it in his possession...for a lawful object, shall, unless he can show that he...had it in his possession...for a lawful object, be guilty of felony.[819]

3.3.1 Application under Article 40.4.2 of the Constitution to High Court

Hardy applied to the High Court before Flood J for an inquiry into his detention under Article 40.4.2 of the Constitution on the ground that section 4(1) of the 1883 Act was inconsistent with Article 38(1) of the Constitution. He argued that the provision 'placed an obligation upon the accused to prove his innocence to the standard of probability, thus allowing for the possibility of conviction despite the existence of a

[812] Ibid, 13.
[813] Fennell, C (n 757), [3.182].
[814] Ibid, [3.182].
[815] Ibid, [3.182].
[816] Heffernan, L (n 36), 105.
[817] *Hardy v Ireland* (n 21).
[818] S.I. No. 191/1972 - Explosives (Ammonium Nitrate and Sodium Chlorate) Order, 1972.
[819] Section 4(1) of the *Explosive Substances Act 1883* (n 20).

reasonable doubt'.[820] Flood J refused the reliefs sought. He observed that the State always bears the legal burden of proof in Irish law.[821] He remarked that the maximum obligation arising in Irish law from the transfer of an evidential burden to an accused is an obligation 'to raise a doubt – a doubt of substance – in relation to the prosecution case'.[822] He stated that the obligation does not 'contemplate...an accused establishing or taking on a burden of proof to the standard of a matter of probability'.[823] He concluded that the effect of section 4(1) of the 1883 Act, at most, was to transfer an 'evidential burden of proof and not a persuasive burden of proof'[824] and for that reason it was not unconstitutional. Confusingly though, the head note states that Flood J held that the provision shifted the 'persuasive burden of proof onto the accused'.[825] Fennell also reflects this view in her book.[826] However, as discussed, Flood J found that the provision shifted an evidential burden onto the accused.

3.3.2 Appeal to Supreme Court

The accused appealed to the Supreme Court. As will be discussed further below, scholars have disagreed in their interpretation of the meaning of the Supreme Court decision in terms of what was decided. The Supreme Court held that section 4(1) of the 1883 Act was not inconsistent with the Constitution.[827] The majority endorsed the reasoning of Costello J in the High Court in *O'Leary.* The five judges agreed that a reverse burden is permissible but disagreed on the type of burden in issue. Different reasons were given by the majority and the minority in this case. The majority judgment was delivered by Hederman J. Agreeing with his judgment, O'Flaherty J stated 'I agree'[828] and Blaney J stated 'I agree with the judgment delivered by Hederman J'.[829] Egan and Murphy JJ, in the minority, delivered two separate judgments.

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[820] *Hardy v Ireland* (n 21), 551.
[821] Ibid, 559.
[822] Ibid, 559.
[823] Ibid, 559.
[824] Ibid; *O'Leary v Attorney General* (n 14), 109, per Costello J.
[825] *Hardy v Ireland* (n 21), 552.
[826] Fennell, C (n 757), [3.178].
[827] *Hardy v Ireland* (n 21), 552, per Hederman, O'Flaherty, Egan, Blaney and Murphy JJ.
[828] Ibid, 565.
[829] Ibid, 567.

The extent of the legal burden of proof on the prosecution was explained in the majority judgment of Hederman J that a guilty verdict could not be reached unless the basic ingredients of the offence were proved by the prosecution beyond reasonable doubt.[830] He stated that the prosecution had to prove:

> (1) That the accused knowingly had in his possession a substance which it proves is an explosive substance;
> (2) That he had it under such circumstances as to give rise to a reasonable suspicion that he did not have it in his possession for a lawful object and that, in turn, means that there is an onus on the prosecution to prove that the accused could not show that he had it in his possession for a lawful object.[831]

He continued:

> Once those ingredients are in place, it is still open to the accused to demonstrate in any one of a number of ways, such as by cross-examination, submissions or by giving evidence, that a *prima facie* situation pointing to his guilt should not be allowed to prevail.[832]

In terms of this analysis he stated:

> [T]his complies with our well-established criminal law jurisprudence in regard to having trials in due course of law. That the constitutional requirement applies whether the offence is made an offence under a pre- or post-constitutional enactment. It protects the presumption of innocence; it requires that the prosecution should prove its case beyond all reasonable doubt; but it does not prohibit that, in the course of the case, once certain facts are established, inferences may not be drawn from those facts...[833]

He concluded by stating that:

> What is kept in place...is the essential requirement that, at the end of the trial and before a verdict can be entered the prosecution must show that it has proved its case beyond all reasonable doubt.[834]

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[830] Ibid, 564, 565.
[831] Ibid, 564.
[832] Ibid, 564.
[833] Ibid, 564.
[834] Ibid, 565.

The above extracts from the majority judgment suggest that the section did not impose a legal burden on an accused to be discharged on the balance of probabilities. Instead, the section fixed the accused with an evidential burden to demonstrate the lawful purpose for possessing the explosives. This reflects the views of Flood J in the High Court as discussed earlier.[835] Notably, Hederman J did not expressly set out the standard of proof borne by the accused in this case. This is so notwithstanding the compulsory nature of the wording of the section as indicated by the use of the word 'shall'.

This thesis takes the view that the minority of Egan and Murphy JJ found the section placed a legal burden on an accused but yet maintained it was consistent with the Constitution without any explanation as to why this is the case. The minority judgments create confusion in relation to the reversal of a legal burden of proof on an accused by the section and the constitutionality of such reversal even though their findings are more in keeping with the compulsory nature of the wording of the section and its use of the word 'shall'. Egan and Murphy JJ found that the section reversed the legal burden on the accused to be discharged on the balance of probabilities however, they found that it did not raise constitutional concerns.[836] Egan J stated:

> If...all the above ingredients are proved beyond reasonable doubt the accused must be convicted unless "he can show that he made it or had it in his possession our under his control for a lawful object"...these words place an onus on the accused but they are in a saving or excusatory context... We are dealing with a statute and the words used are clear. If the saving clause is to be relied upon, I am satisfied that the onus shifts to the accused. The words are "unless he can show..." cannot be construed as meaning that the raising of a doubt would be a sufficient discharge...It is sufficient if there is proof on the balance of probabilities.[837]

It therefore appears that Egan J equated the word 'show' with the word 'prove'. He continued:

> There is nothing in the Constitution to prohibit absolutely the shifting of an onus in a criminal prosecution or to suggest that such would inevitably offend

[835] Ibid, 559. See also 'Travellers and the Law' (2002) 16(1) Annual Review of Irish Law 538, 550.
[836] *Hardy v Ireland* (n 21), 566, 568.
[837] Ibid, 566.

> the requirements of due process. For these reasons I am satisfied that the subsection is not inconsistent with the Constitution.[838]

Murphy J remarked that the standard of proof beyond reasonable doubt on the prosecution and acquittal on the basis of an innocent explanation are principles that flow from the presumption of innocence.[839] He noted that the 'burden which the accused must discharge...is to satisfy the jury of...the existence of a lawful object on the balance of probabilities'.[840] He continued:

> I do not see that there is any inconsistency with a trial in due course of law as provided for by Article 38, s. 1 of the Constitution and...s. 4...which affords to an accused a particular defence of which he can avail if, but only if, he proves the material facts on the balance of probabilities.[841]

He relied on the Northern Ireland Court of Criminal Appeal decision in *Regina v Fegan*[842] and the House of Lords decision in *Reg v Berry*[843] which considered section 4(1) of the 1883 Act as imposing a legal burden on the accused. This is surprising given that there is no written Constitution in the United Kingdom and at the time it was not subject to the presumption of innocence in Article 6(2) of the European Convention on Human Rights.

The reasoning of Egan and Murphy JJ is scant on detail. They offer no justification as to the constitutionality of the statutory provision, interpreted as a reverse legal burden, other than stating that the presumption of innocence is not absolute and that the reverse onus provision is not 'inconsistent' with the Constitution. This suggests that a reverse legal burden of proof is not unconstitutional per se.[844] It is unsatisfactory that there is no detailed analysis as to how this conclusion was determined and why it would not give rise to constitutional concerns given the importance of the presumption of innocence as a fundamental constitutional right, as discussed in Chapters 1 and 2. The minority judgments do not provide clear

[838] Ibid, 566.
[839] Ibid, 568.
[840] Ibid, 568.
[841] Ibid, 568.
[842] [1972] N.I. 80.
[843] [1985] 1 A.C.
[844] For further reading see McDonnell M, 'Criminal Justice (Psychoactive Substances) Act 2010' (2011) 21(3) Irish Criminal Law Journal 66. Beirne A, 'Evidence' (2014) 1(1) Annual Review of Irish Law 352.

guidance as to when it is constitutionally permissible to impose a reverse legal burden on an accused.

It is notable that *Hardy* was not considered in the most recent cases concerning reverse onus provisions.[845] The minority judgments in *Hardy* were merely noted by the Court of Criminal Appeal in *DPP v Forsey.*[846] However, O'Malley J giving the judgment of the Supreme Court in *Forsey* clarified what was decided in *Hardy.* She stated:

> In the majority judgment, Hederman J. held that it was necessary for the prosecution to prove each ingredient of the offence beyond reasonable doubt, and a verdict of guilty could not otherwise be reached. The presumption of innocence did not prevent the drawing of inferences from proven facts.[847]

This statement that the majority judgment was delivered by Hederman J essentially clarified that *Hardy* did not reverse the legal burden of proof as the burden remained on the prosecution to prove the case beyond reasonable doubt. It implies that an evidential burden only was imposed on an accused as the legal burden of proof remained on the prosecution. It is interesting that O'Malley J did not comment on the minority dissenting judgments in *Hardy. Hardy* strongly suggests the existence of diverse views amongst the judiciary. The minority judgments reflect a concerning view regarding the protection of the presumption of innocence, holding that a reverse legal burden required an accused to prove their innocence did not offend the presumption of innocence even though it created a presumption of guilt.

3.3.3 Disputed Interpretation in Academic Literature

The interpretation of *Hardy* is disputed in academic literature with some commentators stating that it imposes a legal burden on the accused and others stating that it imposes an evidential burden on the accused.

Hamilton argues: 'While the majority of the Supreme Court recognised that the legal burden was transferred to the accused under the section, they did not hold the

[845] *DPP v Smyth* (n 21); *DPP v Heffernan* (n 3); *DPP v Tuma* (n 21).
[846] *DPP v Forsey* (n 21).
[847] *DPP v Forsey* (n 25), [110].

section to be unconstitutional'.[848] She continues that *Hardy* offers little more than authority that reverse legal burdens are constitutionally permissible.[849] Indeed, Hogan et al[850] state that 'the Supreme Court accepted that the effect of this provision could be to shift the persuasive burden to the accused'.[851] Similarly, Ní Raifeartaigh observes: 'A majority of the Court held that the provision shifted the *legal burden* to the accused to prove the defence on the balance of probabilities'.[852] However, she relies on the minority judgments of Egan and Murphy JJ. She further noted that Hederman J 'differed from the other two judges in that he felt that the provision transferred an evidential burden to the accused'.[853] The reference to the other two judges appears to be a reference to Egan and Murphy JJ however, they have not been referenced in this passage. Ní Raifeartaigh argues that the impression given by the majority in *Hardy* is that 'statute may restrict the presumption at will'.[854] This view is proffered on the understanding by Ní Raifeartaigh that the majority held that the provision shifted the legal burden to the accused. It is notable that the opinions of O'Flaherty and Blaney JJ, who agreed with Hederman J, are not mentioned by Hamilton, Hogan, or Ní Raifeartaigh in the context of their comments.

On the other side of the academic debate, Hamilton observes that 'Hederman J found, despite the employment of the words 'unless he can *show*', that the section placed an evidential burden on the accused'.[855] McGrath notes that Flood J's decision in the High Court in *Hardy* that the statutory provision embodied an evidential burden on the accused and that the legal burden of proof remained on the prosecution was upheld by the majority in the Supreme Court.[856] Heffernan[857] and Doyle[858] adopt a similar interpretation of *Hardy.* O'Sullivan et al also take a similar view[859] but they argue that the interpretation by the court in this case as with the

[848] Hamilton, C (n 1), 49.
[849] Ibid, 50.
[850] Hogan, GW, Whyte, GF, Kenny, D, Walsh, R (n 286).
[851] Ibid, 1272, [6.5.76].
[852] Ní Raifeartaigh, U (n 522), 13.
[853] Ibid, 13.
[854] Ibid, 14.
[855] Hamilton, C (n 1), 49.
[856] McGrath, D, and Egan McGrath, E (n 720), [2-31]-[2-32]. See also McGrath, D (n 718), 24, [2-21]-[2-22].
[857] Heffernan (n 732), [1.50].
[858] Doyle, O, *Constitutional Law: Text, Cases and Materials* (Clarus Press Ltd 2008), 47, [2-68].
[859] O'Sullivan, C, Kilcommins, S, Campbell, L (n 92), 349.

interpretation in *O'Leary* is one of 'extreme interpretive construction'.[860] They conclude that the 'reasoning in *O'Leary* and *Hardy* is weak having regard to the integrity'[861] of the presumption of innocence.

McGrath remarks however that the minority of Egan and Murphy JJ were of the view that the provision 'placed a legal burden upon the accused'.[862] O'Sullivan et al take a similar view and observe that this interpretation 'is much more credible'[863] and that it 'appears more accurate on a literal reading of the provision'.[864] However, they remark that the minority found no constitutional issue arising and disappointingly it gave no reasons as to why the provision shifted a legal burden other than noting the presumption of innocence is not absolute.[865] McGrath states that a reasoning as to why the section was not unconstitutional was required.[866] He argues that it is difficult to accept the majority judgment as the word 'show' in section 4(1) is synonym for 'prove' or 'establish'.[867] As a matter of statutory interpretation, that would point in the direction of a legal burden which is echoed by Ní Raifeartaigh[868] and Doyle.[869] Ní Raifeartaigh observes that the phrase 'unless he can show' 'generally suggests a shift in the legal burden of proof'.[870] Similarly, Doyle submits that this clause 'merely provided a statutory defence in relation to which it was permissible to place the legal burden of proof on the accused'.[871] To add a further layer of confusion in relation *Hardy,* Charleton et al observe: 'The Supreme Court held that there was nothing unconstitutional about placing an evidential burden on the accused.'[872] However, relying on Murphy J they continue by stating: 'Such a burden could be discharged by

[860] Ibid, 349.
[861] Ibid, 349. See also McGrath, D (n 718), 25, [2-24].
[862] McGrath, D, and Egan McGrath, E (n 720), [2-32].
[863] O'Sullivan, C, Kilcommins, S, Campbell, L (n 92), 349.
[864] Ibid, 349.
[865] Ibid, 349.
[866] McGrath, D (n 718), 25, [2-25].
[867] Ibid, 25, [2-24].See also McGrath, D, and Egan McGrath, E (n 720), [2-42]. See also Healy J, *Irish Laws of Evidence* (Thomson Round Hall 2004), 115, [4-37].
[868] Ní Raifeartaigh, U (n 522), 13, 14.
[869] Doyle, O (n 858), 47, [2-68].
[870] Ní Raifeartaigh, U (n 522), 13, 14.
[871] Doyle, O (n 858), 47, [2-68].
[872] S Charleton, P McDermott, PA, Herlihy C, Byrne, *Charleton & McDermott's Criminal Law and Evidence* (2nd edn, Bloomsbury Professional 2020), [2.94].

him on the balance of probabilities'.[873] It will be noted from the above that Murphy J delivered a minority judgment.

McGrath argues that the judgments of *O'Leary* and *Hardy* leave it is difficult to identify the extent to which the presumption of innocence may be restricted and the principles to be applied when construing a statutory reverse onus provision.[874] In particular, he observes that it is difficult to extract guiding principles from the decision in *Hardy* because the judgments are brief and the submissions of the plaintiff were dismissed in a somewhat 'cursory fashion'.[875] Similarly, Hamilton remarks that the difficulty with the judgments of *O'Leary* and *Hardy* is the 'complete lack of guidance in an area impacting directly on the parameters of a cornerstone principle of the Criminal law'.[876] She argues that the constitutional test for statutory incursions is unclear.[877] Hogan et al state that *O'Leary* and *Hardy* do not do much more than affirm that Article 38.1 requires that the prosecution bears the legal burden of proof at all times and that statutory reverse burdens of proof are not unconstitutional.[878] It may therefore be concluded that on the one hand Hamilton, Hogan et al, and Ní Raifeartaigh interpret the decision as imposing a legal burden of proof on the accused. On the other hand, McGrath, Heffernan, Doyle and O'Sullivan et al interpret the decision as imposing an evidential burden on the accused. Indeed, Hamilton also remarks that Hederman J found an evidential burden but she did not consider this to be the majority judgment which it was. In the words of Ní Raifeartaigh, 'it is disappointing that better foundations have not been laid in these seminal cases'.[879]

Stage 2 –Confusing Judicial Guidance

This chapter argues that in stage 2 confusion arose from *DPP v Smyth*[880] due to the different meanings accorded to 'evidential burden' which was found to be a legal burden of proof, that of proving a reasonable doubt. This arose despite an attempt by *Smyth* to develop the discussion from the limited reasoning in *O'Leary* and *Hardy*

[873] Ibid, [2.94].
[874] McGrath, D (n 718), 25, [2-26].
[875] Ibid, 25, [2-24].
[876] Hamilton, C (n 1), 49.
[877] Ibid, 49-50.
[878] Hogan, GW, Whyte, GF, Kenny, D, Walsh, R (n 286), 1272, [6.5.77].
[879] Ní Raifeartaigh, U (n 522), 14.
[880] *DPP v Smyth* (n 21).

and accord some value to the presumption of innocence by clarifying that the presumption of innocence does not tolerate a reverse burden that requires an accused to discharge it on the balance of probabilities.

3.4 DPP v Smyth

In 2010 a reverse onus provision received close attention in *DPP v Smyth.*[881] In this case, the applicants were convicted of possession of cannabis for the purpose of sale or supply under section 15 of the Misuse of Drugs Act 1977 (1977 Act) and simple possession.

3.4.1 Appeal to Court of Criminal Appeal

The applicants appealed to the Court of Criminal Appeal on the ground that the trial judge misdirected the jury in respect of section 29(2) of the 1977 Act which provides:

> In any such proceedings in which it is proved that the defendant had in his possession a controlled drug...it shall be a defence to prove that:-
>
> (a) he did not know and had no reasonable grounds for suspecting –
>
> (i) that what he had in his possession was a controlled drug...or
> (ii) that he was in possession of a controlled drug.

They argued that the trial judge erred in directing the jury that the reverse statutory burden required the accused to prove the defence beyond reasonable doubt.[882] Charleton J, giving the judgment in the case, found that the trial judge's charge was erroneous[883] and quashed the convictions of both applicants. He explained that the burden of proof at a criminal trial in general terms:

> is borne by the prosecution in respect of every issue; except on those issues on which the burden of proof is cast on the accused by statute. This burden is not to be confused with the burden of adducing evidence. Criminal trials would be chaotic were the accused entitled to run any potential defence which might be hypothetically open on the facts of the prosecution case.[884]

He distinguished the burden of adducing evidence from a legal burden of proof stating:

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[881] Ibid.
[882] Ibid, [11]-[13].
[883] Ibid, [12], [13].
[884] Ibid, [15].

> A legal burden of proof is different. This places upon the party bearing that legal burden the obligation to prove the issue that he is required to prove. The standard of proof may vary...policy reasons have dictated that the defences of insanity and diminished responsibility should be clearly proven by the accused. For these defences, the burden of proof is for the accused to show that he has discharged the burden of proof by showing, as a probability, that he acted within the terms of one or other of those defences.[885]

Charleton J noted developments in the European Court of Human Rights and the United Kingdom[886] where concerns were emerging that the presumption of innocence in Article 6(2) of the European Convention on Human Rights may be breached where reasonable doubts exist in circumstances where an accused is unable to satisfy the burden of proof on the balance of probabilities.[887] Nonetheless, he explained that the burden of proof in section 29(2) of the 1977 Act is to be considered in the context of Article 38.1 of the Constitution.[888] According to Charleton J, the presumption of innocence is important as it 'operates to ensure objectivity within the system'.[889] He stated that the presumption of innocence requires that an accused should not be convicted unless it is proved beyond reasonable doubt that he committed the offence.[890] He observed that this is a 'fundamental principle of our criminal justice system'.[891] He stated that the Oireachtas may cast an evidential burden in respect of a particular element on an accused, and of itself, no constitutional issue arises in relation to the presumption of innocence.[892] However, he explained that this is not the case in respect of reverse legal burdens in all cases. He continued:

> Reasons of policy may perhaps require that any reversed element of proof cast on the accused should be discharged as a probability. That should either be stated in the legislation or be a matter of necessary inference therefrom. The construction of a criminal statute requires the Court to presume that the core elements of an offence must be proven beyond reasonable doubt;

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[885] Ibid, [17].
[886] Ibid, [18]; *R v Lambert* [2002] 2 AC 545; *R v Barr* [2005] EWCA Crim 1764.
[887] For further reading see *Sunday Times v United Kingdom* (1979) 2 EHRR 245, Opinion of Judge Evrigenis; *Sheffield and Horsham v United Kingdom* (1999) 27 EHRR 163, [52]; *Sporrong and Lonnroth v Sweden* (1982) 5 EHRR 35, [69]; *Janosevic v Sweden* (n 606), [101]; *Salabiaku v France* (n 596), [28]; *Van Mechelen v Netherlands* (1997) 25 EHRR 647.
[888] *DPP v Smyth* (n 21), [19].
[889] Ibid, [20].
[890] Ibid, [20].
[891] Ibid, [20].
[892] Ibid, [20].

> otherwise the accused must be acquitted. A special defence, beyond the core elements of the offence, may carry a different burden; insanity and diminished responsibility are examples of such a defence which casts a probability burden on the accused. Where, however, in relation to an element of the offence itself, as opposed to a defence, a burden is cast upon the accused, the necessary inference that the accused must discharge that burden on the balance of probability is not easily made. The Court notes that bearing the burden of proving a defence as a probability could have the effect that in respect of an element of the offence an accused person might raise a doubt as to his guilt, but not establish it as a probability. This might lead to a situation where the charge was not proven as to each element of the offence beyond reasonable doubt, but nonetheless the accused could be convicted. That would not be right.[893]

This is a significant statement clarifying the impact of a reverse legal burden on the presumption of innocence. Charleton J clarified that it would not be right for an accused to be convicted in circumstances where he was unable to discharge a reverse burden of proof on the balance of probabilities on a core element of an offence on the basis that he could be convicted notwithstanding the existence of a reasonable doubt as to his or her guilt.[894] He distinguished the position in relation to elements from defences such as insanity and diminished responsibility and offences of a regulatory nature.[895] He remarked that the 'mental element of possession of a controlled drug is removed from the prosecution and the accused is required to prove it does not exist'.[896] He said that 'proof of a guilty mind is integral to proof of a true criminal offence'.[897] He seems to state two conflicting things about the burden cast on the accused. As a result of the mental element, he considered on one hand that section 29(2) placed 'an evidential burden of proof'[898] on the accused. As

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[893] Ibid, [20].

[894] Ibid, [20]. This approach essentially overrules the decision in *People (DPP) v Byrne* (n 21), in which Keane J compared section 29(2) of the Misuse of Drugs Act 1977 with the equivalent English provision in section 28(3) of the Misuse of Drugs Act 1971 and found that the standard of proof in respect of this reverse burden was on the balance of probabilities.

[895] *DPP v Smyth* (n 21), [20]. For further discussion in respect of regulatory offences see Laurence, Dr D, 'Ireland's Waste Legislation: Is It Time for Some Reform?' (2010) 17(2), Irish Planning and Environmental Law 48, 51; Hamer D, 'The Presumption of Innocence and Reverse Burdens: A Balancing Act' (2007) 66 Cambridge Law Journal 142, 166. In *Brown v Stott* [2003] 1 AC 681, 705 the House of Lords noted that motorists know they are subject 'to a regulatory regime'. It will be easier to justify the application of a reverse burden of proof in a regulatory offence as they deal with practical public interest concerns, such as road safety, workplace safety, environmental concerns etc., as distinct from moral concerns. It is assumed that engagement with a regulatory system that one is waiving some procedural rights as a *quid pro quo* for the benefit/privilege received There is little stigma attached to such offences and the penalty is generally monitory in nature.

[896] *DPP v Smyth* (n 21), [13].

[897] Ibid, [13].

[898] Ibid, [14].

discussed earlier, the effect of an evidential burden is to require an accused to adduce sufficient evidence to raise a reasonable doubt as to a fact in issue.[899] However, on the other hand he described the evidential burden in section 29(2) as follows:

> This is not a burden merely of adducing evidence. It is legal burden discharged on the lowest standard of proof, namely that of proving a reasonable doubt. This has consequences for the trial of charges based on possession of a controlled drug. A burden is...cast on the accused to make out a reasonable doubt in accordance with s. 29...Because this is a legal burden of proof, the decisions as to what evidence on that issue will be sufficient so as to raise a reasonable doubt are for the accused.[900]

As noted earlier by Charleton J, the section does not require proof 'beyond reasonable doubt'.[901] Nevertheless, this passage is problematic because he clearly stated that it is an evidential burden but then seemed to contradict this later by stating it is a legal burden. While he is not sufficiently clear in his use of language, he is clear when he says an evidential burden is cast on the accused. Indeed, it has been subsequently interpreted by the Court of Criminal Appeal as casting 'an evidential burden on the accused and not a legal burden'.[902] Charleton J is also clear as to how that burden may be discharged in a number of ways[903] and there is nothing radical in what he says there. However, the problem arises when he states it is a legal burden of proof which has the effect of creating some confusion. One might wonder if he is introducing some kind of lower legal burden than the legal burden we are used to.

Charleton J's objection to a reverse legal burden of proof on the balance of probabilities on an element of an offence was affirmed by O'Malley J giving the leading judgment in the Supreme Court in *DPP v Heffernan.*[904] In that case O'Malley J distinguished the legislative provision which created a legal burden in the defence of diminished responsibility.[905] The provision survived constitutional challenge on the

[899] Ní Raifeartaigh, U (n 522), 2, 3. See also Heffernan, L, with Ní Raifeartaigh, U (n 720), 9, [1.29].
[900] *DPP v Smyth* (n 21), [21].
[901] Ibid, [13].
[902] *DPP v P.J. Carey (Contractors) Limited* (n 21), 14 per Hardiman J.
[903] *DPP v Smyth* (n 21), [21].
[904] *DPP v Heffernan* (n 3).
[905] Section 6 of the Criminal Law (Insanity) Act 2006.

basis that it did not require an accused to prove an essential aspect of the offence or to negate any element of the prosecution case.[906] She continued:

> It creates a new mitigatory defence…It would…be incorrect to suggest that the imposition of a burden of proof could require an accused to prove either the actus reus or the mens rea, since these are matters that must be proven by the prosecution beyond reasonable doubt before the question of diminished responsibility can arise.[907]

According to O'Malley J the same policy factors justifying the legal burden of proof on the balance of probabilities apply in the case of diminished responsibility as in the case of insanity.[908] This suggests that the courts have always accepted a reverse legal burden in insanity as an exception. Diminished responsibility is arguably a first cousin of insanity so the same principle would apply. Indeed, Edwards J in the Court of Appeal in *Heffernan* said 'it has merely modified the common law defence of insanity'.[909] Therefore on the facts, it is not a radical decision notwithstanding that it permits a legal burden. It relates to a defence that is intimately related to the long established defence of insanity which is an exception to general rules on the burden of proof.

O'Malley J provided some guidance as to what to consider when determining whether a reverse burden impermissibly infringes the presumption of innocence. She stated:

> [C]onsider the elements of the offence and determine whether or not the defence is being required to rebut an element that would otherwise be for the prosecution to prove beyond reasonable doubt.[910]

Notably, she said that 'any burden cast upon an accused that could result in conviction by a jury, despite a reasonable doubt as to an essential part of the offence, would be an unlawful violation of the presumption'.[911] Charleton J gave a concurring judgment in which he set out some general principles. He makes obiter

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[906] *DPP v Heffernan* (n 3), [64].
[907] Ibid, [64].
[908] Ibid, [66].
[909] *DPP v Heffernan* (n 500), [69].
[910] *DPP v Heffernan* (n 3), [85].
[911] Ibid, [64].

comments as to when burdens may be placed on an accused. He remarked that the logic of the decision in *Smyth* was that the reverse burden was 'merely of persuading the jury that there was a reasonable doubt'.[912] Notably, he discussed various instances where it is constitutionally permissible for an accused to demonstrate something. He discusses an example of a case where a gang makes off with precious material engaging an offence of removing the material without a licence. He continues:

> It would be unfair for any ensuing prosecution to fail simply because the prosecution could not prove that perhaps one of the gang's number had not procured a licence.[913]

It is clearly the case that he considers the proportionality principle under the heading of fairness, as an important concept when examining the intrusive nature of a reverse burden on the presumption of innocence. In this context, he places significant weight on the public interest in the prosecution of crime as against the intrusive nature of the provision on the presumption of innocence. He set out a test in the following terms:

> It can tentatively be argued that legislation may legitimately distribute a burden onto the accused where it is necessitated by the nature of the offence and where it does not fundamentally and unnecessarily undermine the duty of the prosecution to demonstrate culpability.[914]

According to Charleton J, the burden of proof on the prosecution may in general terms be reversed where the nature of the offence necessitates the reversal, provided the interference with the legal burden of proof on the prosecution is not fundamentally undermined. He continues by stating:

> No unified theory, however, prohibiting burdens of proof as to the elements of offences on constitutional grounds or of enabling a persuasive burden for defences is either predictably grossly unfair as to the distribution of proof or is necessarily productive of an unavoidably unjust result.[915]

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[912] Ibid, [14] per Charleton J.
[913] Ibid, [18] per Charleton J.
[914] Ibid, [18] per Charleton J.
[915] Ibid, [18] per Charleton J.

He therefore suggests that there is nothing grossly unfair in requiring an accused to contribute to his or her conviction provided the reverse onus provision is constitutional. Nonetheless, it does require the defence to be more proactive in a system where we should expect an accused should never have to actively participate in the case against them.

In 2015, Edwards J giving the judgment in the Court of Appeal in *DPP v Tuma,*[916] endorsed Charleton J's judgment in *Smyth* in relation to section 29(2) of the 1977 Act. However, he acknowledged the central issue posed by labelling provisions as casting legal or evidential burdens which has caused difficulty for the courts since the case of *O'Leary.* He stated:

> [T]hat the debate as to whether the burden...is legal or evidential in nature is a somewhat arid one; though by no means unimportant to appreciate for anyone seeking a deep understanding of the true nature of the provision at issue.[917]

This is an equally important concept for judges to appreciate in that a failure to state correctly what the burden actually is could likely be construed as a misdirection and undermine the presumption of innocence. The failure of the courts to be really clear as to the guiding principles in this area has generated a huge amount of confusion.

3.4.2 Interpretation in Academic Literature

The use of the terms 'legal' and 'evidential' by Charleton J has caused commentators to form different views as to what was intended by *Smyth.* Charleton et al observe that, 'where the legislature has intervened and reversed a burden onto the accused, that is to be discharged by the accused having the persuasive burden of proving a reasonable doubt'.[918] Nevertheless, they explained that the 'modern standard'[919] where an accused has an evidential burden, he or she has 'to raise a reasonable doubt'[920] and this does not require him or her to prove their innocence.[921]

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916 *DPP v Tuma* (n 21), [54], [59], [61].
917 Ibid, [63].
918 Charleton, P McDermott, PA, Herlihy C, Byrne (n 872), [2-07].
919 Ibid, [2-100].
920 Ibid, [2-100].
921 Ibid, [2-100].

Heffernan observes that the 'Court of Criminal Appeal may have muddied the terminological waters in *Smyth* by using the labels 'legal' and 'evidential' seemingly interchangeably'.[922] She states that *Smyth* fashions the evidential burden as an 'intermediate or Hybrid'[923] burden which 'arises where a statutory provision imposes on an accused the burden of raising a particular defence to the standard of a reasonable doubt'.[924] This is an interesting point. However, it is not immediately clear as to how this intermediate burden differs from an evidential burden.

McGrath remarks that *Smyth* is confusing having regard to the distinctions drawn between 'the burden of proof', 'the burden of adducing evidence', 'a legal burden of proof' and 'evidential burden of proof'.[925] However, he observes that the effect of *Smyth* is that section 29(2) of the 1977 Act reverses an 'evidential burden only on an accused'.[926] He relies on Hardiman J's interpretation of the provision in *DPP v P.J. Carey (Contracting) Limited*[927] where he said the provision casts an evidential burden on an accused.[928]

Stage 3 – General Judicial Guidance

This section will strongly argue that in stage 3 the Supreme Court took stock of what the presumption of innocence represents and set out general guidance for considering reverse onus provisions in light of the presumption of innocence. This was triggered when the presumption of innocence was turned on its head by the Court of Appeal case in *DPP v Forsey*[929] arising from confusion and lack of coherent general guidance as to the protective nature of the presumption of innocence. Nonetheless, there is a fundamental weakness in the guidance, in addition to previous cases discussed in stages 1 and 2 above, which merely focus on essential elements of an offence as distinct from every element. This falls short of providing effective protection to the presumption of innocence. It allows for the continued erosion of the presumption of innocence by reversing the legal burden in respect of

[922] Heffernan, L (n 36), 14.
[923] Heffernan (n 732), [1-59].
[924] Ibid, [1-59].
[925] McGrath, D, and Egan McGrath, E (n 720), [2-38].
[926] Ibid, [2-38].
[927] *DPP v P.J. Carey (Contractors) Limited* (n 21).
[928] Ibid, 14.
[929] *DPP v Forsey* (n 21).

elements that are not 'essential elements' of an offence thereby requiring an accused to prove their innocence.

3.5 DPP v Forsey

This case related to a statutory presumption in the Prevention of Corruption Act 2001. Fred Forsey was the holder of public office.[930] He was charged and convicted of offences of receiving a number of corrupt payments.[931] The principle issue in this case concerned the statutory presumption of corruption that was triggered in certain circumstances when a payment was proved. Section 4 of the 2001 Act provided for a presumption of corruption when a holder of public office received a gift, consideration or advantage as an inducement or reward from someone who had an interest in the discharge of the functions of the public official 'unless the contrary is proved'.[932]

3.5.1 Appeal to Court of Appeal

Forsey appealed his conviction to the Court of Appeal on two grounds. In particular, he argued that the trial judge misdirected the jury as to the burden of proof under section 4 of the 2001 Act. He submitted that a reverse legal burden of proof was neither expressly stated in nor necessarily implied from section 4 of the 2001 Act.[933] He argued that the phrase 'until the contrary is proved' did not impose a standard of proof on the balance of probabilities on him.[934] He submitted that an evidential burden at the lower standard of reasonable doubt ought to apply in respect of the statutory presumption. The judgment of the Court of Appeal was given by Ryan J.

3.5.2 Reasoning

The tone of the reasoning from the outset very much weighed in favour of the provision imposing a reverse legal burden undermining the presumption of innocence. Ryan J nonetheless acknowledged the difficulty with a reverse legal burden that an accused could be convicted notwithstanding the existence of a

[930] Section 1(5)(b) of Prevention of Corruption Act 1906 as amended by the Prevention of Corruption (Amendment) Act 2001. See also section 7 of the Public Bodies Corrupt Practices Act 1889.
[931] Section 1(1) and (4) of the *Prevention of Corruption Act 1906* (n 930) as inserted by section 2 of the Prevention of Corruption (Amendment) Act 2001. Note that this legislation has been repealed and replaced by the Criminal Justice (Corruption Offences) Act 2018 with effect from the 30th July 2018; Criminal Justice (Corruption Offences) Act 2018 (Commencement) Order 2018 (S.I. No. 298 of 2018).
[932] Section 4(1) of the *Prevention of Corruption (Amendment) Act 2001* (n 20).
[933] *DPP v Forsey* (n 21), [22], [25]; *Prevention of Corruption (Amendment) Act 2001* (n 20).
[934] *DPP v Forsey* (n 21), [26].

reasonable doubt as to his guilt.[935] He also observed that such burden 'disturbs the '*Woolmington* principle or the golden thread'.[936] However, it is notable from the reasoning in the judgment that Ryan J did not see the provision as imposing an evidential burden. He remarked that the presumption of innocence in Article 38.1 of the Constitution is not absolute and may be interfered with by imposing an obligation on the accused.[937] He referred to key extracts from *O'Leary*[938] and the minority judgments in *Hardy*[939] regarding the reverse legal burden. Notably, he did not refer to the majority judgment of Hederman J in *Hardy* regarding an evidential burden. He also observed that in *Salabiaku v France*[940] the European Court of Human Rights held that the presumption of innocence in Article 6(2) of the European Convention on Human Rights is not absolute.[941] He noted the fact that the accused was in a position to rebut the statutory presumption by being in a position to give evidence,[942] though he said it was not necessary for the accused himself to give evidence.[943] He focused on the international obligations and the purpose of the legislation to protect against the serious crimes of corruption to justify a finding that it imposed a reverse legal burden.

3.5.2.1 International obligations

Ryan J observed that the 2001 Act was enacted to give effect to a series of conventions against corruption.[944] However, he acknowledged that such obligations did not require a presumption of the nature of section 4 of the 2001 Act.[945] This suggests that a reading of the provision as imposing a reverse legal burden went beyond the requirements of the international obligations. Nevertheless, he remarked that Article 28 of the United Nations Convention on Corruption 2005 sought to reduce or eliminate the corrosive and destructive effect of corruption on communities. He continued by stating that Article 28 'seems to authorise something

[935] Ibid, [71].
[936] Ibid, [80].
[937] Ibid, [73].
[938] *O'Leary v Attorney General* (n 14).
[939] *Hardy v Ireland* (n 21), (Egan and Murphy JJ).
[940] *Salabiaku v France* (n 596), 388.
[941] Ibid, [28]; *DPP v Forsey* (n 21), [76].
[942] *DPP v Forsey* (n 21), [79].
[943] Ibid, [85].
[944] Ibid, [86].
[945] Ibid, [86], [87], [88].

of the kind of the provision that is in dispute'.[946] This appears to contradict what he previously said about the international obligations as above. Notably, he did not see an evidential burden as within the intention of Article 28 and instead observed that it 'is intended to have actual significance' in relation to proving corrupt intention in circumstances of corruption.[947]

3.5.2.2 Intention of Legislature

Considering the constitutionality of the statutory presumption operating against the presumption of innocence, Ryan J analysed the intention of the legislature.[948] He stated that a reverse legal burden could only be justified in 'circumstances of special or particular importance and need and where it is exceptionally appropriate to the crime and where reasonable'.[949] He also said it must be clearly provided for in legislation.[950] His attention was drawn to two English cases which examined the equivalent statutory presumption in English law. Specifically, he focused on a key extract from the 1983 English Court of Appeal judgment in *R v Braithwaite.*[951] He observed that the equivalent provision was introduced for the reason that it would be extremely difficult if not impossible for the prosecution to prove receipt of corrupt payments in the absence of the statutory presumption.[952] Secondly, he referred to the 2010 English Court of Appeal case *R v Webster.*[953] He observed from that case that the plain intention of the statutory presumption was to impose a legal burden to disprove corrupt intent on the balance of probabilities.[954] However, the English Court of Appeal in *Webster* held that the provision should be 'read down' in accordance with Article 6(2) of the European Convention on Human Rights as creating an evidential burden and that the legal burden of proof beyond reasonable doubt remained on the prosecution.[955] Ryan J in *Forsey* observed that this means of interpretation was akin to the double construction rule of statutory interpretation in Irish law.[956] Nevertheless, he did not follow the finding in *Webster.* Instead, he

[946] Ibid, [87].
[947] Ibid, [88], [93].
[948] Ibid, [81].
[949] Ibid, [91].
[950] Ibid, [81].
[951] *R v Braithwaite* [1983] 1 WLR 385.
[952] Ibid, 7.
[953] *R v Webster* [2010] EWCA Crim 2819.
[954] Section 2 of the Prevention of Corruption Act, 1916; *R v Webster* [2010] EWCA Crim 2819.
[955] *R v Webster* (n 954), [31], [32]; *DPP v Forsey* (n 21), [18]-[20], [53]-[54].
[956] *DPP v Forsey* (n 21), [19].

choose to place more weight on the intention of the provision as identified in *Webster* which he said was justified in historical circumstances.[957] He stated:

> The court is satisfied that the section is clear in its terms. The legislative history confirms the meaning and intent of the presumption...The legal burden, as identified by the English Court of Appeal, conforms with the approach adopted by the trial judge in this case in his instruction to the jury.[958]

This approach is most surprising. The rationale on historical grounds was undermined by the presumption of innocence in Article 6(2) of the European Convention on Human Rights and more particularly, having regard to the double construction rule of statutory interpretation in Irish law. Ryan J rejected Forsey's contention that the burden imposed by the section should be evidential. He stated that to 'read down the section eviscerates the provision out of existence'.[959] His discussion of the evidential burden is confusing. He referred to a reading of the provision as imposing an evidential burden, such as arises 'when a prima facie case has been made out'.[960] This suggests that he equated a statutory evidential burden with the evidential burden that would be a common feature when the prosecution have made out a prima facie case.

3.5.2.3 Re-enactment of the Statutory Presumption

Ryan J distinguished the statutory presumption in the 2001 Act from the finding in *Webster* having regard to the intention of the Irish legislature. He found that the re-enactment of the provision was a clear intention of the continuation of the statutory presumption as originally enacted.[961] He stated that this put beyond doubt that the presumption of corrupt intent was necessary due to the prevalence of corruption internationally and the difficulty of proving corrupt intent.[962] He did not believe he was taking a different approach to *Smyth.* He observed that while there were some similar considerations in the two cases, the provisions were different and must be carefully analysed.[963] He stated that the 2001 Act was clear and explicit, unlike the

[957] Ibid, [82].
[958] Ibid, [64]-[67].
[959] Ibid, [83].
[960] Ibid, [84].
[961] Ibid, [90].
[962] Ibid, [83].
[963] Ibid, [96]; *O'Leary v Attorney General* (n 14).

statutory provisions considered in *Smyth,*[964] *Tuma*[965] and *O'Leary.*[966] Nonetheless, the finding that a provision that stipulates that an accused must prove their innocence on the balance of probabilities is consistent with the presumption of innocence suggests a complete disregard for the presumption of innocence as a fundamental constitutional right. This is compounded by the fact that the Court of Appeal was aware of Charleton J's finding in *Smyth* as discussed, but yet disregarded the implications a reverse legal burden has in requiring an accused to prove their innocence contrary to the presumption of innocence.

Ryan J found that to 'read down' the provision as imposing an evidential burden would offend the legislative intention and the principles of statutory interpretation.[967] He held that the provision imposed a legal burden on the accused in corruption cases when the prosecution had proved all the necessary legal elements beyond reasonable doubt.[968] He said this was necessary and proportionate and compatible with the Constitution and the European Convention on Human Rights.[969] He dismissed the appeal. It is difficult to reconcile this position with *Ashworth's* view[970] that the seriousness or prevalence of the offence should not be put in the balance to justify an exemption from the presumption of innocence as its purpose would be undermined if it might be 'balanced away by showing' the public interest leaned against it.[971] Secondly, it required an accused to prove their innocence on the balance of probabilities, therefore permitting conviction where corrupt intent was in doubt.

3.5.3 Appeal to Supreme Court

Forsey appealed to the Supreme Court. O'Malley J gave the leading judgment.[972] She disagreed with the finding of the Court of Appeal and stated that it was 'contrary

[964] *DPP v Smyth* (n 21).
[965] *DPP v Tuma* (n 21).
[966] *O'Leary v Attorney General* (n 14).
[967] *DPP v Forsey* (n 21), [92].
[968] Ibid, [69], [97].
[969] Ibid, [97].
[970] Ashworth, A, 'Four Threats to the Presumption of Innocence' (n 80). See also *S v Coetzee* 1997 (3) SA 527, [220].
[971] Ashworth, A, 'Four Threats to the Presumption of Innocence' (n 80), 260.
[972] Clarke CJ, Dunne and Finlay Geoghegan JJ concurred. McMenamin J agreed with the statement of the applicable law set out by O'Malley J though he dissented for a different reason.

to authority and could lead to violations of the right to be presumed innocent'.[973] She found 'that the analysis of the law communicated to the jury by the prosecution and the trial judge could be regarded as somewhat confusing'.[974] She held that:

> The most significant aspect of what occurred...is that the appellant was subjected to a trial process that breached his right to be presumed innocent...as a result of a mutual legal error on the part of the defence, the prosecution and the trial judge, leading to a failure to appreciate and apply a fundamental principle of constitutional law.[975]

Notably, the judgment of the Court of Appeal was delivered before the judgment of O'Malley J in *Heffernan*[976] as discussed above.

3.5.4 Reasoning

O'Malley J clarified some earlier confusion that arose in Ryan J's judgment in the Court of Appeal in *Forsey*[977] around the use of the term 'evidential burden' in *Smyth* and *O'Leary.*[978] She observed that Ryan J[979] misconceived[980] *Smyth* which was caused by the different meanings of 'evidential burden' intended by Charleton J in *Smyth* and that used by Costello J in *O'Leary*. Affirming the evidential burden in *Smyth* in the context of possession of controlled drugs, she said that this meant an accused was required 'to point to or adduce evidence giving rise to a doubt as to...knowledge'.[981] She further stated:

> Charleton J was referring to a burden (in the sense of a legal requirement or obligation) to adduce evidence. This evidential burden arose in the context of the legal burden to show the existence of a reasonable doubt.[982]

She referred to this as the '*Smyth* burden'.[983] This clarification is somewhat similar to the views expressed by Flood J in *Hardy* in the High Court as discussed earlier. In contrast, Costello J in *O'Leary* was referring to the practical issues faced by an

[973] *DPP v Forsey* (n 25), [143], [144].
[974] Ibid, [54].
[975] Ibid, [149]; See also *DPP v Forsey* [2018] IESC 66, [3].
[976] *DPP v Heffernan* (n 3), [64].
[977] *DPP v Forsey* (n 25), [143].
[978] *O'Leary v Attorney General* (n 14), 109.
[979] *DPP v Forsey* (n 21), [84].
[980] *DPP v Forsey* (n 25), [75], [140].
[981] Ibid, [120].
[982] Ibid, [140].
[983] Ibid, [141].

accused when the prosecution has established a *prima facia* case.[984] O'Malley J stated that Costello J clearly did not intend the term 'evidential burden' to be the imposition of a legal obligation on an accused and that the term 'burden' should only be used where it imposes an obligation.[985] O'Malley J observed that if the *Smyth* burden was applied to the statutory presumption in this case an accused would be required to 'demonstrate that there is, arising from some piece...of evidence adduced in the case, a reasonable doubt as to whether the presumption of corruption is correct'.[986] She affirmed the *Smyth* burden noting that the legal burden of proof remains on the prosecution to prove its case beyond reasonable doubt. She stated that if the accused 'succeeds in persuading the jury that such a doubt arises, the jury must then ask itself whether the prosecution can dispel it'.[987] As a matter of general principle, O'Malley J found as follows:

> In the case of the burden created by a presumption, the accused will not rebut the presumption unless the evidence relied upon by the defence is, in itself, sufficient to create doubt about the correctness of the presumption. That is what is meant by "proving" that a doubt exists.[988]

Specifically, in relation to the presumption of corrupt intent, she stated:

> In a case such as this, therefore, the evidence would have to point to the possibility of an innocent explanation for receipt of the benefit. However, the accused would not have to "prove" the innocent explanation.[989]

She observed that the section at issue in *Smyth* was not unique. However, she stated that *Smyth* confined itself to that specific provision and refrained from declaring how to approach any particular reverse burden.[990] Similarly, in *Forsey,* O'Malley J remarked that in considering whether a statutory presumption breaches the presumption of innocence, different provisions have different effects.[991] Nonetheless, she developed the guidance she set out earlier in *Heffernan* to provide

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[984] Ibid, [122]-[126], [140]; *DPP v Smyth* (n 21); *O'Leary v Attorney General* (n 14); *DPP v P.J. Carey (Contractors) Limited* (n 21); *R v Lambert* (n 886).
[985] *DPP v Forsey* (n 25), [99].
[986] Ibid, [141].
[987] Ibid, [141].
[988] Ibid, [142].
[989] Ibid, [142].
[990] Ibid, [115]; *DPP v Smyth* (n 21).
[991] *DPP v Forsey* (n 25), [131], [132]; *DPP v Heffernan* (n 3).

a test for determining the impact of a reverse onus provision on the presumption of innocence. She stated that a court must consider a number of questions as follows:

> Has the provision transferred a burden in respect of an essential element of the offence, that would otherwise have fallen to be proved by the prosecution beyond reasonable doubt? Does it require the accused to prove that the element in question does not exist? If so, it is an inroad into the presumption of innocence, since the accused person may be convicted if he or she cannot positively prove that the element is absent.[992]

This passage suggests that O'Malley J agreed with the analysis of Charleton J in *Smyth*. O'Malley J set out a clear test to assist courts in determining the impact of a statutory presumption on the presumption of innocence. She clarified that a reverse legal burden on an essential element of an offence will offend the presumption of innocence. She found that if the effect of the statutory presumption is to require the accused to prove innocent receipt of the money on the balance of probabilities it would erode the presumption of innocence.[993] She stated that:

> Since corrupt receipt is an essential element of the offence, it would mean that the accused would have to disprove that element – he or she would have to affirmatively prove innocence. That is a clear inroad on the presumption of innocence.[994]

O'Malley J noted the difficulty in proving corrupt intent and accepted that a presumption of corrupt intent is not per se a breach of Article 38.1 of the Constitution.[995] Notwithstanding this, a provision of this nature may itself prove intention where there is no direct evidence of intent thereby evading the burden of proof beyond reasonable doubt on the prosecution to prove guilt. This suggests that such a provision significantly intrudes on the presumption of innocence in Article 38.1. However, O'Malley J found that applying the double construction rule and the test in *Smyth* to the provision that no issue arose[996] for the presumption of innocence. This avoided the risk that the accused would have to prove his innocence and risk

[992] *DPP v Forsey* (n 25), [133].
[993] Ibid, [137].
[994] Ibid, [137].
[995] Ibid, [144]. For further reading see Kane S, 'Evidence and Procedure Update: The Trial Judge Did Not Misdirect the Jury Regarding the Reverse of Burden of Proof' (2016) 26(4) Irish Criminal Law Journal 118; Prendergast (n 219).
[996] *DPP v Forsey* (n 25), [144].

conviction if the issue of corrupt intent was in doubt.[997] O'Malley J allowed the appeal. The decision in this case strongly suggests the extent of the confusion that existed among judges and defence and prosecution lawyers arising from previous judgments, as discussed earlier, in relation to the interpretation of statutory presumptions and also the potentially severe consequences for the presumption of innocence in misapplying the principles.

3.5.5 Interpretation in Academic Literature

The evidence suggests that there are some divergent scholarly views on the ambit of the evidential burden post *Forsey.* Charleton et al observe that the burden on the accused following *Forsey* was to 'establish by whatever means of admissible evidence that there was a reasonable doubt as to the corrupt nature of the payment'.[998] Similarly, McGrath observes that an accused has to do more than 'point to some evidence which might leave the jury in a reasonable doubt, the accused has to establish a reasonable doubt as to the existence of the presumed fact'.[999] Heffernan states that O'Malley J clearly accepted the *Smyth* burden[1000] which she calls an 'intermediate or hybrid burden'.[1001] She states that the evidential burden in *Forsey* 'attracted a distinct standard of proof, namely the raising of a reasonable doubt'.[1002] She observes that '*Forsey* represents a novel rather than radical way of looking at an old problem'.[1003] She describes it as something 'more than mere adducing of evidence necessary to raise a particular defence...and something less than proving the facts at issue'[1004] on the balance of probabilities. As a result, she argues that it 'confirms the legitimacy of a third way of construing reverse burdens that co-exists with the orthodox understanding of legal and evidential burdens'.[1005] She observes that it is a 'more nuanced conceptualisation of statutory presumptions and a constructive advance on the binary classification of the earlier case law'.[1006] She observes that 'imposing an evidential burden of raising a reasonable doubt

[997] Ibid, [144]. See also Boyle DP, 'Reversal of Burden of Proof and Presumption of Innocence in Corruption Case Considered' (2019) 37 Irish Law Times 96.Boyle, DP, 'Reverse Burden of Proof in Corruption Trial Upheld' (2017) 35 Irish Law Times 166.
[998] Charleton, P McDermott, PA, Herlihy C, Byrne (n 872), [2.07].
[999] McGrath, D, and Egan McGrath, E (n 720), [2-42].
[1000] Heffernan, L (n 36), 111.
[1001] Ibid, 111.
[1002] Ibid, 111.
[1003] Heffernan (n 732), [1-60].
[1004] Ibid, [1-60].
[1005] Ibid, [1-59]-[1-60].
[1006] Ibid, [1-59].

avoided the possibility that the accused would have to "prove" an innocent explanation'.[1007]

Heffernan observes that this recent approach 'has breathed new life into discourse on statutory modification of the burden of proof'[1008] and that '[p]ost Forsey, a legal burden is likely to arise only in circumstances...of insanity and diminished responsibility'.[1009] She argues that 'any statutory modification of the burden of proof may raise the spectre of interference with the presumption and may warrant analysis of justifiability of any encroachment on protected rights'.[1010] As such, she observes:

> [I]n a future case it may be necessary for the courts to go on to consider where a statutory provision classified as a Smyth-Forsey burden does represent a justified and proportionate modification of the burden of proof when applied to a given set of facts.[1011]

Nevertheless, it is arguable that the *Smyth-Forsey* burden equates to what Flood J stated in the High Court in *Hardy* that at most an accused is required to 'raise a doubt - a doubt of substance in relation to the prosecution case'.[1012] Indeed, according to Hamilton in 2007, an 'evidential burden requires evidence sufficient to raise a reasonable doubt'.[1013] This remained the case up to *Smyth.* In describing the *Smyth* burden, O'Malley J stated that all that is required to prove that a doubt exists is to 'create doubt'[1014] and 'the evidence would have to point to the possibility of an innocent explanation'.[1015] It is therefore arguable that the distinction between the *Smyth* burden as interpreted by Charleton et al, McGrath and Heffernan and the understanding of the evidential burden pre-*Smyth* is not entirely clear. Indeed, McGrath states that a statutory presumption that contains the word "show", "prove" or "establish" will, where possible, be interpreted as an evidential burden using the double construction rule.[1016]

[1007] Heffernan, L (n 36), 113.
[1008] Heffernan (n 732), [1-59].
[1009] Heffernan, L (n 36), 113.
[1010] Ibid, 114.
[1011] Ibid, 114.
[1012] *Hardy v Ireland* (n 21), 559.
[1013] Hamilton, C (n 1), 3.
[1014] *DPP v Forsey* (n 25), [142].
[1015] Ibid, [142].
[1016] McGrath, D, and Egan McGrath, E (n 720), [2-42].

3.6 Judicial Developments Post Forsey

While Heffernan predicts that a reverse legal burden 'is likely to arise only in circumstances analogous to the exceptional defences of insanity and diminished responsibility',[1017] this template does not appear to have been followed post *Forsey. Forsey* has since been referenced in seven reported cases.[1018] In the majority of cases *Forsey* was referenced as a matter of course without any discussion on the legal and evidential burdens of proof. However, there are some interesting points of note in two subsequent judgments. In *O'Byrne & Neville v DPP,*[1019] High Court judicial review proceedings, an aspect of each of the applicants' claim concerned the fact that each of them were convicted of certain road traffic offences notwithstanding they did not receive the fixed charge notice under the Road Traffic Act 2010 (2010 Act). A statutory presumption in section 38(1) of the 2010 Act provides for a presumption of service of the fixed charge notice upon postage 'until the contrary is shown' Ní Raifeartaigh J stated that the natural and ordinary meaning of the presumption is as follows:

> The presumption will operate to deem such postage 'service' if no further evidence is called. However, if the accused person, either through his own evidence or some other evidence, proves (i.e. establishes to the satisfaction of the court on the balance of probabilities) that he did not receive the s.35 fixed charge notice notwithstanding that it was posted to him, in this scenario the prosecution will have failed to prove 'service', the statutory precondition to prosecution will not have been proved, the person must be acquitted/charges dismissed. Here, the presumption has been rebutted.[1020]

Ní Raifeartaigh J continued to state:

> I emphasise that the presumption in s.38(1) uses the phrase until the "contrary is proved"; this is a standard legislative phrase which indicates (i) that the presumption can be rebutted (i.e. it is not an irrebuttable presumption), (ii) that the burden falls on the accused person to rebut it; and (iii) that the standard of proof on the accused person in this regard is proof on the balance of probabilities.[1021]

[1017] Heffernan, L (n 36), 113.

[1018] *DPP v EI* Court of Appeal 2 April 2019 Birmingham J; *O'Byrne & Neville v DPP* (n 21); *DPP v McDonald* Court of Appeal 28 November 2019 Birmingham J; *DPP v Alinta* (n 21); *DPP v PK* Court of Appeal 8 April 2020 Edwards J; *DPP v Galvin* (n 21); *Kennedy v DPP* [2020] IECA 360.

[1019] *O'Byrne & Neville v DPP* (n 21).

[1020] Ibid, [47].

[1021] Ibid, [47].

She observed that it was a standard provision. However, there is a notable absence of discussion as to the law on legal and evidential burdens. There was no discussion as to whether 'service' is considered an essential element of the offence. It is arguably an essential element of proof. If this is accepted, the prosecution bears the legal burden of proof in respect of this essential element. If service is not proved, then the accused must be acquitted. Ní Raifeartaigh J observed that taking account of *Smyth, Heffernan* and the Supreme Court decision in *Forsey* that section 38(1) of the 2010 Act reverses the legal burden of proof onto the accused to prove the non-receipt of the fixed charge notice.[1022] It is unclear as to how Ní Raifeartaigh J formed this opinion from the aforementioned cases. She remarked that a District judge would have to carefully evaluate the rebuttal evidence and stated that they are not required to 'acquit simply because an accused gets into the witness box and makes a bald claim that he or she did not receive the fixed charge notice'.[1023] While this is understandable, it is difficult to know what other evidence would form the rebuttal evidence by the accused. If they did not receive the fixed charge notice, then that is the rebuttal evidence. It cannot be brought any further than that. It will be recalled that a similar formulation of a presumption in other legislation has been held in *O'Leary* and *Forsey* as merely providing for an evidential burden. Notably, in her reasoning, Ní Raifeartaigh J did not expressly state that the fixed charge notice concerns offences which may be characterised as regulatory in nature. Taking these matters into account, and particularly if service is considered an essential element, it is difficult to reconcile this decision with *O'Leary*, and *Forsey,* which considered similarly worded presumptions as imposing an evidential burden, and which she considered as 'a standard legislative phrase'.[1024] The accused has to prove an innocent explanation to avoid criminal conviction which appears to be contrary to *Forsey* and inconsistent with the presumption of innocence as a fundamental constitutional right.

In the Court of Appeal case of *DPP v Alinta*[1025] McCarthy J considered the statutory presumption in section 11(2) of the Proceeds of Crime Act 2010 (2010 Act). In doing so and relying on *Forsey,* he remarked that a legal burden in the context of an

[1022] Ibid, [49], [78].
[1023] Ibid, [47].
[1024] Ibid, [47].
[1025] *DPP v Alinta* (n 21).

'essential element' of an offence, namely, *mens rea,* 'would represent an 'an inroad' into the fundamental presumption of innocence'.[1026] However in this case, he found that the statutory presumption in the 2010 Act did not represent an inroad on the presumption of innocence as '[i]t does not detract from the necessity of proof beyond reasonable doubt, having regard to the whole of the evidence'.[1027] Interestingly, McCarthy J noted the importance of characterising the reverse burden appropriately:

> Were a judge...to suggest that any so-called evidential burden might be legal in nature, or to cause confusion between the two, the charge might be fatally deficient and the verdict therefore unsafe.[1028]

This statement arguably demonstrates divergent views in the Court of Appeal as to what is the effect of an evidential burden and the importance of clear language when discussing the term 'evidential burden' to avoid confusion. It will be recalled that in *Smyth*, Charleton J stated that an evidential burden is a legal burden discharged on the lowest burden of proof to show the existence of a reasonable doubt. The Supreme Court in *Forsey* did not reject Charleton J's stance but instead explained that it requires an accused to raise a reasonable doubt.[1029] This confusion in itself presents a real and significant challenge for trial judges and lawyers alike as to how the reverse onus provisions should operate in practice in a manner that avoids a risk of their misapplication requiring proof of innocence. Indeed, McCarthy J noted that '[t]he distinction between...the two terms, legal and evidential, in the context of burdens...are legal terms of art'.[1030] He continued by observing that their use and distinction between them has in the past lead to confusion among lawyers to the extent that it may not be appropriate to use them when a jury is being charged.[1031]

3.7 Non-Core/Non-Essential Elements

One notable confusing pattern arising from the cases discussed is the specific use of terms such as 'each ingredient', 'core-element', 'an element', 'the-element', 'essential part' and 'essential elements' in relation to the burden of proof. The word 'essential'

[1026] Ibid, [32]. McCarthy J relied on O'Malley for the Majority in *DPP v Forsey* (n 25), [133].
[1027] *DPP v Alinta* (n 21), [33].
[1028] Ibid, [36].
[1029] *DPP v Forsey* (n 25), [140]-[143].
[1030] *DPP v Galvin* (n 21), [41].
[1031] Ibid, [41].

is defined as 'absolutely necessary...basic elements'[1032] and 'core' is defined as 'the central or most important part'.[1033] While the meanings of 'core' and 'essential' are one and the same, it is clearly the case that, in the context of elements of an offence, their meaning does not extend to all elements. There are two problems with this approach in respect of a reverse legal burden. First, where the burden of proof on the prosecution applies in respect of a 'core' or an 'essential' element it is arguable that a reverse legal burden may be imposed on an accused in respect of a non-core or non-essential element. Therefore, where an accused bears the legal burden on a non-core/non-essential element it could have the effect that an accused person might raise a doubt as to his guilt, but not establish it on the balance of probabilities. This could likely lead to a situation where the charge is not proven as to each element of the offence beyond reasonable doubt, but nonetheless the accused could be convicted. It essentially requires an accused to prove their innocence. Secondly, the difficulty with this approach is that the demarcation line between core/essential and non-core/non-essential elements is not entirely clear.

According to Charleton J in *Smyth,* he stated that there is a presumption that the prosecution must prove the core elements of an offence and if this does not occur, the accused must be acquitted.[1034] He found that an accused is not required to prove 'core elements' of a true criminal offence on the balance of probabilities.[1035] He observed that the guilty mind is a core element[1036] in that 'it is integral to proof of a true criminal offence'.[1037] However, later on in describing this position, he appears to have equated 'core elements' with 'an element' and 'each element' by using these terms interchangeably. In this context, it is arguable that his choice of phrases 'an element' and 'each element' extend to all elements and a reverse legal burden is not permitted in respect of any element of an offence.

[1032] C Soanes (ed), *Oxford English Dictionary* (5th edn, Oxford University Press 2002), 279.
[1033] Ibid, 181.
[1034] *DPP v Smyth* (n 21), [20].
[1035] Ibid, [20].
[1036] For further discussion on 'every ingredient' and 'every element' see Prendergast, D, 'The Constitutionality of Strict Liability in Criminal Law' (2011) 33(1) Dublin University Law Journal 285; Cole, RJ V. (n 433), 238; O Feldman, E, and Doyle, 'Constitutional Law' (2013) 27(1) Annual Review of Irish Law 110, 125; Lee Y, 'Criminal Law Reasonable Doubt and Moral Elements' (2016) 105 1, 22.
[1037] *DPP v Smyth* (n 21), [20].

Nevertheless, in *Heffernan* O'Malley J found that the presumption of innocence will be breached where an accused is required to prove the 'essential part' of an offence. She said that 'any burden cast upon an accused that could result in conviction by a jury, despite a reasonable doubt as to an essential part of the offence, would be an unlawful violation of the presumption'.[1038] It is unfortunate that O'Malley J did not provide guidance as to what the 'essential part' of an offence actually means. Interestingly, Ryan J in the Court of Appeal in *Forsey* observed that the presumption of innocence requires that the prosecution must prove 'all elements' of the offence charged.[1039] O'Malley J in the Supreme Court in *Forsey* observed that connected with the presumption of innocence is 'that the prosecution must prove every element of the guilt of an accused person beyond reasonable doubt'.[1040] She noted the authority of Davitt P. J in *McGowan v Carville*[1041] who accepted that there may be exceptions to this rule in relation to the peculiar knowledge principle. She observed that '[i]ntent was an essential element in many offences...but it was not the case that accused persons were generally obliged to disprove intent.[1042] She interpreted the majority judgment in *Hardy* and stated that: 'Hederman J. held that it was necessary for the prosecution to prove each ingredient of the offence'.[1043] It is notable that Hederman J did not use the phrase 'each ingredient' in his judgment in *Hardy*. However, O'Malley J in *Forsey* endorsed *Smyth* in finding that a reverse burden of proof that requires an accused to 'disprove a core element of an offence'[1044] is capable of violating the presumption of innocence in Article 38.1.[1045] She stated that 'corrupt receipt is an essential element of the offence'[1046] and it would be 'a clear inroad on the presumption of innocence'[1047] if the accused had to disprove that element. The focus on 'core element' and 'essential element' appears to leave open the possibility that a reverse legal burden is permissible on any other element. This leaves a situation that an accused is at an increased risk of conviction where they carry a legal burden on non-core/non-essential elements to prove their innocence.

[1038] *DPP v Heffernan* (n 3), [64].
[1039] *DPP v Forsey* (n 21), [72].
[1040] *DPP v Forsey* (n 25), [89].
[1041] *McGowan v Carville* (n 528).
[1042] *DPP v Forsey* (n 25), [90].
[1043] Ibid, [110].
[1044] Ibid, [130].
[1045] Ibid, [130].
[1046] Ibid, [137].
[1047] Ibid, [137].

It is worth noting the House of Lords finding in *Sheldrake v DPP*[1048] in relation to a non-essential element for guidance. Lord Bingham, with whom the majority agreed, found that an intention to drive was not an essential element and assumed that a reverse legal burden on this non-essential element infringed the presumption of innocence in Article 6(2) of the European Convention on Human Rights, though it was considered necessary.[1049] Stumer observes that a reverse legal burden on a non-essential element would arguably be contrary to the rule of law as the prosecution would not be justified in imposing conviction or punishment.[1050] He eloquently argues:

> To deliberately operate a system which countenances the conviction of people in the absence of proof beyond reasonable doubt treats those individuals as a means in the struggle against crime, rather than an end in themselves.[1051]

Notwithstanding the necessity of any reverse legal burden on any element of an offence, it is arguable that it would infringe the presumption of innocence in Article 38.1 as the accused would be required to prove their innocence and they may be convicted even where a doubt exists. It is unfortunate that the lack of consistency in language by the superior courts has left open the possibility of confusion arising as to the intrusion of a reverse legal burden into the presumption of innocence. There is limited guidance for the courts to discern an essential element from a non-essential element. There are some things that will obviously be core/essential but there are others that could arguably be either one or the other. There is a danger in creating these kinds of distinctions in that there is little or no guidance as to how one decides what is core/essential and what is not.

There is limited academic commentary on this issue. Interestingly though, despite the heavy focus on ‘core element’ by Charleton J and ‘essential part’, ‘core element’ and ‘essential element’ by O’Malley J, McGrath observes that the effect of existing jurisprudence on statutory presumptions is that the presumption of innocence will be

[1048] *Sheldrake v DPP* [2005] 1 AC 264, [14]. Lord Bingham drew attention to the advice of Lord Griffiths in *R v Hunt* [1987] A.C. 352, 374.
[1049] *Sheldrake v DPP* (n 1048), [41]. For further discussion see Stumer A (n 46), 71.
[1050] For further discussion see Stumer A (n 46), 50.
[1051] Ibid, 46.

infringed where a provision places a 'legal burden on an accused in relation to any element of an offence'.[1052] Indeed, a new framework developed by Allen in the UK for assessing the role of reverse burdens and particularly 'establishing a more concrete link between the thick PoI and reverse burdens',[1053] includes a threshold consideration as a first step. It will be noted that the reference to "PoI" is a reference to the presumption of innocence. This requires a court to ensure that the accused does not bear the legal burden on 'any element of an offence'.[1054] In addition, McGrath suggests that a reverse legal burden is not permitted in respect of any element arising from the recent line of jurisprudence. While this would ultimately honour the value of the presumption of innocence and reduce the risk of its erosion, the key extracts from recent Irish jurisprudence as referred to above do not appear to bear this out. Indeed, in a case not discussed by McGrath, Collins J in the Court of Appeal in *DPP v Galvin*[1055] appears to take a different view. He stated:

> As a general principle, the prosecution bears the burden of proving, to the criminal standard, all elements of a criminal offence...A statute may impose a legal burden on an accused in relation to a specified element of an offence but that is comparatively rare.[1056]

It is unclear what Collins J intended a 'specified element' to mean. Nonetheless, reading this statement in conjunction with *Forsey* and *Smyth*, it appears that the balance of judicial opinion favours the possibility that a reverse legal burden on a non-core/non-essential element only, is consistent with the presumption of innocence. This approach reflects poorly on the value to which the courts place on the presumption of innocence. It allows for its continued erosion through the device of a reverse legal burden which requires an accused to prove their innocence to avoid conviction.

[1052] McGrath, D, and Egan McGrath, E (n 720), [2-42].

[1053] Allen, J (n 210), 131. Allen developed a novel rather than a radical method for identifying presumption of innocence compliant reverse legal burdens linked to the 'thick' (broad) conception of the presumption. He uses three guiding principles. First, where the law is unclear as to whether the reverse burden is legal or evidential there is a rebuttable presumption against it being a legal burden. Second, unless justified, the standard for poof on the balance of probabilities should not apply to reverse legal burdens in a criminal context. Third, a reverse legal burden will not breach the presumption of innocence if it attends to a secondary responsibility which stems from a regulatory duty for example regulatory offences.

[1054] Ibid, 131.

[1055] *DPP v Galvin* (n 21).

[1056] Ibid, [31].

In light of the above, it is worth noting statutory amendments made in 2017 to the Criminal Law (Sexual Offences) Act 2006 which are arguably problematic for the presumption of innocence. The problematic amendments concern defences in relation to the age of a child and the explicit burden of proof placed on an accused to prove a 'reasonable mistake' as to the age of the child on the balance of probabilities. While the findings in *Smyth* and *Forsey* address elements of an offence as distinct from defences, the implications of the 2017 amendments on the presumption of innocence are nevertheless worthy of consideration. In particular, section 3 of the 2006 Act relates to a sexual act with a child under 17 years of age.[1057] Section 3(3) is in the following terms:

> It shall be a defence to proceedings for an offence under this section for the defendant to prove that he or she was reasonably mistaken that, at the time of the alleged commission of the offence, the child against whom the offence is alleged to have been committed had attained the age of 17 years.

Section 3(5) is in the following terms:

> The standard of proof required to prove that the defendant was reasonably mistaken that the child had attained the age of 17 years shall be that applicable to civil proceedings.

This defence is drafted in similar terms to the defence in section 29(2) of the Misuse of Drugs Act 1977 which was at issue in *Smyth,* except that section 3(5) expressly imposes the civil standard of proof on the accused which is not contained in section 29(2) of the 1977 Act. The defence in section 3(5) also differs from its predecessor 2006 provision in that the defence required the defendant to prove an 'honest belief' as distinct from a 'reasonable mistake'. Nothing turns on this change of wording however, it is notable that the predecessor provision did not explicitly require proof by the accused on the balance of probabilities unlike the amended section 3(5). That provision was silent on the standard of proof placed on the accused. In the Court of Criminal Appeal in *DPP v Egan*[1058] it was held that the predecessor provision imposed an evidential burden on an accused 'to prove the state of his honest

[1057] Inserted by section 17 of the *Criminal Law (Sexual Offences) Act 2017* (n 746).
[1058] *DPP v Egan* [2010] 3 IR 561, (Fennelly, Herbert and Gilligan JJ).

belief''.[1059] The Court of Criminal Appeal found that the trial judge was correct to require that the accused to prove that there was a reasonable doubt as to whether he had an honest belief as to whether the complainant was 17 years or over.[1060]

However, the critical aspect of this 2017 amended defence is that it statutorily reverses the burden of proof on to the accused to prove a 'reasonable mistake' as to 'age' on the balance of probabilities. It will be recalled that the absence of an explicit statutory shifting of the burden of proof to an accused was an important point that was initially made by O'Flaherty J in *O'Leary*. In that case he found that section 24 of the 1939 Act did not impose a reverse legal burden of proof and in so doing he emphasised that it was important to note that the section made no mention of the burden of proof changing. This is in contrast to the above mentioned provision introduced in 2017 which is explicit regarding the changing of the burden of proof to the accused. It is also clear as to the standard of proof required. Therefore, the substance and effect of the provision are clear. The express reference to the civil standard of proof on the accused significantly changes how the provision interacts with the presumption of innocence, from the original 2006 provision.

It may be argued, in the words of Charleton J, that it is a 'special defence, beyond the core elements of the offence'[1061] which may carry a different burden that should be proven by the accused and sits side by side with the only other two defences of insanity and diminished responsibility where a legal burden of proof is borne by the accused in Irish law. However, this argument does not stand up to much scrutiny when the following is considered.

In this case an accused has to affirmatively prove their innocence. It is arguable that proof of 'age' of the child is an essential/core element of the offence borne by the prosecution. Where the accused seeks to put the existence of this essential/core element in issue, the accused will be required to prove on the balance of probabilities as to his mental awareness. Therefore, where age is established the concurrent existence of mental awareness is effectively presumed to exist as though

[1059] Ibid, [36], per Fennelly J.
[1060] Ibid, [36], per Fennelly J.
[1061] *DPP v Smyth* (n 21), [20].

the prosecution had proved it to the standard beyond reasonable doubt. However, the accused is permitted to challenge this presumption and to seek to prove the contrary. The burden is on the accused to prove a 'reasonable mistake' as to 'age' on the balance of probabilities. This proof is inextricably linked to the essential/core element of 'age'. Even if an accused raises a reasonable doubt as to 'reasonable mistake' it will be insufficient to avoid conviction as it will fall short of the standard on the balance of probabilities. As such the accused will be unable to prove the absence of the element of 'age' through the defence of 'reasonable mistake' on the standard set out in the legislation. This situation suggests, in the words of O'Malley J in *Forsey,* that 'it is an inroad into the presumption of innocence, since the accused person may be convicted if he or she cannot positively prove that the element is absent'.[1062] In addition, it will be recalled that O'Malley J in *Heffernan* stated that 'any burden cast upon an accused that could result in conviction by a jury, despite a reasonable doubt as to an essential part of the offence, would be an unlawful violation of the presumption'.[1063] It is arguable that the element of 'age' and the defence of 'reasonable mistake' when considered together are an 'essential part' of the offence. The result is that the burden of proving the defence on the balance of probabilities could have the effect that in respect of 'age', an essential/core element of the offence, an accused person might raise a reasonable doubt as to his guilt, but not establish it on the balance of probabilities. This could inevitably lead to a situation where a charge will not be proven beyond reasonable doubt as to an essential/core element of the offence, but nonetheless the accused could be convicted. This has significant implications for the presumption of innocence and a risk of a miscarriage of justice.

3.8 Reflections on the General Principles

This chapter examined the extent to which the presumption of innocence is under significant threat of erosion by reverse onus provisions. It provides a strong argument that the continuing threat to the presumption of innocence is exacerbated

[1062] *DPP v Forsey* (n 25), [133]. The same issue arises in respect of a defence and reverse burden of proof provided in similar terms in section 2(3) and (5) (Sexual act with child under 15 years of age) (Inserted by section 16 of the Criminal Law (Sexual Offences) Act 2017) and section 3A(3) and (5) (Offence by person in authority) (Inserted by section 18 of the Criminal Law (Sexual Offences) Act 2017) of the Criminal Law (Sexual Offences) Act 2006 and section 22(3) and (5) (Offence against relevant person by person in authority) of the Criminal Law (Sexual Offences) Act 2017.
[1063] *DPP v Heffernan* (n 3), [64].

by the inconsistency of interpretation by the courts leading to the misapplication of the principles in some cases with severe consequences.

The classification of reverse burdens as 'evidential' or 'legal' has caused significant problems and has solved very few. Notably, Heffernan argues that '*Forsey* represents a novel rather than radical way of looking at an old problem'.[1064] This chapter suggests there are some general principles that can be gleaned from the judgments discussed.

The Oireachtas may, for policy reasons, reverse an element of proof onto an accused. However, a reverse legal burden of proof on a core/essential element of a true criminal offence will be a violation of the presumption of innocence. The severe implications for the presumption of innocence were strongly argued in respect of the Court of Criminal Appeal case in *Forsey.* This was the turning point for the Supreme Court to set out a clear test for determining the impact of a reverse onus provision on the presumption of innocence. Nonetheless, a reverse legal burden may be imposed on an element that is not a core/essential element. Any reverse burden, be it a legal burden on a non-core/non-essential element or an evidential burden on any element at the lowest level of reasonable doubt, must be clearly stated in legislation or necessarily implied therefrom.

A reverse legal burden on a non-core/non-essential element is problematic as an accused will be required to prove their innocence on the balance of probabilities and they are at risk of conviction where a doubt exists.[1065] It extinguishes the 'very essence'[1066] of the right to presumed innocent. The presumption of innocence therefore remains under severe threat of erosion by this unsatisfactory gap where a reverse legal burden on a non-essential element would appear to be consistent with the presumption of innocence notwithstanding that it requires an accused to prove their innocence.

[1064] Heffernan (n 732), [1-60].
[1065] For further discussion see Stumer A (n 46), 15, 16.
[1066] *Heaney and McGuinness v Ireland* (n 611), [48].

There is a difficulty with the lack of clarity and scope as to what in fact may be considered an essential element. It may only be determined on a case by case basis. In *Smyth* Charleton J considered 'proof of a guilty mind' as a core element in the drugs case and in *Forsey* O'Malley J considered 'corrupt receipt' as an essential element in the corruption case. However, beyond guilty mind, there is no further guidance as to what may or may not be a core/essential element. What may be considered an essential element by one court may not be by another. The lack of judicial guidance on this central issue means that there remains an issue for judges in terms of interpretation and a risk of confusion arising particularly in borderline cases.

In relation to reverse evidential burdens, the presumption stands unrebutted unless the accused proves a reasonable doubt. Reverse evidential burdens are consistent with the presumption of innocence as a legal requirement or obligation to prove/show/adduce evidence sufficient to create a doubt about the correctness of the presumption or to point to an innocent explanation. However, an accused is required to be more proactive in a system when otherwise one would expect that the presumption of innocence requires the prosecution to prove its case without the assistance of the accused.

3.9 Conclusion

The case analysis in this chapter provides a strong argument that the presumption of innocence as a bedrock constitutional right is under significant threat of erosion by reverse onus provisions. It arguably demonstrates the degree to which the courts have interacted with statutory exceptions in light of the presumption of innocence and the manner in which this has evolved over three stages. In stage 1, there was no general guidance laid down by the courts. In stage 2 confusing judicial guidance emerged while in stage 3 general guidance were laid down as regards the weight to be accorded to the presumption of innocence when considering reverse onus provisions. It has considered key cases from the Irish High Court, Court of Appeal and Supreme Court. It has also considered comparable provisions and jurisprudence in England and the European Convention on Human Rights. The impact of recent Irish judicial decisions on the development of the concept of the "evidential burden"

is notable. Establishing a “reasonable doubt” does not reflect the established understanding of an evidential burden.

Despite the statements made by the courts over time of the importance of the presumption of innocence, the evidence suggests that the presumption of innocence is under significant threat of erosion by the continued use of reverse onus provisions and the confusion arising as to how to interpret these provisions. Confusion exists amongst the judiciary, lawyers and academics alike.

This chapter has strongly argued that the general guidance laid down in stage 3 by Supreme Court in *Forsey* was triggered by the confusing state of the law and serious misapplication of the principles by the Court of Appeal decision in *Forsey*. Disappointingly though, there is a lack of clear guidance as to the manner in which non-essential elements are to be treated, having regard to the presumption of innocence. This situation regrettably undermines the presumption of innocence by permitting the use of reverse onus provisions on non-essential elements requiring an accused to prove their innocence to avoid conviction.

There is a lack of consistency in the drafting of reverse onus provisions which contributes to the confusion and inconsistent interpretations. Each provision is interpreted in light of its substance and effect. While the recent guidance in the Supreme Court judgment in *Forsey* is helpful, the indications from the post-*Forsey* cases, as discussed above, arguably demonstrate how the interpretation of reverse onus provisions risk eroding the presumption of innocence. This was apparent where the High Court found a reverse legal burden as constitutional[1067] and where the Court of Appeal found that a reverse legal burden may be applied on a specified element of an offence.[1068]

The research will now turn to examine the implications for the presumption of innocence in the context of statutory provisions that criminalise silence.

[1067] *O’Byrne & Neville v DPP* (n 21), [49], [78] per Ní Raifeartaigh J.
[1068] *DPP v Galvin* (n 21), [31] per Collins J.

Chapter 4 - Criminalising Silence

The purpose of this chapter is to examine the extent to which the presumption of innocence is eroded by legislation that criminalises silence. This chapter will be arguing that the right to silence is a key dimension of the presumption of innocence and has not been accorded sufficient status by the Irish courts. The first section will consider various definitions given for the right to silence. It will consider the right to silence both at the pre-trial and trial stages for natural persons.

The chapter will then explore leading Irish and English academic commentary on the relationship between the right to silence and the presumption of innocence. This relationship will be examined to establish the extent to which the link is contested on the one hand and supported on the other hand. This chapter will show that some academic commentators are not convinced that there is a clear relationship between the right to silence and the presumption of innocence. It will be strongly argued that the avoidance of miscarriages of justice is a reason for the right to silence and privilege against self-incrimination which is bound up in the presumption of innocence. It will be argued that a legislative requirement to speak imposes a de-facto reallocation of the burden of proof on an accused which is contrary to the narrow view of the presumption of innocence. As a result it will be argued that the criminal standard of proof does not reduce the degree of compulsion imposed by a reallocation of a de-facto burden. As a consequence, it will be shown that there is an intimate link between the right to silence and the presumption of innocence.

The second part of the chapter will examine the treatment of the right to silence under Irish law and the consequences for the presumption of innocence through the operation of compulsory disclosure provisions which require an individual to answer questions on pain of penal sanction. It does this by conducting a case study of three key Irish judgments which considered statutory provisions that require persons to speak and criminalise silence namely, *Heaney v Ireland*,[1069] *Re National Irish Bank*[1070] and *Sweeney v Ireland.*[1071] The evidence suggests that there continues to be a failure to meaningfully deal with safeguards to reduce the degree of compulsion that

[1069] *Heaney and McGuinness v Ireland* (n 26). *Heaney and McGuinness v Ireland* [1997] 1 ILRM 117.
[1070] *Re National Irish Bank Ltd* (n 27).
[1071] *Sweeney v Ireland* (n 28).

extinguishes the right to silence and presumption of innocence of suspects in Irish law both by the courts and legislators.

4.1 Right to Silence Explained

This section explains the term right to silence which was historically seen as 'a cherished doctrine of the common law'.[1072] As far back as 1980, O'Connor observed that the right to silence at common law at the pre-trial stage was 'a constitutional requirement of criminal procedure'.[1073] However, at that point it was unclear as to where the right was constitutionally located. The right to silence is used interchangeably with the term privilege against self incrimination, though it will be seen that they have distinct meanings.[1074] Walsh notes that the 'presumption shapes the whole structure and substance of the trial and, most particularly...the right to silence'.[1075] Daly describes the right to silence as applying to a suspect pre-trial in the context of an entitlement to 'refuse to answer questions...and...whereby a suspect cannot be compelled to speak against his/her own interest under official questioning by the police'.[1076] In relation to the trial stage, she states that the right to silence embodies the right not to provide information to the prosecution and the right 'to refuse to take the stand and give evidence'.[1077] Similarly, McGrath classifies the right to silence of a suspect as a right 'not to answer questions' and in relation to an accused at trial, as a right 'not to give evidence'.[1078] In this context, the operation of the right to silence was further explained by Budd J in the Court of Criminal Appeal case *DPP v Foley*.[1079] He stated:

> What the "right to silence" amounts to is that an accused is entitled in the first instance to call on the prosecution to prove its case. *Prima facie*, his situation is that he does not have to give an explanation or give evidence. But if proof of guilt is forthcoming - if circumstances are laid before the court of trial that point to the guilt of the accused - then an accused must attempt to rebut the

[1072] *Re National Irish Bank Ltd* (n 27), 351 (per Barrington J).
[1073] O'Connor PA, 'Criminal Due Process, The Pre-Trial Stage and Self-Incrimination' (1980) 15 The Irish Jurist 219, 224.
[1074] M Coen, 'Withholding the Right to Silence: Sweeney v Ireland' <https://ucd.academia.edu/Markcoen [Accessed on 29 March 2021]>, 5; Quirke, H, *The Rise and Fall of the Right to Silence* (Abingdon: Routledge 2017), 8.
[1075] Walsh, DPJ (n 91), 1322, [22-06].
[1076] Daly, YM, 'The Right to Silence - Inferences and Interference' (2014) 47 Australian and New Zealand Journal of Criminology 50, 60.
[1077] Ibid, 60.
[1078] McGrath, D, and Egan McGrath, E (n 720), [11-07].
[1079] *DPP v Foley* [1995] 1 IR 267.

> prosecution case by evidence or else suffer the consequences.[1080]

Foley argued that he had been penalised for exercising his right to silence as he had not been acquitted. Budd J rejected the notion that the right to silence was not respected in *Foley.* He observed that reasonable inferences of guilt beyond reasonable doubt may be drawn by a court of trial from evidence before the court in the absence of an innocent explanation.[1081] The drawing of an inference from evidence before a court is distinct from drawing an inference from silence at trial. On this point it will be noted that the Supreme Court in *Finnerty v Ireland*[1082] Keane J clarified that adverse inferences cannot be drawn from the exercising by an accused of their right not to give evidence at trial.[1083] Nonetheless, McGrath argues that:

> [I]t is something that may affect the weight to be attached to the evidence that has been adduced in the case...it is important to remember that the legal burden remains on the prosecution to establish the guilt of the accused beyond a reasonable doubt and inferences drawn from the failure to give evidence should not be used to strengthen the prosecution case if it falls short of that standard.[1084]

The Balance in Criminal Law Review Group in 2007 succinctly summed up the right to silence during questioning as follows: 'A detained person is entitled to maintain silence in general on the basis that such silence will not be admissible against him or her as part of the prosecution case'.[1085] Similarly, Hamilton observes that the right to silence 'can be defined as the right not to suffer prejudice by reason of a failure to answer questions, most notably through the drawing of adverse inferences'.[1086] She notes that the privilege against self incrimination is broader and 'embodies the right not to be compelled to answer questions or supply information'.[1087] Similarly, Heffernan observes that the privilege is broader than the right to silence though the two concepts overlap in respect of the 'entitlement not to be compelled to answer

[1080] Ibid, 292.
[1081] Ibid, 292.
[1082] *DPP v Finnerty* (n 31).
[1083] Ibid, 376. This position was affirmed in *DPP v Coddington* Court of Criminal Appeal 31 May 2001; *DPP v White* [2011] IECCA 78; *DPP v MJ* [2014] IECCA 21.
[1084] McGrath, D, and Egan McGrath, E (n 720), [11-47].
[1085] 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 36.
[1086] Hamilton, C (n 1), 63.
[1087] Ibid, 63.

questions'.[1088] Coen expresses a similar view.[1089] Interestingly, in the Supreme Court in *DPP v Wilson*[1090] McKechnie J stated that '[t]he right to silence and privilege against self incrimination are common law and constitutional aspects of the same coin'.[1091]

Daly observes that 'the central focus in terms of the right to silence in Ireland is on a failure or refusal to answer questions in police custody, and the potential trial consequences of same'.[1092] Therefore, it can be deduced from the commentary that the right to silence represents the freedom of choice in the sense of the 'spoken word',[1093] not to speak during the pre-trial and trial stages. This chapter will focus on the 'spoken word' and will use the terms right to silence and privilege interchangeably.

4.2 Relationship between the Right to Silence and the Presumption of Innocence

This section analyses academic commentary regarding the relationship between the right to silence and the presumption of innocence. This is a critical consideration for determining whether or not the presumption of innocence is eroded by measures impacting on the right to silence. Commentators have sometimes disagreed about such a relationship. Hamilton observes that the connection between the presumption of innocence and the privilege against self incrimination is strongly contested by some commentators as over extending the reach of the presumption of innocence.[1094] There are divergent views as to where the right to silence flows from or what it expresses. Some say if flows from the presumption of innocence. Others disagree and there is some commentary to the effect that it is bound up in other distinct values. Some commentators have considered the strength of the link depending on whether the presumption of innocence is interpreted narrowly in the

[1088] Heffernan (n 732), [13.72]. See also Heffernan, L, with Ní Raifeartaigh, U (n 720), [9.76].
[1089] Coen R, 'The Decline of Due Process and the Right to Silence's Demise' (2008) 18(1) Irish Criminal Law Journal 10, 12.
[1090] *DPP v Wilson* [2017] IESC 53.
[1091] Ibid, [28] per McKechnie J's minority judgment.
[1092] YM Daly, 'Ireland: Curtailment of the Right to Silence through Statutory Adverse Inferences' (2021) 12 New Journal of European Criminal Law 347, 352.
[1093] Coen (n 1074), 5.
[1094] Hamilton, C (n 1), 19.

context of the burden of proof at trial or broadly in the context of the pre-trial stage.[1095]

4.2.1 Link between the Right to Silence and the Presumption of Innocence contested

This section will examine the manner in which the link between the right to silence and the presumption of innocence is contested. The arguments of leading scholars in this field are few and are less that convincing. Roberts and Zuckerman are not convinced that the presumption of innocence is diminished by removal of the privilege against self incrimination.[1096] They focus on the key objectives of the presumption of innocence, autonomy, justice and accountability, and argue that it is difficult to understand how the privilege contributes to protecting them.[1097] Interestingly, Weigend argues that the right to silence and the privilege against self-incrimination do not flow from the presumption of innocence but are more appropriately found in 'human dignity, general fairness, or perhaps respectability for the court'.[1098] He states that on this basis suspects should not be required to produce evidence to be used against themselves in their own convictions.[1099] Similarly, Redmayne observes that the value of the right draws on respect for personal integrity[1100] which is harmed, and remains cruel, when one is forced to self-incriminate or lie and help in their conviction.[1101]

Roberts and Zuckerman acknowledge that the evidential value of silence may contribute in discharging the prosecutorial burden and make the prosecution easier. In that case, the impact on the right to silence arguably erodes the presumption of innocence as it is inverted to a presumption of guilt as the accused is burdened to prove their innocence. However, they state that the standard of proof beyond reasonable doubt is not diluted, just as evidence obtained by a confession does not

[1095] Owusu-Bempah, A (n 285), 79.
[1096] Roberts, P, and Zuckerman, A (n 70), 554.
[1097] Ibid, 555.
[1098] Weigend (n 39), 288, 289.
[1099] Ibid, 288, 289.
[1100] M Redmayne, 'Rethinking the Privilege Against Self-Incrimination' (2007) 27 Oxford University Press 209, 232.
[1101] JD Jackson, 'Re-Conceptualizing the Right of Silence As an Effective Fair Trial Standard' (2009) 58 International and Comparative Law Quarterly 835, 843; RK Greenawalt, 'Silence as a Moral and Constitutional Right' (1981) 23 William and Mary Law Review 15, 39.

alter the standard of proof on the prosecution.[1102] Similarly, Jackson observes that while requiring self-incrimination may constitute evidence, the standard of proof remains unchanged.[1103] Redmayne dismisses the connection between the presumption of innocence and the right against self-incrimination on three grounds. First, similar to Roberts and Zuckerman and Jackson, he states that if the presumption of innocence is narrowly interpreted there is no connection between the right to silence and the presumption of innocence as the standard of proof does not change.[1104] Nonetheless, the standard of proof beyond reasonable doubt does not reduce the degree of compulsion imposed by a de facto reallocation of the burden of proof by a direct or indirect legislative requirement to speak. A de facto reallocation of the burden is contrary to the narrow view of the presumption of innocence that an accused is not compelled to contribute to the trial or give evidence in his defence. As discussed in Chapter 1 the presumption of innocence and the right to silence interact by placing the prosecution on proof.[1105] In any event, compulsion to speak will assist the prosecution in reaching the legal standard of proof and ultimately satisfying the burden. Secondly, Redmayne acknowledges that there is very good reason for the state to treat us as innocent unless there is good reason to think otherwise: however, he observes that the privilege does not depend on the quality or basis of suspicion in the first instance.[1106] Nevertheless, as discussed in Chapter 1, no person shall be expected to answer to allegations unless there is reasonable suspicion grounding the allegations which relates directly to the presumption of innocence and the burden and standard of proof.[1107] Thirdly, on the argument that the state should have to prove its case without assistance from the accused, he argues that this should be thought of in terms of 'active participation, or else the principle would rule out such things as using the suspect's fingerprints, or even his visual image.[1108] This point fails to take account of the distinction between the use of a compelled statement and compelled evidence that has an existence independent of the will of an individual such as fingerprints and visual images. The right to silence and privilege against self-

[1102] Roberts, P, and Zuckerman, A (n 70), 554.
[1103] Jackson (n 1101), 846.
[1104] Redmayne (n 1100), 218.
[1105] Hamilton, C (n 1), 1-2 citing JC Morton and SC Hutchinson, The Presumption of Innocence (Carswell 1987). See also Ibid, 1-3 citing S. Summers, 'Presumption of Innocence' (2001) 1 Juridical Review 37, 42-44. See also McIntyre, TJ (n 214), 35; Tapper, C (n 162), 135.
[1106] Redmayne (n 1100), 219.
[1107] Ashworth, A, 'Four Threats to the Presumption of Innocence' (n 80); Greenawalt (n 1101).
[1108] Redmayne (n 1100), 219.

incrimination only applies to statements and not to objects[1109] or other evidence that exists independent of the will. The argument that there is no link between the right to silence and the presumption of innocence is weak. It fails to address the fundamental requirement of the presumption of innocence under the Constitution, as part of a fair trial, that there is no requirement on an accused to justify or explain their actions or establish their innocence as discussed in Chapter 1.[1110]

4.2.2 Support for link between the Right to Silence and the Presumption of Innocence

This thesis argues that the link between the right to silence and the presumption of innocence is supported by a range of leading commentators in this area.[1111] This section examines the nature of the link and their contribution to the avoidance of miscarriages of justice. Secondly, it explores the impact on the presumption of innocence, particularly the principle that the prosecution prove its case without assistance from the accused by legislative requirements to speak. Walsh appears to be of the view that the right to silence and privilege against self-incrimination are distinct rights in themselves, but he remarks that they are closely connected to the presumption of innocence.[1112] In particular, he states: 'Closely associated with the presumption of innocence are the right to silence and privilege against self-incrimination'.[1113] Similarly, Hamilton observes that the right to silence is said to be 'inextricably bound' to the presumption of innocence.[1114] However, the link is muddied when she states that like the presumption of innocence, the right to silence and the privilege 'can be described as fundamental rights. Both have been implied into the fair trial provisions of both the Irish Constitution and European Convention on Human

[1109] *McFarlane v DPP* [2008] IESC 7. See also McDermott, PA, and Murphy, MW, 'No Revolution: The Impact of the ECHR Act 2003 on Irish Criminal Law' (2008) 15 Dublin University Law Journal 1.
[1110] Prendergast (n 219), 171; Walsh, DPJ (n 91), [1-24], [22-03], [22-07].
[1111] Hamilton, C (n 1); Walsh, DPJ (n 91); Ashworth, A, 'Four Threats to the Presumption of Innocence' (n 80); Easton, S (n 231); P McInerney, '"Equality of Arms" Between the Suspect Interrogated in Garda Custody and the Gardaí?' (2010) 1 Judicial Studies Institute Journal; O'Reilly, GW, 'Comment on Ingraham's" Moral Duty" to Talk and the Right to Silence' (1997) 87 Journal of Criminal Law and Criminology 521; GW O'Reilly, 'England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice' (1994) 85 The Journal of Criminal Law and Criminology (1973-) 402; Schwikkard PJ, 'The Muddle of Silence' (2009) 6 International Commentary on Evidence; Hocking, BA, & Manville, LL, 'What of the Right to Silence: Still Supporting the Presumption of Innocence, or a Growing Legal Fiction?' (2001) 1 Macquarie Law Journal 63; Friends SC, 'An Effective Way to Deal with Terrorism - Britain and Ireland Restrict the Right to Silence' (1999) 23 Suffolk Transnational Law Review 227.
[1112] Walsh, DPJ (n 91), 1322 [22-04]-[22-06].
[1113] Ibid, 1322 [22-04].
[1114] Hamilton, C (n 1), 61.

Rights'.[1115] Again, this seems to suggest that they are distinct rights. Nonetheless, Hamilton states that 'it is clear that the two rights are closely connected'.[1116] Ashworth also observes that some commentators prefer to see the right to silence and the presumption of innocence as distinct rights.[1117] Nonetheless, he argues that there is a 'relation of kinship between'[1118] the presumption of innocence and the right to silence 'even if there is no direct link or derivation'.[1119] O'Mahoney argues that the presumption of innocence expresses the right to silence both at the pre-trial investigative stage and at trial.[1120] Similarly, Stewart states that 'the privilege against self-incrimination carries on through the entire criminal process as a concomitant of the presumption of innocence'.[1121] A number of commentators observe that the jurisprudence of the European Court of Human Rights reveals that the right to silence and privilege against self incrimination are closely connected to the presumption of innocence.[1122] Easton states that the 'right to silence...constitutes the symbolic and practical expression of the principle of the presumption of innocence'.[1123] Similarly, Quirke notes that the right to silence is the 'nexus' of the presumption of innocence and the burden of proof,[1124] and it is the 'touchstone' against which the presumption of innocence has been tested.[1125] Hamilton makes a persuasive argument for a strong link in the following statement:

> [T]he right to silence can be seen as the logical extension of the presumption through its symbolic and immensely practical role in preventing wrongful conviction.[1126]

[1115] Ibid, 64.
[1116] Ibid, 77. See also Hamilton, Dr C (n 1).
[1117] Ashworth, A, 'Four Threats to the Presumption of Innocence' (n 80), 256.
[1118] Ibid, 256.
[1119] Ibid, 256.
[1120] P Mahoney, 'Right To A Fair Trial in Criminal Matters Under Article 6 E.C.H.R.' (2004) 4 Judicial Studies Institute Journal 107, 121, 122.
[1121] H Stewart, 'The Privilege against Self-Incrimination: Reconsidering Redmayne's Rethinking' (2016) 20 International Journal of Evidence & Proof 95, 99.
[1122] Hamilton, C (n 1), 19; Jackson (n 1101), 182; Stumer A (n 46), xxxviii, xxxvix; Choo, A, L-T, *The Privilege Against Self-Incrimination and Criminal Justice* (Hart Publishing Ltd 2013), 25; Bisset A, 'The Privilege Against Self-Incrimination in Truth Commission-Administered Accountability Initiatives' (2017) 30 Leiden Journal of International Law 155, 164.
[1123] Easton, S (n 231), 181.
[1124] Quirke, H (n 1074), 24.
[1125] Ibid, 20.
[1126] Hamilton, C (n 1), 77. See also Hamilton, Dr C (n 1).

This argument supports the proposition that the function of the right to silence is inherent in the presumption of innocence, the objective of which is to prevent wrongful convictions. It is widely accepted that people under pressure are liable to make a confession even when it is impossible for them to commit the offence.[1127] Therefore, a legislative measure that requires a person to speak compromises the right to silence and Ashworth's basic principle that the innocent should be protected from conviction and punishment.[1128] Additionally, the privilege against self-incrimination can be seen as 'a bastion of human freedom from oppression by the state'[1129] to protect against the invasion of the dignity and privacy of the innocent and the guilty 'which occurs in compulsory self-incrimination'.[1130] On this point the Hederman Report observed:

> [A]dherents to this school of thought consider that any erosion of the privilege might present some risk to the innocent (especially the forgetful, the inarticulate and the socially vulnerable), so that these immunities "contribute to avoiding miscarriages of justice".[1131]

This was a clear acknowledgment by the Hederman Report that the avoidance of miscarriages of justice is a reason for the right to silence and privilege against self-incrimination which is bound up in the presumption of innocence. The Balance in Criminal Law Review Group in 2007 also set out four justifications for the right to silence which are inherently linked to the presumption of innocence as follows:

> First, it may be that an accused is "shocked by the accusation and unable at first to remember some fact which would clear him."...Second, there may be instances where to mention an exculpatory fact might reveal something embarrassing to the accused which he would otherwise wish to conceal... Third, the precise accusation and its implications may not be clear to the accused and the accused might prefer to consult with his lawyer before

[1127] Greer, S, 'The Right to Silence, Defence Disclosure, Evidence and Confession' (1994) 21 Journal of Law and Society, The Royal Commission on Criminal justice 102. at 726; For detailed analysis of this issue see GH Gudjonsson, 'False Confessions and Correcting Injustices' (2012) 46 New England Law Review 689.
[1128] Ashworth, A, 'Four Threats to the Presumption of Innocence' (n 80), 247.
[1129] Tapper, C (n 162), 446.
[1130] Mr Justice Hederman, 'Report of the Committee To Review The Offences Against the State Acts, 1939 - 1998 And Related Matters' (2002), [8.3] citing Pyneboard Pty. Ltd v Trade Practices Commission (1983) 152 CLR 328, 346. See also *Murray v United Kingdom* (n 626), [45].
[1131] Hederman (n 1130), [8.4].

> deciding how to respond...Fourth, the suspect, although innocent, may be inarticulate or is vulnerable to suggestion.[1132]

These points support the extension of the presumption of innocence to the pre-trial setting to protect the presumption of innocence from erosion by measures that compel answers at the pre-trial stage. Such provisions arise in the form of criminalising silence or permitting the drawing of adverse inferences from an accused person's silence. A qualification of the right to silence in this way arguably involves a de facto reallocation of the burden of proof on the accused. Such provisions either directly or indirectly apply pressure on the mind of a suspect to speak. The result is a requirement on the suspect to explain their innocence and to provide answers to assist the prosecution in their case against the accused. This view is evident in much scholarly commentary. Dennis argues that the right to silence and protection against self incrimination derives from values, such as those:

> attached to the freedom of dignity of the individual. It is embodied in the fundamental procedural principle that it is for the prosecution to prove the accused's guilt, and not for the accused to prove innocence.[1133]

His interpretation is that this position extends the prosecutorial burden and standard of proof beyond the trial setting and because of the imbalance in resources between the state and the suspect, the state is required to prove its case without the suspect's assistance.[1134] He notes that 'it is wrong in principle to compel the suspect to be the source of incriminating evidence'[1135] if they are presumed innocent.[1136] Dennis and Owusu-Bempah argue that a suspect is entitled to the privilege against self incrimination in procedures 'designed to establish guilt'.[1137] Owusu-Bempah is a persuasive advocate for a link between the privilege against self-incrimination and the presumption of innocence. She states that the link is easily identifiable as an

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[1132] 'Balance in the Criminal Law Review Group Final Report' (n 35), 20-23; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 5-6. See also 'Report of Expert Group Appointed to Consider Changes in the Criminal Law Which Were Recommended in the Garda SMI Report' (1998), 32; Criminal Law Revision Committee (Great Britan), 'Eleventh Report – Evidence (General), 1972 Cmnd 4991', 21.

[1133] Dennis, I (n 92), 200.

[1134] Ibid, 200.

[1135] Ibid, 200, 201.

[1136] Ibid, 200, 201.

[1137] Dennis, I, 'Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege against Self-Incrimination' (1995) 54 The Cambridge Law Journal 342, 348. Owusu-Bempah, A (n 285), 79.

embodiment of the prosecutions burden of proof in that it is 'wrong to compel'[1138] a person, who is presumed innocent, to self-incriminate.[1139] She states that the 'privilege can uphold the presumption of innocence by ensuring that the accused is not required to actively assist in establishing a case against himself'.[1140] Owusu-Bempah also observes that applying the wider interpretation to the presumption of innocence, the state should be required to account for the accusations pursued without the assistance of the accused even when there is supporting evidence for the accusations.[1141] O'Reilly argues that the right to silence ensures the prosecution discharges its legal burden of proof without assistance from the accused and therefore prevents a shift in this burden onto the accused to speak.[1142] Similarly, Stewart observes that there is 'an underlying normative connection between the presumption of innocence, the privilege against self-incrimination, and the requirement that the state make its case without the active testimonial participation of the accused'.[1143] Schofield-Georgeson also observes that when a defendant first attends court they may:

> [C]ontest a charge by pleading "not guilty", invoking their silence rights in the form of the presumption of innocence, burden of proof and privilege against self-incrimination. In practical terms, this usually means that a defendant simply remains silent...requiring the prosecution to prove its case against them at the hearing.[1144]

He continues:

> By making a denial, a defendant technically waives the right to silence. However, the logical implication of a denial is actually to assert other freedoms that flow from the right to silence, such as the presumption of innocence and burden of proof'.[1145]

[1138] Owusu-Bempah, A (n 285), 79.
[1139] Ibid, 79.
[1140] Ibid, 79.
[1141] Ibid, 7, 79.
[1142] O'Reilly (n 1111), 405, 420, 421.
[1143] Stewart (n 1121), 98. See also E Schofield-Georgeson, 'Silence Matters: A Survey of the Right to Silence in the Summary Jurisdiction of New South Wales' (2020) 24 International Journal of Evidence and Proof 121, 128.
[1144] Schofield-Georgeson (n 1143), 128.
[1145] Ibid, 128.

This section provides a strong argument that there is a clear link between the right to silence and the presumption of innocence for two reasons. First, the objective of the right to silence is to prevent a wrongful conviction which is inherent in the presumption of innocence. Secondly, a legislative measure that either directly or indirectly requires a suspect to answer questions involves a de facto reallocation of the burden of proof. As a result, a suspect is required to explain their innocence and to provide answers to assist the prosecution in their case against the accused which erodes the presumption of innocence. For these reasons, it is clear that the right to silence is an expression of the presumption of innocence.

4.3 Criminalising Silence

In light of the overwhelming academic support for the link between the right to silence and the presumption of innocence, this section will analyse some key Irish judgments on how the right to silence is treated under Irish law and the consequences for the presumption of innocence. There are a broad range of compulsory disclosure provisions that require a suspect to speak and criminalise silence. Criminalising silence arises in contexts as diverse as withholding information on offences against children and vulnerable persons,[1146] control of firearms,[1147] financial crime,[1148] possession of property,[1149] bankruptcy[1150] and road traffic[1151] to name a few. It is interesting to note that despite the frequency of their use as a legislative device to assist the State, their relationship with the presumption of innocence received little judicial attention until the early 1990's. Notwithstanding that, they have received little attention since then with the exception of some key decisions. The key Irish judgments examined in this section include *Heaney v Ireland*,[1152] *Re National Irish Bank*[1153] and *Sweeney v Ireland*[1154] which considered statutory provisions that require persons to speak and criminalise silence where there is a failure to speak. As will be seen in the analysis that follows, the courts have continued to tolerate the criminalisation of silence which arguably assists the

[1146] Section 2 and 3 of the Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012.
[1147] Section 15 of the Criminal Justice Act 1984.
[1148] Section 19 of the Criminal Justice Act 2011.
[1149] Criminal Justice (Theft and Fraud Offences) Act 2001.
[1150] Section 21(4) of the Bankruptcy Act 1988.
[1151] Section 107 of the Road Traffic Act 1961.
[1152] *Heaney and McGuinness v Ireland* (n 26). *Heaney and McGuinness v Ireland* (n 1069).
[1153] *Re National Irish Bank Ltd* (n 27).
[1154] *Sweeney v Ireland* (n 28).

prosecution in discharging its burden of proof thereby eroding the presumption of innocence. Different approaches have been taken by the courts as regards the constitutional location of the right to silence at the pre-trial and trial stages. This has given rise to some confusion around the admissibility in evidence of a compelled statement and it casts a doubt on the willingness of the courts to fully address the true value and consequences of the right to silence.

4.3 Heaney v Ireland

The constitutional basis for the right to silence was considered in the 'landmark case'[1155] of *Heaney v Ireland*.[1156] The accused men, Heaney and McGuinness were arrested and detained under section 30 of the Offences Against the State Act 1939 on suspicion of membership of an unlawful organisation and involvement in a bomb attack in Northern Ireland. During their detention, they failed to answer questions asked under section 52 of the 1939 Act. They were subsequently charged and convicted for failure to answer such questions. They received six months imprisonment. They were acquitted of the membership charges. Section 52 of the 1939 Act provides that:

> (1) ...any member of the Garda Síochána may demand of such person...a full account of such person's movements and actions during any specified period and all information in his possession in relation to the commission or intended commission by another person of any offence under any section or subsection of this Act or any scheduled offence.
> (2) If any person...fails or refuses to...account...or gives...any account or information which is false or misleading, he shall be guilty of an offence...

This provision made it an offence to remain silent.

4.3.1 High Court

Heaney and McGuinness challenged the constitutionality of section 52 of the 1939 Act in the High Court on the grounds that it infringed their privilege against self-incrimination and right to silence guaranteed by Article 38.1 (right to a trial in due course of law) and Article 40.3.1 (personal rights) and the presumption of innocence protected by Article 38.1 of the Constitution amongst other rights. Costello J

[1155] Harrison, A, *The Special Criminal Court: Practice and Procedure* (Bloomsbury Professional 2019), [4.60]. See also 'Whether Privilege against Self–Incrimination and Right to Silence Constitutional Requirements—Whether Section 52 of the Offences Against the State Act, 1939 a Valid Restriction on the Exercise of Constitutional Rights-Anthony Heaney and William McGuinness' (1994) 4 Irish Criminal Law Journal 212, 4.
[1156] *Heaney and McGuinness v Ireland* (n 26).

examined the scope and nature of the right to silence at common law with specific reference to decisions of the House of Lords in *Regina v Director of the Serious Fraud Office*[1157] and *AT & T Istel Ltd v Tully.*[1158] He clarified the scope of the right to silence which was doubtful since the decisions in *State (McCarthy) v Lennon*[1159] and *DPP v McGowan*.[1160] In *Lennon* the Supreme Court of the Irish Free State declared that the common law rule against self incrimination was subject to the constitutional requirement of the Constitution of the Irish Free State of 1922 to answer certain questions on pain of penal sanction.[1161] The 1922 Constitution was capable of being amended by statute. As a result, statements were considered to be lawfully obtained. Notably, this constitutional requirement did not continue in force in the 1937 Constitution. In *McGowan,* the Court of Criminal Appeal confirmed the admissibility in evidence of information obtained under section 52(1) of the 1939 Act. However, it did not consider and indeed it did not have authority to consider the constitutionality of section 52.

Costello J observed that the right to silence at common law confers two immunities, '(a)...against self-incrimination of a suspect and (b)...against self incrimination of an accused person during trial'.[1162] It is interesting to note that Costello J confirmed that the suspects' immunity pre-trial developed for the purpose of protecting against obtaining 'untrue confessions'[1163] in police custody. He found that the right to silence provides that a 'suspect should not be required to answer questions on pain of punishment should he not wish to do so; that he is free to remain silent should he so choose and that he should be informed of his right so to do'.[1164] In relation to accuseds' immunity, he found that it developed as a result of the common law courts objections to 'the abuses arising from court procedures involving the judicial interrogation of accused persons'.[1165] As a consequence an 'accused cannot be

[1157] Ibid, 601; *Murray v United Kingdom* (n 626).
[1158] *AT & T Istel v Tully* [1992] UKHL J0720.
[1159] *State (McCarthy) v Lennon* [1936] IR 485.
[1160] *DPP v McGowan* [1979] IR 45.
[1161] Section 1 of the Constitution (Amendment No. 17) Act 1931 which inserted Article 2A into the 1922 Constitution.
[1162] *Heaney and McGuinness v Ireland* (n 26), 603; *Re National Irish Bank Ltd* (n 27), 330; PJ (n 1111), 2.
[1163] *Heaney and McGuinness v Ireland* (n 26), 604.
[1164] Ibid, 604. Costello J repeats this requirement at 611.
[1165] Ibid, 604; *Re National Irish Bank Ltd* (n 27), 330.

required to give evidence at his own trial...and is entitled to remain silent during it'.[1166]

He examined whether the right to silence at common law was also protected under Article 38.1 of the Constitution. It will be recalled that Article 38.1 provides that: 'No person shall be tried on any criminal charge save in due course of law'. Costello J observed the importance of the presumption of innocence within the trial itself where he stated:

> It...has been construed as a constitutional guarantee that criminal trials will be conducted in accordance with basic concepts of justice...Thus, the principle that an accused is entitled to the presumption of innocence...are all principles which are so basic to the concept of a fair trial that they obtain constitutional protection from this Article.[1167]

He also remarked that 'the Irish courts have developed a concept that there are basic rules of procedure which must be followed in order to ensure that an accused is accorded a fair trial'.[1168] Examining the immunity at trial, from an international perspective,[1169] he held:

> [T]he concept is...so widely accepted as basic to the rules under which criminal trials are conducted that it should properly be regarded as one of those which comes within the terms of the guarantee of a fair trial contained in Article 38, section 1.[1170]

This suggests that Costello J identified the right to silence during one's trial as a right in itself. He then moved on to consider the right to silence in respect of a suspect in a pre-trial setting. In response to an objection on behalf of the Attorney General that Article 38.1 did not extend to the interview stage, he stated:

> I think that is too restrictive a view of the Article. The fairness of a trial may be compromised by what has happened prior to it and this is why, for example, evidence which has been obtained prior to the trial by improper means may vitiate the trial itself. It would follow, in my opinion, that if the right to silence of a suspect can properly be regarded as a basic requirement for our system of

[1166] *Heaney and McGuinness v Ireland* (n 26), 604; *Re National Irish Bank Ltd* (n 27), 330.
[1167] *Heaney and McGuinness v Ireland* (n 26), 605.
[1168] Ibid, 605.
[1169] 5th amendment to the Constitution of the United States of America; Article 14(3)(g) of the *International Covenant on Civil and Political Rights* (n 550); Article 6(1) of the *European Convention on Human Rights* (n 161).
[1170] *Heaney and McGuinness v Ireland* (n 26), 606.

criminal justice then it would be protected by this Article.[1171]

This suggests that Costello J only conducted a brief analysis as to why the right to silence is constitutionally recognised. It is disappointing that he did not venture into any discussion about the values underlying the development of the right to silence in connection with the presumption of innocence. Because of this lack of discussion, it has been suggested that a 'more reasoned argument might have been forthcoming'[1172] if the right to silence was identified as an aspect of the presumption of innocence. Nonetheless, these statements recognise that the right to silence like the presumption of innocence are basic principles of the right to a fair trial protected by Article 38.1 both during the trial and pre-trial stages which is consistent with judicial conceptions of the presumption of innocence as discussed in Chapter 2. It acknowledges that suspects' statements must be freely given thereby supporting the principle that the burden of proof is on the State to prove its case without assistance from the accused. This is fundamental to the presumption of innocence at trial.

Costello J remarked that the immunity for suspects was widely acknowledged in comparable legal systems to Ireland and it was recognised by the European Court of Human Rights[1173] in the context of the right to a fair trial in Article 6(1) of the European Convention on Human Rights. He held that 'the immunity conferred by the common law on suspects is one which obtains the protection of Article 38, section 1'.[1174]

He was clearly alive to the proximity of the custody and trial settings in terms of the necessity to protect the suspect's right to a fair trial thereby extending the reach of Article 38.1 to the interview setting. This proximity is apparent where an unsworn statement made by a suspect during Garda questioning or the lack of a response may be used against them at trial, including to form the basis for a conviction. On

[1171] Ibid, 606.
[1172] 'Whether Privilege against Self–Incrimination and Right to Silence Constitutional Requirements—Whether Section 52 of the Offences Against the State Act, 1939 a Valid Restriction on the Exercise of Constitutional Rights-Anthony Heaney and William McGuinness' (n 1155), 5.
[1173] *Funke v France* (1993) 16 EHRR 297.
[1174] *Heaney and McGuinness v Ireland* (n 26), 606.

this basis pre-trial questioning is the 'functional equivalent'[1175] of taking evidence under oath at trial with the result that there is no apparent distinction between sworn and unsworn statements.[1176] The manner in which a suspect is treated in obtaining a pre-trial statement must be consistent with innocence. On this basis, it appears that Costello J was concerned to ensure that the protection of the right to silence under Article 38.1 as applied during trial also applied during the pre-trial stage.

The net result of this development is that Costello J placed pre-trial silence on the same firm footing as that accorded to silence at trial within the meaning of Article 38.1 of the Constitution. However, despite the fact that he acknowledged that the presumption of innocence was a basic concept of a fair trial, he failed to recognise the impact section 52 of the 1939 Act had on the presumption of innocence. This is arguably demonstrated where he found that the restriction on the right to silence under Article 38.1 by section 52 increased the risk of wrongful admission which, as discussed in Chapters 1 and 2, the presumption of innocence aims to protect against. Considering the impact of section 52 on Article 38.1, he introduced the proportionality principle which he said: 'contains the notions of minimal restraint on the exercise of protected rights, and of the exigencies of the common good in a democratic society'.[1177] Notably, the guarantee of protection given by Article 38.1 does not contain any qualifying words unlike those contained in Article 40.3.2 'as best it may' and Article 40.3.1 'as far as practicable'. Indeed, Article 40.3.2 was not considered by Costello J in this case and he specifically rejected submissions by the accused that the right to silence was an unspecified 'personal' right within the meaning of Article 40.3.1. The lack of clarity as to the exact source of the proportionality principle is less than satisfactory. He found that section 52 did not violate Article 38.1 on the basis that it was proportionate to the objective of investigating and punishing 'serious subversive crime'.[1178] In justifying the invasion on the right to silence by section 52 he was persuaded by other safeguards[1179] that mitigate such risk and abuse of the power. An example of some of the safeguards

[1175] A Alschuler, 'A Peculiar Privilege in Historical Perspective: The Right to Remain Silent' (1996) 94 Michigan Law Review 2625, 2664.
[1176] Ibid, 2632.
[1177] *Heaney and McGuinness v Ireland* (n 26), 607; *Cox v Ireland* [1992] 2 IR 503; *Sunday Times v United Kingdom* (n 887); *R v Chaulk* (n 29).
[1178] *Heaney and McGuinness v Ireland* (n 26), 610.
[1179] Ibid, 610.

included the need for suspicion formed by the arresting Garda and that the suspect must be informed of a number of things such as, the offence of which he is suspected, the right to legal assistance, right to silence and the right to be told of that right.[1180] However, the safeguards identified by Costello J are not a persuasive justification for the risk posed by section 52. The safeguards do not reduce the degree of compulsion in section 52. Self-incriminatory answers are not automatically prohibited from use in evidence by section 52. There is no choice but to speak to avoid criminalisation. This pressure thereby risks the extraction of a wrongful confession or risks the commission of an offence by remaining silent. The safeguards do not act as a defence where one fails to account when requested under section 52. The mere invocation of section 52 inverts the presumption of innocence. A suspect is required to prove their innocence to avoid criminal prosecution and conviction. This is a significant undermining of the presumption of innocence.

Costello J rejected the submission by the accused that section 52 breached his presumption of innocence. Notably, his reasoning on this point did not satisfactorily address the crux of the problem with section 52 which requires a suspect to speak on pain of punishment. He stated:

> [T]he section may result in the production of evidence...in the same way as the taking of fingerprints does not infringe the presumption of innocence of an accused person. Both laws deal with the collection of evidence, not with legal presumption which both a suspect and an accused will continue to enjoy.[1181]

This paragraph confuses the impact on the presumption of innocence by gathering real evidence and evidence by the spoken word, by compulsory means, as one and the same thing. He equates the effect of section 52 with a compulsory provision requiring the production of real evidence that exists independent of the *will* of the suspect. This is disappointing and a misunderstanding of the effect of compulsory disclosure provisions requiring disclosure of real evidence and evidence by the spoken word. Costello J dismissed the accused's claim. His treatment of the

[1180] Ibid, 609.
[1181] Ibid, 610-611.

presumption of innocence is not reflective of a principle that was accorded the status of a bedrock constitutional principle.

4.3.2 Supreme Court

Heaney and McGuinness appealed to the Supreme Court.[1182] O'Flaherty J gave the judgment on behalf of the Court.[1183] He dismissed the appeal and found that Costello J was right in finding that section 52 did not breach the Constitution though he applied a different approach. He stated that 'the court does not reach any conclusion on whether Article 38 is applicable or not'[1184] in this case. Interestingly, he stated that the failure to answer questions under section 52 in this case did not interfere with a trial in due course of law.[1185] However, he acknowledged that certain pre-trial activities such as obtaining confession statements might undermine the requirement for a trial to be held in due course of law. This is both disappointing and difficult to reconcile given that section 52 criminalises silence. Instead, he held that the right to silence was a corollary of freedom of expression protected by Article 40 of the Constitution.[1186] He observed that it was not absolute,[1187] and therefore considered the proportionality of the provision. One would wonder why he choose to direct his mind to Article 40 which is a weaker rights location given that Costello J had applied the proportionality principle in locating the right to silence within the Article 38.1. It may perhaps be the case that he was particularly uncomfortable in applying the proportionality principle as Costello J had applied within the realm of Article 38.1 and secondly, there was greater scope in exercising discretion within the context of Article 40 in deference to crime control over the presumption of innocence. He examined the object of section 52. He noted the description of the 1939 Act in its long title. In relation to the provision itself, he stated:

> S.52...is in the nature of an exceptional provision. It comes into operation only when the government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order.[1188]

[1182] *Heaney and McGuinness v Ireland* (n 1069).
[1183] Hamilton CJ, Blayney, Denham and Barrington JJ concurring.
[1184] *Heaney and McGuinness v Ireland* (n 1069), 122.
[1185] Ibid, 123.
[1186] Ibid, 123.
[1187] Ibid, 127.
[1188] Ibid, 127; *Rock v Ireland* (n 30), 495.

In this statement, O'Flaherty J appeared to distinguish the provision from ordinary criminal legislation by categorising it as an 'exceptional provision'. This position is at variance to *Ashworth's* view[1189] that the seriousness or prevalence of the offence should not be put in the balance to justify an exemption from the presumption of innocence as its purpose would be undermined if it might be 'balanced away by showing' the public interest leaned against it.[1190] While the provision may assist the prosecution in achieving conviction rates where forced admissions are made, it is not necessarily the case that it will lead to convictions of the guilty. As discussed in Chapter 2, the public has an interest in ensuring that the innocent are not convicted and that only the guilty are convicted, thereby ensuring the maintenance of public confidence in the administration of justice.[1191] O'Flaherty J then remarkably observed that, in pursuit of the State's objective, an 'innocent person has nothing to fear from giving an account of his or her movements'.[1192] This statement is a significant departure from common law fair trial rights generally and the presumption of innocence in particular. This suggests a presumption of guilt on the part of suspects being required to answer under this section. He continued:

> [T]he court holds that the prima facie entitlement of citizens to take such a stand must yield to the right of the State to protect itself. A fortiori, the entitlement of those with something relevant to disclose concerning the commission of a crime to remain mute must be regarded as of a lesser order.[1193]

This suggests that O'Flaherty J was clearly focused on crime control. He did not place much value on pre-trial silence and indeed its related right to the presumption of innocence notwithstanding that a suspect may have a legitimate reason for remaining silent. He was clearly of the view that if a suspect was in possession of self-incriminating evidence that his/her right to remain silent must give way to the State's interest in protecting itself against serious crime. This approach fails to support the principles that the State must respect it citizens and that the prosecution must present its case without assistance from the accused. Nevertheless, O'Flaherty

[1189] Ashworth, A, 'Four Threats to the Presumption of Innocence' (n 80). See also *S v Coetzee* (n 970), [220].
[1190] Ashworth, A, 'Four Threats to the Presumption of Innocence' (n 80), 260.
[1191] Law Reform Commission of Ireland (n 108), 177. See also Roberts, P, and Zuckerman, A (n 108), 344.
[1192] *Heaney and McGuinness v Ireland* (n 1069), 128.
[1193] Ibid, 128.

J concluded 'that there is a proper proportionality in the provision between any infringement of the citizen's rights with the entitlement of the State to protect itself'.[1194] This reasoning was regrettably light on detail. The section was found to be constitutional. In light of the fact that the section was considered proportionate to the objective of investigating and punishing 'serious subversive crime',[1195] it would seem to follow that this conclusion also included the admissibility in evidence of any statement for the purpose of achieving this objective. However, as noted earlier, the section itself is silent as to admissibility of compelled answers. Indeed, O'Flaherty J did not discuss the issue of admissibility of a compelled statement in any way which is surprising. This has been characterised as 'a "cart before the horse"; style of judicial reasoning'.[1196] The effect of the Supreme Court's approach is that it provides greater latitude for justifying interference with the right to silence and undermining the presumption of innocence on the grounds of proportionality pursuant to Article 40.6.1.i (freedom of expression) in deference to the pursuit of crime control measures. No such qualifying provision is available in Article 38.1. Given the significance of the issues involved in this case regarding the location of and consequences of the right to silence, it is surprising that there was only one written judgment delivered in this case.

4.3.3 European Court of Human Rights

The applicants subsequently complained to the European Court of Human Rights that section 52 of the 1939 Act violated their right to silence and right against self-incrimination guaranteed by Article 6(1) and inverted the presumption of innocence guaranteed by Article 6(2) of the European Convention on Human Rights.[1197] In their assessment of the complaints, the European Court of Human Rights restated its established case law in *Saunders*[1198] as to why the European Court of Human Rights considered the right to silence and the privilege so important in connection with the presumption of innocence. The European Court of Human Rights made the following important statement:

[1194] Ibid, 128.
[1195] *Heaney and McGuinness v Ireland* (n 26), 610.
[1196] Hogan G, 'The Right to Silence after National Irish Bank and Finnerty' (1999) 21 DULJ 176, 3.
[1197] *Heaney and McGuinness v Ireland* (n 611), [29].
[1198] *Saunders v United Kingdom* (n 616), [68]-[69].

> [T]he right to silence and the right not to incriminate oneself, are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6...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 6.2 of the Convention...The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent.[1199]

The European Court of Human Rights in *Heaney* was therefore very clear in restating its view that there is a close connection between the right to silence and the presumption of innocence expressly provided for in Article 6(2). This extract suggests that the right to silence supports the presumption of innocence by ensuring the burden of proof is not altered and it contributes to the avoidance of miscarriages of justice. The European Court of Human Rights recalled *Murray v United Kingdom*[1200] and accepted that the right to silence and right not to incriminate oneself guaranteed by the fair trial rights in Article 6(1) are not absolute rights.[1201]

In relation to the scope of the right to silence under Article 6 of the European Convention on Human Rights, the European Court of Human Rights recalled *Saunders*[1202] in terms of the types of offences to which the right to silence applies and admissibility of answers obtained on foot of a compulsory disclosure power. Firstly it observed that the right to silence applies 'to criminal proceedings in respect of all types of criminal offences without distinction from the most simple to the most complex'.[1203] This is a higher standard than O'Flaherty J's position, as discussed earlier, where he distinguished section 52 from ordinary criminal legislation as an 'exceptional provision'. Secondly, the European Court of Human Rights noted that *Saunders* 'concluded that the public interest could not be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the

[1199] *Heaney and McGuinness v Ireland* (n 611), [40]. See also *Murray v United Kingdom* (n 626), [60].
[1200] *Murray v United Kingdom* (n 626), [47].
[1201] *Heaney and McGuinness v Ireland* (n 611), [47].
[1202] *Saunders v United Kingdom* (n 616), [74].
[1203] *Heaney and McGuinness v Ireland* (n 611), [57].

accused during the trial proceedings'.[1204] The European Court of Human Rights rejected the State's submission regarding the extent of other safeguards available to a suspect, as discussed earlier, on the basis that they did not reduce the degree of compulsion inherent in section 52. The European Court of Human Rights was clearly of the view that there is an intimate connection between the pre-trial interview setting and the trial setting for the purpose of the right to silence and presumption of innocence in Article 6. The European Court of Human Rights placed great emphasis on the fact that there was uncertainty at the time section 52 was invoked as to whether a statement made could be later excluded from admission into evidence against the accused.[1205] The European Court of Human Rights was less than satisfied with the procedural protections in section 52.[1206] The European Court of Human Rights made a significant observation as regards necessary safeguards to protect the right to silence and presumption of innocence having regard to the purpose of a compulsory disclosure provision. It noted in particular, that if the purpose of the section was to prosecute the person, adverse inferences from silence could have been included in the provision.[1207] Alternatively, it stated if the 'objective of the section 52 request was to investigate a crime committed by others, the request could have been coupled with a clear immunity from prosecution'.[1208] This is a key conclusion by the European Court of Human Rights. It clearly recognised that a request for information in relation to an offence committed by others requires clear statutory safeguards either by way of inference provision if the purpose of the section is for a prosecution or immunity from prosecution where the purpose of the section is for investigation. While it observed that it was not called upon to consider this particular issue, it sent a very clear message as to its thoughts on the nature of the provision and found that:

> [T]he "degree of compulsion", imposed on the applicants by the application of section 52 of the 1939 Act with a view to compelling them to provide information relating to charges against them under that Act, in effect, destroyed the very essence of their privilege against self-incrimination and their right to remain silent.[1209]

[1204] Ibid, [57].
[1205] Ibid, [53].
[1206] Submissions were made on developments in *Re National Irish Bank Ltd* (n 27).
[1207] *Heaney and McGuinness v Ireland* (n 611), [37].
[1208] Ibid, [37].
[1209] Ibid, [55]. This section has not been repealed and remains on the Irish statute book.

The European Court of Human Rights endorsed *Saunders*[1210] and found that 'the security and public order concerns...cannot justify a provision which extinguishes the very essence of the applicants' rights to silence and against self-incrimination guaranteed by Article 6(1) of the Convention'.[1211] Given the close connection between the right to silence and the presumption of innocence as identified by European Court of Human Rights, the nature of section 52 arguably destroys the very essence of the presumption of innocence. This is the complete opposite view of O'Flaherty J in the Supreme Court and a rejection of the proportionality justification but it is consistent with Ashworth's view as discussed earlier. The European Court of Human Rights made it clear that public interest concerns cannot be used to justify such an excessive interference with the right to silence and the presumption of innocence under Article 6. It found that the right to silence and privilege against self-incrimination were violated by section 52.[1212] Moreover the European Court of Human Rights continued:

> [G]iven the close link, in this context, between those rights guaranteed by Article 6(1) and the presumption of innocence guaranteed by Article 6(2) of the Convention...the Court also concludes that there has been a violation of the latter provision.[1213]

It therefore found that section 52 violated the presumption of innocence given its close connection with the right to silence. A similar finding was reached in *Quinn v Ireland.*[1214] Unlike the High Court and Supreme Court judgments in *Heaney,* the European Court of Human Rights was categorical in condemning section 52. Its basis was grounded on the compulsory nature of the provision which criminalised silence and effectively assisted the State in prosecuting the case against them thereby unjustifiably violating the right to silence and the presumption of innocence.

The case makes it clear that right to silence and the presumption of innocence in Article 6 of the European Convention on Human Rights provide a higher standard of

[1210] *Saunders v United Kingdom* (n 616).
[1211] *Heaney and McGuinness v Ireland* (n 611), [58].
[1212] Ibid, [59].
[1213] Ibid, [59].
[1214] *Quinn v Ireland* (2001) 33 EHRR 264, [51], [56].

protection than the constitutional standard as accepted by the Irish Supreme Court. Given the close link that the European Court of Human Rights drew between the right to silence and the presumption of innocence under Article 6 as discussed above, this suggests that the essence of the right to silence under European Convention on Human Rights standards is the protection of the presumption of innocence. As we have seen earlier, many scholars say that the right to silence flows from the presumption of innocence. In a way the European Court of Human Rights is saying here that the presumption of innocence is doubly infringed by section 52, both directly and indirectly via the right to silence which this chapter argues is based on the presumption of innocence. The close connection between the right to silence and the presumption of innocence in Article 6 of the European Convention on Human Rights was again restated in a number of other European Court of Human Rights cases.[1215] Notably in 2015, in *O'Donnell v The United Kingdom,*[1216] Judge Wojtyczek developed the European Court of Human Rights position when he stated:

> It is important to note that the right in question is intrinsically linked with the presumption of innocence and the repartition of the burden of proof between the parties to the proceedings. A restriction on the right to silence affects the way in which the presumption of innocence operates in practice and entails a *de facto* reallocation of the burden of proof, even if such reallocation is not explicitly recognised in the legal system. [1217]

This statement re-emphasises the intimate nature of the link between the right to silence and the presumption of innocence in Article 6. It identifies the practical reality of how the presumption of innocence is adversely affected when the right to silence is restricted in any way even though legal systems do not openly recognise that it reallocates the burden of proof. This impact on the presumption of innocence by a restriction on the right to silence mirrors the views of the majority of academic commentators as discussed earlier.

4.3.4 Reflecting on the Irish and European courts and Heaney

This section reflects on the *Heaney* case. As Fennell observes, this case dealt with the 'presumption of innocence and the right to silence'.[1218] Leading academic

[1215] *JB v Switzerland* Application no 31827/96 03 May 2001, [64]; *Weh v Austria* (n 616), [39]-[40].
[1216] *O'Donnell v United Kingdom* (Application no 16667/10) 7 April 2015.
[1217] Ibid, [3] concurring opinion of Judge Wojtyczek.
[1218] Fennell, C (n 757), [3.183].

commentators in this area are not impressed with the manner in which the Supreme Court approached the right to silence and the presumption of innocence. Notably, Hogan states that the right to silence was proclaimed by the Supreme Court in a 'grudging and curmudgeonly fashion'.[1219] Heffernan states that the interpretation of the right to silence in *Heaney* is 'controversial'.[1220] McGrath observes that '[o]ne of the most notable features of the decision of the Supreme Court in *Heaney* was, undoubtedly, the lack of enthusiasm displayed by the Court for the right to silence'.[1221] He remarks that 'in a number of passages in the judgment, O'Flaherty J echoed the Benthamite view that the right to silence is one which benefits only the guilty'.[1222] Reliance on the 'innocent have nothing to fear' argument by O'Flaherty J was characterised as 'surely unsound'.[1223] Hogan et al explain that: '[if] this premise were correct, one would have to question as to why the privilege enjoyed constitutional protection'.[1224] There are many legitimate reasons for remaining silent. On this point, McGrath argues that the right to silence serves to protect an innocent accused who would be a bad witness at trial and who may convict themselves out of their own mouth.[1225] These legitimate reasons support the rejection of the concept. Indeed, the concept was rejected by McGuinness J in another context where she stated that it 'is not necessarily the whole answer'.[1226] It is clearly the case that McGuinness J was not comfortable with the concept in principle.

McGrath observes that the 'right to silence developed in order to protect the right of an accused not to give evidence on the basis that, if an accused did not enjoy a right to silence at the pre-trial investigative stage, the immunity from testifying at trial would be "illusory"'.[1227] He notes that in elevating the right to silence to constitutional status, Costello J was impelled by the 'focus on the prevention of miscarriages of justice and the grounding of the right in Art.38.1'.[1228] However, this argument is

[1219] Hogan, G, 'The Right to Silence after National Irish Bank and Finnerty' (1999) 21 DULJ 176, 178.
[1220] Heffernan (n 732), [13.78].
[1221] McGrath, D, and Egan McGrath, E (n 720), [11-61]; McGrath, "The Right to Silence"; in Byrne and Binchy, (eds.), Annual Review of Irish Law 1996 (Dublin, 1997), 329. This is a very valuable and insightful critique of *Heaney*.
[1222] Ibid, [11-61].
[1223] Hogan, GW, Whyte, GF, Kenny, D, Walsh, R (n 286), [6.5.120].
[1224] Ibid, [6.5.120].
[1225] McGrath, D, and Egan McGrath, E (n 720), [11-23].
[1226] *Gilligan v Criminal Assets Bureau* [1998] 3 IR 185, 230.
[1227] McGrath, D, and Egan McGrath, E (n 720), [11-48].
[1228] Ibid, [11-56].

weakened somewhat by Costello J's desperate attempt to apply the proportionality principle within the realm of Article 38.1, which is not a qualified right in itself. As a consequence, he thus found it constitutionally fair to criminalise innocence indirectly through silence. In her discussion on counter terrorism legislation including section 52 of the 1939 Act, Hamilton persuasively argues that the constitutional value of the presumption of innocence which aims to protect against wrongful conviction is a 'good reason for insisting upon respect for fundamental rights'.[1229] In that context, she notes that measures designed to curtail the presumption of innocence must be necessary and proportionate to address the threat posed by terrorism and supported by empirical evidence, rather than vague assertions or assumptions.[1230] In support of this argument, proportionality cannot lead to extinguishing the very essence of the presumption of innocence. Indeed, the detrimental effect of the reasoning in this case, which included the proportionality approach, was characterised by Coen as having the following effect: 'criminalisation of silence was constitutionalised'.[1231] Similarly, referring to section 52 and its predecessor,[1232] Heffernan observes that the Irish courts have tolerated the 'criminalisation of silence'.[1233] Fennell also offers a firm view that the Supreme Court ''saved' a provision which criminalised silence'.[1234] Hogan et al go further and argue that the proportionality approach in *Heaney* 'is unsophisticated and appears to sanction something close to the end justifying the means'.[1235] Interestingly, in the context of the constitutional guarantee of fair procedures they observe that Costello J in *Donnelly v Ireland*[1236] seems to reject 'any proportionality approach'[1237] within the realm of Article 38.1 notwithstanding the fact that he introduced this principle into the context of Article 38.1 in the first place in *Heaney.*[1238] In *Donnelly* the constitutional validity of a statute[1239] was challenged within the context of Article 38.1. The High Court was confronted with balancing competing rights of victims and accused persons. The case concerned statutory

[1229] Hamilton, C (n 1), 204.
[1230] Ibid, 204, 205.
[1231] R (n 1089), 7.
[1232] Section 1 of the *Constitution (Amendment No. 17) Act 1931* (n 1161) which inserted Article 2A into the 1922 Constitution.
[1233] Heffernan (n 732), [13.77].
[1234] Fennell, C (n 757), [3.196].
[1235] Hogan, GW, Whyte, GF, Kenny, D, Walsh, R (n 286), [6.5.120].
[1236] *Donnelly v Ireland* [1998] 1 IR 321, 334.
[1237] Hogan, GW, Whyte, GF, Kenny, D, Walsh, R (n 286), [6.5.128].
[1238] Ibid, [6.5.127].
[1239] Section 13 of the Criminal Evidence Act 1992.

provisions permitting the giving of evidence by live television link. Notably, Costello J did not consider the proportionality approach he adopted two years previously in *Heaney.* Instead, he relied on the notion of fairness in 'due course of law' as interpreted by O'Higgins CJ in 1976 in *State (Healy) v Donoghue.*[1240] He stated:

> If the constitutional guarantee of fair procedures is breached then the court will declare a statute which does so to be unconstitutional...there can be no question of balancing conflicting rights - if the procedures are unfair this section must be condemned.[1241]

It is interesting to note that Costello J did not consider this statement in *Heaney.* The outcome may have been different had he done so. Nonetheless, his order in *Donnelly* was subsequently affirmed by the Supreme Court. Hamilton CJ in the Supreme Court examined the fairness of the procedures for an accused concerning the giving of evidence by a person under 17 years via live television link. He found that the Oireachtas was entitled to enact legislation permitting child witnesses to give evidence via live television link unless the contrary is determined by a court for good reason.[1242] Hamilton CJ thus affirmed Costello J's approach in this case. The approach in *Donnelly* suggests that the application of the proportionality principle within the realm of Article 38.1 may be in doubt. Notwithstanding the unsophisticated nature of the proportionality approach as categorised by Hogan et al, it is arguable that the effect of locating the right to silence in Article 40 provides greater latitude for interference with the right to silence and the presumption of innocence on the grounds of proportionality as it is a qualified provision. Irrespective of what empirical evidence was available to necessitate a curtailment of the presumption of innocence, any curtailment that criminalises silence will destroy the very essence of the right. In addition to *Donnelly*, commentary by leading scholars cast doubt in the precedential value of the Supreme Court decision in *Heaney*. The Supreme Court's approach was repudiated by the European Court of Human Rights. McGrath remarks that the Supreme Court decision is of 'little precedential value'[1243] in light of the European Court of Human Rights decision in this case. Similarly, Hogan et al observe that 'the

[1240] *State (Healy) v Donoghue* (n 193), 349-350.
[1241] *Donnelly v Ireland* (n 1236), 334.
[1242] Ibid, 354.
[1243] McGrath, D, and Egan McGrath, E (n 720), [11-62].

entire reasoning in *Heaney* is, frankly, unconvincing'.[1244] Heffernan notes Daly's characterisation of *Heaney* as 'indicative of a 'negative, crime control approach' which she perceived as a thread running through the fabric of the pre-trial process'.[1245] It will be noted though that the Supreme Court decision in *Heaney* was followed by the Supreme Court in three subsequent cases namely; *Re National Irish Bank Ltd,*[1246] *Rock v Ireland*[1247] *and DPP v Finnerty.*[1248] The case of *Re National Irish Bank Ltd* will be discussed below and *Rock v Ireland* and *DPP v Finnerty* will be discussed in Chapter 5. It is important to note that these three cases were decided before the European Court of Human Rights case in *Heaney.* On that basis, the precedential value of the Supreme Court decision is questionable. Its reasoning is not very persuasive.

4.4 Re National Irish Bank Ltd

In the period before the European Court of Human Rights heard and delivered its decision on 21 December 2000 in *Heaney*, the Supreme Court delivered an important judgment on 21 January 1999 on the right to silence in Irish law in the case of *Re National Irish Bank Ltd.*[1249] In this case two inspectors were appointed by the High Court under the Companies Act 1990 to investigate and report on the affairs of National Irish Bank Ltd. An issue arose regarding the operation of sections 10 and 18 of the 1990 Act in the context of the right to silence and privilege against self-incrimination. The inspectors sought directions from the High Court, whether a person 'sought by the inspectors in the course of their investigation was entitled to refuse to answer questions put by the inspectors...which may tend to incriminate him, her or it'.[1250] Section 10 obliged company directors and others to give all assistance to the inspector appointed under the 1990 Act. Shanley J in the High Court stated that this 'clearly embraces answering questions put to them by the inspector'.[1251] He found that persons were 'not entitled to refuse to answer questions

[1244] Hogan, GW, Whyte, GF, Kenny, D, Walsh, R (n 286), [6.5.120].
[1245] Heffernan (n 732), [13.82] citing Daly, Assembly-Lines and Obstacle Courses: The Pre-Trial Process in Ireland (PhD thesis, Trinity College Dublin, 2008), at 173.
[1246] *Re National Irish Bank Ltd* (n 27), (per Barrington J).
[1247] *Rock v Ireland* (n 30).
[1248] *DPP v Finnerty* (n 31).
[1249] *Re National Irish Bank Ltd* (n 27).
[1250] Ibid, 322.
[1251] Ibid, 337.

put by the inspectors...on the grounds that the answers...may tend to incriminate'[1252] them. Notably, section 18 provided that answers given could be used in evidence against the person. In addition, where failure to answer questions occurred, section 10(5) provided the High Court with a power to 'punish the offender in like manner as if he had been guilty of contempt of court'. A person's silence was therefore at risk of legal sanction/criminalisation either directly by remaining silent or indirectly by the pressure to provide an incriminating statement as there was no immunity from prosecution in the section. In justifying the constitutionality of section 10 Shanley J applied the proportionality test used by Costello J in the High Court and O'Flaherty J in the Supreme Court in *Heaney* as discussed above. He found that the restriction on the right to silence was no more than necessary to enable the State secure its obligation to protect citizens' property rights and equality before the law.[1253] He essentially placed property rights over the presumption of innocence.

On the issue of using compelled testimony against the person at trial, he referred to the European Court of Human Rights decision in *Saunders* as discussed earlier and the Supreme Court judgment in *Heaney.* He noted that the privilege did not apply at the preparation stage where the inspectors were gathering information. However, he did not rule on the admissibility of compulsorily obtained answers. On this point, he stated that as the questioning stage had not commenced, the use of answers had 'not as yet arisen.'[1254] However, that is not the end of the matter. He found that there was 'no necessary connection between the occasion of questioning by an inspector and the occasion, at trial, of tendering compelled testimony.[1255] This is concerning. He failed to take account of the fact that an incriminating statement taken during the pre-trial stage could be used in evidence against the maker of the statement. Indeed, he supported his finding stating:

> I have found no Irish or English authority for the proposition...that a valid abrogation at common law requires the sterilisation of answers to questions or the fruits of those answers.[1256]

[1252] Ibid, 342.
[1253] Ibid, 341.
[1254] Ibid, 342.
[1255] Ibid, 341 per Shanley J.
[1256] Ibid, 338 per Shanley J.

However, in considering *Saunders*, it is disappointing that he did not consider a number of points relevant to this case. Notably *Saunders* complaint was solely confined to the use of incriminating statements in evidence which had been obtained in an administrative investigation.[1257] *Saunders* also observed that an administrative investigation was capable of determining a 'criminal charge' within the autonomous meaning of the European Court of Human Rights caselaw.[1258] The question of the pre-trial investigation being capable of determining a 'criminal charge' was directly relevant to the issue of questioning by inspectors at the pre-trial stage in this case but was not considered by Shanley J. Furthermore, the Commission's Opinion in *Saunders* is instructive in relation to the application of the right to silence and the presumption of innocence during pre-trial administrative investigations. In the concurring opinion of Mr Loucaides, he stated:

> The presumption of innocence would in fact be a meaningless protection if an accused person was compelled to give evidence against himself. Therefore the privilege against self-incrimination must be recognised as a sine qua non for the effectiveness of the protection in question. In my view the privilege in question and the presumption of innocence are the two sides of the same coin...The rule against self-incrimination being part and parcel of the presumption of innocence which is protected in Article 6(2) of the Convention in absolute terms, there can be no justification for its breach. Therefore, inasmuch as the applicant was compelled to give incriminating evidence which was later on used against him in his trial, I find that there has been in this case a direct violation of Article 6(2) of the Convention. Such violation is an autonomous violation independent of the question of whether there has also been a breach, in this case, of the principle of "fair hearing" under para. 1 of Article 6.[1259]

Notably, this view was not considered either by Shanley J in the High Court. This is concerning for two reasons. First, it suggests that the close connection between the right to silence and the presumption of innocence at the pre-trial stage and the importance of the presumption of innocence was completely overlooked or it was not given any weight. This may be partly due to the fact that the European Convention on Human Rights was not part of the law in Ireland until 2003. Secondly, the impact of compelled incriminating evidence later used at trial violating the presumption of innocence was not considered. The Bank officials appealed to the Supreme Court in

[1257] *Saunders v United Kingdom* (n 616), [67], [68], [69].
[1258] Ibid, [67].
[1259] Ibid, 330-331, [77]. See also *Murray v United Kingdom* (n 626), 55, [82] per Dissenting Opinion of Mr L. Loucaides.

relation to the right to silence in so far as it affected natural persons.

4.4.3 Supreme Court

Barrington J gave the judgment on behalf of the Supreme Court.[1260] He first observed that the right to silence is generally located in Article 40.6.1° (freedom of expression) and is reinforced by Article 40.3 (personal rights).[1261] This means that the right to silence is subject to the principle of proportionality. He also observed that Article 38.1 only applies to the conduct of a criminal trial.[1262] This effectively overruled Costello J's approach in *Heaney* in applying Article 38.1 to the pre-trial setting for the purpose of protecting the right to silence. Barrington J discussed the voluntariness of a statement and its admissibility within the context of Article 38.1, as being a matter for the trial judge. In a passage which has been termed 'crucial',[1263] he stated: '[t]he fact that inspectors are armed with statutory powers or may even have invoked them does not necessarily mean that a statement made in reply to their questions is not voluntary'.[1264] This is difficult to reconcile considering the compulsory nature of section 10 of the 1990 Act. It is disappointing to note that, similar to the approach of Shanley J in the High Court, Barrington J did not consider the concurring opinion of Mr Loucaides in *Saunders*, as discussed earlier, regarding the relationship between the right to silence and the presumption of innocence and the impact of compelled incriminating evidence later used at trial violating the presumption of innocence.

He reaffirmed the law on admissibility of evidence at trial under Article 38.1[1265] in conjunction with Article 40.3 (personal rights), that an involuntary statement is not admissible in evidence.[1266] He found that a disputed question on voluntariness is decided 'by the trial judge.[1267] However, the matter of voluntariness appears to be one of degree. He held that 'what is objectionable under Article 38 of the Constitution is compelling a person to confess and then convicting him on the basis of his

[1260] O'Flaherty, Murphy, Lynch and Barron JJ concurring.
[1261] *Re National Irish Bank Ltd* (n 27), 351.
[1262] Ibid, 351.
[1263] McDermott, PA, 'Evidence and Procedure Update–Silence as a Criminal Offence' (2001) 11 Irish Criminal Law Journal 9, 10.
[1264] *Re National Irish Bank Ltd* (n 27), 353.
[1265] *DPP v Quilligan (No 3)* [1993] 2 IR 305; *DPP v McGowan* (n 1160); *DPP v Doyle* [1993] 2 IR 305; *People (Attorney General) v Gilbert* [1973] IR 383; *People (AG) v Cummins* [1972] IR 312; *State (McCarthy) v Lennon* (n 1159). See also *Ferreira v Levin* [1996] 1 SA 984.
[1266] *Re National Irish Bank Ltd* (n 27), 359.
[1267] Ibid, 360.

compelled confession'.[1268] While it is regrettable that Barrington J was unclear as to the impact of the pressure imposed on a person to speak by the compulsory nature of section 10, he took a different view to Shanley J in relation to the connection between the investigative stage and the trial stage. He continued:

> [A] confession...by the inspectors...under s. 10...would not, in general, be admissible at a subsequent criminal trial of such official unless, in any particular case, the trial judge was satisfied that the confession was voluntary.[1269]

At first sight this appears to offer the same protection at the pre-trial stage as would apply at the trial under Article 38.1. However, there is a lack of clarity as to where the line is drawn between a compelled and voluntary statement. The statements quoted above make it clear that the provision does not absolutely prohibit the use of an involuntary statement in criminal proceedings. The fact that Barrington J rejected the notion that no use could be made of such involuntary statements creates uncertainty around the use of compelled statements in evidence which is disappointing on constitutional grounds. This is concerning as the operation of the provision arguably inverts the presumption of innocence whereby a suspect is placed in a position to explain their innocence by the pressure of the compulsory provision on pain of punishment. A consideration of the facts on a case by case basis by the trial judge is arguably an insufficient safeguard as it does not reduce the degree of compulsion that exists in the first instance thereby extinguishing the very essence of the right to silence and the presumption of innocence.

It is clear from this case that in general, where the right to silence and the presumption of innocence are interfered with at the pre-trial stage, admissibility of evidence at trial falls within the scope of Article 38.1.[1270] Notably, Barrington J uttered a serious but welcome reservation as to whether the proportionality principle may be applied in the context of Article 38.1. He stated:

> [I]t is doubtful if the principle of proportionality — so important in other branches of constitutional law — can have any useful application here. A

[1268] Ibid, 360.
[1269] Ibid, 361.
[1270] Ibid, 351.

> criminal trial is conducted 'in due course of law' or 'with due process of law' or it is not.[1271]

This statement, read in conjunction with the view of Costello J in *Donnelly* as discussed earlier, effectively overruled Costello J's approach in *Heaney* on the application of the proportionality principle within the realm of Article 38.1. Indeed, Costello J's approach in *Heaney* has been characterised as 'effectively all but disowned'[1272] following Barrington J's stance. It is arguable that the fairness test in Article 38.1 affords greater protection for an accused than the proportionality test in Article 40.6.1 (Freedom of Expression). Unlike the fairness test, proportionality requires a court to resolve the question having regard to other matters such as security of the State, public order or victims' rights to name a few. As a result, the right to silence and the presumption of innocence are not balanced away by other crime or security concerns. Therefore, while the proportionality principle as adopted by O'Flaherty J in *Heaney* is applicable when Article 40.6.1 is relied upon either at the pre-trial stage or at trial, Barrington J in *Re National Irish Banks* held that it is not available when considering admissibility of the evidence under Article 38.1 at trial. Nonetheless, the 1990 Act did not provide an express provision prohibiting the use of a compelled statement in criminal proceedings. As a consequence, while a compelled statement may pass constitutional muster using the voluntariness test, it is arguable that it will be inconsistent with a fair trial within Article 6(1) and the presumption of innocence in Article 6(2) owing to their close connection. The mere nature of requiring a person to speak on pain of penal sanction destroys the essence of the right to silence and the presumption of innocence in Article 6. Barrington J dismissed the appeal and affirmed the order of Shanley J in the High Court.

4.4.4 Reflecting on the Irish courts and Re National Irish Bank Ltd

The theory underpinning the relevance of this case is that the High Court and Supreme did not accord sufficient weight to the presumption of innocence in the context of section 10, a compulsory disclosure provision requiring a person to answer questions at the pre-trial stage on pain of punishment, thereby abrogating the right to silence. Both the scholarly and judicial debates suggest that the right to silence and the presumption of innocence are so closely related that they cannot be

[1271] Ibid, 353.
[1272] Hogan, G (n 1219), 4.

separated. On this basis both aspects are considered together. It will be noted that this case was decided following the Supreme Court case in *Heaney* but prior to the European Court of Human Rights decision in that case. Nonetheless, neither the High Court nor the Supreme Court mentioned the words 'innocent', 'innocence' or the 'presumption of innocence'.

Furthermore, Shanley J in the High Court was clear in his finding that the compulsory disclosure provision was intended to abrogate the privilege against self-incrimination at the pre-trial stage.[1273] A difficulty with this finding is that the compulsory provisions did not contain an express saver excluding self-incrimination from evidence at trial and he failed to consider the presumption of innocence. This is remarkable for a number of reasons. Firstly, the majority of scholarly debates support the contention that the right to silence either flows from or is an extension of the presumption of innocence as argued earlier. Secondly, scholarly debates in Chapter 1 strongly argue that the presumption of innocence ought to apply at the pre-trial stage arising from the coercive nature of the powers of the State to ensure there is a principled reason to exercise them with restraint.[1274] Thirdly, judicial conceptions of the presumption of innocence prior to the decision in this case in 1999, as described in Chapter 2, clearly suggest that the presumption of innocence was not confined to the trial setting and therefore extended to pre-trial procedures.[1275]

Nonetheless, this case has been considered by one commentator to be 'a very welcome one'[1276] in addressing the tension between the abrogation of the right to silence and admissibility of a compelled statement. However, this view is not a universal scholarly view. McGrath remarks that 'Barrington J's judgment clearly suggests that there is an *absolute* rule, grounded in Art.38.1, against the admission of compelled statements'.[1277] He also states that the voluntariness test provides 'an

[1273] *Re National Irish Bank Ltd* (n 27), 338, 340 per Shanley J.
[1274] Hamilton, C (n 1), xiii; Roberts, P, and Zuckerman, A (n 70), 554; Stuckenberg (n 39), 310, 312; Roberts (n 272), 914; Stewart (n 187), 414, 415; Tribe, LH (n 119), 404; Owusu-Bempah, A (n 285), 7, 8; Hogan, GW, Whyte, GF, Kenny, D, Walsh, R (n 286), 1296 [6.5.84].
[1275] *People (AG) v O'Callaghan* (n 9), 509, 513; *O'Flynn v District Justice Clifford* (n 566), 744 per Gannon J; *McCarthy v Commissioner Garda Síochána* (n 485); *Hardy v Ireland* (n 21), 565, 568.
[1276] McGuckian, S, 'Recent Developments in the Law Governing the Admissibility of Confessions in Ireland' (1999) 9 Irish Criminal Law Journal 8.
[1277] McGrath, D, and Egan McGrath, E (n 720), [11-199].

effective form of substitute protection'[1278] where there is 'no specific provision sterilising the use of an incriminating statement obtained through the use of statutory powers of compulsion'.[1279] Harrison observes that it appears that as a result of *Re National Irish Banks*, 'that evidence obtained on foot of a demand under s 52 would not be admissible'.[1280] Similarly, the Hederman Report stated that a statement taken pursuant to section 10 'would be constitutionally inadmissible in evidence'.[1281] That Report makes a similar conclusion in respect of section 52 of the 1939 Act as discussed in *Heaney.* However, Barrington J was not so clear in his assessment of section 10. He said that the admissibility of any statement made under that section would be subject to the voluntariness test which is a matter for the trial judge to consider in each case as discussed above. Indeed, Heffernan observes 'that any statement obtained on foot of the statutory powers would be admissible at any particular criminal trial only if the trial judge was satisfied that it was voluntary'.[1282] Therefore, it does not mean that a statement obtained under a compulsory provision will be automatically inadmissible at trial. Notwithstanding the contrasting scholarly views, the analysis suggests that evidence obtained on foot of this compulsory power is not automatically inadmissible. Section 10 essentially required individuals to speak on pain of punishment. As a consequence, the presumption of innocence was inverted and required the person to explain their innocence destroying the very essence of the presumption of innocence.

It will be noted though, that the admissibility issue did not receive real clarity until the subsequent European Court of Human Rights decision in *Heaney* in 2001 in respect of Article 6 of European Convention on Human Rights as discussed above. Nevertheless, while the Supreme Court in this case relied on the Supreme Court's decision in *Heaney*, the outcome in this case may have been different had consideration been given to the concurring Commission Opinion of Mr Loucaides in *Saunders* as discussed earlier. Moreover, had the European Court of Human Rights decision in *Heaney* been available to Shanley J, he would have clearly observed it re-emphasising its view on the close connection between the pre-trial and trial

[1278] Ibid, [11-218].
[1279] Ibid, [11-218].
[1280] Harrison, A (n 1155), [4.64].
[1281] Hederman (n 1130), [8.10], [8.83].
[1282] Heffernan (n 732), [13.79].

stages. Secondly, he would have had the benefit of the discussion of the European Court of Human Rights around the use of pre-trial compelled answers at trial and particularly the fact that they destroy the very essence of the right to silence and the presumption of innocence. Similarly, the European Court of Human Rights decision in *Heaney* was not available to the Supreme Court in this case to consider. Much like section 52 of the 1939 Act, there is uncertainty when section 10 is invoked as to whether a statement made could be later excluded from admission into evidence against an accused. In light of the European Court of Human Rights decision in *Heaney,* it is clearly the case that there are insufficient safeguards in section 10 to reduce the degree of compulsion inherent in the section. The provision neither provides for an adverse inference to be drawn in the event of silence nor a clear immunity from use in a prosecution in the event of incriminating answers obtained. On this basis, it is arguable that the degree of compulsion effectively inverts the presumption of innocence to a presumption of guilt thereby requiring an explanation of innocence and ultimately destroying the very essence of the right to silence and presumption of innocence.

McGrath observes that following *Heaney* and *Re National Irish Bank* that the constitutionality of compulsory disclosure provisions are considered using the proportionality test whereas admissibility of compelled answers are considered using the voluntariness test which is much more difficult to satisfy.[1283] This is difficult to reconcile when one considers that the purpose of the compelled answers obtained during the pre-trial process, which is intimately connected with the trial process, may be used in evidence. It is difficult to separate the two stages. Hogan et al quote passages from this case[1284] and *Donnelly,*[1285] relevant to the discussion above in respect of the proportionality principle. They observe that there is 'uncertainty'[1286] as to whether the proportionality principle can be applied where Article 38.1 is engaged. They remark that 'the test is largely absent from criminal rights cases'.[1287] Given the legal uncertainty on this point, they state 'that it is unlikely that the proportionality test

[1283] McGrath, D, and Egan McGrath, E (n 720), [11-199].
[1284] *Re National Irish Bank Ltd* (n 27), 353.
[1285] *Donnelly v Ireland* (n 1236), 334.
[1286] Hogan, GW, Whyte, GF, Kenny, D, Walsh, R (n 286), [6.5.26].
[1287] Ibid, [6.5.29].

could be applied so as to dilute the very essence of core constitutional rights'.[1288] Having regard to the description of the presumption of innocence in Chapter 2 and the right to silence earlier, it is clear that they are core constitutional rights. Nevertheless, Hogan et al observe that while respecting the essence the right to silence and presumption of innocence, these rights may be restricted using the proportionality principle.[1289] This suggests that the law in this area is in a state of confusion.

4.5 Sweeney v Ireland

The most recent case to consider the constitutionality of a statutory provision criminalising silence was *Sweeney v Ireland.*[1290] In that case, Sweeney challenged section 9(1)(b) of the Offences Against the State (Amendment) Act, 1998. That section makes it an offence[1291] for any person without reasonable excuse to withhold information that might be of material assistance in securing the arrest, prosecution or conviction of 'any other person'[1292] for specified serious offences. As to the facts, Sweeney was a suspect in a murder investigation where the injured party died on 13th August 2007. He was interviewed informally on 16th August 2007 and 14th September 2007. On both occasions, he was cautioned in the usual manner, 'that he had the right to remain silent but that anything that he might say in the course of the interview could be used in the course of a trial'.[1293] On 30th November 2007, he was arrested on suspicion of murder. During his detention he was interviewed and cautioned again in the usual terms. He remained silent during each interview. He was never charged with murder. In 2014 he was sent for trial for an offence of withholding information under section 9(1)(b) of the 1998 Act. Notably, the charge sheet included the date range within which he was interviewed as a suspect. It read as follows:

> [O]n the dates between 13/08/2007 and the 01/12/2007 in the State did fail without reasonable excuse to disclose as soon as practicable...information

[1288] Ibid, [6.5.29].
[1289] Ibid, [6.5.29].
[1290] *Sweeney v Ireland* (n 28).
[1291] Note the offence is indictable and on conviction, an accused is subject to a fine or imprisonment for a term not exceeding five years or both under section 9(2) of the Offences Against the State (Amendment) Act, 1998.
[1292] Section 9(1)(b) of the Ibid.
[1293] *Sweeney v Ireland* [2017] IEHC 702, [2].

> which [he] knew or believed might be of material assistance in securing the apprehension, prosecution or conviction of any other person for a serious offence to wit an offence that involved the loss of human life.[1294]

He was not informed at any stage during interview that he may be liable for an offence under section 9(1)(b) of the 1998 Act if he failed or refused to respond to questioning. He subsequently challenged the constitutionality of the section in the High Court.

4.5.1 High Court Proceedings

One of the grounds upon which Sweeney challenged the constitutionality of the section was that the offence breached his constitutional right to silence, in particular his privilege against self-incrimination. Baker J found that given that the section related to withholding information in relation to the commission of an offence by another, it was not immediately clear that it encroached on the right not to self-incriminate.[1295] This finding is surprising as the charge arose out of a situation where Sweeney was a suspect and in circumstances where he had failed to answer questions during three separate interviews under caution. Coen observes that there is 'some confusion in the judgment about the role played by the privilege against self-incrimination in the finding of unconstitutionality'.[1296] In support of this view, he draws attention to Baker J's statement where she stated that a suspect during questioning may be placed 'in an irresolvable dilemma to answer questions regarding the crime and possibly incriminate himself or herself or to refuse to answer any questions and thereby commit a criminal offence'.[1297] The operation of the section in this way is concerning as it arguably inverts the presumption of innocence whereby a suspect is placed in a position to explain their innocence by the pressure of the compulsory provision to speak or risk criminalisation by remaining silent. Baker J was clearly exercised by the compulsory nature of the section in criminalising silence by a person not otherwise at risk of prosecution and that it was capable of application to a suspect during questioning as in this case.[1298] On at least six occasions in her judgment she makes specific reference to the fact that silence in

[1294] Ibid, [7].
[1295] Ibid, [37].
[1296] Coen (n 1074), 8.
[1297] *Sweeney v Ireland* (n 1293), [79].
[1298] Ibid, [76], [82].

itself under section 9(1)(b) was an offence[1299] which could lead to conviction. It is disappointing that she did not draw any conclusion on the impact of this problem with the presumption of innocence under Irish law. Nonetheless, given the close relationship between the right to silence and the presumption of innocence as discussed earlier, it is arguable that they cannot be separated and on this basis both aspects are considered together in this analysis.

Baker J analysed the sources of the right to silence. She located the right to silence as deriving from two sources. However, she stated that she was bound by the Supreme Court decision in *Heaney.*[1300] She concluded that as the right to silence has its basis in 'broad constitutional principles and is not wholly founded in the principle against self-incrimination'[1301] it could be relied upon in this case. She therefore found that while the right to silence flowed from the narrow privilege against self-incrimination located in Article 38.1, the right to silence may be regarded as a stand-alone broader right deriving from the freedom of expression guarantee in Article 40.3.1. Coen categorised this as 'a right not to be compelled to speak'.[1302] Baker J considered the proportionality test in *Heaney* in relation to an interference with the right to silence in general and observed that:

> A statutory provision which compels a person to...answer questions in the course of an investigation is not regarded as destroying the right if the procedural protections are sufficient to ensure a proper balance between the right to silence and the right of the State in the common good to investigate crime or protect public peace and order.[1303]

Unfortunately, Baker J was unclear in describing the procedural protections that would effectively reduce the degree of compulsion on a suspect to the extent that it did not destroy the very essence of their right to silence and the presumption of innocence. Applying the proportionality test to section 9(1)(b), she stated on two occasions in her judgment that there was a lack of procedural protections for a person under interrogation for an offence under section 9(1)(b) unlike other statutory

[1299] Ibid, [55], [59], [77], [78], [81], [90].
[1300] Ibid, [39].
[1301] Ibid, [42].
[1302] Coen (n 1074), 9.
[1303] *Sweeney v Ireland* (n 1293), [44], [90].

provisions such as section 52 of the 1939 Act considered in *Heaney.*[1304] Specifically, she observed that there was no statutory provision for warning the person of the consequences of remaining silent.[1305] It is not clear how she formed this view as there is no warning provision in section 52 either. Nonetheless, in the case of a suspect, it is arguable that a warning would be insufficient protection to reduce the degree of compulsion where a provision criminalises silence as it abolishes the very essence of the right to silence and the presumption of innocence. Considering the absence of procedural safeguards against the automatic criminalising of silence as referred to earlier, Baker J found that the section disproportionately interfered with the right to silence and was therefore unconstitutional. It is disappointing that her finding did not consider the required safeguards under the European Convention on Human Rights where a provision abolishes a suspect's right to silence and the presumption of innocence as discussed earlier. While it would not have altered the outcome, it would have strongly suggested real respect for the presumption of innocence. In obiter comments, she briefly discussed the European Court of Human Rights case in *Heaney*. It is disappointing that she did not analyse the European Court of Human Rights view in *Heaney* with regard to the need for specific procedural safeguards. It will be recalled that the European Court of Human Rights focused on the purpose of such compulsory legislation. *Heaney* clearly recognised that if the purpose of the section was to prosecute the person, adverse inferences from silence could have been included in the provision.[1306] Alternatively, if the 'objective of the [compulsory] request was to investigate a crime committed by others, the request could have been coupled with a clear immunity from prosecution'.[1307] This was directly relevant to section 9(1)(b) as it concerned an offence committed by others. However, this does not appear to have been considered by Baker J. This indicates that the courts continue to pay lip service to the presumption of innocence. Baker J did not discuss the relevance of this section to the presumption of innocence. Indeed, there are only two references to the word 'innocent' in the judgment. They are contained in extracts quoted from two judgments *Heaney* and *Gormley*. There is only one passing reference to the phrase 'presumption of innocence' in relation to the link drawn by the European Court of

[1304] Ibid, [58], [63].
[1305] Ibid, [56], [58].
[1306] *Heaney and McGuinness v Ireland* (n 611), [37].
[1307] Ibid, [37].

Human Rights between the privilege and the presumption of innocence. This is a disappointing reflection on the real value placed on the presumption of innocence by the Irish courts. Had these safeguards been considered it would have strongly suggested the constitutional value of the presumption of innocence in a material way. It may have clarified that the voluntariness test in respect of compulsory disclosure provisions is an insufficient safeguard to reduce the degree of compulsion imposed by such provision which extinguishes the very essence of the right to silence and the presumption of innocence of suspects.

Baker J also discussed the implications of the section 9(1)(b) on Article 6 of the European Convention on Human Rights with specific reference to the point in time at which the right to silence is triggered in her obiter comments. She referred to the judgment of Clarke J (as he then was) in *DPP v Gormley*[1308] who analysed the jurisprudence on the right to silence under Article 6 on this point. It is noteworthy that Clarke J's discussion in *Gormley* on questioning at the pre-trial stage was rooted in what he stated to be 'the need for basic fairness, which is inherent in the requirement of trial in due course of law under Article 38.1 of the Constitution'.[1309] Baker J in *Sweeney* observed that the right is triggered at the point at which national courts 'attach consequences to the attitude of an accused'.[1310] She noted Clarke J's view that 'the position in Irish law was the same'.[1311] She was also persuaded by Clarke J's view of the European Court of Human Rights approach to the following:

> [P]lacing of significant reliance on admissions made in the course of questioning could lead to a trial being unfair and expressed himself "persuaded that a like position must be found to exist under Bunreacht na hÉireann".[1312]

Baker J then considered by way of analogy that this must 'also inform the lawfulness of securing a conviction arising from silence in the course of questioning of a person in the course of a criminal investigation'.[1313] Consequently, she observed that Article 6 is triggered by section 9(1)(b) at 'the point at which a person remains silent,

[1308] *DPP v Gormley* (n 256).
[1309] Ibid, [9.2].
[1310] Ibid, [89].
[1311] *Sweeney v Ireland* (n 1293), [89].
[1312] Ibid, [91].
[1313] Ibid, [91].

whether that person is under interrogation or not'.[1314]

Nonetheless, as noted earlier, Baker J stated that as a matter of Irish law, she was bound to follow the Supreme Court decision in *Heaney* where the broader right to silence was found as flowing from the freedom of expression. Coen's point that Baker J's argument that the privilege against self-incrimination is not applicable in a situation where the legislative wording is about the wrongdoing of others has some merit. Indeed, he also argues convincingly in the context of other offences that her reliance on the broad right to silence deriving from the freedom of expression 'is a neater solution than one based on the privilege against self-incrimination'.[1315] He supports this argument on the basis that 'the broader right to silence is violated by the section in *all* cases'.[1316] Nonetheless, interference with the right to silence on the basis of freedom of expression is subject to the proportionality principle and therefore potentially weakens the protection for suspects at the pre-trial interview stage. Locating the right to silence within Article 38.1 for suspects arguably places the right to silence on a firmer basis and secures the need for basic fairness. While it may be more restrictive in terms of its reach, it would nevertheless be triggered when a person is a suspect and for all other persons where there is a risk of self-incrimination. The real strength of the right to silence located in Article 38.1 is that it is not subject to the proportionality principle[1317] thereby securing the presumption of innocence in a more effective way. As noted earlier from the judgments of Costello J in *Donnelly*[1318] and Barrington J in *Re National Irish Bank,*[1319] the proportionality test involving a balancing of rights was effectively ruled out as falling within the ambit of Article 38.1. The strength of this view will be analysed below in the context for the Supreme Court judgment. Baker J found that the section infringed his right to silence and declared the section incompatible with the Constitution.

4.5.2 Supreme Court Proceedings

The State appealed the High Court decision to the Supreme Court.[1320] The Irish

[1314] Ibid, [90].
[1315] Coen (n 1074), 8.
[1316] Ibid, 8.
[1317] *Heaney and McGuinness v Ireland* (n 1069).
[1318] *Donnelly v Ireland* (n 1236), 334.
[1319] *Re National Irish Bank Ltd* (n 27), 353.
[1320] *Sweeney v Ireland* (n 28).

Human Rights and Equality Commission intervened as amicus curiae.[1321] Charleton J gave the judgment on behalf of the Court and reversed the order of the High Court.[1322] He found that not alone does section 9(1)(b) not infringe the privilege against self-incrimination, it 'expressly preserves the right to silence'.[1323] He found that the requirement to cooperate under the section only applies to witnesses or non-participants to a crime or those who lack a reasonable excuse.[1324] In support of this finding he gave a detailed description distinguishing the meaning of a witness of a crime and a person who participates in a crime.[1325]

4.5.2.1 Application of provision to suspect

It will be recalled that Sweeney was a suspect for the offence of murder but was also questioned in relation to another person's involvement in the same murder for which he was a suspect. In this respect, the judgment is less than clear in terms of its application to a suspect who has information in relation to another's participation in a crime for which he/she is also a suspect. On one hand, Charleton J stated that the 'section...rests on the commission of a clearly defined offence of which the accused becomes aware'.[1326] Later in the judgment he states that the section requires the following:

> [T]he prosecution to prove...that someone other than the accused committed it, that the accused had information which was of material assistance to apprehending or proceeding against that person...[1327]

Later again, he found that the effect of this section is that 'it is aimed at witnesses to crime or those who have information about a crime and is aimed at nothing else'.[1328] The reference to 'those who have information about a crime' does not appear to rule out the application of the section to a suspect in the context of the actions of another in respect of the same offence for which he/she is a suspect. A similar view may be taken from the following statement where he stated:

[1321] Irish Human Rights and Equality Commission, 'Sweeney v Minister for Justice Ireland and the Attorney General Submissions' <https://www.ihrec.ie/human-rights-and-equality-commission-appears-before-supreme-court-in-right-to-silence-case/ [Accessed on 18 April 2021]>, [42].
[1322] O'Donnell, MacMenamin, Dunne, Finlay Geoghegan JJ concurring.
[1323] *Sweeney v Ireland* (n 28), [77].
[1324] Ibid, [65], [86].
[1325] Ibid, [17], [18].
[1326] Ibid, [47].
[1327] Ibid, [64].
[1328] Ibid, [65].

> [S]pecifically, what is at issue is not what the suspect did or did not do by way of participation in a crime or what he or she witnessed in the course of committing a different crime. Instead, the section is about what was done by another.[1329]

Again, this reasoning seems to suggest that the section may be applied to a suspect regarding the actions of another in respect of a crime for which he/she is a suspect. Indeed, Charleton J found that 'the section as it applies to this offence, the commission by another of murder, is not productive of inconsistent application and nor is it likely to lead to arbitrary enforcement'.[1330] It is clearly the case therefore, that he did not find the application of the section to Sweeney as arbitrary enforcement even though Sweeney was himself a suspect for the murder. On this basis, the argument that the section does not affect the right to silence and privilege against self-incrimination of a suspect is not very compelling. When applied in this circumstance it is difficult not to conclude that it does not pressurise a suspect to speak in relation to the offence in respect of which they are suspected.

4.5.2.2 Lack of safeguards in the provision

Charleton J made reference to a broad suite of legislation containing safeguards deeming admissions for a substantive offence inadmissible. There is no safeguard provided in the section to expressly deem inadmissible any admissions made in relation to the substantive offence. As a consequence, it is suggested that the constitutional position as expressed by Charleton J that 'the principle of the inadmissibility of coerced answers in criminal proceedings is necessarily to be read into the legislation'[1331] offers less protection than the European Convention on Human Rights standard. It is disappointing that this view was not considered by the Supreme Court. The reasoning of Charleton J in relation to the inadmissibility of coerced admissions in criminal proceedings appears to fall short of the European Court of Human Rights standard. It allows for the courts to determine the voluntariness of such answers on a case by case basis. It does not provide for the automatic inadmissibility of coerced answers. As a result, some coerced answers may be used in evidence thereby affecting the essence of the right to silence and the

[1329] Ibid, [69].
[1330] Ibid, [87].
[1331] Ibid, [72].

presumption of innocence.

There is no provision for a caution or a warning. As one commentator has properly stated: 'Without proper notice the suspect can neither make an informed decision about whether and when to speak nor exercise his/her independent right of access to pre-trial legal advice'.[1332] Bearing this in mind, a deeper analysis in relation to the protections for the presumption of innocence as expressed by the European Court of Human Rights in *Heaney* and as discussed above in relation to a section 52 request, should have been taken. It is noted though that Charleton J relied heavily on the distinction between section 52 of the 1939 Act and section 9(1)(b). As discussed earlier, section 52 requires an account in relation to oneself and the provision of information in relation to another, while section 9(1)(b) requires one to provide information in relation to another person only. Nevertheless, it will be noted that the European Court of Human Rights in *Heaney* made a very strong comment in respect of the purpose of section 52 in relation to the investigation of crimes committed by others. It will be recalled that the European Court of Human Rights stated that if the 'objective of the section 52 request was to investigate a crime committed by others, the request could have been coupled with a clear immunity from prosecution'.[1333] This is a remarkable statement where the European Court of Human Rights choose to recognise the impact of section 52 in relation to providing information about the commission of crimes by others. It goes further than simply dealing with a provision requiring a person to account for their own actions. It arguably demonstrates that the European Court of Human Rights was concerned for individuals called to account for offences committed by others. It expressed a clear view of the necessity for an immunity to mitigate infringement of the essence of the right to silence, privilege against self-incrimination and the presumption of innocence. In addition, it is worth noting the dissenting voice of Professor Dermot Walsh in the Hederman Report where he expressed concern by the imposition of a criminal sanction on individuals to enforce compulsion to cooperate. He stated:

> Just as the State should not use the criminal sanction to compel an individual to provide evidence against himself or herself in a criminal investigation, so also should it not use the criminal sanction to compel the individual's co-

[1332] Heffernan (n 732), [13.86].
[1333] *Heaney and McGuinness v Ireland* (n 611), [37].

operation with a police investigation.[1334]

His concern was made irrespective of whether the compulsion related to a requirement to cooperate in respect of a crime where the individual or another person was the suspect. It is arguable therefore, that the two sections are on all fours in respect of the investigation of crimes committed by others.

4.5.2.3 "Without Reasonable Excuse"

Charleton J also considered the 'reasonable excuse' protection in the context of protecting those who may be at risk of revealing participation in a crime. Even claiming the privilege is an indication of involvement in the offence.[1335] Indeed, it is arguable that the 'reasonable excuse' threshold indirectly compels a person to admit an offence of participation thereby infringing their right to silence and privilege against self-incrimination and their presumption of innocence. It has been observed that if the person 'remains silent it may not be clear that they possess that legitimate reason to withhold and they could be convicted'.[1336] It will be noted that section 9(1)(b) absolves a person from disclosure of information to the Gardaí in relation to an offence committed by another if they have a reasonable excuse. Indeed, the prosecution must prove that the accused had no reasonable excuse for not disclosing such information.[1337] The question therefore arises as to how this aspect of the provision operates, in particular, where a person may incriminate themselves as a suspected accomplice when they answer certain questions. Charleton J stated that the person would have a 'reasonable excuse' and that the circumstances in which a person may refuse to answer questions on the grounds of self-incrimination are well established.[1338] However, he did not describe what they were. Nonetheless, his consideration of *R v Donnelly*[1339] is instructive on this point as it considered a similarly worded Northern Ireland provision. Charleton J found: 'It is...clear from existing decisions on the commonplace phrase "without reasonable excuse" that exposure of the accused to revealing his or her own participation in the crime, as in *Donnelly*, is covered'.[1340] However, the protective nature of this finding is not entirely

[1334] Hederman (n 1130), 258.
[1335] Coen (n 1074), 21.
[1336] Ibid, 21.
[1337] *Sweeney v Ireland* (n 28), [64].
[1338] Ibid, [36].
[1339] [1986] NI 56.
[1340] *Sweeney v Ireland* (n 28), [64].

convincing on closer examination of his reasoning on this point. He noted that the defence is required to raise something more that a 'strained interpretation of participation with a view to excusing the fact that he or she had not come forward'.[1341] He stated that the excuse must be reasonable; it cannot...be falsely invoked'.[1342] As a consequence, the excuse must be truthful. It is arguable therefore that raising an excuse must provide a context that is not artificial or fanciful in order to satisfy the 'reasonable' threshold. It is difficult to imagine an excuse satisfying this threshold without an admission of participation in a crime. Coen persuasively argues that given the fact that the section 'can have the effect of undermining the privilege against self-incrimination should have resulted in a finding of unconstitutionality'.[1343]

4.5.3 Reflecting on the Irish courts and Sweeney

The distaste for provisions criminalising silence and the consequence for the presumption of innocence was discussed in the Hederman Report.[1344] It observed that generally there is a 'perceived risk that innocent persons will wrongly incriminate themselves if they are obliged to answer questions under threat of legal sanction'.[1345] More specifically Professor Dermot Walsh dissenting, raised a fundamental objection to section 9 due to its coercive nature in criminalising innocent individuals for the purpose of facilitating the investigation of offences committed by others.[1346] He also expressed concerns that a person could be 'threatened with prosecution and a lengthy prison sentence if he or she fails without reasonable excuse to cooperate'.[1347] This is a clear indication of the manner in which section 9 of the 1998 Act facilitates the erosion of the presumption of innocence. However, the majority did not hold the same view.[1348] In relation to *Sweeney,* McGrath and Heffernan both observe that the central aspect of the Supreme Court's finding was that the section was aimed at a witness as distinct from a participant in that crime.[1349] However, Coen in his extensive analysis of *Sweeney* persuasively argues that the reason Charleton J did not find a breach of the privilege against self incrimination 'does not engage with the true

[1341] Ibid, [35].
[1342] Ibid, [36].
[1343] Coen (n 1074), 17.
[1344] Hederman (n 1130).
[1345] Ibid, [8.51].
[1346] Ibid, 259.
[1347] Ibid, 259.
[1348] Ibid, 259.
[1349] Heffernan (n 732), [13.85].

impact of the section on the right to silence'.[1350] He notes that the 'judgment seeks to establish a distinction without a difference'.[1351] He argues convincingly that the Judgment attempts to distinguish between being punished for remaining silent as a suspect as compared to being punished for failing to assist the authorities about the involvement of others in an offence of which one is aware.[1352] However, he rightly observes that '[t]here is a failure...to fully engage with how s 9(1)(b) intersects with the privilege against self-incrimination'.[1353] As with Coen, Charleton J's analysis of the interaction of the section with the privilege against self-incrimination is not convincing.[1354] While McGrath does not discuss the case in much detail, he observes that arising from *Sweeney* that not every provision requiring information on pain of punishment will breach the right to silence.[1355] Notably, Coen argues that Charleton J's statement that the section could not be construed as enabling conviction in the event of silence is 'demolished by Charleton J's characterisation of how the provision was invoked in respect of Mr Sweeney'.[1356] Coen is clearly not convinced by Charleton J's interpretation of the section.

Charleton et al observe that according to *Sweeney* 'a person is excused from self-incrimination'.[1357] However, this does not address a situation where a person admits their involvement in an offence as a consequence of the compulsory nature of the section. Allied to this concern, Heffernan, similar to Coen as discussed, argues that Charleton J's finding is not convincing in relation to the section's compatibility with protected rights. She states:

> [T]he court's conclusion that s 9(1)(b) 'expressly preserves the right to silence'...is difficult to reconcile with the text and the manner in which the section was applied in the present case. Nor does the court's reference to the generic caution administered to every arrested person...salve this concern.[1358]

She observes that while Charleton J's reasoning is appealing in respect of a witness

[1350] Coen (n 1074), 15.
[1351] Ibid, 16.
[1352] Ibid, 16, 17.
[1353] Ibid, 17.
[1354] Ibid, 19.
[1355] McGrath, D, and Egan McGrath, E (n 720), [11-66]. See also Heffernan (n 732), [13.85].
[1356] Coen (n 1074), 16.
[1357] Charleton, P McDermott, PA, Herlihy C, Byrne (n 872), [1.44].
[1358] Heffernan (n 732), [13.85].

who had no involvement in the crime a suspected participant in the crime is different.[1359] She argues that '[t]he lines of Garda inquiry are surely more blurred in interrogative practice than the simple distinction between participant and witness would suggest'.[1360] This argument mirrors the concerns identified in the earlier analyse of the Supreme Court decision. It is arguable therefore that the judgment, in the words of Coen, 'fits neatly into the corpus of Irish jurisprudence that does not accord sufficient weight to the right to silence'[1361] and indeed the presumption of innocence.

4.6 Reflections

As discussed above, the evidence strongly suggests that while the link between the right to silence and the presumption of innocence is contested, the overwhelming academic commentary is that there is an intimate connection between the two concepts. It suggests that the right to silence is recognised as an important protection for respecting the *will* of suspects and accused persons at the pre-trial and trial stages. The chapter provides a strong argument that the right to silence is an extension of the presumption of innocence which requires the State to respect individuals thereby requiring the State to discharge its burden of proof without assistance from the accused.

There has been much judicial discussion around the constitutional location of the right to silence. Different approaches have been taken by the courts as regards the constitutional location of the right to silence at the pre-trial and trial stages which has given rise to some confusion around the admissibility in evidence of a compelled statement. In *Heaney* in the High Court Costello J placed pre-trial silence on the same firm footing as that accorded to silence at trial within the meaning of Article 38.1 of the Constitution. However, he applied the proportionality test notwithstanding the fact that Article 38.1 is not a qualified provision. Costello J's light touch reasoning is disappointing. Notably, O'Flaherty J in the Supreme Court did not affirm the location of the right to silence in Article 38.1. Instead, he located the right to silence in Article 40 applying the proportionality test. Surprisingly, he did not discuss the admissibility of a compelled statement in any way. He gave little weight to pre-trial

[1359] Ibid, [13.86].
[1360] Ibid, [13.86].
[1361] Coen (n 1074), 21.

silence. It is arguable that the effect of the Supreme Court's approach is to provide greater latitude to interfere with the right to silence on the grounds of proportionality. The European Court of Human Rights subsequently found that under Article 6(1) which was closely connected to the presumption of innocence in Article 6(2), that compelled answers obtained at the pre-trial stage could not be admitted in evidence. This effectively acknowledged the close connection between pre-trial activities and those at trial. It noted the lack of protections for suspects and accused persons contained in section 52. However, despite the safeguard options set out by the European Court of Human Rights section 52 remains unchanged. The effect of the reasoning in the Supreme Court decision is not convincing and arguably supports a presumption of guilt as the starting point when section 52 is engaged. In light of the European Court of Human Rights approach in *Heaney*, it is arguable that the precedential value of the Supreme Court decision is of little effect.

The constitutional position of the right to silence in Article 40.6.1 (freedom of expression) was reaffirmed by Barrington J in *Re National Irish Banks* as discussed. He found however that the admissibility of compelled evidence at trial falls to be considered under Article 38.1. While there appeared to have been substantial strides made in relation to rejecting the application of the proportionality principle under Article 38.1, there is nevertheless a lack of clarity as to where the line is drawn between a compelled and involuntary statement under Article 38.1. There is some confusion in the academic literature as to whether the proportionality principle actually applies under Article 38.1 as discussed above. Nonetheless, Barrington J rejected the fact that no use could be made of such involuntary statements. This creates uncertainty around the use of compelled statements in evidence which is disappointing on constitutional grounds. This view is disputed by some academic commentators as discussed above. It appears that Barrington J's position is at variance to the requirements of Article 6 of the European Convention on Human Rights where a statement obtained on pain of punishment destroys the very essence of the right to silence and the presumption of innocence and should not be admitted.

The Supreme Court in *Sweeney* reversed the order of the High Court and found that the operation of section 9 of the 1998 Act which criminalises silence was constitutional. However, it did not comment on the constitutional location of the right

to silence. This thesis agrees with Coen's extensive analysis of *Sweeney* that the reasons Charleton J did not find a breach of the privilege against self incrimination 'does not engage with the true impact of the section on the right to silence'.[1362] As a consequence, the jurisprudence does not accord sufficient weight to the interaction of the right to silence with the presumption of innocence in respect of suspects. Nonetheless, Charleton J considered the necessity for inclusion of an immunity from prosecution provision within a compulsory provision. He found that 'the principle of the inadmissibility of coerced answers in criminal proceedings is necessarily to be read into the legislation'.[1363] While this may satisfy the constitutional test it arguably fails to satisfy the European Convention on Human Rights standard where the European Court of Human Rights in *Heaney* stated that if the 'objective of the [compulsory] request was to investigate a crime committed by others, the request could have been coupled with a clear immunity from prosecution'.[1364] It is arguable that the constitutional position offers less protection for the right to silence and presumption of innocence than the European Convention on Human Rights standard. It is disappointing that this view was not considered by the Supreme Court in *Sweeney*. An express saver excluding self-incrimination would remove discretion from the courts to consider admissibility on a case by case basis and help preserve the presumption of innocence. It would automatically exclude compelled statements made on pain of legal/penal sanction. This would meaningfully protect the presumption of innocence by respecting the right to silence and ensuring a suspect is not convicted out of their own mouth. Charleton J discussed the 'reasonable excuse' caveat as a safeguard within section 9 of the 1998 Act. However, this fails to deal with the real risk of self incrimination and the presumption of innocence. It is arguable that the inclusion of such a caveat is of little value as the excuse must be evaluated by the Court to determine whether or not it is reasonable in the first instance. The indirect nature of such a caveat arguably creates a risk that a person may feel compelled to wrongly confess participation in an offence thereby eroding the presumption of innocence and creating the risk of a miscarriage of justice.

[1362] Ibid, 15.
[1363] *Sweeney v Ireland* (n 28), [72].
[1364] *Heaney and McGuinness v Ireland* (n 611), [37].

This thesis argues that locating the right to silence within the realm of Article 38.1 as extended to the pre-trial interview setting, as distinct from Article 40.6.1 freedom of expression, is favoured. Interference with the right to silence on the basis of the freedom of expression is subject to the proportionality principle and therefore potentially weakens the protection. Arguably, locating the right to silence within Article 38.1 places the right to silence on a firmer basis where the proportionality principle does not apply. While it may be more restrictive in terms of its reach, it would nevertheless be triggered when a person is a suspect and for all other persons where there is a risk of self-incrimination. This approach offers greater protection for the presumption of innocence which is directly linked to the right to silence and the privilege against self-incrimination. This approach is consistent with the judicial conceptions of the presumption of innocence in the pre-trial setting as discussed in Chapter 2. The chapter provides strong arguments that suggest the courts are playing lip service to the presumption of innocence due to the lack of discussion on the presumption of innocence when considering right to silence matters in circumstances where the right to silence is clearly intimately connected to the presumption of innocence. Despite statements made by judges about the presumption of innocence in the pre-trial setting they do not appear to have influenced the protection of the right to silence. Judges repeatedly place significant reliance on the right of the State to protect itself. This is evident from judicial statements in the cases discussed such as, 'the State is entitled to encroach on the right of the citizen to remain silent in pursuit of its entitlement to maintain public peace and order',[1365] 'that the powers given to the inspectors under s. 10 of the Companies Act 1990...are no greater than the public interest requires...they pass the proportionality test...interviewees are not entitled to refuse to answer questions',[1366] and sufficient procedural protections on compulsory provisions 'ensure a proper balance between the right to silence and the right of the State in the common good to investigate crime or protect public peace and order'.[1367] This strongly suggests that the public interest in the protection of State interest is preferred over due process rights which is pursued in legislation and permitted by the courts aided by the presumption of constitutionality.

[1365] Ibid, 127 per O'Flaherty J.
[1366] *Re National Irish Bank Ltd* (n 27), 353 per Barrington J.
[1367] *Sweeney v Ireland* (n 1293), [44] per Baker J.

4.7 Conclusion

This chapter has conducted an analysis of the extent to which the presumption of innocence is eroded by the criminalisation of silence through the operation of statutory provisions that require an individual to speak on pain of penal sanction. It has analysed key judgments from the High Court, Supreme Court and European Court of Human Rights. The analysis shows that the courts have continued to tolerate the criminalisation of silence which arguably assists the prosecution in discharging its burden of proof and undermines the presumption of innocence.

The evidence suggests that there has been a continued failure to meaningfully deal with safeguards to reduce the degree of compulsion that extinguishes the right to silence and presumption of innocence in Irish law both by the courts and legislators. *Sweeney* had the opportunity to develop *Heaney* and arguably demonstrate the real importance of the presumption of innocence and distinguish it on the basis that the subsequent cases were decided before the European Court of Human Rights case in *Heaney.* That would have sent a clear message as to the real value of the presumption of innocence and provided meaningful guidance on the appropriate safeguards on provisions that criminalise silence in order to reduce the risk of erosion of the presumption of innocence.

The chapter identifies a significant threat of erosion of the presumption of innocence caused by the voluntariness test which is left to the courts to consider on a case by case basis as there is no automatic exclusion of statutorily compelled answers. Discretion is vested in the courts to decide in each case. There is a continued reluctance by the Irish courts to be influenced by the European Court of Human Rights in *Heaney* for a legislative exclusion of compelled answers. This would remove discretion away from the courts on admissibility of such answers and would provide for the automatic exclusion of such answers. This stance does not auger well for the respect shown to the presumption of innocence in Irish law as a bedrock constitutional principle as compared to the protection available under the European Convention on Human Rights. This is a worry as it copper fastens the judicial view that there is no need for legislation. Regrettably, the legislators appear to be taking

the lead from these judicial pronouncements as the legislation has not been amended to provide for automatic exclusion of compelled answers.

This chapter identifies the need for a clear express immunity from prosecution to be included in legislation which criminalises silence for failing to account for their movements or that of another person.

This chapter has identified inconsistencies as to where the right to silence is constitutionally located at the pre-trial and trial stages and confusion amongst some scholars in relation to the admissibility of compelled statements arising from the case of *Re National Irish Bank Ltd.* It argues that a suspect would be better protected by locating the right to silence within the realm of Article 38.1.

The research will now turn to examine the extent to which the presumption of innocence is eroded by legislation that permits the drawing of adverse inferences at trial from an accused person's failure to account during Garda questioning.

Chapter 5 – Adverse Inferences from Failure to Account

The purpose of this chapter is to examine the extent to which the presumption of innocence is eroded by legislation that permits the drawing of adverse inferences at trial from an accused person's failure to account during Garda questioning. It will be recalled that Chapter 4 argued that the right to silence is a key dimension of the presumption of innocence. This chapter will argue that the right to silence and the presumption of innocence have not been accorded sufficient status by the Irish legislature and Irish courts by the operation of the inference provisions.

The first section explains the operation of adverse inference provisions. The chapter will then examine the impact of the inference provisions on the right to silence and the presumption of innocence by discussing leading Irish and English academic commentary in this area. It will be strongly argued that the inference provisions indirectly apply pressure on a suspect to speak. It will be argued that as a result they impose a de facto reallocation of the burden of proof on an accused which is contrary to the narrow view of the presumption of innocence that the burden of proof remains on the prosecution at all times.

The chapter then discusses the introduction of inference provisions in Irish law. It will focus on the 'failure to account' provisions in sections 18 and 19 of the Criminal Justice Act 1984 as they provide a fertile source of judicial consideration in recent years. The chapter conducts a case study of some key Irish judgments in this area. It will be shown that while sections 18 and 19 of the 1984 Act are limited to specific circumstances, this chapter nonetheless argues that these provisions significantly erode the right to silence and the presumption of innocence.

5.1 Adverse Inferences Explained

This section explains the operation of legislative provisions that permit the drawing of adverse inferences at trial from an accused person's silence during Garda questioning. An example of inferences that may be drawn include an inference that the accused is guilty and relied on the right to silence to avoid incriminating themselves or that a defence was fabricated between the pre-trial questioning and the trial. Notwithstanding a person's right to silence, legislation permits a trial court to

draw inferences adverse to the accused where the accused fails to answers specific questions during pre-trial questioning. They first appeared in Irish law in 1984.[1368] They were phrased as 'Inferences from failure, refusal to account for objects, marks, etc'[1369] and 'Inferences from accused's presence at a particular place'.[1370] It was not until 1994 that similar provisions appeared in English law.[1371] During the 1990's the inference provisions were expanded in Irish law. This coincided with similar legislative developments in English law in 1994.[1372] The 1990's saw the introduction of 'failure to mention' provisions in respect of exceptional offences such as drug trafficking offences[1373] and offences under the Offences against the State Acts, 1939 to 1998 and a scheduled offence for the purposes of Part V of the Act of 1939.[1374] These provisions provided for the drawing of an adverse inference from silence during Garda questioning where the defence sought to rely of a fact at trial which was not mentioned at the pre-trial questioning stage. These exceptional provisions were replaced with a 'failure to mention' provision of more general application to all arrestable offences in 2007.[1375] This provision will be the subject of in-depth analysed in Chapter 6.

Notably, the Irish courts have recognised that the inference provisions[1376] are 'an important part of the armoury of the State when dealing with serious crime'.[1377]

[1368] Sections 18 and 19 of the *Criminal Justice Act 1984* (n 1147).
[1369] Section 18 of the Ibid.
[1370] Section 19 of the Ibid.
[1371] Sections 36 and 37 of the Criminal Justice and Public Order Act 1994 (England and Wales). This Act also introduced a 'failure to mention facts when questioned or charged' provision under section 34 and requirement to give evidence at trial under section 35. These provisions are based on the Criminal Law Revision Committee (Great Britan) (n 1132). Similar provisions were introduced in Northern Ireland in 1988 under Article 5 and 6 of the Criminal Evidence (Northern Ireland) Order 1988. This Order also introduced a 'failure to mention facts when questioned or charged' provision under Article 3 and requirement to give evidence at trial under Article 4.
[1372] Sections 34, 36 and 37 of the *Criminal Justice and Public Order Act 1994 (England and Wales)* (n 1371).
[1373] Section 7 of the Criminal Justice (Drug Trafficking) Act, 1996.
[1374] Section 5 of the *Offences Against the State (Amendment) Act, 1998* (n 1291). A separate inference provision in relation to failure to answer a question material to the investigation of the offence of membership of an unlawful organisation was introduced by section 2 of the 1998 Act.
[1375] Section 19A of the *Criminal Justice Act 1984* (n 1147) as inserted by section 30 of the Criminal Justice Act 2007. Another distinct inference provision was also introduced for failure to answer questions in relation organised crime offences under Section 72A of the *Criminal Justice Act 2006* (n 10) as inserted by section 9 of the Criminal Justice (Amendment) Act 2009.
[1376] Sections 18, 19 and 19A of the *Criminal Justice Act 1984* (n 1147).
[1377] *DPP v Fitzpatrick* [2012] IECCA 74, [43] per O'Donnell J. See also *DPP v Wilson* (n 1090), [28] per McKechnie J.

McKechnie J in the Supreme Court in *DPP v Wilson*[1378] observed that the rationale behind the inference provisions is that they 'may serve to loosen the suspect's tongue and convince him to depart from what he might otherwise perceive as the safe course of remaining silent'.[1379] One problematic aspect of these provisions, identified by Quirke, is that they assume that the right suspect has been arrested.[1380] These statements clearly indicate that they are a legislative device to aid the prosecution in their case against the accused. This view is supported in the following statement of McKechnie J in *Wilson* where he set out his view as to the reason why the adverse inference provisions in sections 18 and 19 of the Criminal Justice Act 1984 were introduced:

> The rationale behind the introduction of these provisions was that the exercise of the right to silence might unfairly impact on the gardaí's ability to fully and effectively investigate crime and thus either prevent the bringing of or else prejudice the prosecution's case, in that a suspect could hide behind that right even in the face of circumstances that clearly called for an explanation.[1381]

Greenawalt argues that the drawing of inferences from silence in circumstances where substantial evidence exists is a 'natural sequence of his choice to remain silent'.[1382] However, the indirect nature of inference provisions arguably creates a risk that a person may feel compelled to wrongly confess participation in an offence, being admissible in evidence against a suspect. Easton makes a persuasive observation in relation to the pressure of a police interview setting and the risk of making an unreliable statement in these circumstances. She links the pressure of adverse inferences and the risk of unreliable statements to eroding the presumption of innocence. She states:

> In the context of interrogation there is a possibility of suspects being pressurised to make incriminating statements and a well documented danger of unreliable statements being produced, when the individual is subject to pressure...and the risk that fundamental values of the criminal law may be infringed, including...the presumption of innocence.[1383]

[1378] *DPP v Wilson* (n 1090).
[1379] Ibid, [28] per McKechnie J.
[1380] Quirke, H (n 1074), 16.
[1381] *DPP v Wilson* (n 1090), [28] per McKechnie J.
[1382] Greenawalt (n 1101), 40.
[1383] Easton, S (n 231), 176.

In considering whether an adverse inference provision[1384] renders a trial unfair the Court of Criminal Appeal took a similar view in *DPP v Donnelly*.[1385] O'Donnell J stated in general terms:

> [O]bjections to the drawing of inferences from the silence of an accused while in garda custody have rarely been with the logic or common sense of such inferences. Most people would regard a refusal to answer questions as to the movements of a person in circumstances which in the words of the European Court of Human Rights "call out for explanation", (such as those in the present case), as itself at least suggestive of guilt.[1386]

These statements are similar in effect to the statement by O'Flaherty J in *Heaney* that an 'innocent person has nothing to fear from giving an account of his or her movements'[1387] as discussed in Chapter 4. However, Ashworth observes that the presumption of innocence indicates that it is wrong to require a person to supply evidence against oneself.[1388] Daly argues that the inference provisions 'clearly interfere with the right to silence, by attaching consequences to its existence'.[1389] Given the close connection of the right to silence to the presumption of innocence[1390] these statements suggest a presumption of guilt on the part of suspects who remain silent when adverse inference provisions are invoked at the pre-trial investigative stage. This does not reflect the broad scholarly view of the presumption of innocence as extending to the pre-trial stage.[1391] Indeed, it does not reflect the judicial conception of the presumption of innocence.[1392] It will be recalled that the evidence from the post 1937 case law clearly suggests that the presumption of innocence is not merely a procedural rule, applying only during trial but a substantive right as an aspect of the right to trial in due course of law in Article 38.1. In addition, its significance has been elevated as a higher principle of law in its own right which is inextricably bound up with the fundamental rights in Article 40.4.1° (liberty) and Article 40.3.2.° (good name).

[1384] Section 2 of the *Offences Against the State (Amendment) Act, 1998* (n 1291).
[1385] *DPP v Donnelly* [2012] IECCA 78.
[1386] Ibid, [34].
[1387] *Heaney and McGuinness v Ireland* (n 1069), 128.
[1388] Ashworth A, 'Self-Incrimination in European Human Rights Law — A Pregnant Pragmatism ?' (2008) 30 Cardoza Law Review 751, 768. See also Owusu-Bempah, A (n 285), 136.
[1389] Daly, YM (n 1076), 64.
[1390] As discussed in Chapter 4.
[1391] As discussed in Chapter 1
[1392] As discussed in Chapter 2

It is therefore arguable that the judicial commentary on the adverse inference provisions as discussed above is a significant departure from common law fair trial rights generally and the presumption of innocence in particular. The extract from *Donnelly* as set out above reflects the decision in the seminal European Court of Human Rights case of in *Murray v United Kingdom*[1393] on adverse inference provisions. There the Court found that the drawing of adverse inferences from a refusal to comply with a statutory requirement:[1394]

> to provide an explanation for his presence in the house was a matter of common sense and cannot be regarded as unfair or unreasonable in the circumstances...Nor can it be said...that the drawing of reasonable inferences...had the effect of shifting the burden of proof from the prosecution to the defence so as to infringe the principle of the presumption of innocence.[1395]

The Court discussed a number of safeguards in relation to the operation of the inference provision[1396] in compliance with Article 6(1) and (2) of the European Convention on Human Rights. This included the fact that warnings were given in relation to the effect of exercising the right to remain silent and that this was understood by the accused.[1397] The Court further stated:

> On the one hand, it is self-evident that it is incompatible with the immunities under consideration to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself. On the other hand, the Court deems it equally obvious that these immunities cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution. Wherever the line between these two extremes is to be drawn, it follows from this understanding of "the right to silence" that the question whether the right is absolute must be answered in the negative.[1398]

[1393] *Murray v United Kingdom* (n 626). The ruling in this case was endorsed in *Condron v United Kingdom* (2001) 31 EHRR 1; *Averill v United Kingdom* (n 618); *Beckles v UK* (2003) 36 EHRR 13.
[1394] *Criminal Evidence (Northern Ireland) Order 1988* (n 1371).
[1395] *Murray v United Kingdom* (n 626), [54].
[1396] *Criminal Evidence (Northern Ireland) Order 1988* (n 1371).
[1397] *Murray v United Kingdom* (n 626), [47]-[58].
[1398] Ibid, [47].

The difficulty with these statements is that there is an assumption that an innocent person would speak in the face of questioning. Indeed, the Supreme Court in *Wilson* stated that '[d]epending on the particular circumstances calling for an account...the suspect's silence may weigh heavily against him'.[1399] However, this view fails to take account of the many legitimate reasons that an innocent suspect may have for remaining silent including, a desire to protect others, to avoid undermining their 'feeling of personal integrity',[1400] protection against the risk of false confessions due their vulnerability at the pre-trial stage[1401] or wish to have an opportunity to consult a lawyer.[1402] A jury may also be unable to distinguish innocent silence from suspicious silence and therefore, to borrow the words of Easton, the common-sense assumption may be 'unreliable, impressionistic and unsystematic'.[1403] The safeguards as discussed in *Murray* above, including reasonable access to a solicitor, conviction cannot be based solely or mainly on an inference from silence are also reflected in the amended inference provisions in sections 18, 19 and 19A of the Criminal Justice Act 1984, section 2 of the Offences Against the State (Amendment) Act 1998 and section 72A of the Criminal Justice Act 2006. The fact that the right to silence is not considered absolute under the European Convention on Human Rights makes it unlikely that the Convention will add anything to the constitutional position in this area. The next section will analyse the impact of adverse inferences on the presumption of innocence.

5.2 The Impact of Adverse Inference Provisions on the Presumption of Innocence

Many leading scholars have highlighted the impact that legislative provisions which permit the drawing of adverse inferences of guilt from an accused person can have on the right to silence. Charleton et al observe that '[t]he effect of a failure to explain provision in legislation can conflict with the right of the accused to remain silent in the face of the charge'.[1404] However, they justify these legislative provisions on the basis that they do not direct a court how to proceed as distinct from enabling a conclusion

[1399] *DPP v Wilson* (n 1090), [28] per McKechnie J.
[1400] Redmayne (n 1100), 222.
[1401] Daly, YM (n 1076), 67.
[1402] *Averill v United Kingdom* (n 618), 853.
[1403] Easton, S, 'Legal Advice, Common Sense and the Right to Silence' (1998) 2 The International Journal of Evidence & Proof 109, 114. See also Heffernan, L, with Ní Raifeartaigh, U (n 720), [9.120].
[1404] Charleton, P McDermott, PA, Herlihy C, Byrne (n 872), [2.90].

to be drawn which accords with constitutional fairness.[1405] Unfortunately, this view does not account for the pressure such provisions they impose on a suspect to speak in order to avoid an adverse inference of guilt being drawn from their silence. Walsh remarks that they raise issues in relation to fair trial rights and the right to silence.[1406] He states:

> [T]heir effect is to place a suspect...in the situation where he has to make a difficult choice between remaining silent and risking inferences adverse to his interests being drawn at his trial...where his answers...will be admissible in evidence at his trial. The option of remaining silent may not always be in his best interest.[1407]

He nevertheless states that '[t]hey do not compel the person to speak or to incriminate himself.[1408] Nonetheless, some scholars consider that adverse inference provisions are a form of compulsory device that indirectly compels a suspect to speak. Daly argues that they are designed to encourage suspects to speak.[1409] Hamilton observes that they increase the pressure on suspects to speak.[1410] Indeed, she states that 'it is wrong in principle to compel the suspect to be the source of incriminating evidence'.[1411] Jackson claims that the inference provisions in Northern Ireland have persuaded 'more suspects to speak'.[1412] Owusu-Bempah states that they create 'an "indirect compulsion" to speak...incompatible with a "no-assistance" approach to the defendant's role in the criminal justice process'.[1413] Indeed, this reflects the view of the European Court of Human Rights in *Murray* where it stated that they involve 'a certain level of indirect compulsion'.[1414] Dennis argues that the inference provisions create an indirect obligation to cooperate 'through the threat that...silence will make conviction more likely'.[1415] It would appear therefore that adverse inferences do not directly compel a suspect to speak as there is no criminal

[1405] Ibid, [2.104].
[1406] Walsh, DPJ (n 91), 338 [6-126].
[1407] Ibid, 338 [6-126].
[1408] Ibid, 338 [6-126].
[1409] Daly, YM (n 1076), 63. For further reading see *DPP v Wilson* (n 1090), [28]; *Rock v Ireland* (n 30); *Murray v United Kingdom* (n 626), [50]; *Ex parte Smith* [1993] AC 1, [30], [32].
[1410] Hamilton, C (n 1), 71.
[1411] Ibid, 69.
[1412] Jackson JD, 'Silence and Proof: Extending the Boundaries of Criminal Proceedings in the United Kingdom' (2001) 5 The International Journal of Evidence & Proof 145, 157.
[1413] Owusu-Bempah, A (n 285), 104.
[1414] *Murray v United Kingdom* (n 626), [50].
[1415] Dennis, I (n 92), 175-176 [5.023].

sanction for failure to answer questions. Nonetheless, a suspect is indirectly compelled to speak by the pressure of the provision to disclose their defence at an earlier stage or risk an adverse inference being drawn at trial.[1416] Gudjonsson observes that it cannot be discounted that the operation of inference provisions is likely to contribute to an increased conviction rate of vulnerable innocent accused persons as they are more likely to make a confession under pressure.[1417] Notably, in relation to silence, *Murray* found that a conviction cannot be based 'solely or mainly on...silence or on a refusal to answer questions'.[1418] This is also reflected in Irish inference legislation.[1419] However, there is no similar protection where evidence is given of a confession obtained during a pressurised inference interview notwithstanding the dangers associated with such confessions as discussed. The use of threats and coercion in obtaining confessions is prohibited.[1420] However, the inference provisions represent a form of coercion legitimised by the legislature. In relation to confessions generally, a conviction may be imposed on the basis of an uncorroborated confession alone at common law.[1421] To protect against 'actual and potential miscarriages of justice',[1422] a corroboration warning is mandatory in respect of confession evidence in trials on indictment where the jury is to be advised 'to have due regard to the absence of corroboration.[1423] However, this requirement does not extend to make corroboration a requirement[1424] in order for there to be a conviction. The problem with this for the presumption of innocence is that there is no automatic exclusion of compelled answers, direct or indirect, to be used as the sole or main basis for conviction, arising from a pressurised inference interview. There is case law on the exclusion of confessions achieved by coercion.[1425] However, recourse to an adverse inference drawing provision would not be covered by the case law because

[1416] For further reading see *DPP v Wilson* (n 1090), [28] per McKechnie J.
[1417] Gudjonsson (n 1127), 700-702; Owusu-Bempah, A (n 285), 134-135; Quirke, H (n 1074), 48.
[1418] *Murray v United Kingdom* (n 626), [47].
[1419] Section 2 of the *Offences Against the State (Amendment) Act, 1998* (n 1291); section 72A of the *Criminal Justice Act 2006* (n 10); sections 18, 19 and 19A of the *Criminal Justice Act 1984* (n 1147).
[1420] See *DPP v Breathnach* [1981] 2 Frewen 13; *DPP v Pringle* [1995] 2 IR 547; *DPP v Geoghan and Bourke* unreported 18 November 2003 Central Criminal Court.
See also *The Queen v Johnston* (1864) 15 ICLR 60; *R v Priestly* [1967] 51 Cr App R 1; *R v Miller* [1986] 3 All ER 119.
[1421] McGrath, D, 'Evidence' (1998) 12 Annual Review of Irish Law 338, 6; *R v McNicholl* [1917] 2 I.R. 557; *R v Sullivan* (1887) 20 LR Ir 550.
[1422] McGrath, D, and Egan McGrath, E (n 720), [8-334].
[1423] Section 10 of the Criminal Procedure Act 1993. See also McGrath, D (n 1421), 6.
[1424] For further discussion see McGrath, D, and Egan McGrath, E (n 720), [8-332]-[8-351].
[1425] *DPP v O'Reilly* [2009] IECCA 18; *DPP v Breen* [2008] IECCA 126; *People (AG) v Cummins* (n 1265); *McCarrick v Leavy* [1964] IR 225; *DPP v Ping Lin* [1976] A.C. 574.

legislation explicitly allows for such provisions. They are a form of coercion that the legislature has provided for. The absence of an express saver excluding such indirectly compelled statements risks a miscarriage of justice, the avoidance of which is a reason for the right to silence and privilege against self-incrimination which is bound up in the presumption of innocence.

The presumption of innocence and the right to silence interact by placing the prosecution on proof.[1426] In this context, leading scholars consider that adverse inference provisions impact the burden of proof on the prosecution and the presumption of innocence. Ashworth argues that 'adverse inferences from a defendant's failure to answer questions may well have a strong impact on the presumption of innocence, by effectively reducing the prosecution's burden in matters of proof'.[1427] Similarly, Hamilton states:

> The right to silence may also be viewed as an extension of the presumption of innocence in its broadest guise as a principle requiring the state to respect its citizens. More specifically, the evidential guarantees of prosecutorial proof beyond all reasonable doubt protected by the presumption are compromised...by adverse inferences drawn from silence.[1428]

In other words, as a consequence of the close connection between the right to silence and the presumption of innocence, a provision permitting the drawing of an adverse inference from silence erodes the right to silence, and the presumption of innocence in particular, as it compromises the burden of proof on the prosecution. This can be best described as a de facto reallocation of the burden of proof. Indeed, Hamilton continues:

> One of the main arguments animating the right to silence remains the presumption of innocence on the basis that placing a burden on the accused to speak through the drawing of adverse inferences offends against the principle that the prosecution prove its case.[1429]

[1426] As discussed in Chapters 1 and 4 see Hamilton, C (n 1), 1-2 citing JC Morton and SC Hutchinson, The Presumption of Innocence (Carswell 1987). See also Ibid, 1-3 citing S. Summers, Presumption of Innocence (2001) 1 Juridical Review 37, 42-44. See also McIntyre, TJ (n 214), 35; Tapper, C (n 162), 135.
[1427] Ashworth, A, 'Four Threats to the Presumption of Innocence' (n 80), 256.
[1428] Hamilton, C (n 1), 77. See also Hamilton, Dr C (n 1).
[1429] Hamilton, C (n 1), 67.

In the words of Hocking and Manville, the legal burden is shifted to the accused 'in a small but significant way'.[1430] The adverse inference-drawing provisions reduce the burden of proof on the prosecution by placing a de facto burden of proof on the accused to speak. They arguably erode the presumption of innocence as it is inverted to a presumption of guilt as the accused is burdened to prove their innocence. O'Reilly argues that a suspect is forced to explain their alleged criminal conduct, and his right to silence is thus replaced with 'a duty to talk'.[1431] A failure to provide a reasonable explanation gives rise to an inference of guilt which conflicts with the presumption of innocence as it allows for verdicts to be based on surmises and not on evidence.[1432] Therefore, a failure to provide a reasonable explanation gives rise to a presumption that the suspect or accused has no innocent explanation which is somewhat akin to a presumption of guilt. This situation is rooted in the notion that innocent suspects have nothing to fear. Evidence of guilt based on silence is surmised or guessed. McInerney argues that the inference provisions 'significantly influence the trial of an accused person and have serious repercussions for the presumption of innocence'.[1433] It is arguable that the quality of evidence, as a surmise, in the form of adverse inferences from silence in establishing the truth at trial, contributes to the fragility of the fact-finding process at trial as discussed in Chapter 1. As a result, there is an increased risk of wrongful conviction which is Ashworth's second supporting reason for the presumption of innocence.

However, Denis does not agree that the presumption of innocence is undermined or that the burden of proof is reversed where the right to silence is curtailed by adverse inferences as an accused is still entitled to the benefit of the doubt.[1434] Nonetheless, as discussed in Chapter 4, the standard of proof beyond reasonable doubt does not reduce the degree of compulsion imposed by a de facto reallocation of the burden of proof by a direct or indirect legislative requirement to speak. A de facto reallocation of the burden is contrary to the narrow view of the presumption of innocence that an accused is not compelled to contribute to the trial or give evidence in their defence.

[1430] Hocking, BA, & Manville, LL (n 1111), 71.
[1431] O'Reilly, GW (n 1111), 522, 532, 534; O'Reilly (n 1111), 403, 405, 444, 445, 446, 448, 451.
[1432] O'Reilly (n 1111), 403, 446.
[1433] McInerney (n 1111), 11.
[1434] Dennis, I (n 92), 202 [5-046]; Dennis, I (n 1137), 374.

In any event, any indirect compulsion to speak will assist the prosecution in reaching the legal standard of proof and ultimately satisfying the burden.

Easton discusses how the presumption of innocence can be undermined by reducing the burden of proof at trial where adverse inferences from silence are used either to establish a *prima facia* case at trial or to support a *prima facia* case to the legal standard.[1435] She observes that the pressure on the suspect to comply is exacerbated by the power differential between the suspect and the prosecution.[1436] She provides a very persuasive description as to how the burden of proof is affected. She states:

> [O]nce comment is permitted on silence, whether in police interrogation or at trial, then the whole focus of the trial shifts onto the defence and assessment of its arguments, rather than on the prosecution's case against the accused so it is hard to sustain the view that the burden of proof is not affected.[1437]

Hamilton acknowledges that this describes how the burden is altered in practice.[1438] It clearly supports the argument that there is a de facto reallocation of the burden of proof. Easton observes that the 'drawing of adverse inferences from silence, constitutes a substantial change to the burden of proof as the burden is shared between the prosecution and defence'.[1439] A similar view is expressed by Owusu-Bempah. She notes that the inference provisions in English Law qualify the right to silence.[1440] Indeed, Quirke remarks that the inference provisions in English Law do not fit well with the right to silence, privilege against self incrimination and the presumption of innocence as they make it easier for the prosecution to discharge its burden of proof.[1441] This reflects the effect of the inference provisions in Irish Law which indirectly pressurise a suspect to speak. Easton describes the practical effect of the inference provisions at trial. She states:

[1435] Easton, S (n 231), 180-183.
[1436] Ibid, 181.
[1437] Ibid, 182.
[1438] Hamilton, C (n 1), 72.
[1438] Ibid, 71.
[1439] Easton, S (n 231), 182 citing M. McConville 'Silence in Court' (1987) NLJ 1169.
[1440] Owusu-Bempah, A (n 285), 104.
[1441] Quirke, H (n 1074), 157, 158, 178. Quirke remarks that the *Carloway Review* in Scotland adopted a similar conclusion in, Lord Carloway, 'The Carloway Review' (2011), [7.5.24], [7.5.26].

> The defendant becomes the focus of attention and his account, or failure to supply an explanation of his conduct, rather than the strength of the prosecution's case, dominates the trial.[1442]

While the adverse inference provisions do not compel an accused to give evidence at trial under Irish law, their practical effect is that they nonetheless impose a de facto reallocation of the burden of proof by shifting the focus of the trial on to the accused and thereby indirectly pressurising an accused to speak. As a consequence, this shifts the focus of the trial from the prosecution to the accused.

Duff makes an important point in relation to the practical effect of such provisions.[1443] He states that they significantly dilute the right to silence as a court may draw inferences about an 'accused's lack of innocence from his failure to attempt to rebut the prosecution case by explaining his side of the story'.[1444] This is true. Indeed, this is the very purpose of such provisions. It is clearly the case that such provisions qualify the right to silence as they indirectly require a suspect and accused person to speak. Quirke describes a related consequence of the inference provisions and how it affects the right to silence and presumption of innocence. She observes that the right to silence is an expression of the burden on the prosecution to prove its case 'without assistance from the accused'.[1445] She states that the inference provisions create an assumption of cooperation and participation contrary to the principle that the prosecution prove its case.[1446] Quirke's argument is persuasive as she clearly draws a link between the right to silence and the burden of proof. The practical effect of adverse inferences is that they affect the right to silence in two ways. They pressurise a suspect to speak and if they do not speak an adverse inference from silence or the pressurised utterance may be used in evidence against the accused. Therefore, either way such provisions make it easier for the prosecution to discharge its burden of proof by using the accused to contribute to the case against him either by way of utterance or silence. This erodes the presumption of innocence. The accused is placed in a position of having to justify their actions and to essentially demonstrate their innocence because of the evidential value of silence. Silence is

[1442] Easton, S (n 231), 182.
[1443] P Duff, 'The Agreement of Uncontroversial Evidence and the Presumption of Innocence: An Insoluble Dilemma?' (2002) 6 Edinburgh Law Review 25.
[1444] Ibid, 34.
[1445] Quirke, H (n 1074), 85, 178.
[1446] Ibid, 179. See also Owusu-Bempah, A (n 285), 139.

used as evidence to fill the void where real evidence is lacking. Silence is treated in like manner to a confession. The worrying aspect of this practice is that unlike a confession, which is a free and voluntary express utterance of admission, silence may only be characterised as evidence of silence or as a guess or surmise, given that there are many legitimate reasons for remaining silent. This analysis suggests that in practice the operation of the adverse inference provisions relieves the prosecution from having the strength of their case tested, including the requirement to establish the guilt of the accused. This thesis argues that measures such as adverse inference provisions in practice erode the presumption of innocence, notwithstanding their constitutional status, by pressurising suspects to provide an innocent explanation that they were not engaged in the offence under investigation and if not, an inference of guilt arises.

5.3 Introduction of Adverse Inference Provisions in Irish Law

This section explores and analyses the first limited, though significant, attempt to implement adverse inference provisions in Irish law in 1984.[1447] It focuses on sections 18 and 19 of the Criminal Justice Act 1984 which introduced a power to draw inferences from a failure to account for possession of certain objects[1448] and presence at a particular place.[1449] These provisions were initiated by sections 17 (failure, refusal to account for objects, marks, etc) and 18 (accused's presence at a particular place) of the Criminal Justice Bill 1983.[1450] The 1983 Bill also contained a 'failure to mention' provision at section 16 which proposed to permit inferences to be drawn from an accused person's failure, during questioning, to mention any fact that he could reasonably have been expected to mention and which he relied on in his defence at trial.

These sections were the subject of much debate during the second stage and committee stage of the Bill. Damning arguments were made in relation to the introduction of these provisions for the presumption of innocence and the right to

[1447] Sections 18 and 19 of the *Criminal Justice Act 1984* (n 1147). See *DPP v Fitzpatrick* (n 1377), [27] per O'Donnell J.
[1448] Section 18 of the *Criminal Justice Act 1984* (n 1147).
[1449] Section 19 of the Ibid.
[1450] Criminal Justice Bill 1983 No 27 of 1983.

silence. In general terms, the sections were described as 'cumbersome'.[1451] Moreover, it was argued that the provisions were aimed 'at abolishing effectively the right to silence of the accused person'.[1452] Ms Avril Doyle Fine Gael stated that '[t]here is no doubt that there is an erosion of the right to silence in these measures'.[1453] Ms Monica Barnes Fine Gael effectively described the effect of the erosion. She stated that the inference part of the Bill 'shifts the emphasis. A person now has to convince a garda of his innocence rather than the garda having to prove that he is guilty'.[1454] Mr Liam Skelly Fine Gael argued that sections 16, 17 and 18 'made substantial inroads into the presumption of innocence of all our citizens'.[1455]

More specifically, there was considerable opposition across all parties to the introduction of the section 16 'failure to mention' provision in light of its impact on the presumption of innocence and the right to silence. It is worth noting some general discussion on this section. Mr David Molony Fine Gael argued that 'section 16 is the most dramatic change ever proposed in our criminal legal system since the foundation of the State'[1456] which he characterised as 'a demolition hammer'.[1457] Mr. David Andrews Fianna Fáil said that it 'was an extremely dangerous section'[1458] while Mr William O'Dea Fianna Fáil stated that '[i]t was an extraordinary piece of legislation by any standards'.[1459] Indeed, Mr. Andrews argued that it was 'one of the greatest pieces of legislative gobbledegook ever to come before this House.[1460] This indicated the complexity of the draft provision. The debates strongly suggest that the section inverts the presumption of innocence due to the pressure imposed by the section to speak. This shows the revolutionary change proposed in Irish law. Mr. Andrews stated that '[s]ection 16 is so fundamental to the change in jurisprudential attitudes

[1451] 'Dáil Éireann Debate 15 November 1983 Vol. 345 No. 11', per Mr Brian Lenihan senior Fianna Fáil.
[1452] 'Dáil Éireann Debate 2 November 1983 Vol. 345 No. 6', per Mr Tomás MacGiolla, Workers Party.
[1453] 'Dáil Éireann Debate 13 December 1983 Vol. 346 No. 9'.
[1454] Ibid, per Ms Monica Barnes Fine Gael.
[1455] 'Dáil Éireann Debate, 19 January 1984 Vol. 347 No. 2', per Mr Liam Skelly Fine Gael referring to a warning by the President of the Incorporated Law Society, Mr. Houlihan, in the Irish Independent of 28 November 1983.
[1456] 'Dáil Éireann Debate 24 November 1983 Vol. 346 No. 2'.
[1457] Ibid.
[1458] 'Dáil Éireann Debate 19 June 1984 Vol. 351 No. 8'.
[1459] Ibid.
[1460] 'Dáil Éireann Debate 9 November 1983 Vol. 345 No. 9'.

— it proposes to revolutionise certain aspects of our law'.[1461] Mr. Alan Shatter Fine Gael supported this view in stating 'I believe it is'.[1462] He continued:

> It seems to switch the emphasis...in certain instances of the presumption that somebody is innocent until they are proved guilty to raising an inference that they may be guilty until such time as they can prove they are innocent. That is a fundamental change in our criminal jurisprudence'.[1463]

Similarly, Hugh Coveney Fine Gael stated that '[t]o a layman like myself the measure seems to place some onus on a defendant to satisfy the Garda as to his innocence when being questioned'.[1464] Mr Tony Gregory Independent advocated the same concern and remarked that '[t]he basic principle that one should be considered innocent until proven guilty all but goes by the board'.[1465] This position was more clearly described by Mr Prionsias De Rossa Workers Party. He argued that '[b]y allowing an adverse inference to be drawn from the silence of a questioned person, section 16 undermines the presumption of innocence and the burden of proof beyond reasonable doubt which lies with the prosecution'.[1466]

In terms of its application, Mr Andrews argued:

> Section 16 is of general application. It provides a compulsion by a threat that an inference may be drawn from a failure to mention at the investigatory or charging stage a fact subsequently relied on in the defence.[1467]

He continued:

> It is noteworthy that section 16 goes further than merely encroaching on the right to silence. It does so in a specific way, by seeking to compel the defendant to reveal his defence. That is one of the most serious defects of section 16, that the defendant should be requested, urged or compelled to reveal his defence.[1468]

[1461] Ibid.
[1462] 'Dáil Éireann Debate 10 November 1983 Vol. 345 No. 10'.
[1463] Ibid.
[1464] 'Dáil Éireann Debate 15 November 1983 Vol. 345 No. 11' (n 1451).
[1465] 'Dáil Éireann Debate 13 December 1983 Vol. 346 No. 9' (n 1453).
[1466] 'Dáil Éireann Debate, 19 January 1984 Vol. 347 No. 2' (n 1455).
[1467] 'Dáil Éireann Debate 9 November 1983 Vol. 345 No. 9' (n 1460).
[1468] Ibid.

This view on the compulsory nature of the section was supported by Mr Richard Bruton Fine Gael. He stated that the change as envisaged by section 16 for a suspect is 'almost requiring him to present his entire case for the defence. To require such a change may be going too far in that area.[1469] He continued and said that the defence should not be required 'to be presented at the interrogation stage'.[1470]

The effect of the provision on the right to silence and the use of silence in evidence were also debated. Mr Michael O'Kennedy Fianna Fáil argued in relation to the Judges' Rules that, '[u]nder the new regulation there is a writ that this will be abolished in so far as under section 16 an adverse inference may be drawn if the person questioned remains silent.[1471] In relation to the use of silence as evidence, Mr Liam Skelly Fine Gael observed that an accused 'is being tried not only for the offence (for which there may be only the flimsiest other evidence) but for his or her skill or lack of it in answering questions, perhaps about technical matters'.[1472] This highlights the lack of probative value attaching to silence as discussed earlier.

In light of the fact that Minister Noonan could not reach agreement on section 16 of the Bill, he dropped the provision at Committee Stage. He stated:

> Because section 16 met with such opposition and because I believe that changes as major as those we are proposing to make in this Bill should have the maximum consensus possible in a society as homogenous as ours...I dropped section 16 not as a matter of principle but, to put it bluntly, because it was not worth the trouble it was causing.[1473]

However, this is not the end of the matter on a general provision of this nature. A provision of similar general effect re-emerged in 2007 which was inserted into section 19A of the Criminal Justice Act 1984.[1474] This will be discussed in depth in Chapter 6.

[1469] 'Dáil Éireann Debate 1 December 1983 Vol. 346 No. 5'.
[1470] Ibid.
[1471] 'Dáil Éireann Debate 6 December 1983 Vol. 346 No. 6'.
[1472] 'Dáil Éireann Debate, 19 January 1984 Vol. 347 No. 2' (n 1455), per Mr Liam Skelly Fine Gael referring to an article in Magill magazine of November 1983 by Mr. Adrian Hardiman article entitled "Justice Being Done?"
[1473] 'Dáil Éireann Debate, 21 June 1984 Vol. 352 No. 1'.
[1474] Section 19A of the *Criminal Justice Act 1984* (n 1147) as inserted by section 30 of the Criminal Justice Act 2007.

In relation to sections 17 and 18, similar arguments were made in relation to their impact on the presumption of innocence. Mr. Alan Shatter Fine Gael stated sections 17 and 18 'seems to require the individual to prove his innocence rather than the Garda to prove guilt'.[1475] Similarly, Mr De Rossa argued that '[s]ections 17 and 18 undermine the presumption of innocence and the burden of proof beyond reasonable doubt as required of the prosecution.[1476] Ms Mary Harney, Fianna Fáil stated:

> Our legal system has one very good provision, that is, that a person is innocent until proven guilty. That is fundamental to our legal and judicial process. I am disappointed that in this Bill we see an erosion of this principle. We will be virtually switching, from the courtroom to the Garda station the trial of a suspected person who has been arrested and charged.[1477]

Mr Skelly also later argued that they 'constitute a far reaching curtailment on the right to silence'.[1478] Similarly, Mr De Rossa argued that 'sections 17 and 18 directly limit the right of a person's silence, the right of people to remain silent even before they have been charged.[1479] He continued:

> The sections abolish the Judges Rules as hitherto known and undermine the protections afforded an accused making a statement by the use of caution. These sections envisage the use of compulsion in the extraction of information from interviewees and thus abolishes the right to silence and undermines the rule that statements be made voluntarily. That is a strong indictment of the efforts to restrict the right to silence.[1480]

On the other hand, the value of silence under these provisions where a suspect decides not to speak was described by Ms Harney. She stated that 'this evidence will be fundamental in any subsequent trial and can be of paramount importance in deciding whether a person is innocent or guilty'.[1481] This is concerning given that there are many legitimate reasons for remaining silent as discussed earlier. Similar to the discussion above on the value of silence obtained under section 16, it may be viewed as representing the suspect's skill or lack of skill in not answering questions for which an accused will also be tried. Furthermore, the provisions place a

[1475] 'Dáil Éireann Debate 10 November 1983 Vol. 345 No. 10' (n 1462).
[1476] 'Dáil Éireann Debate, 19 January 1984 Vol. 347 No. 2' (n 1455), per Mr Pruntious De Rossa.
[1477] 'Dáil Éireann Debate 30 November 1983 Vol. 346 No. 4'.
[1478] 'Dáil Éireann Debate, 21 June 1984 Vol. 352 No. 1' (n 1473).
[1479] 'Dáil Éireann Debate 19 June 1984 Vol. 351 No. 8' (n 1458).
[1480] 'Dáil Éireann Debate, 19 January 1984 Vol. 347 No. 2' (n 1455).
[1481] 'Dáil Éireann Debate 30 November 1983 Vol. 346 No. 4' (n 1477).

requirement on a suspect to speak primarily based on suspicion, particularly so where an accused is not required to have a solicitor present during interview, even though there is no such requirement to do so at trial.

Notably, Minister Noonan provided an assurance that instructions would be provided as a condition precedent in terms of the effective operation of sections 17 and 18 in order to limit the erosion of the right to silence and the presumption of innocence. He stated:

> The question of ordinary language has been brought up. Of course, there is no intention that the Garda will take the Bill around in their pockets and quote the sections. It is intended that it will be non-legal language, ordinary language, in the sense that ordinary people will understand it. However, it will not be left to the discretion of the Garda to judge what is ordinary language and what is not. I have said in my previous submissions that there would have to be a new caution to meet this requirement of ordinary language. Obviously, there would be variations on it because we are talking about objects, marks, present at the place of a crime, so there are those variations on the specifics of sections 17 and 18.Gardaí, of course, will be given instructions as to the caution which it would be appropriate to give. The form would have to be worked out with the Attorney General so that the caution would be a proper caution, legally proper as well as in ordinary language. There is no question of the Garda trying to cope with the technical language of section 17 (1) or section 18 (1).[1482]

While the Gardaí may not be bringing around the legislation in their pockets, they are actually reading out the provisions word for word to suspects.[1483] It is one thing for the Gardaí, lawyers and judges having to cope with the technicalities of the caution. The real question arises as to what hope a suspect has. It is therefore clear that it was envisaged that the caution would be an extension of the inference sections in order to give them constitutional validity by affording a high degree of protection to suspects and accused persons. It will be noted however, that no such caution or legislative instructions were ever provided notwithstanding the acknowledgement by Minister Noonan of the technical nature of the provisions. Given that the caution is an extension of the inference provisions, it should be clear. Put another way. If there were clear cautions, there would still be an issue with the inference provisions

[1482] 'Dáil Éireann Debate 19 June 1984 Vol. 351 No. 8' (n 1458).
[1483] Garda Síochána, *Code of Practice on Access to a Solicitor by Persons in Garda Custody* (2015) <http://www.garda.ie/Documents/User/Code of Practice on Access to a Solicitor by Persons in Garda Custody.pdf>, Appendix A.

because of their effect in creating a de facto burden of proof. This problem is compounded by the absence of a caution to clearly convey the effect of the legislation while also reminding the suspect of the right to silence. If it is not conveyed in the manner intended by the legislation it could likely confuse the suspect into thinking there is a greater onus on them to speak.

It was argued by many that the source of the inferences provisions was the 11th Report of the English Law Revision Commission of 1972.[1484] Mr. Mervyn Taylor Labour Party observed that 'sections 16 to 18 of the Bill go beyond that report yet these sections were rejected by two Tory Governments as being dangerous and unnecessary. [1485] In relation to the failure to mention provision in section 16 of the Bill, Mr. David Molony Fine Gael and Mr. Tony Gregory Independent argued that a similar proposal had been rejected by the British Government.[1486] The debate on the inference provisions also discussed the influence of the English report of the Royal Commission on Criminal Procedure, published in January 1981. Mr Fintan A. Coogan Fine Gael observed that this report 'advocated that the right to silence as it existed should be abolished'[1487] on the basis that there were highly skilful criminals using silence to avoid conviction by refusing to answer questions and manufacturing evidence.[1488] Mr Molony made a similar observation.[1489] He also referred to the O'Briain report in 1978.[1490] Indeed, both Mr Ivan Yates Fine Gael and Mr Molony observed that the proposed inference provisions were similar to those recommended by Judge Barra Ó Briain[1491] in his report. Mr Molony observed that Judge Ó'Briain considered limiting the right to silence to questions that would be specific, strictly limited and set out in statute.[1492] However, he argued that '[t]he proposal in the Bill is wide ranging, universal in its application and is not confined to serious crime'.[1493] A

[1484] 'Dáil Éireann Debate 15 November 1983 Vol. 345 No. 11' (n 1451), per Mr.Mervyn Taylor Labour Party.
[1485] Ibid, per Mr.Mervyn Taylor Labour Party.
[1486] 'Dáil Éireann Debate 24 November 1983 Vol. 346 No. 2' (n 1456), per Mr David Molony Fine Gael; 'Dáil Éireann Debate 13 December 1983 Vol. 346 No. 9' (n 1453), per Mr. Tony Gregory Independent.
[1487] 'Dáil Éireann Debate, 19 January 1984 Vol. 347 No. 2' (n 1455).
[1488] Ibid.
[1489] 'Dáil Éireann Debate 24 November 1983 Vol. 346 No. 2' (n 1456).
[1490] 'Committee to Recommend Certain Safeguards for Persons in Custody and for Members of An Garda Síochána ("the O'Briain Report")(1978)'.
[1491] 'Dáil Éireann Debate 15 November 1983 Vol. 345 No. 11' (n 1451), per Mr Ivan Yates, Fine Gael; 'Dáil Éireann Debate 10 April 1984 Vol. 349 No. 9', per Mr David Molony, Fine Gael.
[1492] 'Dáil Éireann Debate 24 November 1983 Vol. 346 No. 2' (n 1456).
[1493] Ibid.

similar concern was raised by Mr. William Ryan in the Seanad where he argued that '[t]hese sections are without question in contravention of the existing right to silence'.[1494]

A number of reasons were cited as a justification for introducing the inference provisions. It is clearly the case that the measures were introduced as a crime control measure in terms of crime detection in order to balance the rights of community's and crime suspects. There was a general theme running through the arguments in relation to the lack of cooperation by suspects of serious crime with criminal investigations. Mr Enda Kenny Fine Gael gave an example of many 'cases of detained persons picking a spot on the ceiling at which they have looked for five or six hours and said nothing'.[1495] Similarly, Mr Brian Lenihan senior Fianna Fáil stated that the Bill is an attempt to deal with serious crime that is professionally organised.[1496] He said:

> The most obvious thing for them to do as professional criminals is not to say anything, do nothing, point out nothing and not give any explanation, just total non-co-operation with the police force. If that is done in a calculated and professional way and no inference can be drawn from it in regard to an explanation not given that is a very serious deterrent regarding the ultimate conviction of the person concerned.[1497]

Mr Frank Crowley Fine Gael also argued that '[p]eople will not answer questions and it makes life extremely difficult for the Garda. People in detention can just sit back and laugh at the Garda. They do not have to...answer anything.[1498] Mr Liam Naughten Fine Gael stated that they would 'strengthen the arm of the law when they are dealing with serious offences'.[1499] Ms Mary Flaherty Fine Gael made a similar argument.[1500] Minister Noonan acknowledged that sections 16 to 18 of the Bill had 'come in for criticism — strongly put in a number of instances'.[1501] In justifying the provisions, he directed his statement at section 16 but stated that it 'will also apply,

[1494] 'Seanad Éireann Debate 11 July 1984 Vol. 104 No. 12'.
[1495] 'Dáil Éireann Debate 18 January 1984 Vol. 347 No. 1'.
[1496] 'Dáil Éireann Debate 15 November 1983 Vol. 345 No. 11' (n 1451).
[1497] Ibid.
[1498] 'Dáil Éireann Debate, 19 January 1984 Vol. 347 No. 2' (n 1455).
[1499] Ibid.
[1500] 'Dáil Éireann Debate 13 December 1983 Vol. 346 No. 9' (n 1453).
[1501] 'Dáil Éireann Debate, 19 January 1984 Vol. 347 No. 2' (n 1455).

with some modifications, to sections 17 and 18'.[1502] He described one of the objectives of the provisions as follows:

> One of the objectives of the section is to eliminate the existing artificial distinction between what can and cannot be said by the trial judge in relation to the silence of the accused when being questioned or charged and to enable the judge, and consequently the prosecution, to comment in a commonsense way on the fact that a person seeks in court to offer an explanation for his behaviour that he could reasonably have been expected to have offered earlier but failed to do so. In my view it is impossible to defend the distinction which the law makes between what the judge can say and what he cannot. It flies in the face of common sense.[1503]

Mr Michael Keating Progressive Democrats focused on the civic duty of individuals to their communities to speak up and stated:

> [T]he right to silence has to be qualified to some extent by the obligation of the ordinary individual, all of us, towards the rights of the community...it does not seem preposterous that a person should feel obliged to speak in the light of his responsibility to the community.[1504]

Notably, Minister Noonan's aim was to balance the competing rights of individual suspects and the rights of community's particularly in the context of serious crime. He stated:

> The aim throughout has been to achieve a proper and acceptable balance between the rights of the individual who may happen to be suspected or accused of a crime and the right of the community in general to have crimes properly investigated and those guilty of them brought to justice. From time to time, according as there are developments in public attitudes, increased sophistication among criminals and so on, that balance may have to be adjusted.[1505]

In a similar vein Mr George M. Birmingham Fine Gael argued that sometimes the thesis that the unequal contest between and accused and the State which can only be made fair by affording a high degree of protection to an accused in rules of procedure, in order to give effect to the presumption of innocence, does not stand

[1502] Ibid.
[1503] Ibid.
[1504] Ibid.
[1505] 'Dáil Éireann Debate 10 April 1984 Vol. 349 No. 9' (n 1491).

up. He was effectively arguing that protection to suspects may be reduced in certain circumstances. He gave an example:

> [I]t is felt it does not stand up when instead of dealing with an individual accused one is dealing with a threat to society as a whole and to the security of the State. Therefore, we have modified our procedures when dealing with those whose aim it is to overthrow the State. We have done this since the foundation of the State.[1506]

It is notable however that Hugh Coveney Fine Gael stated 'on balance the alleged advantages are outweighed by the dangers.[1507] The evidence strongly suggests that there was significant concern raised for the impact on the presumption of innocence and the right to silence by the introduction of the adverse inference provisions notwithstanding its objective to deal with serious crime.

5.3.1 Enactment of sections 18 and 19 of the 1984 Act

Sections 17 and 18 were renumbered in Committee Stage to sections 18 and 19[1508] and as such appear as sections 18 and 19 of the 1984 Act. Sections 18 and 19 as originally enacted were narrow in nature as they only applied on 'arrest without warrant'.[1509] They were also limited in that only the arresting Garda could invoke the provisions.[1510] They contained a provision that inferences amounted to corroborative evidence.[1511] The safeguards contained in the provisions were that only such inferences 'as appear proper may be drawn'[1512] and a person could 'not be convicted of an offence solely on an inference drawn'.[1513] Both provisions provided that they would not have effect unless the accused was told in ordinary language what the effect of failure to refusal to account might be.[1514] Notably, they did not change the position with regard to the Judges' Rules caution.[1515] As stated by the Minister for Justice Michael Noonan, when the provisions were being introduced it was intended

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[1506] 'Dáil Éireann Debate 1 December 1983 Vol. 346 No. 5' (n 1469).
[1507] 'Dáil Éireann Debate 15 November 1983 Vol. 345 No. 11' (n 1451).
[1508] Criminal Justice Bill 1984 No 27a of 1983 As Amended in Committee Stage [Dáil Éireann].
[1509] Section 18(1)(a) and section 19(1)(a) of the *Criminal Justice Act 1984* (n 1147).
[1510] Section 18(1)(b) and section 19(1)(b) of the Ibid. See also *DPP v Fitzpatrick* (n 1377), [35] per O'Donnell J.
[1511] Section 18(1) and section 19(1) of the *Criminal Justice Act 1984* (n 1147).
[1512] Section 18(1) and section 19(1) of the Ibid.
[1513] Section 18(1) and section 19(1)of the Ibid.
[1514] Section 18(4) and section 19(3) of the Ibid.
[1515] *DPP v Finnerty* (n 31), 381; *DPP v Fitzpatrick* (n 1377).

that ‘the Garda will continue to caution a person to the effect that he is not obliged to say anything’.[1516]

5.3.2 Review of sections 18 and 19 of the 1984 Act

In 2007 sections 18 and 19 were the subject of review by the Balance in the Criminal Law Review Group (Review Group).[1517] The Review Group was established on 1st November 2006 by Mr Michael Dowell, Minister for Justice, Equality and Law Reform.[1518] It was chaired by Dr. Gerard Hogan Senior Counsel and required to report by 1st March 2007. The terms of reference of the Review Group included an examination of the right to silence and admissibility of video evidence where an accused person remains silent.[1519] The Review Group submitted its Interim Report dated 31st January 2007[1520] and Final Report dated 15th March 2007[1521] to the Minister for Justice, Equality and Law Reform. It made a number of recommendations for change in the criminal law. These included the drawing of adverse inferences at trial from silence during Garda questioning. It made a number of recommendations in relation to the operation of the inference provisions, in particular section 18 (Inferences from failure, refusal to account for objects, marks, etc) and section 19 (Inferences from accused's presence at a particular place) of the 1984 Act which were limited to specific circumstances. In acknowledging the technical nature of the inference provisions, the Review Group recommended that the giving and withdrawing of cautions should be regulated by legislation to make it easier to implement the provisions.[1522]

The Review Group observed that the provisions were not used very much.[1523] As a result the Review Group was of the view that ‘a fresh legislative provision is required to tie together the fundamental principles of the existing sections, namely that

[1516] ‘Dáil Éireann Debate 2 November 1983 Vol. 345 No. 6’ (n 1452).
[1517] ‘Balance in the Criminal Law Review Group Final Report’ (n 35); ‘Balance in Criminal Law Review Group The Right to Silence Interim Report’ (n 35).
[1518] ‘Balance in the Criminal Law Review Group Final Report’ (n 35), 5; ‘Balance in Criminal Law Review Group The Right to Silence Interim Report’ (n 35), 1.
[1519] ‘Balance in the Criminal Law Review Group Final Report’ (n 35), 5, 6; ‘Balance in Criminal Law Review Group The Right to Silence Interim Report’ (n 35), 1, 2.
[1520] ‘Balance in Criminal Law Review Group The Right to Silence Interim Report’ (n 35).
[1521] ‘Balance in the Criminal Law Review Group Final Report’ (n 35), 5.
[1522] Ibid, 92; ‘Balance in Criminal Law Review Group The Right to Silence Interim Report’ (n 35), 43.
[1523] ‘Balance in the Criminal Law Review Group Final Report’ (n 35), 268; ‘Balance in Criminal Law Review Group The Right to Silence Interim Report’ (n 35), 50. See also *DPP v Fitzpatrick* (n 1377), [35] per O’Donnell J.

common sense dictates that an inference can be drawn from failure to explain something which is inherently suspicious'.[1524] The difficulty with common sense is that it assumes that an innocent person would speak in the face of questioning as discussed in this chapter. The Review Group later stated that it would be 'preferable to make a fresh start with a new provision which would command confidence'.[1525] The Review Group stated:

> [A] general failure to answer questions, such as for example failing to account for movements which are not in themselves suspicious, could not be admissible without a major inroad into established principles...such a proposal would be a direct interference with the right to silence and would involve a fundamental shift in the onus of proof.[1526]

This is a clear indication of the Review Group's view of the narrow constitutional parameters within which statutory adverse inference provisions are permitted to have effect. In particular, the Review Group confirmed that inferences from silence in response to general questions that do not relate to suspicious circumstances are not permissible. However, the Review Group's statement envisages that a suspect should be required to actively participate in answering specific questions in relation to circumstances that are suspicious. This effectively creates a de facto burden of proof on an accused to prove their innocence. The Review Group gave an example in the body of their report of a special case where such a provision may be permitted where there is a 'failure to explain suspicious circumstances'.[1527] This goes beyond the original nature of sections 18 and 19 of the 1984 Act. It then concluded by recommending streamlining the operation of sections 18 and 19 into one consolidated section extending their scope to 'suspicious circumstances'[1528] which was defined. It recommended that provision be made to allow for an adverse inference to be drawn from a failure to give an explanation for 'something which is

[1524] 'Balance in the Criminal Law Review Group Final Report' (n 35), 93; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 42.
[1525] 'Balance in the Criminal Law Review Group Final Report' (n 35), 268; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 50.
[1526] 'Balance in the Criminal Law Review Group Final Report' (n 35), 83; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 38. See also *DPP v Bowes* [2004] IECCA 44.
[1527] 'Balance in the Criminal Law Review Group Final Report' (n 35), 83; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 38.
[1528] 'Balance in the Criminal Law Review Group Final Report' (n 35), 271; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 52.

inherently suspicious, and which...calls for an answer from the detained person'.[1529] It also recommended that the giving of false or misleading information would give rise to an inference as these were not provided for in the original provisions.[1530] Such circumstances were intended to be broad and not exhaustive and to include the specific matters contained within the previous sections 18 and 19. The Review Group also prepared Head 5 of a draft bill included in the Review Group's reports as a replacement for sections 18 and 19.

Notably, the draft provision prepared by the Review Group continued to contain a provision that inferences under the proposal would amount to corroborative evidence.[1531] The use of an inference in such circumstances has the effect of inverting the presumption of innocence to a presumption of guilt requiring an accused to actively participate in and support the prosecution's case against him/her. As discussed above, this effectively creates a de facto burden of proof on the accused to prove their innocence. It is arguable that if the situation is inherently suspicious an adverse inference can be drawn from such circumstances, as distinct from the accused's silence. The integrity of the presumption would be preserved by requiring investigators to seek out objective evidence rather than using silence to support the prosecution case. As discussed earlier, silence can only be said to be evidence of silence and a guess or surmise as to evidence guilt.

5.3.3 Substitution of sections 18 and 19 of the 1984 Act

In 2007[1532] sections 18 and 19 of the 1984 Act were substituted with new provisions by sections 28 and 29 of the Criminal Justice Act 2007. Notably, the sections as re-enacted did not extend beyond the specific matters previously contained within those sections notwithstanding the recommendation of the Review Group for one consolidated provision. Instead, the sections are restricted to a requirement to

[1529] 'Balance in the Criminal Law Review Group Final Report' (n 35), 92; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 42.
[1530] 'Balance in the Criminal Law Review Group Final Report' (n 35), 91; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 42.
[1531] 'Balance in the Criminal Law Review Group Final Report' (n 35), 268; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 51.
[1532] Section 28 and 29 of the *Criminal Justice Act 2007* (n 34). Recommendations for reform were made at Recommendation 6 of the 'Report of Expert Group Appointed to Consider Changes in the Criminal Law Which Were Recommended in the Garda SMI Report' (n 1132), 31-36. Provisional recommendations were made in the 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 37-43. See also recommendations made in the 'Balance in the Criminal Law Review Group Final Report' (n 35), 80-98.

provide an explanation when found in possession of an object or presence at a particular place rather than being required to explain something inherently suspicious. The sections are restricted to a requirement to provide an explanation when found in possession of an object or presence at a particular place rather than being required to explain something inherently suspicious.[1533] A search in all the Dáil debates on this Bill of the word 'suspicious' and the number '18', in the context of section 18, did not reveal any explanation for the departure from the Review Group's recommendation. This suggests there was a lack of engagement with these provisions during the Dáil debates.

Section 18 of the 1984 was substituted by section 28 of the 2007 Act in the following terms:

> 18.—(1) Where in any proceedings against a person for an arrestable offence evidence is given that the accused—
>
> > (a) at any time before he or she was charged with the offence, on being questioned by a member of the Garda Síochána in relation to the offence, or
> > (b) when being charged with the offence or informed by a member of the Garda Síochána that he or she might be prosecuted for it,
>
> was requested by the member to account for any object, substance or mark, or any mark on any such object, that was—
>
> > (i) on his or her person,
> > (ii) in or on his or her clothing or footwear,
> > (iii) otherwise in his or her possession, or
> > (iv) in any place in which he or she was during any specified period,
>
> and which the member reasonably believes may be attributable to the participation of the accused in the commission of the offence and the member informed the accused that he or she so believes, and the accused failed or refused to give an account, being an account which in the circumstances at the time clearly called for an explanation from him or her when so questioned, charged or informed, as the case may be, then, the court, in determining whether a charge should be dismissed under Part IA of the Criminal Procedure Act 1967 or whether there is a case to answer and the court (or, subject to the judge's directions, the jury) in determining whether the accused is guilty of the offence charged (or of any other offence of which he or she could lawfully be convicted on that charge) may draw such inferences from

[1533] Section 28 and 29 of the *Criminal Justice Act 2007* (n 34).

the failure or refusal as appear proper; and the failure or refusal may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence in relation to which the failure or refusal is material.

(2) A person shall not be convicted of an offence solely or mainly on an inference drawn from a failure or refusal to account for a matter to which subsection (1) applies.

(3) Subsection (1) shall not have effect unless—

> (a) the accused was told in ordinary language when being questioned, charged or informed, as the case may be, what the effect of the failure or refusal to account for a matter to which that subsection applies might be, and
> (b) the accused was afforded a reasonable opportunity to consult a solicitor before such failure or refusal occurred.

(4) Nothing in this section shall, in any proceedings—

> (a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his or her presence relating to the conduct in respect of which he or she is charged in so far as evidence thereof would be admissible apart from this section,
> (b) be taken to preclude the drawing of any inference from the silence or other reaction of the accused which could properly be drawn apart from this section, or
> (c) be taken to preclude the drawing of any inference from a failure or refusal to account for the presence of an object, substance or mark or for the condition of clothing or footwear which could properly be drawn apart from this section.

(5) The court (or, subject to the judge's directions, the jury) shall, for the purposes of drawing an inference under this section, have regard to whenever, if appropriate, the account of the matter concerned was first given by the accused. (6) This section shall not apply in relation to the questioning of a person by a member of the Garda Síochána unless it is recorded by electronic or similar means or the person consents in writing to it not being so recorded.

(7) Subsection (1) shall apply to the condition of clothing or footwear as it applies to a substance or mark thereon.

(8) ...

(9) In this section 'arrestable offence' has the meaning it has in section 2 (as amended by section 8 of the Criminal Justice Act 2006) of the Criminal Law Act 1997.".

The terms of section 19 are similar except that it requires a person to account for their presence at a particular place when demanded to account. While the sections are limited in nature they have nevertheless been described as 'a provision of more general application'.[1534] They apply to all arrestable offences[1535] carrying a penalty of imprisonment of five years or more. They may be invoked before a suspect is 'charged...on being questioned'[1536] and when 'being charged or...informed that he might be prosecuted for the offence'.[1537] Therefore, the timing at which they may be invoked is specified. They are no longer restricted to being invoked by the arresting Garda.[1538] The safeguards are that the consequences of failure or refusal and indeed silence must be explained in ordinary language to the suspect.[1539] The interviewing shall be electronically recorded unless the suspect consents in writing that it not be electronically recorded[1540] and the suspect shall be afforded a reasonable opportunity of access to legal advice before they fail to account.[1541] However, the provisions do not go so far as to permit the presence of a solicitor during questioning. An accused cannot be convicted solely or mainly on an inference.[1542]

Access to legal advice was considered in the Judgment of the Court of Criminal Appeal in *DPP v Fitzpatrick*[1543] delivered by O'Donnell J. He stated that it is an important safeguard given the significant interference with the right to silence that the inference provisions pose.[1544] He stated that previous access to general legal advice will be insufficient without 'specific opportunity of consulting'[1545] a solicitor. The

[1534] *DPP v Fitzpatrick* (n 1377), [35] per O'Donnell J.
[1535] Section 2(1) of the Criminal Law Act 1997 as amended by section 8 of the Criminal Justice Act 2006.
[1536] Sections 18(1)(a) and 19(1)(a) of the *Criminal Justice Act 1984* (n 1147) as substituted by sections 28 and 29 of the Criminal Justice Act 2007 respectively.
[1537] Sections 18(1)(b) and 19(1)(b) of the Ibid as substituted by sections 28 and 29 of the Criminal Justice Act 2007 respectively.
[1538] Sections 18(1)(a) and (b) and 19(1)(a) and (b) of the Ibid as substituted by sections 28 and 29 of the Criminal Justice Act 2007 respectively.
[1539] Sections 18(3)(a) and 19(3)(a) of the Ibid as substituted by sections 28 and 29 of the Criminal Justice Act 2007 respectively. See also *DPP v Fitzpatrick* (n 1377), [35].
[1540] Sections 18(6) and 19(6) of the *Criminal Justice Act 1984* (n 1147) as substituted by sections 28 and 29 of the Criminal Justice Act 2007 respectively.
[1541] Sections 18(3)(b) and 19(3)(b) of the Ibid as substituted by sections 28 and 29 of the Criminal Justice Act 2007 respectively.
[1542] Sections 18(2) and 19(2) of the Ibid as substituted by sections 28 and 29 of the Criminal Justice Act 2007 respectively.
[1543] *DPP v Fitzpatrick* (n 1377) O'Donnell, de Valera, Gilligan JJ.
[1544] Ibid, [42] per O'Donnell J.
[1545] Ibid, [31]-[38].

opportunity to consult a solicitor must therefore be connected to the time at which the requirement to account is made, that is to say, at or around the time the requirement is made or when the suspect and solicitor is informed that it may be made.[1546] The opportunity to consult a solicitor after the provision is invoked and requirement to account made will be deemed unreasonable as the accused and solicitor will be unaware of its invocation and unable to specifically advise as to the potential impact in the particular case.

It was established by the Supreme Court in *DPP v Doyle*[1547] that the right of access to legal advice does not extend to the presence of a solicitor during a suspect interview as a matter of constitutional law.[1548] This includes during an inference interview. O'Malley J discussed access to legal advice in the context of the inference provisions generally. She stated '[i]t might be observed that the State has anticipated that this situation could come about and has provided for it by establishing the scheme now in existence'.[1549] It would appear that O'Malley J was referring to the Garda Code of Practice on Access to a Solicitor by Persons in Garda Custody which provides, as a matter of practice by way of administrative protection, that a suspect may have a solicitor present during questioning if requested.[1550] This nevertheless falls well short of a Constitutional or legal right to the presence of a solicitor during questioning. O'Malley J continued and remarked:

> My own view would be that this is an issue that might soon come to the fore in the context of one or more of the many legislative provisions that now provide for the drawing of inferences from failure to answer questions. There are at this stage half a dozen separate enactments permitting adverse inferences to be drawn from the exercise of the right to silence under garda questioning, the most far-reaching being the possibility that inferences will be drawn at trial from a failure to mention at interview any fact relied upon in the trial.[1551]

[1546] Ibid, [38]-[44].
[1547] *DPP v Doyle* (n 258). per Denham CJ, Charleton, McMenamin, O'Malley, O'Donnell, McKechnie JJ
[1548] Ibid, [50] per Charleton J, [17] per Denham CJ, [60] per McMenamin J, [17] per O'Donnell J.
[1549] Ibid, [69] per O'Malley J.
[1550] Ibid; 'Balance in the Criminal Law Review Group Final Report' (n 35), 90; Garda Síochána (n 1483). This is now provided for in *Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the Right to a Lawyer in Criminal Proceedings and in European Arrest Warrant Proceedings and on the Right to Have a Third Party Informed upon Deprivation of Liberty* (n 654). However, this it has yet to be adopted by Ireland.
[1551] *DPP v Doyle* (n 258), [70] per O'Malley J.

O'Malley J was clearly of the view that given the far-reaching impact of the failure to mention inference provision that the issue of presence of a solicitor during questioning might soon be considered by the courts. Subsequently, Doyle challenged this issue to the European Court of Human Rights. In *Doyle v Ireland*[1552] European Court of Human Rights stated that the right of access to a lawyer extends to the physical presence of a lawyer during questioning.[1553] Notably, the European Court of Human Rights in *Condron v United Kingdom*[1554] stated that the presence of a solicitor may be inherent in the caution and is therefore 'an important safeguard for dispelling any compulsion to speak'.[1555]

Irish law has been amended to provide that the suspect shall be informed, before a failure to account occurs, of the right to consult a solicitor and afforded an 'opportunity', as distinct from a 'reasonable opportunity', to so consult (other than where he or she waived that right) before such failure occurs.[1556] McGrath claims that this amendment 'underlies the increased status accorded to the right'.[1557] However, this amendment is not yet commenced. When commenced, this clarification will require that questioning cannot commence under the inference provisions until the suspect speaks to a solicitor. This is consistent with the decision in *DPP v Fitzpatrick*.[1558] Furthermore, Clarke J[1559] on behalf of the Supreme Court in *DPP v Gormley*[1560] stated that 'the entitlement not to self-incriminate incorporates an entitlement to legal advice in advance of mandatory questioning of a suspect in custody'.[1561] This constitutional right applies also in respect of inference interviews. Notably in this regard, Doyle argues: 'Solicitor presence ensures that the individual knows when they can safely remain silent, given the intricacy of the legislation'.[1562]

[1552] *Doyle v Ireland* (Application no. 51979/17) 23 May 2019, [101].
[1553] Ibid, [101].
[1554] *Condron v United Kingdom* (n 1393).
[1555] Ibid, [21].
[1556] Sections 9 (c), (d) and (e) and 10 and 11 of the *Criminal Justice Act 2011* (n 1148). Note that these amendments have yet to be commenced. See also Criminal Justice Bill 2011 and Explanatory Memorandum. See also *DPP v Wilson* (n 1090), [28]; *DPP v Fitzpatrick* (n 1377), [35]; McGrath, D (n 718), [11.132].
[1557] McGrath, D (n 718), [8.38].
[1558] *DPP v Fitzpatrick* (n 1377), [41]-[42] .
[1559] Denham CJ, Murray, Hardiman, McKechnie JJ concurred.
[1560] *DPP v Gormley* (n 256), [9.2]. See also *DPP v Healy* [1990] 2 IR 73 regarding the constitutional entitlement to have reasonable access to legal advice prior to the conduct of any interrogation.
[1561] *DPP v Gormley* (n 256), [9.13].
[1562] Doyle, I, 'Solicitor Presence at Police Interview: An Acute Need for Legislative Intervention' (2021) 31 Irish Criminal Law Journal 78, [4.1.1].

However, the constitutional position appears to fall short of the right under the European Convention on Human Rights to have a lawyer physically present during interview.[1563] Access to legal advice is an important protection for a suspect as it is a stage where the case against the suspect is only based on suspicion and investigators may not have disclosed their hand entirely in order not to prejudice the investigation. Therefore, a suspect is at a disadvantage in not being fully apprised of the case against them but yet is required to answer in the face of inference questions.

It will be noted that sections 18 and 19 do not directly attract a penal sanction. Nonetheless, the potential consequences of the adverse inference provisions are more serious than a provision directly criminalising silence such as section 52 of the Offences Against the State Act 1939 (maximum penalty of six months imprisonment), as discussed in Chapter 4. A conviction secured with the assistance of an adverse inference from silence may result in a greater penalty as the adverse inference provisions apply to a broader category of offences ranging from five years to life imprisonment. It will be noted that the safeguards as discussed do not reduce the pressure imposed by these inference provisions to speak when a demand is made under either section 18 or 19 of the 1984 Act. As such, an accused could be convicted of the substantive offence due to the pressure imposed by these provisions to speak and wrongly inculpate himself or herself or by the drawing of an adverse inference in circumstances where there might otherwise be insufficient evidence.

The frequency of their use as a legislative device to assist the State and their relationship with the presumption of innocence received little judicial attention until the early 1990's. Against this backdrop, the next section will conduct a case analyse of some key Irish judgments concerning sections 18 and 19 of the Criminal Justice Act 1984.

[1563] *Doyle v Ireland* (n 1552), [101].

5.4 Significant Erosion of the Right to Silence and the Presumption of Innocence

This section focuses on the drawing of adverse inferences from silence in two specific situations which are limited to when a suspect is required to account for possession of certain objects and presence at a particular place. This thesis argues that despite the limited nature of the provisions and the safeguards included in the adverse inference provisions at the pre-trial stage as discussed earlier, and in section 1(b) of the Criminal Justice (Evidence) Act 1924 which prohibits the use of silence of an accused person at the trial stage being used in evidence at trial, that the use in evidence at trial of silence obtained at the pre-trial questioning stage continues to significantly erode the presumption of innocence. This section explores and analyses two key Supreme Court decisions, *Rock v Ireland*[1564] and *Finnerty v Ireland*[1565] and other recent key decisions concerning the manner in which the courts have since considered the status of the right to silence, the use of pre-trial silence in evidence at trial and the impact on the presumption of innocence.

5.4.1 Rock v Ireland

In *Rock v Ireland*[1566] the applicant challenged the constitutionality of sections 18 and 19 of the Criminal Justice Act 1984 in the High Court before Murphy J. The main grounds of challenge were that they were 'an unwarranted interference and an impermissible intrusion on what is generally described as an accused's "right to silence"'[1567] and that they violated his presumption of innocence.[1568] In his judgment, Murphy J refers to sections 18 and 19 on their own interchangeably throughout the judgment. It will be recalled that section 19 relates to inferences which may be drawn from an accused's presence at a particular place[1569] but otherwise it is similar in its effect to section 18.[1570] Therefore, a challenge to or defence of one section would be equally applicable to the other. He quoted at length from the finding by Costello J in

[1564] *Rock v Ireland* (n 30).
[1565] *DPP v Finnerty* (n 31).
[1566] *Rock v Ireland* [1995] 11 JR 005483.
[1567] Ibid, 005489 per Murphy J.
[1568] Ibid, 005496.
[1569] Sections 19 of the *Criminal Justice Act 1984* (n 1147).
[1570] Sections 18 of the Ibid.

the High Court in *Heaney v Ireland*[1571] and O'Flaherty J in the Supreme Court in *O'Leary v Attorney General.*[1572]

Murphy J endorsed the finding by Costello J in *Heaney* that the right to silence at trial is constitutionally protected under Article 38.1 (right to a fair trial) as an ingredient of a fair trial.[1573] He stated that Rock took issue with the application of the proportionality test as applied by Costello J in *Heaney* in that:

> the application of the doctrine of proportionality to constitutional rights is unwarranted and impracticable. He contended that rights conferred by the constitution should not be abridged or moderated in that way.[1574]

It is disappointing that Murphy J did not analyse this submission in detail other than noting the conclusion by Costello J that section 52 of the Offences Against the State Act 1939, which made it an offence to remain silent in the face of questioning, was not unconstitutional as it was not an 'excessive intrusion of the accused's rights'.[1575] He found that Costello J's judgment in *Heaney* had been 'implicitly supported by...O'Leary'[1576] and therefore 'sections 18 and 19 are not unconstitutional'.[1577] He found that 'section 18 is no more than an evidence-gathering operation which would result, in certain circumstances, in additional evidence being made available by the prosecution'.[1578] The problem with this is that the accused silence is elevated to the status of evidence for the benefit of the prosecution when in fact it is only evidence of silence as there are many legitimate reasons for remaining silent. This point did not receive any attention by Murphy J.

In relation to the challenge that the inference provisions contravened the presumption of innocence, Murphy J considered the Supreme Court decision of O'Flaherty J in *O'Leary* which upheld the constitutionality of section 24 of the Offences Against the State Act 1939. It will be recalled in that case that O'Flaherty J

[1571] *Heaney and McGuinness v Ireland* (n 26).
[1572] *O'Leary v Attorney General* (n 21); *O'Leary v Attorney General* (n 22).
[1573] *Rock v Ireland* (n 1566), 005493.
[1574] Ibid, 005495.
[1575] Ibid, 005495.
[1576] Ibid, 005501 - 005502.
[1577] Ibid, 005502.
[1578] Ibid, 005502.

found that section 24 of the 1939 Act did not shift the burden of proof to the accused but merely shifted an evidential burden to the accused which could be challenged in number of different ways.[1579] Murphy J noted in this case that 'section 18 does not refer to evidence but only the possibility that inferences may be drawn from certain facts. No doubt inferences adverse to the interest of the accused'.[1580] Again, this is a problematic finding by Murphy J as he did not discuss the fact that an accused may have a legitimate reason for remaining silent. He continued and addressed a concern raised by Rock as regards the fact that silence in the face of questioning amounted to corroboration of other evidence. He stated:

> I see no significant difference between the provision that inferences might be drawn from silence of the accused or that such silence might amount to corroboration. In either event there is no doubt a strengthening of the State's case but in no sense is it final and in neither event is the accused required to exculpate himself. He can challenge the prudence, wisdom or strength of the inferences to be drawn and draw attention to the infirmities of the Prosecution case with or without the corroboration provided by the section.[1581]

On this basis he found that 'no more than in the O'Leary case has the presumption of innocence been set to one side or the burden of proof shifted to the accused'.[1582] The problem with this analysis is that it has the practical effect of shifting the focus of the trial onto the accused to provide an innocent explanation. It requires an accused to displace the inferences by contributing in circumstances where the presumption of innocence requires the prosecution to prove their case without assistance from the accused. Therefore, the adverse inference provisions effectively reallocate a de facto burden of proof to the accused to answer questions. It is conceivable in some cases that the only way this could convincingly be done is for the accused to take the stand.[1583] Murphy rejected Rocks claim that either sections 18 or 19 were unconstitutional as they did not constitute an excessive intrusion on the rights of the accused. Rock appealed Murphy J's decision to the Supreme Court.

Supreme Court

[1579] Ibid, 005500.
[1580] Ibid, 005500.
[1581] Ibid, 005500.
[1582] Ibid, 005500.
[1583] As discussed in Chapter 3, this position was also stated in *DPP v Forsey* (n 784), [36].

Hamilton CJ gave the judgment on behalf of the Supreme Court.[1584] He noted the finding by Costello J in the High Court in *Heaney* and the subsequent finding by O'Flaherty J in the Supreme Court where he located the right to silence in Article 40.6 (freedom of expression).[1585] However, he did not expressly state a view on the constitutional location of the right to silence or the presumption of innocence though he stated generally, that '[t]here is no doubt that the right to silence and the presumption of innocence in a criminal trial are implicit in the provisions of the Constitution'.[1586] The Supreme Court in *DPP v K.M*[1587] nevertheless interpreted *Rock* as locating the right to silence in Article 40.6 as a corollary of the right of freedom of expression.

Hamilton CJ endorsed the position in *Heaney* that the right to silence is not absolute and is subject to public order and morality.[1588] He distinguished sections 18 and 19 from section 52 of the Offences against the State Act 1939 firstly by remarking as follows:

> Clearly, the 1939 Act was intended to deal with circumstances in which an extraordinary threat to public order, and perhaps even to the security of the State...The 1984 Act is, by contrast, a piece of ordinary criminal legislation.[1589]

Secondly, unlike Murphy J in the High Court[1590] Hamilton CJ stated that the 1984 Act was potentially more serious in that the penalty on conviction, where adverse inferences drawn could lead to imprisonment for a period of five years or more.[1591] On the other hand, a failure to comply with section 52 was an offence in itself and attracted a penalty of up to six months imprisonment.[1592]

[1584] *Rock v Ireland* (n 30), per O'Flaherty J, Denham, Barrington and Keane JJ concurring.
[1585] Ibid, 499.
[1586] Ibid, 496.
[1587] *DPP v KM* [2018] 1 IR 810, [35] per O'Malley J.
[1588] *Rock v Ireland* (n 30), 496.
[1589] Ibid, 494.
[1590] *Rock v Ireland* (n 1566), 005501.
[1591] Sections 18(1) and 19(1) of the *Criminal Justice Act 1984* (n 1147) as originally enacted provided that these inference provisions applied in respect of an offence for which an accused was arrested. The Criminal Justice Act 2007 amended sections 18 and 19 of the 1984 Act to provide that these inference provisions apply in respect of an 'arrestable offence' within the meaning of section 2 (as amended by section 8 of the Criminal Justice Act 2006) of the Criminal Law Act 1997.
[1592] Section 52(2) of the *Offences Against the State Act 1939* (n 20).

Hamilton CJ used the terms proportionality and balancing of rights interchangeably in determining the impact of the legislative provisions on the privilege against self-incrimination. He found that in 'seeking to balance the individual's right to avoid self-incrimination with the right and duty of the State to defend and protect the life, person and property of all its citizens'[1593] that the inference provisions fell within the permissible range of restraint.[1594] As such he found that the inference provisions did not affect the constitutional right to the presumption of innocence or the burden and standard of proof on the prosecution.[1595] He relied on the Supreme Court decision in *O'Leary,* as discussed in Chapter 3, stating that 'inferences drawn may be shaken in many ways, by cross-examination, by submission by evidence or by circumstances of the case'.[1596] While this statement represents the variety of ways that counsel for the defence could assail the prosecution evidence about the accuseds de facto burden of proof,[1597] as discussed above, it is conceivable in some cases that the only way it could convincingly be done is for the accused to take the stand.[1598] The problem with this approach is that it requires an accused to displace the inferences by contributing in circumstances where the presumption of innocence requires the prosecution to prove their case without assistance from the accused. It fails to take account of the practical effect of an adverse inference provision which effectively reallocates a de facto burden of proof to the accused to answer questions. This has the practical effect of shifting the focus of the trial onto the accused to provide an innocent explanation. Indeed, it is notable that Hamilton CJ conceded that the adverse inference provisions can have a very real adverse impact on an accused person. He stated, 'it is true that ss. 18 and 19 could lead to an accused being convicted of a serious offence in circumstances where he or she might otherwise'.[1599] However, he focused on the limitations contained within the inference provisions to justify the constitutionality of the provisions. In this respect, he stated that 'an inference cannot form the basis for a conviction in the absence of other evidence'.[1600]

[1593] *Rock v Ireland* (n 30), 498.
[1594] Ibid, 501.
[1595] Ibid, 497-498.
[1596] Ibid, 498.
[1597] This point was also discussed in Chapter 3.
[1598] This position was also stated in *DPP v Forsey* (n 784), [36].
[1599] *Rock v Ireland* (n 30), 501.
[1600] Ibid, 497, 501.

He found that a failure/refusal[1601] to account 'amounted to corroboration of other evidence'[1602] and that 'such inferences may only be used as corroboration of any other evidence'.[1603] It is interesting to note that corroborating evidence is described as 'supporting evidence which has a degree of credibility'[1604] and is 'independent'[1605] and 'tends to implicate the suspect in the offence'.[1606] The problem with silence as evidence of guilt is that it can only be evidence of silence. In other words, it may only be equated to a guess or a surmise as to evidence of guilt as there are many legitimate reasons for remaining silent as discussed earlier. It is indeed insufficient to meet the threshold of suspicion. It is arguably fanciful to elevate the status of silence to that of evidence that is 'credible', 'independent' or 'tending to implicate a suspect in the offence'. To do so, is to argue that the innocent have nothing to hide in providing an account. As such, it is therefore impossible to conclude beyond reasonable doubt in any case that silence is evidence or suspected evidence of guilt. However, Hamilton CJ stated that 'no improper or unfair inferences are drawn or permitted to be drawn from such failure or refusal'.[1607] He held that 'only such inferences as appear proper can be drawn'[1608] as they 'amount to evidence only: they are not to be taken as proof'.[1609] He continued and stated that 'a court could refuse to allow an inference in circumstances where its prejudicial effect would wholly outweigh its probative value as evidence'.[1610] There are two issues arising from these findings. Firstly, it is disappointing that Hamilton CJ did not provide clear guidance as to what an improper inference may be. The guidance provided is ambiguous. It suggests that anything short of 'wholly prejudicial' may be admissible. The problem with this is that it arguably allows for the admissibility of an inference even in circumstances where its prejudicial effect would outweigh its probative value as

[1601] For a discussion on the meaning of *'failure'* and *'refusal'* see *DPP v Devlin* [2012] IECCA 70, [98].
[1602] *Rock v Ireland* (n 30), 497.
[1603] Ibid, 498.
[1604] *DPP v Gilligan* [2006] 1 IR 107, 141 per Denham J.
[1605] Ibid, 140 per Denham J.
[1606] Ibid, 140 per Denham J. See also *DPP v Meehan* [2006] 3 IR 468, 491, 495; *The People (Attorney General) v Williams* [1940] IR 195, 200; *Attorney General v Levison* [1932] IR 158; *R v Baskerville* [1916] 2 KB 658, 667.
[1607] *Rock v Ireland* (n 30), 497.
[1608] Ibid, 497, 501.
[1609] Ibid, 498.
[1610] Ibid, 501. In *DPP v Finnerty* (n 31), 14 it was stated that since the leading case of R v Christie [1914] AC 545 '...a trial judge should in most cases take care to ensure that...evidence is excluded where it has little or no evidential value'".

evidence. In *DPP v Bullman*[1611] Finnegan J stated that 'the trial judge may only draw such inferences and such degree of inferences, as may be proper'.[1612] A 'proper' inference has since been interpreted to mean 'one that follows logically from the questions asked and the refusal in the particular case'.[1613] This test arguably follows the common-sense assumption that an innocent person would speak in the face of questioning which in the words of Easton, as discussed earlier, may be 'unreliable, impressionistic and unsystematic'.[1614] This approach appears to allow for admissibility of an explanation that is clearly called for in the circumstances even if its prejudicial effect wholly outweighs it probative evidential value. As can be seen, the term 'proper' is not easily defined. It fails to recognise that there may be a genuine reason for remaining silent. As a result, a person exercising their right to silence may be assisting the prosecution in their case against themselves. Secondly, Hamilton CJ's statement that inferences amount to evidence only is not a trivial matter. An accused exercising their right to silence can have serious implications for them. The exercise of that right which, as discussed in Chapter 4 is bound up in the presumption of innocence, may, by virtue of the adverse inference provisions, be used as evidence against the accused which could be the difference between conviction and acquittal. Silence may be the piece of evidence that could tip the prosecution case to the point of conviction despite the fact that silence is only probative of silence and a guess or surmise as to evidence of guilt. In order to avoid this circumstance, an accused would be required to speak and provide an innocent explanation thereby inverting the presumption of innocence to a presumption of guilt. Furthermore, the pressure imposed by the inference provisions and particularly the penalty in the event that an adverse inference is drawn may cause an individual to wrongly self-incriminate. This may be triggered by the hope of a lesser sentence due to the perception of a benefit accruing by cooperating with the authorities rather than not cooperating by remaining silent. Hamilton CJ dismissed the applicants appeal and found that sections 18 and 19 of the 1984 Act did not violate his constitutional right to the presumption of innocence.

[1611] *DPP v Bullman* [2009] IECCA 84.
[1612] Ibid, [3].
[1613] *DPP v Donnelly* (n 1385), [32] per O'Donnell J.
[1614] Easton, S (n 1403), 114. See also Heffernan, L, with Ní Raifeartaigh, U (n 720), [9.120].

5.4.2 Reflections on Rock

As can be seen from *Rock,* the Supreme Court did not lay a very clear foundation for determining the impact of an adverse inference provision on the right to silence and the presumption of innocence. Some leading scholars observe that *Rock* and *Murray,* as discussed earlier, are somewhat unclear as to the extent to which inference provisions may legitimately encroach on the right to silence without violating it. Daly states that '[l]ittle guidance has been provided in this jurisdiction as to what exact inference is to be drawn'.[1615] She has also observed elsewhere that '[t]he Irish courts have not addressed the specifics of the likely inferences to be drawn, nor has the legislature provided any guidance in this regard'.[1616] Similarly, McGrath argues that *Rock* 'provided little guidance as to when it was appropriate to draw inferences and what inferences could be drawn'.[1617] He observes however that some helpful guidance can be drawn from the European Court of Human Rights jurisprudence[1618] in particular the 'common sense' approach adopted by the Court as discussed earlier. Nonetheless, the concerns with this approach have been analysed earlier in this chapter. Indeed, Hogan et al state that the *Murray* decision 'is still of very considerable importance inasmuch as it places some (although, perhaps, somewhat imprecise) limitations on the entitlement of Contracting States to legislate for the drawing of adverse inferences from an accused's silence'.[1619]

While sections 18 and 19 are limited to requests to account for possession of certain implements and presence at a particular place, the overall effect when they are invoked is a significant erosion of the right to silence and the presumption of innocence as discussed. This view is supported by Daly's discussion of the Supreme Court decision in *Rock* where she argues that '[o]nce again, the Irish courts accepted the legislature's limitation of the pre-trial right to silence rather than providing a robust defence of the right'.[1620] Indeed, in more recent times the courts have acknowledged the significant erosion of the right to silence that the inference provisions present. Nonetheless, it will also be shown that the courts are willing to

[1615] Daly, YM, 'Is Silence Golden? The Legislative and Judicial Treatment of Pre-Trial Silence in Ireland' (2009) 16 DULJ 35, 7.
[1616] Daly, YM (n 1076), 64.
[1617] McGrath, D, and Egan McGrath, E (n 720), [11.154].
[1618] Ibid, [11.117]. See *Murray v United Kingdom* (n 626); *Condron v United Kingdom* (n 1393); *Averill v United Kingdom* (n 618).
[1619] Hogan, GW, Whyte, GF, Kenny, D, Walsh, R (n 286), [6.5.128].
[1620] Daly, YM (n 1615), 8.

continue to support this significant erosion of the right to silence as an aspect of the presumption of innocence as discussed in Chapter 4 and in this chapter. As discussed earlier, sections 18 and 19 have been significantly amended with additional safeguards by section 28 and 29 of the Criminal Justice Act 2007, respectively.[1621] However, notwithstanding such safeguards the extent of the erosion of the right to silence by these provisions was arguably demonstrated by the Supreme Court in *DPP v A McD*[1622] and *DPP v Wilson.*[1623]

5.4.3 Judicial Developments Post Rock

This section will examine two key post *Rock* judgments in *DPP v A McD* and *DPP v Wilson* relating to the extent of the erosion of the right to silence and the presumption of innocence by adverse inference provisions.

5.4.3.1 DPP v A McD

In *DPP v A McD* McKechnie J gave judgment on behalf of the Supreme Court.[1624] During the criminal investigation in this case section 19 of the 1984 Act was invoked. At trial the prosecution did not rely on section 19. Instead, it relied on inculpatory statements made by the accused in respect of an offence for which he was subsequently charged. The accused challenged the admissibility of this evidence to the Supreme Court. The central point of appeal on this issue was whether the answers given during an interview with the accused following his original arrest and detention precluded the invocation of section 19 against the accused prior to a subsequent interview conducted during his re-arrest and detention in circumstances where new evidence had come to light.[1625] As stated by McKechnie J, '[i]n other words, in light of such answers, could it be said that the accused had, within the meaning of the section, failed or refused to account for his presence as was demanded'.[1626]

[1621] These sections set out a number of safeguards such as, one cannot be convicted of an offence solely or mainly on the inferences so drawn. The provisions shall have no effect unless the accused was told in ordinary language what the effect of the failure or refusal to account might be, and was informed before such failure or refusal that he had the right to consult a solicitor and that he was afforded a reasonable opportunity to so consult before the failure or refusal occurred. The provisions will have no application unless the interview process is being electronically recorded.

[1622] *DPP v A McD* (n 32), per McKechnie J. See also *DPP v KM* (n 1587); *DPP v Carroll* [2021] IECA 261, [16]-[19].

[1623] *DPP v Wilson* (n 1090) per McKechnie J.

[1624] Denham CJ, O'Donnell and O'Malley JJ concurring.

[1625] *DPP v A McD* (n 32), [85] per McKechnie J.

[1626] Ibid, [85] per McKechnie J.

In his discussion on the operation of section 19, McKechnie J observed that the right to silence 'has a strong constitutional setting'.[1627] He continued:

> In the context of a detained person who is under interrogation as a suspect in the commission of a criminal offence and who subsequently is in fact charged with such an offence, the right, if in issue at the trial, is firmly anchored in Art.38.1 of the Constitution. This is particularly so where, as in this case, the potential consequences of exercising that right are directly in play at the trial. Therefore, it is not necessary to say where in other circumstances the right can also be found, such as in Art.40.3.1° of the Constitution, or in Art.40.6.1° as a corollary to the right of freedom of expression, as stated by this court in *Heaney v Ireland [1996] 1 I.R. 580 at 585; [1997] 1 I.L.R.M. 117 at 123* ("*Heaney*"), and reiterated in *Rock v Ireland [1997] 3 I.R. 484 at 499; [1998] 2 I.L.R.M. 35 at 48-49* ("*Rock*").[1628]

It is clear that he placed significance on the constitutional protection afforded to the right. However, he observed that notwithstanding the authorities upholding adverse inference provisions, 'it still remains the situation that the statutory provisions in issue constitute an impairment of a right which has protection at constitutional level'.[1629] This is a strong statement in relation to the impact of these provisions on the right to silence. It is notable that McKechnie J located the right to silence in Article 38.1 when adverse inferences are involved. His reference to 'in other circumstances' seems to imply that the right can be derived from a number of constitutional provisions, depending on the context. Nonetheless, his finding represents a shift in the Supreme Courts thinking as to the appropriate location of the right to silence and the reason for doing so when adverse inferences are involved. This finding diverges from *Rock* which considered sections 18 and 19 and located the right to silence in Article 40.6 as discussed earlier. Indeed, it represents a departure from the findings of the Supreme Court in *Heaney, Finnerty* and *Re National Irish Bank Ltd* which recognised the right to silence as a corollary of freedom of expression.

It is clear that McKechnie J in *A McD* supported his finding by focusing on the intimate connection between the pre-trial and trial settings having regard to the consequences that may attach to the attitude of an accused. This approach is

[1627] Ibid, [79] per McKechnie J.
[1628] Ibid, [79] per McKechnie J.
[1629] Ibid, [83] per McKechnie J. See also *DPP v KM* (n 1587), [59] per O'Malley J.

consistent with the Supreme Court judgment of Clarke J (as he then was) in *DPP v Gormley*[1630] as discussed in Chapters 1 and 4. McKechnie J nevertheless reserved his position in relation to locating the right in other provisions of the Constitution in other circumstances. It is disappointing that he did not discuss the proportionality of section 19 in terms of its interference with the right to silence in Article 38.1. It will be recalled from the judgments of Costello J in *Donnelly*[1631] and Barrington J in *Re National Irish Bank*[1632] that the proportionality test involving a balancing of rights was effectively ruled out as falling within the ambit of Article 38.1 thereby securing the presumption of innocence in a more effective way.[1633]

In considering the central issue as referred to above, McKechnie J stated that matters had changed significantly post the original arrest and detention of the accused and this was the 'immediate background by which the s.19 issue must be determined'.[1634] He continued:

> In both s.18 and s.19, for a failure or refusal to come within the section, the account demanded and not given must be one "*…which in the circumstances at the time* clearly called for an explanation…"...Accordingly, the emphasised portion of the section...positions the obligation to account in a given context.[1635]

McKechnie J found that there was an 'outright refusal to engage with the new evidence put to him'.[1636] As such he found that the Gardaí were justified in invoking section 19. Therefore, where an accused has already provided an explanation, the Gardaí will be permitted to invoke section 19 where new evidence comes to light and the accused will be required to provide an explanation. It is notable that he clearly referred to the sections as imposing an obligation to account. This arguably inverts the presumption of innocence to a presumption of guilt requiring an accused to provide an innocent explanation.

[1630] *DPP v Gormley* (n 256), [8.8] per Clarke J. See also *Sweeney v Ireland* (n 1293), [89] per Baker J; *DPP v KM* (n 1587), [59] per O'Malley J.
[1631] *Donnelly v Ireland* (n 1236), 334.
[1632] *Re National Irish Bank Ltd* (n 27), 353.
[1633] As discussed in Chapter 4.
[1634] *DPP v A McD* (n 32), [103].
[1635] Ibid, [104].
[1636] Ibid, [108].

Despite the fact that the legislature has continued to remain silent on what exact inference may be drawn, McKechnie J provided some limited judicial guidance on the adequacy of accounts under section 19.[1637] While acknowledging that 'more precise parameters'[1638] may need to be established, he stated 'that the minimum level of plausible engagement is required before an account can satisfy the requirements of s. 19 of the 1984 act'.[1639] He stated, '[w]hat that necessarily will be will involve a consideration of the entirety of the circumstances presenting in each case'.[1640] This indicates the complexity and uncertainty around the operation of these provisions. Indeed, Heffernan observes that '[t]he facts of *A McD* demonstrated the interpretative intricacies that inference-drawing mechanisms can present in police practice on the ground'.[1641] In relation to the explanations given by the accused following his original arrest he found that it was not 'demonstrably incapable of belief or so incredible as to merit being disregarded as untrue'.[1642] While he accepted the explanation as adequate at the time for the purpose of section 19, this test is far from being clear. The only clarity he provided in relation to adequacy of accounts under section 19 was when he stated that a 'plainly unrelated or potentially farcical'[1643] account would not be sufficient to avoid the drawing of an adverse inference otherwise the provision would be null and void. In general, the guidance is ambiguous and indicates a low threshold to comply with a requirement to account under sections 18 or 19. Nonetheless, it provides a strong argument that a suspect has no discretion but to cooperate and to speak or risk an adverse inference of evidence of guilt being drawn. This raises a serious question as to the true value of the statements by McKechnie J in relation to the status of the right to silence in Article 38.1 of the Constitution.

It appeared that the right to silence at the pre-trial stage was being elevated by McKechnie in *A McD* to the point of being afforded equal protection to that as applies during trial by locating these rights in Article 38.1 to effectively protect the presumption of innocence. However, the right to silence at trial and that during

[1637] For further reading see Daly (n 1092), 353.
[1638] *DPP v A McD* (n 32), [102].
[1639] Ibid, [101].
[1640] Ibid, [101].
[1641] Heffernan (n 732), [13.99].
[1642] *DPP v A McD* (n 32), [102].
[1643] Ibid, [101].

questioning, which is effectively an extension of the trial setting, is treated differently notwithstanding the fact that the right to silence in both circumstances is derived from Article 38.1 when inference provisions are in operation. The right to silence is therefore treated less favourably when exercised at the pre-trial questioning stage than at trial. Inferences from silence during pre-trial stage are permitted. However, inferences from silence at trial are prohibited[1644] in order to protect the presumption of innocence. It is arguable that the judicial approach is inconsistent with the scholarly debates, as discussed in Chapter 1, that the presumption of innocence ought to apply at the pre-trial stage to ensure that the treatment of suspects and accused persons is consistent with the presumption and that the burden and standard of proof on the prosecution is not diluted.

5.4.3.2 DPP v Wilson

Following on from *A McD* the Supreme Court considered the operation of section 19 of the 1984 Act in *DPP v Wilson.*[1645] During the trial Wilson objected to the admissibility of evidence that he had failed to answer questions put to him during an inference interview regarding his presence at specified locations relevant to a burglary. He objected on the basis that he was not being questioned in relation to a burglary during the course of the relevant interview, but rather with a firearms offence for which he had never been charged. The trial judge nevertheless found that the Gardaí could question the accused in relation to the firearms offences as they were inextricably linked to the burglary. He was convicted on the burglary charge. He appealed his conviction to the Court of Appeal. The same principal argument against the admissibility of the 'no comment' answers in the section 19 inference interview in respect of the burglary offence was advanced before the Court of Appeal. The Court of Appeal found that this was a question of general public importance. Leave to appeal was granted by the Supreme Court on this single issue.

The leading judgment was delivered by Denham CJ[1646] on behalf of the Supreme Court. McKechnie J also delivered an assenting judgment. In their judgments both Denham CJ and McKechnie J helpfully described the terms of section 19(1) of the 1984 Act which contains the sequential elements involved in the invocation of the

[1644] Section 1(b) of the *Criminal Justice (Evidence) Act, 1924* (n 33).
[1645] *DPP v Wilson* (n 1090) per McKechnie J.
[1646] O'Donnell, McKechnie, Clarke, O'Malley JJ concurring.

section.[1647] Denham CJ referred to these obligations 'as relating to the "inferences caution"' and stated that the following must occur:

> First, the member concerned must reasonably believe that the presence of the accused at a relevant place and time may be attributable to participation in the commission of "the offence". Second, the member concerned must inform the accused that he or she is of that belief being a belief that the presence of the accused may be attributable to participation in the commission of "the offence". Third, the member concerned must, in accordance with s.19(3)(a), tell the accused in ordinary language what the effects of failure or refusal to account may be. However, that effect may be that an inference might be drawn in relation to guilt of "the offence charged". It is clear, therefore, that the inferences caution must relate to "the offence" which obviously relates back to the offence in respect of which, in the words of the first phrase of s.19 itself, there are "proceedings against a person"'.[1648]

Denham CJ continued and stated that '[t]he inferences caution must relate to the same offence as is involved in the proceedings ultimately brought and thus the same offence as that with which the accused is charged'.[1649] Denham CJ and McKechnie J clarified that inferences can only be drawn at trial where the section is invoked during questioning in respect of the offence subsequently preferred against the accused.[1650] The Supreme Court quashed the accused's conviction as the inference provisions were incorrectly invoked.

It is unfortunate that Denham CJ or McKechnie J did not provide a particular form of wording to be used to effectively invoke these provisions or provide guidance on how the provisions operate in parallel with the Judges Rules caution which warns an accused that they are not obliged to speak. This is a critical aspect of their operation given their impact on the right to silence and the presumption of innocence. This is an important point in terms of ensuring consistency of application and avoiding confusion in the mind of a suspect who is demanded to provide an account. Any confusion could on the one hand lead to the making of a wrongful inculpatory statement or on the other hand lead a suspect to remain silence when otherwise they might speak but for the confusion.

[1647] *DPP v Wilson* (n 1090), [31] per Denham CJ and [25] per McKechnie J.
[1648] Ibid, [31] per Denham CJ. See also [25] per McKechnie J.
[1649] Ibid, [32] per Denham CJ .
[1650] Ibid, [49], [50] per Denham CJ and [33], [35], [50], [52], [55] per McKechnie J. See also *DPP v Bolger* [2013] IECCA 6; *DPP v Bolger (No 2)* [2014] IECCA 1.

Notably, McKechnie J made some general observations in relation to the impact of sections 18 and 19 of the 1984 Act on the right to silence. He stated that the sections 'laid the foundation for the indelible alteration of the exercise of that right'.[1651] He noted that they 'were critically significant as an encroachment on the right to silence'.[1652] He also stated that even with the benefit of legal advice a suspect is 'faced with a critical choice, one which may be determinative of the outcome at trial'.[1653] This statement is a clear indication of the pressure imposed by the inference provisions to speak. It is arguable that the benefit of legal advice does not dilute the pressure imposed by an inference provision. Notwithstanding this impact on the right to silence, he noted the findings of both the High Court and Supreme Court in *Heaney* and followed his decision in *A McD* in relation to the location of the right in Article 38.1.[1654] He went on to state that '[c]ontext might influence, if not determine, its resting place in any given case'.[1655] Nonetheless, he found that the erosion of the right to silence by section 19 was justified as follows:

> [T]he restriction on the constitutional right to silence can be justified by reference to society's interest in the investigation of crime, and in its successful prosecution in court. Without the safeguards contained in the legislation, it could not be said that the relevant provisions are constitutionally compliant...such safeguards played a key role in this court's judgment in Rock v Ireland, where...it held that section 18 and 19 of the 1984 Act were not unconstitutional.[1656]

McKechnie J appeared to revert to the position that Costello J adopted in the High Court in *Heaney* by applying the proportionality test to Article 38.1 in justifying section 19 by reference to the public interest in the investigation and prosecution of crime. While the provision may be justified for the purpose of crime investigation it is the use of silence in a subsequent trial that is the main problem for the presumption of innocence. Nevertheless, McKechnie J's finding introduces a layer of confusion

[1651] *DPP v Wilson* (n 1090), [21] per McKechnie J.
[1652] Ibid, [20] per McKechnie J. Note a similar general statement by Kennedy J in the High Court in *DPP v Roche* [2019] IECA 317, [324] where she said that the inference provisions in section 18, 19 and 19A 'encroach on the right to silence and the privilege against self-incrimination guaranteed by the Constitution'.
[1653] *DPP v Wilson* (n 1090), [28] per McKechnie J.
[1654] Ibid, [17] per McKechnie J.
[1655] Ibid, [17] per McKechnie J.
[1656] Ibid, [30] per McKechnie J.

given that serious doubts have already been expressed by the Court of Criminal Appeal in *Donnelly v Ireland*[1657] and the Supreme Court in *Re National Irish Bank Ltd,*[1658] as discussed above and in Chapter 4,[1659] as to whether the proportionality test can be applied to Article 38.1. This confusion is disappointing.

The approach of McKechnie J in *A McD* was more recently followed by the Supreme Court in *DPP v Sheehan.*[1660] O'Malley J gave judgment on behalf of the Supreme Court.[1661] She considered the operation of section 18 of the 1984 Act and stated that a jury 'should only draw an inference if they decide that the failure to account for something was attributable to the Gardaí having a strong case and his having no answer, or no answer that would stand up to scrutiny.[1662] This is suggestive of O'Flaherty's statement in *Heaney* that the innocent have nothing to fear. Indeed, in an earlier analysis of section 18 by the Court of Appeal in *DPP v MacCarthaigh,*[1663] which has not been contradicted, Sheehan J found that an arrested person 'is obliged to engage in a meaningful way'.[1664] He continued in his analysis and contrasted the impact of the inference provisions with *Re National Irish Bank Ltd* as discussed in Chapter 4. He stated:

> The essential difference between that case and the present one insofar as voluntariness is concerned is that a suspect being asked question pursuant to ss. 18 and 19 of the Criminal Justice Act 1984, as amended, is not obliged to answer and unlike the Companies Act inquiry under the Companies Act is not liable to any sanction if he fails to so answer. The appellant in this case was not compelled to answer the question put to him (the caution that he was not obliged to answer any questions if he did not wish to do so was still in place) and accordingly answers given by a suspect when the inference provisions are invoked are voluntary absent any other matter that might impinge on this issue.[1665]

It is difficult to reconcile these two statements. On the one hand Sheehan J stated that the suspect must engage in a meaningful way. It is difficult to understand how

[1657] *Donnelly v Ireland* (n 1236), 334.
[1658] *Re National Irish Bank Ltd* (n 27).
[1659] See also Hogan, GW, Whyte, GF, Kenny, D, Walsh, R (n 286), [6.5.128].
[1660] *DPP v Sheehan* [2021] IESC 49, [118]-[119] per O'Malley J.
[1661] Mac Menamin, Dunne, Charleton, Woulfe JJ concurring.
[1662] *DPP v Sheehan* (n 1660), [39] per O'Malley J.
[1663] *DPP v MacCarthaigh* [2015] IECA 234.
[1664] Ibid, [24].
[1665] Ibid, [32].

this falls within the realm of voluntary engagement. However, on the other hand he stated that the suspect is not obliged to engage. The problem with this finding is that it fails to appreciate the pressure imposed by the statutory requirement to speak or risk an adverse inference from silence being used as corroborative evidence, potentially leading to conviction and a penalty much greater that one from a provision directly criminalising silence as discussed earlier.

It is interesting to note the status of *A McD* as stated by O'Malley J in *Sheehan.* She remarked that, '[i]t is accepted that A. McD is the leading authority, and has resolved any apparent difference in emphasis as between the earlier authorities'.[1666] It is regrettable that she did not go into any detail as to what the differences were in earlier authorities that she was referring to. Indeed, *Rock* was not referenced in her judgment. In any event, if it is the case that *A McD* is the leading authority on these adverse inference provisions, it does not appear to change the position as found by the Supreme Court in *Rock.* The provisions are considered to be constitutional notwithstanding the adverse impact they have on the right to silence and the presumption of innocence.

The cases discussed provide a strong argument that a suspect is required to answer questions and account under sections 18 and 19. This arguably inverts the presumption of innocence to a presumption of guilt thereby requiring the accused to provide an innocent explanation, which completely undermines the presumption of innocence. This again raises a serious question as to the true value of the statements by McKechnie J in *A McD* in relation to the status of the right to silence in Article 38.1 of the Constitution. This is disappointing and indicates that the superior courts continue to pay lip service to the value of presumption of innocence. In light of the limited guidance on the adequacy of accounts, Heffernan notes that 'we must await possible future cases for the further elucidation of legal principles'. [1667]

It is noted that the investigation of crime, in addition to the relevant safeguards in the provisions, are continuously used as a justification for the adverse inference provisions. However, this again raises a question in relation to the real value of the

[1666] *DPP v Sheehan* (n 1660), [69].
[1667] Heffernan (n 732), [13.99].

presumption of innocence in the first instance. It is arguably the case that none of the legislative safeguards or the standard of proof on the prosecution are sufficient to reduce the degree of compulsion to speak imposed by the inference provisions which effectively re-allocates a de facto burden of proof on the suspect during questioning, thereby violating the presumption of innocence.

5.4.4 Finnerty v Ireland

Finnerty v Ireland[1668] is characterised as a 'landmark case'.[1669] In this case the Supreme Court was called upon to consider an issue regarding the drawing of adverse inferences from silence at the pre-trial stage. This case did not in itself concern the use of an adverse inference provision. However, it is instructive in relation to the drawing of inferences from a fact not raised during questioning but relied on at trial and the Supreme Court's view of the impact of the inference provisions in sections 18 and 19 of the Criminal Justice Act 1984.

The applicant was detained under section 4 of the Criminal Justice Act 1984. He exercised his right to silence and declined to answer questions during Garda questioning. He was subsequently charged with the rape of a student in Donegal. The accused subsequently raised a new fact in the witness box which triggered the drawing of an adverse inference from his silence during Garda questioning at trial. The trial judge ruled that the fact that the applicant had refused to account for events during Garda questioning was admissible in evidence. He also ruled that the prosecution was permitted to cross-examine the applicant on his refusal. He was convicted and sentenced to 7 years imprisonment. He appealed on eight grounds, two of which related to the rulings of the trial judge regarding the admissibility of his pre-trial silence and cross-examination of same at trial to the Court of Criminal Appeal.[1670] On Appeal Lynch J's findings were brief. He found that it was reasonable for the prosecution to ask the accused why he did not give a full account when he gave his first exculpatory account to Gardaí. He found that it did not encroach on the right to silence but that this form of evidence of silence in the Garda station and the cross-examination by the prosecution was:

[1668] *DPP v Finnerty* (n 31).
[1669] Heffernan (n 732), [13.76].
[1670] *DPP v Finnerty* 1998 WJSC CCA 5526.

> highly relevant to the credibility of the applicant's lately preferred account of events. The evidence of silence, and his cross examination about the silence, were permitted and adduced only for that purpose, and that was made quite clear, and in the circumstances of the case that course of proceedings was perfectly permissible and proper.[1671]

He did not discuss statutory inference provisions in any way. He rejected these grounds and dismissed the appeal.[1672]

Supreme Court

Finnerty appealed his case to the Supreme Court where Keane J gave the judgment.[1673] The appeal was solely concerned with the following:

> [T]he claimed right of a person detained under s. 4 of the Act of 1984 to refuse to answer questions put to him by Gardaí during...detention...and the need to ensure that no inference adverse to him are drawn at any subsequent trial from the exercise of that right.[1674]

Keane J reversed the Court of Criminal Appeal decision. He allowed the appeal and ordered a retrial.

Keane J conducted a brief exploration of the constitutional location of the right to silence. He remarked that Costello J in the High Court in *Heaney* found that the right to silence derived from Article 38.1 and that he applied the proportionality test. However, he observed that the right to silence was traced to a different source by O'Flaherty J in the Supreme Court in *Heaney,* as a corollary of freedom of expression, and that the same principles were applied by the Supreme Court in *Rock.* He also simply referred to the decision of Barrington J in *Re National Irish Bank Ltd.*[1675] There was no further discussion on the constitutional location of the right to silence. He continued:

> It follows that the right of suspects in custody to remain silent, recognised by the common law, is also a constitutional right...Absent any express statutory provisions entitling a court or jury to draw inferences from such silence, the

[1671] Ibid, 5529-5530.
[1672] Ibid, 5530, 5533.
[1673] Hamilton C J, Denham, Barrington and Murphy concurred.
[1674] *DPP v Finnerty* (n 31), 376.
[1675] As discussed in Chapter 4.

> conclusion follows inevitably that the right is left unaffected by the Act of 1984, save in cases coming within ss. 18 and 19, and must be upheld by the courts.[1676]

Keane J was referring to the inference provisions in sections 18 and 19 of the 1984 Act. It is disappointing that he was not clearer about the constitutional location of the right to silence. However, it appears that he followed the findings of the Supreme Court in *Heaney*, *Rock* and *Re National Irish Bank Ltd* in finding that the right is recognised as a corollary of freedom of expression. He confined this finding to the drawing of adverse inferences from silence during Garda detention where it is provided for in an express statutory provision. He made it clear that this finding did not include cross-examination at trial in relation to silence during Garda questioning, including in respect of a new fact mentioned in the witness box when he stated:

> Under no circumstances should any cross-examination by the prosecution as to the refusal of the defendant, during the course of his detention, to answer any questions, be permitted.[1677]

At that time there was no such legislative exception to permit the cross-examination of an accused in relation to pre-trial silence. It is notable though, that Keane J chose to remain silent on whether an express statutory provision could permit cross-examination at trial in relation to silence during Garda questioning.

He found that a trial judge should not in general make any reference to the refusal by an accused to answer questions during Garda detention to the jury.[1678] He stated that 'no...general abridgement of the right to silence was intended to be effected where a person declined to answer questions put to him'.[1679] Keane J appears to suggest that the provisions of section 18 and 19 do not permit adverse inferences to be drawn from silence resulting from general pre-trial questioning. He noted that the 1984 Act did not provide for the drawing of an adverse inference where a person was relying on a fact that he failed to mention during pre-trial questioning. He made reference to a failure to mention provision in English law in section 34 of the Criminal Justice

[1676] *DPP v Finnerty* (n 31), 380.
[1677] Ibid, 381.
[1678] Ibid, 381.
[1679] Ibid, 379. For further reading see 'Report of Expert Group Appointed to Consider Changes in the Criminal Law Which Were Recommended in the Garda SMI Report' (n 1132), 32-34; 'Balance in the Criminal Law Review Group Final Report' (n 35), 83.

(Public Order) Act 1994. Section 34 provided that adverse inferences may be drawn from any fact relied on by an accused in their defence which was not mentioned when questioned by a police officer. Interestingly, he noted that the form of caution had been changed to cater for such a provision in English law. He stated that had the Oireachtas intended to abridge the right to silence by allowing for adverse inferences to be drawn from a failure to answer any questions put to them by Gardaí, it would have provided for this in legislation.[1680] It is disappointing that he did not examine the modification of the right to silence by other Irish statutory provisions that were relevant at the time by way of analogy, though limited, in relation to the doctrine of recent invention. For example, section 5 of the Offences Against the State (Amendment) Act, 1998 and section 7 of the Criminal Justice (Drug Trafficking) Act 1996 permitted adverse inferences to be drawn from silence in specific circumstances during Garda detention when an accused subsequently raised a new fact in the witness box at trial.

In principle, the decision opens the door for the introduction of legislation to permit cross examination as to credit in relation to the reasons a new fact was mentioned for first time by the accused at trial.[1681] However, it did not go so far as to permit cross-examination to establish 'recent fabrication in the absence of prior inconsistent statements'.[1682] As a result, it is arguable that this finding lead to influencing the expansion of the inference provisions in 2007 which will be discussed in detail below.

Keane J reviewed the historical context of the criminal law prior to the 1984 Act. He observed that a suspect had a right to refuse to answer police questions and that there was an 'obligation on the police to inform him of that right in the formula...of the 'traditional police caution'[1683] which was 'eventually enshrined...in the "Judges Rules"'.[1684] He stated that the usual caution should be given to a suspect before they

[1680] *DPP v Finnerty* (n 31), 379.
[1681] For further reading see 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 21, 36.
[1682] For further reading see Ibid, 21, 36.
[1683] *DPP v Finnerty* (n 31), 377.
[1684] Ibid; *R v Voisin* [1918] 1 K.B. 531, 538. For further decisions of the Judges Rules see *McCarrick v Leavy* (n 1425); *People (AG) v Cummins* (n 1265).

are questioned even though the giving of the caution is not expressly provided for in the 1984 Act in an adverse inference situation.[1685] Significantly, Keane J found:

> The Act of 1984...did not modify in any way the right of a person whom the Gardaí suspect of having committed a crime to refuse to answer questions put to him by Gardaí and his entitlement under the Judges' Rules to be reminded of that right before any questioning begins. That right would...be significantly eroded if at the subsequent trial of the person concerned, the jury would be invited to draw inferences adverse to him from his failure to reply to those questions and, specifically, to his failure to give the questioning Gardaí an account similar to that subsequently given in evidence. It would render virtually meaningless, the caution required to be given to him under the Judges' Rules.[1686]

In this statement Keane J clarified that two rights are vested in a suspect during Garda detention, that is to say, the right to refuse to answer questions and the right to be reminded of that right prior to questioning, by administering the traditional Judges' Rules caution. He was clearly concerned about the impact on the right to silence and the caution if adverse inferences could be drawn at trial from silence during Garda questioning. This was a remarkable statement given that he also noted that the Supreme Court earlier upheld the adverse inference provisions in sections 18 and 19 of the 1984 Act in *Rock.* It is disappointing that Keane J did not analyse this contradictory situation in more detail and provide guidance in relation to the form of caution to be used before such provisions are invoked. This is an unsatisfactory situation. On the one hand suspects would be informed under the Judges Rules caution that they were not obliged to say anything. However, on the other hand they would be warned in accordance with sections 18 and 19 that if they did not say anything that their silence could be used as evidence of guilt against them. It is difficult not to conclude that sections 18 and 19 render the caution and indeed the right to silence meaningless. In other words, they appear to effectively abolish the very essence of the right thereby reallocating a de facto burden of proof resulting in a significant erosion of the presumption of innocence. Despite the pressure resulting from the application of sections 18 and 19, any probative utterance in the form of a confession made under these pressurised circumstances is admissible in evidence. In this context, such provisions are clearly aimed at requiring the accused to assist

[1685] *DPP v Finnerty* (n 31), 378.
[1686] Ibid, 379.

the prosecution in their case against them by allowing for the gathering of silence or a forced probative utterance from the suspect as evidence. This is inconsistent with the argument that the State should have to prove its case without assistance from the accused.

5.4.5 Reflections on Finnerty

Fennell argues that what happened at trial in *Finnerty* is significant. She states:

> [I]t shows how, if you have in the system generally exceptional provisions which allow for comment on silence and allow for inferences to be drawn from silence, this can affect the culture or mindset of the judiciary such that they literally forget that this is an ordinary case and the normal position still applies.[1687]

This is a persuasive point. Notably, the exceptions in sections 18 and 19 have been broadened since *Finnerty* in the form of a 'failure to mention' provision in section 19A of the Criminal Justice Act 1984. Indeed, it is arguable that exceptional provisions can also affect the culture or mindset of the legislature in terms of their willingness to expand these provisions to abridge the right to silence generally in respect of ordinary crime cases at the expense of the true value of the right to silence and the presumption of innocence. This may be characterised as the 'contagion' effect defined by Hamilton as 'the migration of law and policy from the counter-terrorism to the 'ordinary' criminal justice spheres'[1688] thereby involving 'general deprioritisation of due process values'.[1689] Hamilton also argues that contagion may occur in both directions, 'trickle up' as well as 'trickle down'.[1690]

The finding in *Finnerty* was discussed in a number of Court of Criminal Appeal cases.[1691] Some general comments by Macken J in the Court of Criminal Appeal in *DPP v P(P) M*[1692] are worth considering. One of the key grounds of appeal in this case concerned wrongful commentary by counsel on behalf of the DPP about the

[1687] Fennell, C (n 757), [3.211].
[1688] Hamilton, C, '"Contagion" between the Special and the Normal in Criminal Justice: A Comparative Perspective' in Mark Coen (ed), *The Offences Against the State Act 1939 At 80: A Model Counter-Terrorism Act?* (Bloomsbury Publishing Plc 2021), 239.
[1689] Ibid, 250.
[1690] Ibid, 250-251.
[1691] *DPP v Coddington* (n 1083); *DPP v White* (n 1083); *DPP v M.J.* (n 1083). It was also followed by the Supreme Court in *DPP v KM* (n 1587).
[1692] *DPP v P(P) M* [2010] IECCA 61.

applicant's credibility in relation to his failure to give evidence at trial. Notably, Macken J stated that the object of the Criminal Justice (Evidence) Act 1924 was to protect the right to silence and the presumption of innocence. She stated:

> The object of s.1(b) of the Act of 1924, especially in its time context, was to prevent the prosecution, directly or indirectly, from negating the right to silence and the presumption of innocence from which it flows, by inveighing against an accused's failure to give evidence in his own defence (itself a relatively new right in 1924).[1693]

This statement provides a strong argument as to how the presumption of innocence protects against the drawing of adverse inferences by exercising one's right to silence at trial. Later in her judgment, Macken J reiterated that the reason for section 1(b) of the 1924 Act is to protect the presumption of innocence. She stated:

> [P]arties engaged in a trial must be extremely careful not to suggest or infer in any way, or pass comment, or make statements, from which an adverse inference might be drawn by the jury which could affect that presumption of innocence. Because the presumption of innocence exists, and because no burden transfers to the accused to establish his innocence, the fact that he does not give evidence, as he is not obliged to, cannot be a basis from which any inference can be drawn.[1694]

She continued and stated that the right to silence at trial was a 'fundamental Rule of Law'.[1695] Equally, it is arguable that the right to silence at the pre-trial questioning stage is a 'fundamental rule of law' in light of recent Supreme Court findings that the right to silence at the pre-trial questioning stage is located in Article 38.1 (fair trial right), particularly where the adverse inference provisions are invoked.[1696] The pre-trial questioning is as searching and rigorous as cross-examination at trial. It is arguable therefore that these judicial pronouncements support the view as discussed in Chapter 4 that pre-trial questioning is the 'functional equivalent'[1697] of taking evidence under oath at trial. There is therefore a requirement to truly respect and protect the right to silence and the presumption of innocence in both settings equally. There is a contradiction in the manner in which the presumption of innocence under

[1693] Ibid, 5.
[1694] Ibid, 9.
[1695] Ibid, 14.See also *DPP v KA* [2018] IECA 186, [21].
[1696] *DPP v A McD* (n 32), per McKechnie J; *DPP v Wilson* (n 1090), per McKechnie J.
[1697] Alschuler (n 1175), 2664.

Article 38.1 is being applied at the pre-trial and trial stages. As discussed earlier, there is strong judicial authority on the permissibility of adverse inferences in relation to pre-trial silence in the context of statutory adverse inference provisions.[1698] This is compared with the strong rhetoric against any adverse inference where the accused refuses to take the stand based on the Criminal Justice (Evidence) Act 1924.[1699] It is possible though that the judges feel more comfortable in stating how unacceptable it would be to pass comment on the exercise of the accused's silence at trial because of the protection contained in the 1924 Act. Both the legislature and the courts agree that that is important. Furthermore, it is more difficult to condemn adverse inferences in the pre-trial stage because there is case law confirming they are constitutionally sound. The distinction could also be based in part on a judicial bias that the trial is a sacred (legal) construct, the fairness of which must be scrupulously upheld by the judiciary, whereas the pre-trial stage is a less critical stage in the process and a fair trial will ensure fairness overall. Nonetheless, it is arguable that the value of Article 38.1 is being interpreted by two standards depending on the setting in which it is being applied when one would expect that one standard ought to apply. After all, the courts have found that Article 38.1 also applies at the pre-trial stage during inference interviews. Therefore, one would expect that the high standard which applies at trial for the purpose of protecting the presumption of innocence equally applies at the pre-trial stage given that the pre-trial stage is an extension of the trial stage in this circumstance.

In the Court of Appeal in *DPP v SM*[1700] Donnelly J observed that the rules in *Finnerty* 'were derived to deal with the particular facts of that case, an encroachment by the prosecution on the right to silence without any justification'.[1701] In general terms, she observed that the 'constitutional right to silence...is part and parcel of a fair trial'.[1702] She observed that it was not absolute and stated that '[t]he fact that a person has a constitutional right to silence does not mean that they have an immunity from all

[1698] *Rock v Ireland* (n 30); *DPP v MacCarthaigh* (n 1663); *DPP v Wilson* (n 1090); *DPP v A McD* (n 32); *DPP v Sheehan* (n 1660); *DPP v KM* (n 1587); *DPP v Carroll* (n 1622).
[1699] *DPP v Finnerty* (n 31); *DPP v P(P) M* (n 1692); *DPP v White* (n 1083); *DPP v M.J.* (n 1083); *DPP v KA* (n 1695); *DPP v KM* (n 1587); *DPP v SM* [2020] IECA 170.
[1700] *DPP v SM* (n 1699).
[1701] Ibid, [27].
[1702] Ibid, [29]. See also *DPP v Burke* [2019] IECA 239, [24].

appropriate reference to the times they exercised it'.[1703] She said that the statutory adverse inference provisions are one exception where the prosecution could encroach on the right to silence.[1704] She referred to O'Malley J in *DPP v KM* where she held that the right to silence can be waived by an accused.[1705]

Nonetheless, it is difficult not to conclude that an accused person's right to silence at trial and the presumption of innocence are indirectly and irretrievably prejudiced by permitting a trial to draw adverse inferences from silence at the pre-trial questioning stage. Notwithstanding the range of safeguards contained in the inference provisions, including access to legal advice and the standard of proof, it is clearly the case in light of the requirement to provide a plausible or meaningful explanation when requested to account, that the safeguards do not reduce the pressure imposed by the inference provisions to speak or risk the drawing of an adverse inference from silence. Given that the Supreme Court has shifted its view that the right to silence at the pre-trial setting is protected by Article 38.1, particularly so when an adverse inference provision is invoked,[1706] it is arguable that the same protections that apply under Article 38.1 at trial ought to apply at the pre-trial questioning stage given the intimate connection between the two stages. The inferences provisions operate at a stage in the process that is equivalent to the trial stage where inferences from silence are prohibited by section 1(b) of the 1924 Act, in order to protect the presumption of innocence. In other words, the inference provisions either circumvent section 1(b) of the 1924 Act at the expense of the presumption of innocence or they are in direct conflict with it. If this view is accepted, it is clearly the case that the continued operation of the inference provisions presents a significant erosion of the presumption of innocence.

5.5 Reflections

This chapter examined the extent to which the presumption of innocence is under significant threat of erosion by the adverse inference provisions. The chapter provides a strong argument that despite the safeguards in the adverse inference provisions and the protection of the presumption at trial in section 1(b) of the

[1703] *DPP v SM* (n 1699), [29].
[1704] Ibid, [29].
[1705] Ibid, [28]. See also *DPP v KM* (n 1587), [65]-[67].
[1706] *DPP v A McD* (n 32), per McKechnie J; *DPP v Wilson* (n 1090), per McKechnie J.

Criminal Evidence Act 1924, that the continued use of silence obtained during pre-trial questioning, in evidence at trial, significantly erodes the right to silence and the presumption of innocence. It also provides a strong argument that the safeguards and the standard of proof do not reduce the pressure imposed by the requirement to speak, when requested to account. The problem with this approach is that the provisions require an accused to displace the inferences by contributing in circumstances where the presumption of innocence requires the prosecution to prove their case without assistance from the accused. It fails to take account of the practical effect of an adverse inference provision which effectively reallocates a de facto burden of proof to the accused to answer questions. This has the practical effect of shifting the focus of the trial onto the accused to provide an innocent explanation.

The problem with silence as corroborating evidence of guilt is that it can only be evidence of silence. In other words, it may only be equated to a hunch as there are many legitimate reasons for remaining silent as discussed earlier. It is arguably fanciful to elevate the status of silence to that of 'supporting evidence which has a degree of credibility'[1707] and is 'independent'[1708] and 'tends to implicate the suspect in the offence'.[1709] The problem with silence as evidence of guilt is that it can only be evidence of silence. To do so, is to argue that the innocent have nothing to hide in providing an account. It is difficult to understand that it would even satisfy a suspicion threshold let alone beyond reasonable doubt. It is therefore impossible to conclude beyond reasonable doubt in any case that silence is evidence of guilt.

It has been strongly argued that pre-trial questioning is the 'functional equivalent'[1710] of taking evidence under oath at trial and that the right to silence at trial and during pre trial questioning are treated differently. In this context, it has been shown that the Supreme Court in *DPP v A McD*[1711] has shifted its view that the right to silence at the pre-trial setting is now protected by Article 38.1, particularly so when an adverse

[1707] *DPP v Gilligan* (n 1604), 141 per Denham J.
[1708] Ibid, 140 per Denham J.
[1709] Ibid, 140 per Denham J. See also *DPP v Meehan* (n 1606), 491, 495; *The People (Attorney General) v Williams* (n 1606), 200; *Attorney General v Levison* (n 1606); *R v Baskerville* (n 1606), 667.
[1710] Alschuler (n 1175), 2664.
[1711] *DPP v A McD* (n 32), [79] per McKechnie J.

inference provision is invoked. However, it has been shown that the presumption of innocence is protected by section 1(b) of the 1924 Act at trial but yet the adverse inference provisions allow for silence during the equivalent pre-trial setting under Article 38.1 to be used as evidence at trial. The presumption of innocence and the right to silence are therefore treated less favourably when exercised at the pre-trial questioning stage than at trial. It is arguable that the judicial approach is inconsistent with the scholarly debates, as discussed in Chapter 1, that the presumption of innocence ought to apply at the pre-trial stage to ensure that the treatment of suspects and accused persons is consistent with the presumption and that the burden and standard of proof on the prosecution is not diluted.

5.6 Conclusion

The case analysis in this chapter provides a strong argument that the presumption of innocence as a fundamental constitutional right is under significant ongoing threat of erosion by the adverse inference provisions. It shows the degree to which the courts have interacted with these statutory provisions in light of the presumption of innocence. As discussed in Chapters 3 and 4, despite the ongoing statements made by the courts over time of the importance of the presumption of innocence, the evidence suggests that the presumption remains under significant threat of erosion by the continued use of the inference provisions.

The analysis provides strong arguments that the continued operation of the ‘failure to account’ provisions in sections 18 and 19 of the 1984 Act, while limited in nature, significantly erode the right to silence and the presumption of innocence. They allow for silence to be used as corroborative evidence in circumstances where silence may only be considered as a hunch or a guess and of itself it produces no evidence.

The research will now turn to examine how the erosion of the right to silence and the presumption of innocence has escalated by legislation that permits the drawing of adverse inferences at trial from an accused person’s failure to mention a fact during Garda questioning and later relied on at trial.

Chapter 6 – Adverse Inferences from Failure to Mention a Fact

The purpose of this chapter is to examine the extent to which the presumption of innocence is eroded by legislation that permits the drawing of adverse inferences from a fact relied on by an accused at trial not mentioned during Garda questioning. The chapter will focus on the 'failure to mention' provision in section 19A of the Criminal Justice Act 1984 which was introduced in 2007.[1712]

The chapter conducts an examination of the Balance in Criminal Law Review Group Reports in 2007 and the recommendation to introduce a 'failure to mention' provision applicable in respect of ordinary criminal offences. It examines the Dáil debates on the introduction of such a provision and the legislative provision as enacted. It will be argued that the introduction of the 'failure to mention' provision in section 19A of the 1984 Act further erodes of the right to silence and the presumption of innocence as it is a more general abridgment of these rights in respect of ordinary criminal offences.

It will be shown that this erosion of rights is compounded by the lack of legislative will to introduce a caution to, effectively constitutionalise the 'failure to mention' provision in section 19A as an extension of that provision, to clearly and consistently convey the effect of the inference provisions to a suspect. This thesis argues that the 2007 'failure to mention' provision erodes the presumption of innocence and the right to silence to the point that their very essence is abolished.

Finally, the chapter will discuss the European Union Directive on the presumption of innocence and what it may mean for the future of the adverse inference provisions in Irish law.

6.1 Further Erosion of the Right to Silence and Presumption of Innocence

This chapter argues that the right to silence and the presumption of innocence were further eroded in the 'first decade of the twenty-first century' by the introduction of a 'failure to mention' provision which extends to all arrestable offences for the duration of an inference interview. This change in the law was effected by section 19A of the

[1712] Section 30 of the *Criminal Justice Act 2007* (n 34).

Criminal Justice Act 1984.[1713] Daly observes that the requirement of section 19A 'is more stringent than ss 18 and 19, as reformulated under the Criminal Justice Act 2007'.[1714] This section explores and analyses this development. It will discuss the recommendations of the Balance in Criminal Law Review Group in 2007. It will also discuss the speed at which the provision passed through the legislative process without due diligence on the impact it has on the right to silence and the presumption of innocence.

Section 19A was introduced against the backdrop of significant levels of serious crime. It allows for the drawing of inferences where an accused fails at an earlier time, where the State's case has not been made out (such as before or on being charged or while being questioned) to mention any fact later relied on in his defence, being a fact which in the circumstances existing at the time clearly called for an explanation. McKechnie J in *Wilson*[1715] remarked that section 19A is 'widely regarded as a legislative response'[1716] to the Supreme Court's decision in *Finnerty*. While this may be so, section 19A was introduced following recommendations made by the Balance in the Criminal Law Review Group in 2007 (Review Group).

6.1.1 Balance in the Criminal Law Review Group Report 2007

The Balance in the Criminal Law Review Group was established on 1st November 2006 by the Minister for Justice Equality and Law Reform Mr Michael McDowell. It was set up to advise on rebalancing the criminal law as between the rights of victims of crime on the one hand and the rights of an accused on the other hand 'in addressing what is known as 'the Problem of Crime''.[1717] The setting up of the Review Group was preceded by a speech given by the Minister in Limerick on 20th October 2006.[1718] Speaking to the many developments in favour of the protection of accused persons over the previous decades, he stated:

> [A]long the way a consequence of that development and reform of the law

[1713] Section 19A was inserted into the 1984 Act by section 30 of the Ibid.
[1714] Daly (n 1092), 355.
[1715] *DPP v Wilson* (n 1090).
[1716] Ibid, [23] per McKechnie J.
[1717] 'Balance in the Criminal Law Review Group Final Report' (n 35), 17.
[1718] 'Rebalancing Criminal Justice"-Remarks by Tanaiste in Limerick, 20th October, 2006,' <http://www.inis.gov.ie/en/JELR/Pages/Speech-rebalancing-criminal-justice>. See also Vaughan S, Kilcommins, B, 'Reconfiguring State-Accused Relations in Ireland' (2006) 41 The Irish Jurist 90.

> may have been that the needs, concerns and rights of victims of crime may have unintentionally become secondary to the rights and protections for the criminal. Somehow it seems that we may now have arrived at a situation where on occasions the scales of justice are tilted too heavily to one side. Unfortunately when that occurs, that imbalance is likely to favour the criminal rather than the innocent victim all too often. I want...to raise the possibility that we, as a society, must now face up to difficult questions...as a means of ensuring that the scales of justice are held evenly between those who would break the law and those who would uphold it, between the accused and the prosecutor and between the criminal, the victim and the community.[1719]

The Minister was clearly exercised in relation to the state of the law as it stood at that time indicating that the scales of justice was favouring accused persons over victims of crime. In addressing this imbalance, the Minister focused on a number of areas including the right to silence. He stated that 'if one stands back from the development of the law in this area and considers the bigger picture, the focus is almost exclusively on the rights of the accused'.[1720] He continued:

> But where do the rights of victims stand in such cases? Surely we need to ask questions as to why the focus seems to be always on the rights of the accused almost to the point of exclusion of the victim's rights or indeed anybody else who might be adversely effected.[1721]

He then posed the following question:

> Has the time come to consider broadening the circumstances in which an inference can be drawn from the failure of an accused to respond to fair questioning duly recorded not as sufficient proof of guilt but as corroboration of other evidence of guilt?[1722]

This is the first indication of the Minister considering the question of extending the ambit of 'failure to mention' provisions in relation to reliance on a fact at trial not mentioned during Garda questioning and their use as corroborative evidence.

The Review Group[1723] was established with experts in this area of law. The Minister stated that the membership of the Review Group represented:

[1719] 'Rebalancing Criminal Justice"-Remarks by Tanaiste in Limerick, 20th October, 2006,' (n 1718).
[1720] Ibid.
[1721] Ibid.
[1722] Ibid.
[1723] Discussed in Chapter 5.

> a solid blend of legal, academic and practical expertise and I am confident that their work will be a valuable contribution to...a need to sometimes consider and review values and standards in our criminal justice system to ensure that the scales of justice remain balanced and are not tilted unfairly in one direction.[1724]

However, Hardiman J took a contrary view. He noted that there was no practicing criminal lawyer on the Group and stated that it was 'necessary that there should be some input into a committee on the "rebalancing" of the criminal law from those who know how that law works in practise, and from both sides.[1725] Indeed, Hardiman J questioned the whole concept of rebalancing the criminal law in the first instance. He argues:

> This term conceals an unproved assumption and has been very assiduously fostered in public discourse for that reason. One does not set out to rebalance something already regarded as properly balanced. One sets out to rebalance something which is malfunctioning, which is out of kilter, which is not working appropriately. Accordingly the persistent use of the term "rebalancing" involves an assumption, which is rarely thought necessary to stand over by rational argument, that the criminal justice system is already gravely out of balance. No evidence for this assumption has been produced.[1726]

In support of his argument he states that the estimated combined rate of conviction in the District Courts and above was 90%-95%[1727] which would suggest that it was not out of balance. As such he argues that the rebalancing notion needed to be 'rigorously established by facts and figures'.[1728] Duffy also takes a similar view on the issue of 'balance'. She argues:

> Overall, the "balance" debate is failing to engage with the nexus of the concept: to achieve parity between the rights of defendants and the rights of victims, both sets of rights should be safeguarded and strengthened. Diminishing one set of rights will not advance those of the other group.[1729]

[1724] 'Dáil Éireann Debate, 7 November 2006' <https://www.oireachtas.ie/en/debates/question/2006-11-07/49/>, per Mr Michael McDowell, Minister for Justice, Equality and Law Reform.
[1724] The Hon. Mr Justice Adrian Hardiman, 'Weasel Words and Doubtful Meanings: A Study in the Language of Law "Reform"' (2007) 2 Judicial Studies Institute Journal 1, 5.
[1725] The Hon. Mr Justice Adrian Hardiman (n 1724), 5.
[1726] Ibid, 4, 5.
[1727] Ibid, 11.
[1728] Ibid, 11.
[1729] Duffy, D, '"Balance" in the Criminal Justice System: Misrepresenting the Relationship between the Rights of Victims and Defendants' (2009) 19 Irish Criminal Law Journal, 8.

Nonetheless, the Review Group noted:

> [C]rime has gradually been becoming more violent and offenders more ruthless. While criminals have become more sophisticated and dangerous, at the same time the activities of the Garda Síochána in combating crime have been subject to increased scrutiny in recent years, in itself a commendable development. The cumulative effect, however, of all of these developments may have been to gradually tilt the balance in favour of the criminal defendant.[1730]

The evidence clearly suggests that there was a concern that the scales of justice had tilted too far in favour of accused persons and the task of the Review Group was to identify ways in which the scales could be rebalanced taking account of the rights of victims.

6.1.1.1 Use of silence as corroborative evidence or as going to credibility of a defence

This section examines the discussion of the Review Group as to the use to which silence may be put in the context of a 'failure to mention' provision. They discussed the adverse impact of its use as corroborative evidence in assisting the prosecution prove its case. The Review Group was clearly of the view the most that could be achieved by such a provision was that silence may only be used as going to the credibility of a defence and not as corroborative evidence.

When the Review Group[1731] was established it was tasked to examine the right to silence as part of its terms of reference.[1732] Despite the findings by the Supreme Court in *Heaney* and *Re National Irish Bank Ltd* that the right to silence is a corollary of freedom of expression in the Constitution, the Review Group stated that it is 'regarded as part of the bundle of rights protected by the right to trial in due course of law by Article 38.1'.[1733] This reflects the Supreme Court's most recent view as expressed in *A McD, Wilson, SM* and *Sheehan* that the right to silence is located in Article 38 when adverse inferences are involved.[1734] However, the Review Group did

[1730] 'Balance in the Criminal Law Review Group Final Report' (n 35), 12.
[1731] Discussed in Chapter 5.
[1732] 'Balance in the Criminal Law Review Group Final Report' (n 35), 5; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 1-2.
[1733] 'Balance in the Criminal Law Review Group Final Report' (n 35), 18; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 3.
[1734] Discussed in Chapter 5.

not discuss what this constitutional location of the right to silence would mean for the right. The Review Group re-emphasised the findings in *Finnerty* in relation to the right to silence at trial where cross examination is not permitted as to the reason for remaining silent during Garda questioning. In setting out one practical effect of the right to silence it referred to the 11th Report of the English Law Revision Commission of 1972[1735] as follows:

> [I]f a suspect either declines to answer Garda questions or, alternatively, omits to mention some matter which would tend to exculpate him, but keeps this back until his trial, "the court or jury may not infer that his evidence on this issue at the trial is untrue."[1736]

This point illustrates the danger attached to inferring guilt from silence. In some cases, the reason for remaining silent may not be remotely connected to guilt. In fact it may be the opposite and the reason may be related to innocence. Because of the many variables associated with inferring guilt from silence, it may be said that on each occasion there remains a reasonable doubt that there is an innocent explanation for silence as distinct from a reasonable doubt that there is no innocent explanation or one that would stand up to scrutiny. However, the Review Group was of the following view:

> The decision in Finnerty would appear to leave open the possibility that the Oireachtas could validly enact (within certain parameters) new legislation providing for inferences to be drawn from the failure to answer Garda questions.[1737]

This statement appears to suggest that adverse inferences could be drawn from failure to mention a fact during Garda questioning within certain parameters. It will be recalled that at the time of the Review Group's Report, there were already two adverse inference provisions provided for in section 18 (Inferences from failure, refusal to account for objects, marks, etc) and section19 (Inferences from accused's presence at a particular place) of the 1984 Act.[1738] There were three other provisions

[1735] Criminal Law Revision Committee (Great Britan) (n 1132).
[1736] 'Balance in the Criminal Law Review Group Final Report' (n 35), 19; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 4. The Review Group was referring to the Criminal Law Revision Committee (Great Britan) (n 1132), [28].
[1737] 'Balance in the Criminal Law Review Group Final Report' (n 35), 49; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 21.
[1738] Discussed in Chapter 5.

concerning failure to mention certain facts in specific types of case.[1739] The Review Group considered the option of extending other 'failure to mention' provisions in section 5 of the Offences Against the State (Amendment) Act 1998 (offences against the State)[1740] and section 7 of the Criminal Justice (Drug Trafficking) Act 1996 (drug offences)[1741] to all arrestable offences.[1742] Nevertheless, having reviewed those provisions,[1743] the Review Group was concerned that the provisions made reference to the fact that silence during questioning could be used as 'corroboration'.[1744] In particular, they stated that this 'suggests that the failure to mention the fact in the interview somehow supports the prosecution case'.[1745] They continued:

> This can be unsatisfactory (and possibly confusing in practice) in that it implies that the defendant would be bolstering the prosecution case by putting forward a defence where the inference is drawn.[1746]

This indicates the deep concern of the Review Group in relation to the creation of adverse inference measures aimed at challenging a suspect on matters beyond their credibility in respect of a fact first mentioned in the witness box. The Review Group recommended the introduction of a statutory inference provision which would:

> permit an accused who puts forward a defence for the first time in the witness box to be cross-examined as to when he or she first came up with the defence. It would further allow the prosecution and, indeed the judge to comment on the lateness of the defendant's mentioning the fact, but solely for the purpose of questioning the truthfulness of the alleged exculpatory

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[1739] Sections 2 and 5 of the *Offences Against the State (Amendment) Act, 1998* (n 1291); Section 7 of the *Criminal Justice (Drug Trafficking) Act, 1996* (n 1373).

[1740] Section 5 of the *Offences Against the State (Amendment) Act, 1998* (n 1291). Note that this provision was repealed by section 3 and Schedule 1 of the *Criminal Justice Act 2007* (n 34).

[1741] Section 7 of the *Criminal Justice (Drug Trafficking) Act, 1996* (n 1373). Note that this provision was repealed by section 3 and Schedule 1 of the *Criminal Justice Act 2007* (n 34).

[1742] 'Balance in the Criminal Law Review Group Final Report' (n 35), 89; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 41. Arrestable offences are defined in section 2(1) of the *Criminal Law Act 1997* (n 1535) as amended by section 8 of the Criminal Justice Act 2006.

[1743] Section 5 of the *Offences Against the State (Amendment) Act, 1998* (n 1291); Section 7 of the *Criminal Justice (Drug Trafficking) Act, 1996* (n 1373).

[1744] 'Balance in the Criminal Law Review Group Final Report' (n 35), 86; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 40. Section 5(2) of the *Offences Against the State (Amendment) Act, 1998* (n 1291); Section 7(1) of the *Criminal Justice (Drug Trafficking) Act, 1996* (n 1373).

[1745] 'Balance in the Criminal Law Review Group Final Report' (n 35), 86; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 40.

[1746] 'Balance in the Criminal Law Review Group Final Report' (n 35), 86; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 40.

> account...the provision would not invite the trier of fact to hold that the false defence amounts to corroboration and nor would it permit a more general inference of guilt to be drawn.[1747]

The Review Group repeated their view that any change should only be 'limited to the question of recent invention of a defence, and...not...corroboration and nor would it permit a more general inference as to guilt to be drawn'.[1748] These statements clearly indicate the Review Group's rejection of using adverse inferences from 'failure to mention a fact' as corroborative evidence in the context of supporting the prosecution case. The Review Group's recommended 'failure to mention' provision was focused on using a fact at trial not mentioned during questioning as going to harm the credibility of the defence as distinct from its use as corroborative evidence. It recommended that any new failure to mention provision would permit the cross-examination of 'an accused who puts forward a defence for the first time in the witness box...as to when he or she first came up with the defence'.[1749] It continued in recommending that the value of change would be restricted to 'impeaching the defendant's credibility'[1750] in relation to the lateness in mentioning the fact relied upon in evidence. The Review Group reflected this recommended change in two draft Heads of bill included in the Review Group's report regarding failure or refusal to mention a fact (Head 2)[1751] and the form of caution to be administered to a person (Head 3).[1752] Notably, Head 1 of the bill included in the Review Group's report proposed to replace the 'failure to mention' provisions in section 5 of the 1998 Act (offences against the State)[1753] and section 7 of the 1996 Act (drug offences)[1754] with one broad failure to mention provision. The intention of Head 1 is clearly set out in the note at the end of Head 1 as follows:

[1747] 'Balance in the Criminal Law Review Group Final Report' (n 35), 85-86; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 39-40.
[1748] 'Balance in the Criminal Law Review Group Final Report' (n 35), 86; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 40.
[1749] 'Balance in the Criminal Law Review Group Final Report' (n 35), 85; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 39.
[1750] 'Balance in the Criminal Law Review Group Final Report' (n 35), 85; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 39.
[1751] 'Balance in the Criminal Law Review Group Final Report' (n 35), 259; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 45.
[1752] 'Balance in the Criminal Law Review Group Final Report' (n 35), 264; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 48.
[1753] Section 5 of the *Offences Against the State (Amendment) Act, 1998* (n 1291). Note that this provision was repealed by section 3 and Schedule 1 of the *Criminal Justice Act 2007* (n 34).
[1754] Section 7 of the *Criminal Justice (Drug Trafficking) Act, 1996* (n 1373). Note that this provision was repealed by section 3 and Schedule 1 of the *Criminal Justice Act 2007* (n 34).

> It is proposed to have a new, single inference drawing provision in relation to matters not mentioned by the detained person. It would be illogical and confusing to retain three separate provisions by keeping the two existing provisions and adding a new provision.[1755]

The Review Group was therefore anxious to narrow the extent to which 'failure to mention' provisions would apply, as going to credibility of a defence only, and to streamline them into one provision to avoid confusion. Notably, the Review Group's position did not go so far as to satisfy the question posed by Minister McDowell in his speech in Limerick on 20th October 2006 where he indicated the need to consider extending the ambit of 'failure to mention' provisions in relation to reliance on a fact at trial not mentioned during Garda questioning and their use as corroborative evidence.[1756]

6.1.2 Review Group Draft Head 2 - Failure to Mention a Fact

In light of the recommendation of the Review Group, it prepared a 'failure to mention a fact' provision in draft Head 2 of the bill included in their report.[1757] The terms of Head 2 are as follows:

> (1) This head applies to any arrestable offence within the meaning of section 2(1) of the Criminal Law Act 1997 as amended by section 8 of the Criminal Justice Act 2006.
> (2) Where in any proceedings against a person for an offence to which this head applies evidence is given that the accused—
>
> > (a) at any time before he or she was charged with the offence, on being questioned by a member of the Garda Síochána in relation to the offence, or (b) when being charged with the offence or informed by a member of the Garda Síochána that he or she might be prosecuted for it,
>
> failed to mention any fact relied on in his or her defence in those proceedings, being a fact which in the circumstances existing at the time he or she could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, then the court, in determining whether a charge should be dismissed under Part IA of the Criminal Procedure Act 1967 or whether there is a case to answer and the court (or, subject to the judge's

[1755] 'Balance in the Criminal Law Review Group Final Report' (n 35), 258; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 44.
[1756] 'Rebalancing Criminal Justice"-Remarks by Tanaiste in Limerick, 20th October, 2006,' (n 1718).
[1757] 'Balance in the Criminal Law Review Group Final Report' (n 35), 259; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 45.

directions, the jury) in determining whether the accused is guilty of the offence charged (or of any other offence of which he or she could lawfully be convicted on that charge) may draw such inferences from the failure, as to the truthfulness of the fact so relied on, as appear proper.

(3) Subhead (2) shall not have effect unless the accused was told in ordinary language when being questioned, charged or informed, as the case may be, that it may harm the credibility of his or her defence if he or she does not mention when questioned, charged or informed, as the case may be, something which he or she later relies on in Court.

(4) Nothing in this head shall, in any proceedings—

(a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his or her presence relating to the conduct in respect of which he or she is charged, in so far as evidence thereof would be admissible apart from this head, or (b) be taken to preclude the drawing of any inference from the silence or other reaction of the accused which could properly be drawn apart from this head.

(5) This head shall not apply in relation to a failure to mention a fact if the failure occurred before the commencement of this Part.

(6) In deciding whether to draw, and in drawing, an inference under this head, the court (or, subject to the judge's directions, the jury) shall have regard to when the fact in question was first mentioned by the accused.

(7) This head shall not apply to a question asked in an interview unless either the interview has been recorded by audio or audio-visual means or the detained person has consented in writing to the non-recording of the interview.

(11) No person may be convicted by reason only of an inference drawn pursuant to this section.[1758]

Head 2 of a draft bill included in the Review Group's report was prepared with the specific intention that it be 'limited to the question of recent invention of a defence'[1759] whereby an inference could be drawn 'as to the falsity of the fact'[1760] if there was a failure or refusal to mention the fact during questioning. Subhead (2) specifically referred to the drawing of adverse inferences 'as to the truthfulness of the fact so

[1758] 'Balance in the Criminal Law Review Group Final Report' (n 35), 260-264; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 45-46. Note that sub-head (11) was not in the Interim Report. It was inserted into the Final Report following a submission received during consultation process on the Interim Report.

[1759] 'Balance in the Criminal Law Review Group Final Report' (n 35), 261; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 46.

[1760] 'Balance in the Criminal Law Review Group Final Report' (n 35), 261; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 46.

relied on'.[1761] Furthermore, subhead (3) provided that the accused must be informed in ordinary language 'that it may affect the credibility of his or her defence if he or she does not mention when questioned...something which he or she later relies on in Court'.[1762] This expressly provided that a reliance on a fact at trial not previously mentioned during questioning went to the credibility of the accused's defence. Subhead (4) provided for the admissibility in evidence of silence. It is notable that subhead (4) was silent as regards credibility. However, when this provision is read in conjunction with subheads (2) and (3), it is clearly the case that the Head was premised on the fact that any references to the admissibility of silence as evidence was a reference to its admissibility as to the credibility of the defence raised. Indeed, in their note at the end of Head 2, the Review Group referred to the failure to mention provision in section 5 of the Offences Against the State (Amendment) Act 1998 which was in effect at that time. It provided that a reliance on a fact at trial not previously mentioned during questioning amounted to corroborative evidence. The Review Group reiterated the purpose of the recommended adverse inference provision as discussed above and concluded by stating:

> The fact that a defence is false...does not mean that the accused is guilty or corroborate the prosecution case...the reference to corroboration is potentially inappropriate and should be removed.[1763]

It is therefore clear that the Review Group concluded that it was inappropriate to rely on a fact at trial not previously mentioned during questioning as corroborative evidence. Instead, the Review Group concluded that such reliance only goes to the credibility of the defence. This puts the matter beyond doubt as to the intention of Head 2.

The Review Group also observed that a suspect may have a legitimate reason for remaining silent. By way of example they stated that a suspect may be 'in shock for

[1761] 'Balance in the Criminal Law Review Group Final Report' (n 35), 260; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 45.
[1762] 'Balance in the Criminal Law Review Group Final Report' (n 35), 260; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 45.
[1763] 'Balance in the Criminal Law Review Group Final Report' (n 35), 262; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 46.

example, or embarrassed, or incapable of applying his or her mind to the position'.[1764] It recommended that a court could have regard to when the fact was first mentioned.[1765] In addition to their recommendation, the Review Group addressed this point in subhead 6 to the effect that a 'court...shall have regard to when the fact in question was first mentioned by the accused'.[1766] It appears that the proposal was to take account of the many legitimate reasons for remaining silent during questioning and to avoid the drawing of an adverse inference where a new fact, being a legitimate reason for remaining silent during questioning, was raised at trial. However, the solution is unclear as it only addresses the issue of 'when' the response was given as distinct from 'why' it was not given during questioning. It does not require the court to do anything with the information other than note when it was first given. A provision of similar effect was included in section 19A(5).

The Review Group was not impressed with a suggested amendment to Head 2 that it received, following the publication of their Interim Report. The suggested amendment was to the effect that, 'a person shall not be convicted solely on an adverse inference drawn from such a failure'.[1767] This suggestion nevertheless is required by the European Court of Human Rights jurisprudence[1768] where an inference amounts to corroborative evidence. Nonetheless, the Review Group stated:

> [T]his point is not well taken, because under our proposals, the inference will not amount to corroboration, but will rather permit the negativing of newly advanced facts by way of defence. The inclusion of such a clause might, therefore, unwittingly extend the scope of the inference drawing provision by suggesting that the inference could (or might) amount to corroboration of the prosecution case when we have been careful to avoid this very suggestion.[1769]

[1764] 'Balance in the Criminal Law Review Group Final Report' (n 35), 87; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 40.
[1765] 'Balance in the Criminal Law Review Group Final Report' (n 35), 87; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 40.
[1766] 'Balance in the Criminal Law Review Group Final Report' (n 35), 261; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 46.
[1767] 'Balance in the Criminal Law Review Group Final Report' (n 35), 87.
[1768] *Murray v United Kingdom* (n 626), [47]. The ruling in this case was endorsed in *Condron v United Kingdom* (n 1393), 56]; *Averill v United Kingdom* (n 618), [43]; *Beckles v UK* (n 1393), [58].
[1769] 'Balance in the Criminal Law Review Group Final Report' (n 35), 87-88.

The Review Group was concerned that the provision might be used to bolster the prosecution case but reluctantly agreed to the insertion of the clause. This insertion is included at sub head (11) above. It appears that subhead (11) is a typographical error in the Review Group's report and should more appropriately read as subhead (8). To ensure that an inference would not amount to corroborative evidence, the Review Group recommended 'that the clause be prefaced by words "for the avoidance of doubt", so that it will help to make clear that there is no suggestion that any inference drawn might otherwise amount to corroboration'.[1770] Unfortunately, this recommendation is unclear as to how it clarifies the intention of the Review Group that there is no suggestion that any inference drawn might otherwise amount to corroboration. The Review Group did not discuss this point any further.

6.1.3 Lack of Debate at Bill Stage- Failure to Mention a Fact

The Criminal Justice Bill 2007 was the subject of much criticism during Dáil and Seanad debates for the speed in which it was being introduced.[1771] It was enacted at alarming speed.[1772] In less than six weeks the bill passed through the legislative process. A modified version of Head 2 'failure to mention' provision prepared by the Review Group was included in the 2007 bill[1773] in a new section 19A to be inserted into the Criminal Justice Act 1984. The Minister for Justice, Equality & Law Reform, Mr Michael McDowell TD, introduced the bill in the Dáil where, in the words of Brendan Howlin TD, it received a 'one-and-a-half-hour debate'.[1774] The speed in which the bill and this provision specifically were debated meant that its implications for the right to silence and presumption of innocence were not adequately considered by the Oireachtas. A search of the Dáil and Seanad debates on the bill using the search terms 'silence' and 'innocence' returned 61 matches for 'silence'

[1770] Ibid, 88.

[1771] 'Dáil Éireann Debate, 22 March 2007, Vol. 634 No. 2' <https://www.oireachtas.ie/en/debates/debate/dail/2007-03-22/27/>, per Brendan Howlin TD, Paddy Mc Hugh TD, Catherine Murphy TD, Ciarán Cuffe TD; 'Dáil Éireann Debate, 23 March 2007 Vol. 634 No 3' <https://www.oireachtas.ie/en/debates/debate/dail/2007-03-23/7/>, per Ciarán Cuffe TD, Damien English TD; 'Seanad Éireann Debate, 26 April 2007 Vol. 186 No. 23', per Senator Maurice Cummins, Senator David Norris.

[1772] Note that in 2007 the coalition Government of the 29th Dáil, led by Fianna Fáil and the Progressive Democrats, was dissolved on 29th April 2007. Deaglan De Breadun, 'President Dissolves Dáil, Clears Way for Election' (30 April 2007) <https://www.irishtimes.com/news/president-dissolves-dáil-clears-way-for-election-1.1295613?mode=sample&auth-failed=1&pw-origin=https%3A%2F%2Fwww.irishtimes.com%2Fnews%2Fpresident-dissolves-d%25C3%25A1il-clears-way-for-election-1.1295613 [Accessed 1/9/21]>.

[1773] Section 28 of the Criminal Justice Bill 2007.

[1774] 'Dáil Éireann Debate, 22 March 2007, Vol. 634 No. 2' (n 1771).

and returned 41 matches for ‘innocence’. The distribution of the matches can be seen in the table below.

House	Stage	Date	By whom ‘silence’ and ‘innocence’ mentioned	No of times silence	No of times innocence
Dáil Éireann	Second Stage	22 March 2007	Tánaiste and Minister for Justice, Equality & Law Reform Michael Mc Dowell TD	**5**	**1**
			Jim O’Keeffe TD FG	**10**	
			Catherine Murphy TD Social Democrats	**3**	**1**
			Aengus O’Snodaigh TD SF	**3**	
			Ciaran Cuff TD Green	**2**	
Dáil Éireann	Second Stage (resumed)	23 March 2007	Ciaran Cuff TD Green	**4**	
			John Dennehy TD FF	**1**	**1**
			Róisín Shortall TD Social Democrats	**1**	
			Charlie O’Connor TD FF	**1**	
			Finian McGrath TD Independent	**1**	**1**
			Bernard Durcan TD FG		**3**
Dáil Éireann	Second Stage (resumed)	23 March 2007	Joe Costello TD Labour	**2**	
			Joe Higgins TD	**1**	**2**
Dáil Éireann	Second Stage (resumed)	27 March 2007	Tánaiste and Minister for Justice, Equality & Law Reform Michael Mc Dowell TD	**1**	
Dáil Éireann	Committee Stage	29 March 2007	Tánaiste and Minister for Justice, Equality & Law Reform Michael Mc Dowell TD	**9**	
			Brendan Howlin TD Lab		**1**
Dáil Éireann	Committee Stage (resumed)	29 March 2007	Ciaran Cuff TD Green	**1**	
			Aengus O’Snodaigh TD SF		**1**
Dáil Éireann	Report Stage	4 April 2007	Brendan Howlin TD Lab		**2**
Dáil Éireann	Report Stage (Resumed)	4 April 2007	Jim O’Keeffe TD FG		**1**
			Aengus O’Snodaigh TD SF		**1**
			Tánaiste and Minister for Justice, Equality & Law Reform Michael Mc Dowell TD		**2**

Dáil Éireann	Report Stage (Resumed)	5 April 2007	Aengus O'Snodaigh TD SF		**1**
			Tánaiste and Minister for Justice, Equality & Law Reform Michael Mc Dowell TD		**2**
Dáil Éireann	Report Stage (Resumed) and Final Stage	24 April 2007	Tánaiste and Minister for Justice, Equality & Law Reform Michael Mc Dowell TD		**2**
			Aengus O'Snodaigh TD SF		**2**
			Brendan Howlin TD Lab		**1**
Seanad Éireann	Second Stage	26 April 2007	Minister of State at Department of Finance Tom Parlon TD	**4**	
			Senator Maurice Cummins FG	**1**	
			Senator Jim Walsh FF	**1**	**2**
			Senator Tony Kett FF		**1**
			Senator Dr Maurice Hayes (Independent-nominated by Taoiseach)	**1**	
			Senator Brendan Ryan Lab		**2**
			Senator Fergal Quinn (Independent)		**1**
			Senator David Norris (Independent)	**7**	**4**
Seanad Éireann	Committee and Remaining Stages	27 April 2007	Tánaiste and Minister for Justice, Equality & Law Reform Michael Mc Dowell TD	**2**	**4**
			Senator Jim Walsh FF		**2**
				61 total	**41 total**

It is notable that a sizeable number of the references to 'silence' were made by the Government side in support of the changes. Overall, in most cases, silence was referenced as a matter of course without any debate as to the impact on the right to silence or the presumption of innocence as a result of the change proposed by section 19A. The references to 'innocence' were evenly spread across the Government and opposition parties. However, such references were primarily made in respect of other sections of the Bill relating to bail, sentencing and crime prevention in the context of protecting innocent people from crime.

From a crime control perspective, Mr Jim O'Keeffe TD appeared to suggest that the right to silence provisions did not go far enough. He expressed a concern 'that the

provisions are cosmetic. I am not confident the measures...will make a significant difference'.[1775] However, by contrast Catherine Murphy TD stated that she had 'major concerns about the changes to the right to silence'.[1776] Her concerns were in the context of the individuals against whom the provision might be used. She stated:

> If that provision is transposed into law for use against people who are vulnerable, those at the lower end of the criminal fraternity or even innocent people facing charges, it must be given serious consideration.[1777]

Ciarán Cuffe TD and Aengus O'Snodaigh TD characterised the proposal as a 'removal of the right to silence'.[1778] Joe Higgins TD stated that the legislation 'attacks traditional rights, such as the right to silence'.[1779] However, unfortunately they did not elaborate on how the right to silence was removed or was attacked by the provision.

The Minister said that the purpose of the bill was to give the Gardaí the legislative tools in light of the threat to society by 'gangland criminals'.[1780] The state of serious crime was captured in the crime statistics for 2006 provided by the Central Statistics Office, and referred to by Brendan Howlin TD. He noted:

> [D]rug possession up by almost one third in a year, murders up by 20% while detection rates dropped...last November there were 113 gun murders. Of these 58, or 51% were...detected...proceedings...commenced in only 36 cases...and convictions obtained in only 19 cases. The year 2006 was the worst for gun murder in the history of the State.[1781]

The crime figures were also noted by Mr Gay Mitchell TD.[1782] These crime statistics demonstrate the type of serious crimes against which the bill, including section 19A was aimed. Minister McDowell stated that the enactment of the legislation:

[1775] Ibid.
[1776] Ibid.
[1777] Ibid.
[1778] Ibid, per Aengus O'Snodaigh TD; 'Dáil Éireann Debate, 23 March 2007 Vol. 634 No 3' (n 1771), Ciarán Cuffe TD .
[1779] 'Dáil Éireann Debate, 23 March 2007 Vol. 634 No 3' (n 1771).
[1780] 'Dáil Éireann Debate, 22 March 2007, Vol. 634 No. 2' (n 1771).
[1781] Ibid.
[1782] 'Dáil Éireann Debate, 23 March 2007 Vol. 634 No 3' (n 1771).

> provides the House with an opportunity to send a clear and unambiguous message that, as society, we are not prepared to allow organised criminal gangs set about the destruction of families and communities.[1783]

He continued:

> This legislation is proportionate to the threat faced by society...The right to silence issue has been canvassed and this legislation is in line with developments relating to other serious offences.[1784]

It is disappointing that there was no debate as to what issues the Minister was referring to when he stated that it was in line with developments regarding other serious offences. He made two points about section 19A, stating that:

> [I]t relates to all arrestable offences...it...will deal with a failure on the part of the accused to mention while being questioned specific facts that he or she later relies on in his or her defence...the failure to mention the relevant fact may give rise to an inference where it is, or is capable of being, treated as corroboration for any other evidence on the matter.[1785]

The provision is objectionable for a number of reasons. Firstly, there was very little debate on the point of corroboration. The Minister stated that it would be applied in the same way as arose in sections 18 and 19'.[1786] This does not reflect the recommendation of the Review Group who recommended that an inference should only go the credibility of the defence as discussed earlier. Mr Howlin TD observed that '[f]ailure to mention a fact can be treated as corroborative of other evidence but not convincing evidence on its own'[1787] and queried the necessity for this provision and how it changed the 'right to silence and to be protected from self incrimination'.[1788] Minister McDowell responded stating that this had been the case in England and Wales since 1994 and Northern Ireland since 1988.[1789] Interestingly, he noted the Review Group's recommendation that an inference should only go the credibility of the defence. However, he stated '[m]y view is that it is more appropriate

[1783] 'Dáil Éireann Debate, 22 March 2007, Vol. 634 No. 2' (n 1771).
[1784] Ibid.
[1785] Ibid.
[1786] Ibid.
[1787] 'Dáil Éireann Debate 4 April 2007 Vol. 635 No. 2', per Mr Brendan Howlin TD.
[1788] Ibid, per Mr Brendan Howlin TD.
[1789] Ibid, per Minister Michael McDowell TD.

to have our law in line with the law of Northern Ireland and Great Britain, and to state that it is corroborative of the prosecution case'.[1790] He gave a strong defence of his position stating:

> It must be a fact relied on in his or her defence. It does not mean the person must testify. It is a fact relied on in his or her defence, therefore, it is the credibility and truthfulness of the entire defence in the case, rather than the credibility of the accused, that is at issue. I honestly do not see that this is a dramatic change in our law...Where somebody has been asked a question which demands an explanation at the time, refuses to comment but comes up with the self-same explanation at a later point, common sense demands that a member of a jury looking at that would consider this capable of undermining the allegation of fact being put before him or her at that point. I find it very difficult to understand what is the objection to this. Juries operate under the rule of law. How is the presumption of innocence or the right to silence affected if somebody puts forward a fact in his or her defence in a case and, at a critical point in the investigation, failed to mention that fact? How are the rights of the accused in those circumstances curtailed or subverted if somebody can draw an inference from that set of circumstances that is adverse to the defence? I do not know and have never seen any cogent explanation for it...Why should a jury try a case with blinkers and why should the criminal justice process preclude common sense inferences being drawn from fairly straightforward sets of circumstances?[1791]

However, unfortunately there was no discussion on the rationale put forward by the Review Group on their recommendation that an inference should only go to credibility of the defence where indeed the answers to the questions posed by the Minister lay. Mr Jim O'Keafe TD then queried '[w]hy is it that the recommendations of the expert group on criminal law reform have not been followed?'[1792] The Minister did not respond to this question. There was no further discussion by any other TD on the corroboration point. The position of the Minister in extending the 'failure to mention' provision from what was primarily designed for offences against the State and serious drugs offences to what may be termed as ordinary criminal offences may be characterised as the 'contagion' effect as discussed in Chapter 5. It will be recalled that this is defined by Hamilton as 'the migration of law and policy from the counter-terrorism to the 'ordinary' criminal justice spheres'[1793] thereby involving 'general

[1790] Ibid, per Minister Michael McDowell TD.
[1791] Ibid, per Minister Michael McDowell TD.
[1792] Ibid, per Mr Jim O'Keafe TD.
[1793] Hamilton, C (n 1688), 239.

deprioritisation of due process values'.[1794] Hamilton also argues that contagion may occur in both directions, 'trickle up' as well as 'trickle down'.[1795] Kilcommins et al describe this type of phenomenon as 'overspill from the subversive domain into the ordinary criminal justice realm'.[1796]

It will be recalled from Chapter 5 that the then Minister for Justice Mr Michael Noonan attempted to introduce a provision of similar effect in section 16 of the Criminal Justice Bill 1983.[1797] Following lengthy parliamentary debates and objection to such a provision across all Government parties in relation to its impact on the right to silence and the presumption of innocence, Minister Noonan dropped the provision for the 1983 Bill. Interestingly, this point did was not discussed in the Review Group reports or during the 2007 parliamentary debates. It would appear however, that the speed of progression of the 2007 Bill through the legislative process and the lack of parliamentary debate that it was not subjected to meaningful scrutiny in relation to its impact on the right to silence and the presumption of innocence. The lack of parliamentary discussion on section 19A may be explained by Hardiman J's observations. He stated:

> Another feature of recent public debate has been the near total absence of rigorous parliamentary opposition to law reform proposals. The tabloid school of scaremongering has been so effectively practised that it would appear that many public representatives, even those with a tradition of concern about civil liberties, are afraid of suffering political damage if they are seen to stand up for "criminals' rights" as it would no doubt be misrepresented.[1798]

There was certainly a noticeable absence of parliamentary debate on section 19A as compared to the debates in the early eighties on the similar provision proposed to be introduced in section 16 of the 1984 Act as discussed above. The reality of section 19A is that there are no exceptions regarding its use against any individual. This provision is applicable in respect of all offences, carrying a penalty of five years

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[1794] Ibid, 250.
[1795] Ibid, 250-251.
[1796] Kilcommins, S, O'Donnell, I, O'Sullivan, E, Vaughan, B, *Crime, Punishment and the Search for Order in Ireland* (Institute of Public Administration 2004), 163.
[1797] As discussed in Chapter 5. It will be noted that section 16 of the Criminal Justice Bill 1983 did not contain an express safeguard of reasonable access to a solicitor. Nonetheless, this was not the issue raised during parliamentary debates in 1983 and 1984. It was the effect of pressure of the proposed inference provision that was at issue.
[1798] The Hon. Mr Justice Adrian Hardiman (n 1724), 6.

imprisonment or more, for which a person may be arrested and detained for questioning including a vulnerable person with a disability. Arrestable offences can range in scale as discussed earlier. At the upper end of the scale they include offences that fall within the realm of criminal gangs or offences against the State. At the lower end they arise in respect of arrestable offences such as shoplifting or criminal damage. On this point alone, the introduction of the provision is capable of going well beyond the purpose of dealing with organised and serious criminals for which it was intended.

Secondly, in a column piece in the *Irish Times* on 26 April 2007, Mr Brendan Grehan, Senior Counsel argued that the bill contained 'flawed'[1799] measures including those interfering with the right to silence. He stated that:

> The measures which caused most concern when over 200 barristers (mostly involved in criminal cases) wrote to Minister for Justice Michael McDowell last month were...curtailing the right to silence.[1800]

He continued and stated that, 'the effect of this provision will be to shift the focus from what now happens in the courtroom to the Garda station'.[1801] As a consequence, his concern revolved around the lack of legal advice safeguards in the bill unlike measures in English law.[1802] It will be noted that the provision in section 19A(3)(b) did nothing more in substance than restating the law in relation to access to a solicitor. It provided that the section shall not have effect unless 'the accused was afforded a reasonable opportunity to consult a solicitor before such failure or refusal occurred'. Notably, this remains to the present legislative position.[1803] Nonetheless, even if a solicitor is permitted to be present during questioning, it does not reduce the pressure as required by section 19A to speak. No amount of legal

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[1799] Brendan Grehan Senior Counsel, 'Criminal Justice Bill Increases Erosion of Civil Rights' *The Irish Times* (26 April 2007) <https://www.irishtimes.com/opinion/criminal-justice-bill-increases-erosion-of-civil-rights-1.1203583 [Accessed on 23 May 2021]>.

[1800] Ibid.

[1801] Ibid.

[1802] Police and Criminal Evidence Act 1984 (PACE) CODE C Revised Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers 2019, [6.6], [6.8] Annex B, Annex C.

[1803] Note section 9 of the *Criminal Justice Act 2011* (n 1148). Additional protections were made 10 years ago in the 2011 Act to further regulate access to a solicitor by suspects in Garda custody. However, they have not yet been commenced. Furthermore, they do not regulate the presence of a solicitor during questioning of suspects in Garda stations.

advice can change the requirement of the section to speak. The results of this analysis provide a strong argument that the debates did not sufficiently engage with the impact of section 19A on the right to silence and the presumption of innocence.

6.1.4 Implementation of Review Group Head 2 into Section 19A

When the 'failure to mention' provision in section 19A was enacted it did not reflect the draft Head of Bill as prepared by the Review Group. Section 19A is in the following terms:

> 19A.—(1) Where in any proceedings against a person for an arrestable offence evidence is given that the accused—
>
> > (a) at any time before he or she was charged with the offence, on being questioned by a member of the Garda Síochána in relation to the offence, or
> > (b) when being charged with the offence or informed by a member of the Garda Síochána that he or she might be prosecuted for it,
>
> failed to mention any fact relied on in his or her defence in those proceedings, being a fact which in the circumstances existing at the time clearly called for an explanation from him or her when so questioned, charged or informed, as the case may be, then, the court, in determining whether a charge should be dismissed...or whether there is a case to answer and the court...in determining whether the accused is guilty of the offence charged (or of any other offence of which he or she could lawfully be convicted on that charge) may draw such inferences from the failure as appear proper; and the failure may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence in relation to which the failure is material.
>
> (2) A person shall not be convicted of an offence solely or mainly on an inference drawn from a failure to mention a fact to which subsection (1) applies.
>
> (3) Subsection (1) shall not have effect unless—
>
> > (a) the accused was told in ordinary language when being questioned, charged or informed, as the case may be, what the effect of the failure to mention a fact to which that subsection applies might be, and
> >
> > (b) the accused was afforded a reasonable opportunity to consult a solicitor before such failure occurred.
>
> (4) Nothing in this section shall, in any proceedings—
>
> > (a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his or her

presence relating to the conduct in respect of which he or she is charged in so far as evidence thereof would be admissible apart from this section, or
(b) be taken to preclude the drawing of any inference from the silence or other reaction of the accused which could properly be drawn apart from this section.

(5) The court...shall, for the purposes of drawing an inference under this section, have regard to when the fact concerned was first mentioned by the accused.

(6) This section shall not apply in relation to the questioning of a person by a member of the Garda Síochána unless it is recorded by electronic or similar means or the person consents in writing to it not being so recorded.

(7)...

(8)...

(9)...

Despite the strong persuasive arguments which were carefully considered by the Review Group as to the limited value to which adverse inferences under this Head should extend, the enacted provision was broader in effect. Section 19A(1) provides that inferences are 'treated as, or as capable of amounting to, corroboration of any evidence' contrary to the recommendation and concerns expressed by the Review Group as discussed earlier. The section therefore fails to provide that reliance on a fact at trial, which was not mentioned when questioned, goes to credibility. It also provides for 'the admissibility in evidence of the silence'.[1804] Furthermore, section 19A fails to include the words 'for the avoidance of doubt' in section 19A(2) as recommended by the Review Group and as discussed earlier. The approach in section 19A was not favoured by the Review Group which described the use of silence as corroborative evidence as 'unsatisfactory (and possibly confusing in practice) in that it implies that the defendant would be bolstering the prosecution case by putting forward a defence where the inference is drawn'.[1805] It will be recalled that the intention of the Head of bill was premised on the fact that it only went to credibility of the defence whereas the enacted provision expressly extends to the admissibility of silence as corroborative evidence.

[1804] Section 19A(4) of the *Criminal Justice Act 1984* (n 1147).
[1805] 'Balance in the Criminal Law Review Group Final Report' (n 35), 86; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 40.

In light of the obvious disregard of these recommendations of the Review Group, it appears that the provision is designed to bolster the prosecution case at the expense of the accused, an issue which the Review Group was anxious to avoid. Indeed, Heffernan remarks that it 'is broader in scope than the statutory provision recommended by the Balance in the Criminal Law Review Group'.[1806] Nonetheless, McGrath observes that an accused can control the triggering of section 19A 'by tailoring the defence mounted'.[1807] It appears that McGrath is suggesting that it is a matter for the accused whether or not to rely on a fact at trial not mentioned during questioning. However, an accused may not be able to tailor their defence and wish to rely on a fact at trial not mentioned during questioning for genuine reasons.

In relation to section 19A(5) where a 'court...shall, for the purposes of drawing an inference under this section, have regard to when the fact concerned was first mentioned by the accused', this provision appears to provide a layer of protection for an accused who fails/omits to mention a fact during questioning but informs investigators of the fact as soon as possible thereafter. This reflects the Review Group's recommendation as discussed earlier. This enables a court to conduct an objective assessment as to when the fact was first mentioned. However, on its face, it appears that the court is only permitted to have regard to 'when' the fact was first mentioned as distinct from 'why' it was not mentioned when first questioned. It is therefore arguable that the provision is of limited effect in reducing the degree of compulsion imposed by section 19A.

On the whole, the section requires a suspect to anticipate every single fact that they might rely on at trial and to inform investigators of them during questioning or as soon as possible thereafter. Some leading scholars have expressed distaste for section 19A in the context of its adverse impact on the right to silence and the presumption of innocence. Campbell argues that such 'provisions threaten individual rights and represent a significant shift in the fundamental balance of the criminal

[1806] Heffernan (n 732), [13.104].
[1807] McGrath, D, and Egan McGrath, E (n 720), 11-108.

process'.[1808] Daly argues that '[s]ection 19A...severely impedes the pre-trial exercise of the right to silence'.[1809] She continues by stating:

> [I]t clearly restricts the pre-trial exercise of that right and displays a distrust of and distaste for the right to silence rather than seeking any significant protection for that right. By applying section 19A to all arrestable offences the legislation constitutes the greatest incursion on the right to silence in this jurisdiction to date.[1810]

Daly also describes the pressure imposed by the provision on a suspect to speak. She states that it:

> severely impedes the pre-trial exercise of the right to silence by placing pressure on persons suspected of involvement in any arrestable offence to provide details of all matters to questioning gardai so as to ensure that a jury at trial will not be invited to consider pre-trial silence as symptomatic of guilt.[1811]

In her analysis of section 19A, Hamilton argues that 'strong concerns must be voiced about the impact on the presumption'.[1812] She supports her argument in light of Ashworth's view that the balance between the State and the accused is most affected at the pre-trial stage.[1813] She continues that the 'power differential between the State and accused may be at its greatest and the state has not yet made out a case to answer'.[1814] She states:

> While at a doctrinal level the legal burden of proof is unaffected, this important power differential raises questions about to what extent adverse inference provisions compromise (at least at the level of 'tangible consequences') evidential guarantees of prosecutorial proof beyond all reasonable doubt. Given that the accused in Ireland enjoys a constitutionally protected presumption of innocence mandating state proof of every aspect of the offence, it may be justifiably argued that the state is using the suspect to do its job for it.[1815]

[1808] Campbell, L, 'The Criminal Justice Act 2007 — A Theoretical Perspective' (2007) 17(3) Irish Criminal Law Journal 8, 13.
[1809] Daly, YM (n 1615), 9.
[1810] Ibid, 10.
[1811] Daly, YM (n 1076), 65.
[1812] Hamilton (n 1), 196.
[1813] Ibid, 195.
[1814] Ibid, 195.
[1815] Ibid, 196.

Hamilton essentially argues that the provision requires suspects to contribute to the prosecution case against them. McMahon states that 'the accused is likely to disclose as much as possible, for fear that they might need to rely on a particular fact at some point over the course of their defence'.[1816]

It is arguable therefore that the requirement to speak extends beyond the questions asked by investigators. The importance of a particular fact may not crystallise until the trial. Therefore, a suspect is pressurised to speak by the section irrespective of the questions asked. The suspect must speak in respect of all details once questioned in relation to the offence. If the suspect remains silent, an adverse inference may be drawn where reliance is placed on the fact at trial, if that fact was not mentioned during questioning. In light of the concerns voiced by the Review Group as to the use of silence as corroborative evidence, in addition to the issues identified above, it is arguable that section 19A erodes the right to silence and the presumption of innocence despite the safeguards in the provision. This thesis argues that in practice section 19A is effectively a general abridgement of the right to silence. Indeed, Heffernan refers to it as a 'general inference-drawing provision [which] effectively rolled back the benchmark set in *Finnerty'.*[1817] It requires a suspect to disclose every conceivable relevant fact that they might wish to rely on at trial. Otherwise, failure to do so will trigger the drawing of an adverse inference, which is elevated to the status of an adverse inference equating to evidence of guilt, from the failure to mention the fact during questioning if reliance is placed on the fact at trial.

As a result, this thesis argues that section 19A effectively creates a de facto burden of proof on the accused to explain their innocence. It therefore arguably abolishes the very essence of the right to silence and the presumption of innocence. While section 19A shares certain elements with sections 18 and 19, section 19A is significantly different. Indeed, it has not yet the same degree of judicial consideration as sections 18 and 19.[1818] Notably, in support of the analysis above, McKechnie J in

[1816] McMahon, C, 'Turning Gold into Lead — A Reappraisal of Inferences from Silence' (2018) 36 Irish Law Times 78, 79.
[1817] Heffernan (n 732), [13.105].
[1818] J Holt, 'Drawing Adverse Inferences from Silence – Further Clarification from the Court of Appeal' (2020) 30 Irish Criminal Law Journal 34, 44.

the Supreme Court in *Wilson*[1819] remarked in obiter comments that unlike sections 18 and 19, section 19A 'shifts the entire obligation onto a detained person to recall and disclose any fact covered by the section during his interrogation, and does not require any request for an account to have been made during questioning or otherwise'.[1820] Indeed, Daly observes that section 19A 'is the broadest inference provision which the Oireachtas has sanctioned to date'.[1821] As discussed above, it is not contingent on any specific question compared with the failure to account provisions in section 18 (Inferences from failure, refusal to account for objects, marks, etc) and section 19 (Inferences from accused's presence at a particular place). These provisions are only triggered following a failure to account when demanded. Another significant feature is that unlike section 19A, the giving of an account precludes the drawing of adverse inferences under sections 18 and 19.[1822] However, giving an account or providing some information will not prevent the drawing of adverse inferences under section 19A from a failure to mention a fact later relied on in one's defence. Under section 19A, the obligation to speak extends beyond the questions asked by investigators. Once the provision is invoked, there is an obligation to speak. The suspect has to actively engage with the investigative interview. If the suspect does not speak, they cannot rely on a fact at trial not mentioned without an adverse inference of guilt being drawn.

Access to legal advice and presence of a solicitor during questioning is seen as an important safeguard in protecting the suspects right to silence and presumption of innocence as discussed in Chapter 5. It is an important safeguard when section 19A is invoked. McGillicuddy observes that the operation of section 19A 'increases the stakes for an accused person and his or her legal representative when considering whether to divulge certain facts at an early stage of the investigation'.[1823] Furthermore, Hamilton refers to comments of Ashworth that 'it is a matter of some anxiety that inferences may be drawn in a situation where the suspect and his solicitor are not fully apprised of the State case against him and where the solicitor is

[1819] *DPP v Wilson* (n 1090).
[1820] Ibid, [23] per McKechnie J.
[1821] Daly (n 1092), 354.
[1822] *DPP v A McD* (n 32), [96] per McKechnie J.
[1823] McGillicuddy, T, 'Restrictions on the Right to Silence under the Criminal Justice Act 2007 – Part 2' (2008) 18 Irish Criminal Law Journal 112, 11.

not present during interviews'.[1824] It is arguable though that the safeguard of legal advice is set at naught. No amount of legal advice will reduce the degree of compulsion imposed by section 19A on a suspect to answer questions and disclose their defence during pre-trial questioning.

6.1.4.1 Equivalent English provision

There are some judicial comments by the English courts in respect of the equivalent English provision[1825] to section 19A that are worth analysing in this context. Against this backdrop, it is important to note that there are two significant differences in English law. The first is that the adverse inferences only go to credibility as distinct from its use as corroboration in Irish law. It will be noted therefore that the English equivalent provision does not expressly provide for the use of silence as corroborative evidence.[1826] Secondly, the form of caution had been changed to cater for such a provision in English law. Ironically, these higher standards of protection in English law operate in circumstances where the United Kingdom lacks written constitutional provisions in this area. One would therefore expect that there would be similar standards at least or higher standards where the presumption of innocence and the right to silence are constitutionally protected. Despite the fact that the equivalent English provision does not appear to be as expansive as section 19A, the English Court of Appeal in *R v B*[1827] nevertheless observed that it 'is a notorious minefield'.[1828] In *R v Brizzalari*[1829] the English Court of Appeal noted the weight that juries give to adverse inferences in the English equivalent provision to section 19A and therefore cautioned prosecutors against 'too readily seeking to activate'[1830] it. In the same case the English Court of Appeal observed that 'the mischief at which the provision was primarily directed was the positive defence following a "no comment" interview and/or the "ambush" defence'.[1831] Nonetheless, an adverse inference only goes to the credibility of the defence in English law. While section 19A is similar in relation to preventing ambush defences,[1832] the use of an adverse inference is

[1824] Hamilton (n 1), 196.
[1825] Section 34 of the *Criminal Justice and Public Order Act 1994 (England and Wales)* (n 1371).
[1826] Section 34 of the Ibid.
[1827] *R v B* [2003] EWCA Crim 3080.
[1828] Ibid, [20].
[1829] *R v Brizzalari* [2004] EWCA Crim 310.
[1830] Ibid, [57]; *R v Beckles* [2005] 1 WLR 2829, [6].
[1831] *R v Brizzalari* (n 1829), [57]; *R v Beckles* (n 1830), [6]. See also Dennis, I (n 92), [5.030], [5.032].
[1832] For further reading see McGillicuddy, T, 'Restrictions on the Right to Silence under the Criminal Justice Act 2007 – Part 1' (2008) 18 Irish Criminal Law Journal 77, 3.

entirely different as it can be used as corroborative evidence of guilt. The House of Lords in *R v Webber*[1833] concluded that the object of the English equivalent provision to section 19A was 'to bring the law back into line with common sense'.[1834] However, the problem with common sense as discussed in Chapter 5, is that common-sense assumes that an innocent person would speak in the face of questioning which in the words of Easton may be 'unreliable, impressionistic and unsystematic'.[1835] It is noteworthy that the objective of common sense for the purpose of section 19A is different to the object of the equivalent English provision. The objective of common sense under English law uses reliance on a fact at trial not mentioned during questioning as only going to the credibility of the defence. In contrast, under Irish law the objective of common sense is to use reliance on a fact at trial not mentioned during questioning as corroborative evidence of guilt. It is interesting to note that the Northern Ireland 'failure to mention' provision[1836] at issue in *Murray* provided that an inference amounted to corroborative evidence. However, it is significant to note that the Northern Ireland Order has since changed from expressly providing in the Order that an inference amounts to corroborative evidence. It has been aligned with the equivalent English provision.[1837] This arguably indicates a shift in thinking as to the value of an inference arising from silence when the 'failure to mention provision' is invoked and perhaps a concern in relation to its impact on the right to silence and the presumption of innocence. This thesis argues that the common sense approach of reliance on a fact at trial not mentioned during questioning as corroborative evidence of guilt in section 19A is far-reaching in that it erodes the right to silence and the presumption of innocence to the extent that they are effectively abolished.

6.1.5 Confusion – Absence of Utterance and Silence Caution

The issues identified earlier with section 19A regarding its impact on the integrity of the right to silence and the presumption of innocence is compounded by the absence of a prescribed standard form of caution to clearly convey to a suspect their limited right to silence while at the same time explaining the effect of the inference provision on that right. In light of their recommendation for a new 'failure to mention' provision, the Review Group confirmed that there was a clear relationship between such a

[1833] *R v Webber* [2004] UKHL 1 [2004] 1 Cr. App. R. 40.
[1834] Ibid, 529 [33].
[1835] Easton, S (n 1403), 114. See also Heffernan, L, with Ní Raifeartaigh, U (n 720), [9.120].
[1836] Article 4 of the *Criminal Evidence (Northern Ireland) Order 1988* (n 1371).
[1837] Section 34 of the *Criminal Justice and Public Order Act 1994 (England and Wales)* (n 1371).

statutory inference provision and the Judges' Rules.[1838] The current Judges' Rules caution states 'You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence'.[1839] Where an interview is recorded in a Garda station, the caution is as follows:

> You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence. As you are aware this interview is being taped and the tape may be used in evidence.[1840]

This caution reflects the traditional Judges' Rules caution, though it contains an additional sentence as regards the electronic recording of the interview and the use of the recording in evidence.

The Review Group identified a significant issue with the formulation of the Judges' Rules caution if inferences were to be permitted to be drawn from silence. The Judges' rules including the present caution[1841] prior to questioning were originally drawn up by the judges of the Kings Bench Division in 1912.[1842] They were introduced as guidance for the police at a time when the organised police in Ireland and England were relatively new and there was no legal framework for police questioning. An amended version of the Rules was drafted in 1918 which was affirmed by the Supreme Court in *People (AG) v Cummins.*[1843] While they do not have the force of law the Irish courts have stated, 'they have stood up to the test of time and will be departed from at peril'.[1844] The Judges' Rules provide that when a member of the Gardaí has made up their mind to charge a person,[1845] or where a person is in custody,[1846] or where a person volunteers a statement[1847] he should first

[1838] 'Balance in the Criminal Law Review Group Final Report' (n 35), 89.
[1839] Rule 5 of the Judges' Rules.
[1840] Regulation 6(2)(a) of the Criminal Justice Act, 1984 (Electronic Recording of Interviews) Regulations, 1997 SI No. 74 of 1997.
[1841] Rule 5 of the Judges' Rules.
[1842] *R v Voisin* (n 1684), 539.
[1843] *People (AG) v Cummins* (n 1265), per Ã DÃilaigh CJ, Walsh, Budd, FitzGerald and McLoughlin JJ.
[1844] *DPP V Farrell* [1978] IR 13, 21.
[1845] Rule 2 of the Judges' Rules. See also *DPP v O'Reilly* (n 1425).
[1846] Rule 3 of the Judges' Rules.
[1847] Rule 4 of the Judges' Rules.

caution the person before asking any question(s).[1848] Notably in *Re Gunner Buckley*[1849] Finlay CJ stated that it was the 'fact of custody' as distinct from the 'legal origin' of custody[1850] that was recognised as the trigger to necessitate the administration of the caution.[1851] The fact of custody has been broadly interpreted as including physical or verbal restraint where the person concerned is of the belief that he/she is not at liberty to leave.[1852] McGrath argues that 'the requirement for the caution is clearly grounded in the pre-trial right to silence enjoyed by a suspect and serves to ensure that a person who may be charged with an offence understands that he does not have to answer any questions'.[1853] However, the problem with the current formulation of the caution is that it is not expressed in such terms.[1854] Indeed, the High Court in *Sweeney v Ireland*[1855] stated that '[t]he starting point of the caution is that the person under investigation is told that he or she has a right to silence'.[1856] Interestingly, in 2012 O'Donnell J observed in *DPP v Fitzpatrick*[1857] that the terms of the Judges' Rules caution 'have not been adjusted in the light of the statutory'[1858] inference provisions of section 18 of the Criminal Justice Act 1984.[1859] The Review Group also stated that:

> More critically, if it were thought desirable to permit inferences to be drawn from an accused's silence while under arrest or in Garda custody, it would be necessary to effect a significant revision of the Judges' Rules.[1860]

The Review Group clearly indicated in this statement that the Judges' Rules caution needs to be changed for circumstances when the inference provisions are invoked. Indeed, it suggests that the Review Group envisaged that the caution would be an

[1848] Rules 2 - 5 of the Judges' Rules. Regulation 6 of the *Criminal Justice Act, 1984 (Electronic Recording of Interviews) Regulations, 1997 SI No. 74 of 1997* (n 1840).
[1849] *Re Gunner Buckley* [1998] 2 IR 454.
[1850] Ibid, 462.
[1851] See also *DPP v Gormley* (n 256), [8.8]; *People (AG) v Cummins* (n 1265); *People (AG) v Kearns* [1938] 72 ILTR 115; McGrath, D (n 1421), 344-345.
[1852] McGrath, D (n 1421), 345-346.
[1853] McGrath, D (n 718), [8.181].
[1854] Ibid, [11.95].
[1855] *Sweeney v Ireland* (n 1293).
[1856] Ibid, [60] per Baker J. See also *Re National Irish Bank Ltd* (n 27), 330.
[1857] *DPP v Fitzpatrick* (n 1377).
[1858] Ibid, [42] per O'Donnell J.
[1859] Ibid, [42] per O'Donnell J.
[1860] 'Balance in the Criminal Law Review Group Final Report' (n 35), 32; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 11, see also 12.

extension of Head 2 in order to give the 'failure to mention' provision constitutional validity by affording a high degree of protection to suspects and accused persons.

The Review Group relied on McGrath stating that the Judges' Rules caution 'may be regarded "as containing an implicit promise that the silence of a suspect will not be used in evidence against him or her"'.[1861] The Review Group observed that the Judges' Rules caution might deter an innocent suspect from speaking when they may otherwise be able to exculpate themselves, and it often assists guilty suspects by sheltering a false story.[1862] Nonetheless, a suspect has a right to be informed of their right to silence and the right must be conveyed to the suspect by using the caution as stated by Keane J in *Finnerty.*[1863] However, there is a conflict where silence is permitted to be used in evidence through the operation of an adverse inference provision but the person is informed by the caution that he/she has a right to remain silent. On this understanding of its effect, the Review Group quoted in agreement with Cory J in *R v Chambers* where he said:

> [I]t would be a snare and a delusion to caution the accused that he need not say anything in response to a police officer's question but nonetheless put in evidence that the accused clearly exercised his right and remained silent in the face of a question which suggested his guilt.[1864]

It is important to note that O'Malley J in the Supreme Court in *DPP v K.M*.[1865] adopted this statement in respect of the Judges' Rules caution in Irish law. This supports Keane J's point in *Finnerty* that the caution would be rendered meaningless by the drawing of adverse inferences from silence.

The Review Group recommended that the Judges' Rules be replaced by new legislation to give guidance and enable regulations to be made to prescribe a form of

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[1861] 'Balance in the Criminal Law Review Group Final Report' (n 35), 32; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 11. McGrath D, *Evidence* (Thomson Round Hall 2005), 656.
[1862] 'Balance in the Criminal Law Review Group Final Report' (n 35), 33, 34; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 12 citing Criminal Law Revision Committee (Great Britan), 'Eleventh Report – Evidence (General), 1972 Cmnd 4991', [43].
[1863] Discussed in Chapter 5.
[1864] R v Chambers [1990] 2 SCR 1293, 1316 referred to in 'Balance in the Criminal Law Review Group Final Report' (n 35), 32-33; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 11.
[1865] *DPP v KM* (n 1587), 12.

caution[1866] to reflect the legislative change. Draft cautions were prepared in Head 3 of the draft bill included in the Review Group Reports. Notably, the Review Group stated the following in their note at the end of Head 3:

> We envisage that if head 2 is enacted the general caution would be in the following terms or terms to the like effect (as with the U.K. general caution, albeit that our proposed wording is somewhat different):
>
> > "You do not have to say anything. But it may harm the credibility of your defence if you do not mention when questioned something which you later rely on in Court. Anything you do say may be given in evidence."[1867]

This draft caution clearly reflects the intention of Head 2 in relation to the extent to which the 'failure to mention' provision was intended to specifically warn the suspect that silence may affect the 'credibility of your defence'.[1868] As this was intended to be a 'general caution'[1869] it is clearly the case that it was intended to replace the current Judges' Rules caution. In practical terms this would have meant that Head 2 would operate as a matter of course for the duration of all interviews. It also suggests that the Review Group envisaged that the caution would be an extension of Head 2 in order to give the 'failure to mention' provision constitutional validity by affording a high degree of protection to suspects and accused persons. The need for a caution as recommended by the Review Group also reflects the views of the Minister for Justice Michael Noonan when the inference provisions in sections 18 and 19 of the 1984 Act were being introduced, as discussed in Chapter 5, where he stated that:

> Gardaí, of course, will be given instructions as to the caution which it would be appropriate to give. The form would have to be worked out with the Attorney General so that the caution would be a proper caution, legally proper as well as in ordinary language. There is no question of the Garda trying to cope with the technical language of section 17 (1) or section 18 (1).[1870]

[1866] 'Balance in the Criminal Law Review Group Final Report' (n 35), 88-89; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 41.
[1867] 'Balance in the Criminal Law Review Group Final Report' (n 35), 265; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 48.
[1868] 'Balance in the Criminal Law Review Group Final Report' (n 35), 88; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 40.
[1869] 'Balance in the Criminal Law Review Group Final Report' (n 35), 265; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 48.
[1870] 'Dáil Éireann Debate 19 June 1984 Vol. 351 No. 8' (n 1458).

The Review Group did not discuss this Dáil debate in their reports. Unfortunately, no cautions have yet been made despite the recommendation of the Review Group and the fact that the inference provisions were amended over a decade ago. Therefore, at present, an ad hoc system operates whereby the Gardaí are expected to prepare a caution to warn a suspect on a case by case basis in the absence of statutory guidance. This approach is cumbersome and complex in that a suspect is cautioned in the usual manner[1871] and then has the relevant statutory inference provision(s) read over to them and the consequences of remaining silent explained to them.[1872] Walsh observes that the consequences under the relevant statutory provision must be explained in ordinary language to ensure the warning does not mislead the suspect.[1873] Therefore, a fundamental issue arises as regards the suspect's actual understanding of the effect of section 19A and indeed all other inference provisions. The problem with this approach was arguably demonstrated by the finding of Fennelly J in *DPP v Bowes*[1874] where he condemned the caution used. In that case, the adverse inference provision contained in section 7 of the Criminal Justice (Drug Trafficking) Act 1996, the predecessor to section 19A, was considered. There was no prescribed caution to convey the effect of the statutory inference provisions in section 7 of the 1996 Act in ordinary language to the suspect. Instead, it was left to the Garda to interpret the meaning of the provision and formulate a warning. Fennelly J held that the formulation of the warning as given by the Garda that 'failure to mention some facts'[1875] was insufficient to satisfy the warning requirements of the statutory provision. He stated that a formulation in terms of, 'failure to mention any fact which you may rely on in your defence…is closer to what is needed'.[1876] The issue with the warning essentially concerned the appropriate use of words contained in the section. The wording used did not reflect the words of the section. This highlights the risk of not providing a standard inference caution which also takes account of the Judges' Rules caution on the right to remain silent. Notably, the complexity of the inference provisions was arguably demonstrated by O'Donnell J in

[1871] Rule 5 Judges Rules and Regulation 6(2) of the *Criminal Justice Act, 1984 (Electronic Recording of Interviews) Regulations, 1997 SI No. 74 of 1997* (n 1840).
[1872] Garda Síochána (n 1483).
[1873] Walsh, DPJ (n 91), 344 [6-144].
[1874] *DPP v Bowes* (n 1526). See also *DPP v Campbell* Unreported CCA 19 December 2003.
[1875] *DPP v Bowes* (n 1526).
[1876] Ibid.

Supreme Court in *DPP V Fitzpatrick*[1877] where he observed, in relation to section 18, that 'it is not easy to interpret the section as a coherent whole...Furthermore, the practical operation of subs. (3) raises difficult questions'.[1878] The drafting style in section 18 is reflective of the drafting style in section 19A. This strongly suggests the complexity of the provisions and the difficulty they pose in terms of how they are to be interpreted. As a consequence, this drafting concern as identified by O'Donnell J arguably raises an issue in relation to how the provision is interpreted by Gardaí and legal advisors. The administration of the inference provisions is exposed to inconsistent interpretation. O'Donnell J observed that the caution should be reviewed and guidance provided to Gardaí in relation to invoking the inference provisions.[1879] McGrath argues that '[a] bespoke and carefully formulated caution is required for each of the statutory provisions'.[1880] These judicial and academic views are a clear indication that the lack of a prescribed caution is problematic for the right to silence and presumption of innocence. It remains the case that the suspect has a right to remain silent, however limited it may be. The problem is the absence of an appropriate caution to be used to convey the limited right to silence and the requirements of the inference provision to the suspect in a way that is easy to understand and avoid confusion in order to protect the presumption of innocence. Given that the caution is an extension of the 'failure to mention' provision, it should be clear. Similar to sections 18 and 19 of the 1984 Act as discussed in Chapter 5, even if there was a clear caution for the 'failure to mention' provision there would still be an issue with the inference provision because of its effect in creating a de facto burden of proof. This problem is compounded by the absence of a caution to clearly convey the effect of the provision while also reminding the suspect of the right to silence. If it is not conveyed in the manner intended by the provision it could likely confuse the suspect into thinking there is a greater onus on them to speak.

Easton[1881] remarks that issues of confusion came to light in Northern Ireland following the enactment of the Criminal Evidence (Northern Ireland) Order 1988 which was

[1877] *DPP v Fitzpatrick* (n 1377).
[1878] Ibid, [40]; *DPP v Bowes* (n 1526). See also 'Balance in the Criminal Law Review Group Final Report' (n 35), 31-33; 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35), 44.
[1879] *DPP v Fitzpatrick* (n 1377), [44].
[1880] McGrath, D, and Egan McGrath, E (n 720), 11-125.
[1881] Easton, S (n 231), 67.

accompanied by guidance from the Secretary of State to the Chief Constable on a specific form of caution. She observes that suspects showed little sign of understanding its meaning and often felt they were obliged to speak and may have been telling lies to protect themselves.[1882] As a result the caution was amended to correspond with the England and Wales version.[1883] Easton claims that it still remains ambiguous, that suspects may not be aware of the exact consequences of remaining silent and that the decision to answer questions may be taken without a clear understanding of the effect of the caution and full knowledge of the case against them.[1884] The Irish approach is compounded by the fact that there is no prescribed caution as discussed. The effect is that the absence of a caution to clearly convey the effect of the legislation, while also reminding the suspect of the right to silence, may be resulting in inconsistencies adding to the compulsion to speak and creating a de facto burden thereby inverting the presumption of innocence.

6.1.5.1 Withdrawing the Caution

The Review Group's draft Head 3 also addressed the situation of the withdrawing of the caution. Following the recommendation of the Review Group on the making of cautions, section 32 of the Criminal Justice Act 2007 was enacted to allow for the making of regulations for the administration of cautions and their withdrawal in certain circumstances. It is arguable that this step envisaged that the caution would be an extension of the inference provisions in order to give them constitutional validity by affording a high degree of protection to suspects and accused persons. It is remarkable to note however, that fourteen years later, no such regulations have yet been made. In that regard, the Judges' Rules caution and the caution used during a recorded interview as discussed above continue to operate in parallel with the operation of section 19A despite judicial utterances for change and the recommendations of the Review Group as discussed earlier. Furthermore, it will be noted that Head 27 of the General Scheme of Garda Síochána (Powers) Bill 2021 proposes to change the wording of the traditional caution to dispense with the requirement to take a hand written note of anything said by a suspect. It provides that anything said will be 'recorded'.[1885] This means that anything said may be

[1882] Ibid, 67. See also F Skinnider, E, and Gordon, 'The Right To Silence – International Norms And Domestic Realities' (2001), 18.
[1883] Police and Criminal Evidence Act 1984 (PACE) - Code C. [10.5] and Annex C.
[1884] Easton, S (n 231), 68.
[1885] Head 27(3) of the General Scheme of Garda Síochána (Powers) Bill 2021.

recorded in writing or by electronic means for example on a body worn camera[1886] prior to detention or on a DVD recording system in a Garda station during detention.[1887] However, the proposed caution does not engage with the inference provisions as envisaged by the caution under section 32 of the 2007 Act. It is ironic to think that a caution is provided to cover the effect of utterances during an ordinary interview. However, no formal form of caution is proposed in relation to the effects of utterances and silence during pressurised and confusing inference interviews where silence is likely to be accorded equal weight in evidence as an utterance. This is a poor reflection on the real value accorded to the right to silence and the presumption of innocence by the legislature. The effect is that the absence of a caution to clearly convey the effect of the legislation, while also reminding the suspect of the right to silence, may be resulting in inconsistencies adding to the compulsion to speak and creating a de facto burden thereby inverting the presumption of innocence.

The operation of section 19A was the subject of obiter comments in *Braney v Special Criminal Court*[1888] by Charleton J[1889] in his judgment on behalf of the Supreme Court. In his consideration of section 2 of the Offence Against the State (Amendment) Act 1998 (inference provision regarding membership of an unlawful organisation) he remarked that other inference provisions were similar in their effects and he made a specific reference to section 19A. In particular, he stated that:

> It is required in all such provisions that the ordinary caution that a suspect is "not obliged to say anything" must be withdrawn and that the accused must be informed of the consequences of failure to give an explanation.[1890]

It is unfortunate that there was no further discussion as to how a revised caution should be framed and whether utterances made in an inference interview would be admissible in evidence due to the pressure imposed by the inference provision. It is unclear how the caution could be withdrawn when in law an inference provision is designed to limit the right to silence only. As discussed earlier, utterances are admissible in evidence even when the inference provisions are invoked

[1886] Heads 6 and 20 of the General Scheme of Garda Síochána (Digital Recording) Bill 2021.
[1887] *Criminal Justice Act, 1984 (Electronic Recording of Interviews) Regulations, 1997 SI No. 74 of 1997* (n 1840). See also section 57 of the *Criminal Justice Act 2007* (n 34).
[1888] *Braney v Special Criminal Court* [2020] IESC 007.
[1889] O'Donnell, McKechnie, MacMenamin, O'Malley JJ concurring.
[1890] *Braney v Special Criminal Court* (n 1888), [65].

notwithstanding the coercive nature of the inference provisions. This is aided by the fact that the suspect is cautioned in the usual manner. However, should the traditional caution be withdrawn as a matter of course during an inference interview, in the absence of judicial or legislative guidance as to a replacement caution and the admissibility in evidence of utterances in such circumstances, it is arguably the case that any utterances made will be inadmissible in evidence. This is on the basis that the suspect is no longer under caution and the right to silence would be withdrawn. If this view is accepted, it would be a significant middle ground move towards protecting the right to silence and the presumption of innocence in a meaningful way. It is unfortunate that Charleton J did not provide guidance on the admissibility in evidence of utterances in such circumstances. It nonetheless remains to be seen if the courts will develop this further in the absence of legislation. It is arguable that the removal of the words 'not obliged to say anything' from the ordinary caution as suggested by Charleton J in the above extract from *Braney*, when read in conjunction with the requirement in section 19A to provide an explanation as to the consequences of failure to give an explanation, has the effect of obliging a suspect to provide an explanation to prove their innocence contrary to the right to silence and the presumption of innocence. It is interesting to note that McGrath also argues that the usual caution should not be used as it would 'convey a misleading impression that the person is entitled to stay silent and there will be no adverse consequences for doing so'.[1891]

Both Hogan and Daly in their own right discuss the constitutionality of section 19A. Hogan et al recognise that section 19A has not yet been addressed constitutionally. While acknowledging the proportionality and constitutionality of the section with reference to the safeguards[1892] it contains, they state:

> The measure does seem to be well-tailored, and likely to advance its objective of effectively prosecuting crime. The question of its constitutionality would come down to its balance between the extent of the social good that it provides against the very significant encroachment on the right to silence. It is

[1891] McGrath, D, and Egan McGrath, E (n 720), [11-124].

[1892] This section sets out a number of safeguards such as, one cannot be convicted of an offence solely or mainly on the inferences so drawn. The provision shall have no effect unless the accused was told in ordinary language what the effect of the failure or refusal to account might be, and was informed before such failure or refusal that he had the right to consult a solicitor and that he was afforded a reasonable opportunity to so consult before the failure or refusal occurred. The provisions will have no application unless the interview process is being electronically recorded.

> certainly not clear on the precedent of *Rock* – where the inferences were drawn on the basis of a circumstance that specifically invited explanation – that such broad interference with pre-trial silence is constitutional.[1893]

Daly makes a somewhat similar conclusion as Hogan et al. However, she relies on *Rock* which constitutionalised section sections 18 and 19 of the 1984 Act and *Bowes* which dealt with section 7 of the Criminal Justice (Drug Trafficking) Act 1996, the predecessor to section 19A, as discussed above, and argues:

> [S]ection 19A is likely to be accepted by the Irish courts as being proportionate and constitutional...while section 19A represents a significant restriction on the right to silence this is counterbalanced by the safeguards introduced in tandem with it. As before, it seems likely that the courts will apply the legislation put before them.[1894]

Both Hogan et al and Daly refer to the safeguards. This section sets out a number of safeguards such as, one cannot be convicted of an offence solely or mainly on the inferences so drawn. The provision shall have no effect unless the accused was told in ordinary language what the effect of the failure or refusal to account might be, and was informed before such failure or refusal that he had the right to consult a solicitor and that he was afforded a reasonable opportunity to so consult before the failure or refusal occurred. The provisions will have no application unless the interview process is being electronically recorded. It is clearly the case that Hogan et al, unlike Daly, are not convinced that *Rock* is sufficient precedent to support the constitutionality of section 19A. It would appear that the effects of sections 18 and 19 are not comparable to section 19A given the far reaching nature of section 19A. It applies to all arrestable offences for the full duration of the inference interview, irrespective of the questions asked, in circumstances where the State has not made out its case at the pre-trial stage. By contrast, sections 18 and 19 are focused and apply only when required to account for the presence of an object or mark on their person or their presence at a crime scene.

It is strongly argued that the impact of section 19A cannot be justified by the social good at which the provision is aimed. The provision is constitutionally unfair in terms of the impact it has on the right to silence and the presumption of innocence. It

[1893] Hogan, GW, Whyte, GF, Kenny, D, Walsh, R (n 286), [6.5.134].
[1894] Daly, YM (n 1615), 12.

arguably reallocates a de facto burden of proof on to a suspect to provide an innocent explanation. The purpose of the provision is to bolster the prosecution case against the suspect as corroborative evidence as distinct from going to the credibility of the defence. The indirect compulsion imposed by section 19A for the duration of the inference interview is such that no amount of legal advice in addition to the cumulative effect of the safeguards in the provision and the standard or proof, will reduce the degree of compulsion imposed by section 19A to speak. This view is supported by McMahon who states that 'the procedure for the drawing of adverse inferences from silence under s.19A significantly curtails the right to silence of the accused, such that it is not redeemed by its apparent statutory safeguards'.[1895]

Furthermore, as discussed earlier, the adverse impact of section 19A is compounded by the lack of a caution to clearly convey the effect of the provision to the suspect. Even if there was a clear caution there would still be an issue with section 19A because of its effect in creating a de facto burden for the duration of the inference interview. Nonetheless, it is arguable that it was envisaged that the caution would be an extension of section 19A in order to give it constitutional validity by affording a high degree of protection to suspects and accused persons. If the effect of the legislation is not conveyed in the manner intended by the legislation, while also reminding the suspect of the right to silence, it could likely confuse the suspect adding to the compulsion to speak. This thesis argues that section 19A is effectively a general abridgment of the right to silence and the presumption of innocence. As such, it therefore erodes these rights to the point that their very essence is abolished.

6.2 Presumption of Innocence and Right to Silence under the EU Presumption of Innocence Directive

The future of the adverse inference provisions is uncertain in light of the European Parliament and Council of the European Union Directive on the Presumption of Innocence.[1896] Like Denmark, Ireland has not yet opted into this EU Directive as it

[1895] McMahon, C (n 1816), 79.

[1896] *Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the Strengthening of Certain Aspects of the Presumption of Innocence and of the Right to Be Present at the Trial in Criminal Proceedings* (n 659).

'maintains an 'opt in' approach to directives'[1897] in the area of Justice and Home Affairs matters. While the EU Directive is not binding on the Irish courts, they have yet to draw on the EU standards in considering judgments where adverse inference provisions are concerned.

6.2.1 Impact Assessment

The European Commission carried out an impact assessment on the presumption of innocence following a request by the European Council.[1898] The impact assessment considered the impact of adverse inference provisions on the right to silence and right not to incriminate oneself. It accompanied proposals for measures for strengthening the presumption of innocence. The impact assessment stated that the proposed measures on strengthening the presumption of innocence aims to ensure:

> that every suspect or accused person is presumed innocent in accordance with the Charter and the ECHR...It will set minimum standards of certain aspects of the right to be presumed innocent.[1899]

It was designed to address a problem that the Commission perceived to exist in relation to the standard of protection for the presumption of innocence under the European Convention on Human Rights and the Charter of Fundamental Rights. The Commission observed:

> The recognition and protection of the presumption of innocence in the Charter of Fundamental Rights of the European Union ('the Charter') and in the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') have not prevented Member States from repeatedly violating this principle, in spite of the fact that the level of safeguards in national legislation is, in general, acceptable. This allows the conclusion that the protection currently offered by the Charter and the ECHR is not enough to ensure that presumption of innocence is respected by EU Member States.[1900]

[1897] Daly (n 1092), 348.
[1898] Recital 7 of *Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the Strengthening of Certain Aspects of the Presumption of Innocence and of the Right to Be Present at the Trial in Criminal Proceedings* (n 659).
[1899] European Commission, 'Commission Staff Working Document Impact Assessment Accompanying the Document Proposal for Measures on the Strengthening of Certain Aspects of the Presumption of Innocence and on the Right to Be Present at Trial in Criminal Proceedings' (n 688), 4.
[1900] Ibid, 4.

The Commission was concerned about the impact of adverse inferences on the right to silence and the right not to self-incriminate in particular, under the European Convention on Human Rights.[1901] As a consequence it stated:

> [T]he protection of these rights in domestic law of Member States is not sufficient given that inferences are drawn from the silence, i.e., exercising the right to silence can in certain circumstances be used as incriminatory evidence.[1902]

The Commission observed in relation to Austria that the exercise of the right 'could be seen as an aggravating circumstance in the criminal proceedings'.[1903] In particular, it noted for example, that feedback on Austria suggested that persons were informed that the exercise of the right to silence could be seen as an aggravating factor in proceedings in court.[1904] In relation to the Netherlands, the Commission observed that a decision by a suspect to exercise the rights to silence is often undermined by police.[1905]

This supports the view expressed earlier in this chapter that no amount of legal advice in addition to the cumulative effect of the safeguards in the provisions and the standard or proof, will reduce the degree of compulsion imposed by the adverse inference provisions. The Commission considered four options in relation to its assessment of the situation across member states.[1906] The options were in the following terms, two of which were legislative in the form of an EU Directive as set out at option 3(a) and 3(b):

Option 1 Status quo Retention of the status quo.	This option would involve taking no action
Option 2 Soft law measure obligation	Non-legislative action (soft law). This option would include guidelines and training on good practice on suspects' or accused persons' right to be presumed innocent. Option 2 could be implemented on its own or as a first step or supporting action for implementing EU legislation.

[1901] Ibid, 25.
[1902] Ibid, 25.
[1903] Ibid, 25.
[1904] Ibid, 25.
[1905] Ibid, 25.
[1906] Ibid, 31, 32.

Option 3 Legislative measure	a) Directive setting minimum rules on the principle of presumption of innocence applying the ECtHR acquis and establishing appropriate specific remedies in case of breach
	b) Directive as under option 3(a), but setting common minimum rules which provide for a higher level of protection than the ECtHR acquis as regards each of the specific problems identified above (except for the absence of public references to guilt before conviction, where it is not possible to go beyond the ECtHR principle). This would be done by further limiting or even excluding the possibility of having exceptions to the general principle.[1907]

The option preferred was 'a combination of elements from options 2, 3(a) and 3(b)'.[1908] In summary, the impact assessment concluded that this includes:

> Right not to incriminate oneself, right not to co-operate and right to remain silent - combination of options 3(a) and 3(b): -
>
> Policy option 3(a), including specific remedies in case of breach; - Policy option 3(b) only as regards not allowing adverse inferences drawn from the exercise of these rights.[1909]

Notably, the inclusion of option 3(b) as regards not allowing adverse inferences to be drawn from silence 'at any stage of the procedure'[1910] is characterised as setting 'common minimum rules which provide for a higher level of protection for the presumption of innocence than the ECtHR' as stated above. This position was clearly aimed at both the pre-trial and trial stages. Indeed, the Commission emphasised that this was a higher standard than the protection under Article 6(2) stating 'suspects or accused persons benefit from higher common minimum standards in the area of presumption of innocence than those contained in Article 6(2) of the ECHR'.[1911] The purpose of this higher standard was stated as follows:

[1907] Ibid, 31, 32.
[1908] Ibid, 46.
[1909] Ibid, 46.
[1910] Ibid, 31.
[1911] Ibid, 43.

> This higher standard strikes a correct balance between the interests at stake: it is intended to protect the essence of the right to remain silent, so that a conviction should not be based on the silence of the accused and other incriminatory evidence should exist.[1912]

It is arguably the case that the converse of this statement is that the inference provisions abolish the essence of the right to silence and the presumption of innocence as discussed earlier. They have the effect of reallocating a de facto burden of proof. The Commission repeated its position when it stated that the purpose of prohibiting the drawing of inferences from silence was to:

> [e]stablish the general principle of the right not to incriminate oneself, the right not to cooperate and the right to silence (not allowing improper pressure from police or judicial authorities) – option 3(a)-, not allowing adverse inferences to be drawn from the exercise of those rights, thus going beyond the present ECHR standard – option 3(b).[1913]

The Commission continued and gave a further explanation for this option in the following terms:

> Given the close link of this aspect of the presumption of innocence to the functioning of the European Area of Justice...in the sense that it establishes a concrete and 'tangible' procedural right of suspect or accused persons and not only a general principle of procedural criminal law, the general ECtHR principles need to be reinforced by not admitting inferences to be drawn from the exercise of these rights, without which their content is at risk and without which the objective of ensuring its protection is not ensured.[1914]

The Commission was absolutely clear in its view that the preservation of the integrity of the presumption of innocence demanded a higher standard than existed under Article 6(2) of the European Convention on Human Rights in that silence could not be used as incriminating evidence. In its assessment, the Commission made a convincing observation with regard to the limited effect of the jurisprudence of the European Court of Human Rights in protecting the presumption of innocence. It was persuaded by a submission from the European Criminal Bar Association which stated:

[1912] Ibid, 44.
[1913] Ibid, 48.
[1914] Ibid, 48.

> [I]t would be 'dangerous' to rely on ECtHR as the presumption of innocence standard because the perspective of the Court is ex post facto and it will take into account the entirety of the national trial proceedings.[1915]

The Commission concluded by stating:

> [T]he system of protection granted by the ECtHR is ex-post only. Ensuring justice in individual cases ex-post serves a different purpose from laying down generally applicable rules ex-ante and cannot be said to be equivalent.[1916]

This impact assessment laid the basis for the introduction of an EU Directive to offer further protection for the presumption of innocence. The Commission's rationale for the EU Directive is therefore derived from the manner in which cases are decided by the European Court of Human Rights. It observed that the Court has left a degree of flexibility around the protection of the presumption in Article 6(2) 'and related rights in light of the requirement to balance the fair trial rights of suspects or accused persons with the general public interest, as well as the diverse legal traditions of Member States'.[1917] This is an interesting point which accords with Ashworth's view[1918] that the seriousness or prevalence of the offence should not be put in the balance to justify an exemption from the presumption of innocence as its purpose would be undermined if it might be 'balanced away by showing' the public interest leaned against it,[1919] as discussed earlier in this chapter and in Chapters 3 and 4.

6.2.2 Explanatory Memorandum to the Presumption of Innocence Directive

It is worth noting that the explanatory memorandum to the presumption Directive observed that the right to silence and the right against self incrimination are important aspects of the presumption of innocence.[1920] This accords with the discussion in the impact assessment above and the overwhelming academic support for the link between the right to silence and the presumption of innocence as

[1915] Ibid, 15.
[1916] Ibid, 16.
[1917] Ibid, 16.
[1918] Ashworth, A, 'Four Threats to the Presumption of Innocence' (n 80). See also *S v Coetzee* (n 970), [220].
[1919] Ashworth, A, 'Four Threats to the Presumption of Innocence' (n 80), 260.
[1920] Explanatory Memorandum of *Proposal for a Directive of the European Parliament and of the Council on the Strengthening of Certain Aspects of the Presumption of Innocence and of the Right to Be Present at Trial in Criminal Proceedings* (n 683), [16], [19]. See also LEAP, 'Fair Trials: EU Directive on the Presumption of Innocence: Implementation Toolkit' (2017), 25 [43]. See also European Commission, 'Green Paper The Presumption of Innocence' (n 650), 7.

discussed in Chapter 4. The Commission stated that the right to remain silent 'would be merely illusory if the suspects or accused had to fear that their non-cooperation or their silence will be used against them later in the criminal proceedings'.[1921] This reflects a view expressed by the International Commission of Jurists in a briefing on the proposed Directive when they stated:

> [S]ilence can never corroborate other evidence since it is not a positive action, it produces no evidence of itself. To attempt to use silence in this way would be wholly in breach of the right to silence and the freedom from self-incrimination as it infers guilt through guesswork and the subjective preference of the trier of fact.[1922]

More recently, the Commission stated that the right to remain silent and the privilege against self-incrimination mean that if a suspect chooses not to speak that 'this cannot be used against you to secure conviction'.[1923] This exact phrase is repeated on the European Commission website.[1924] This strongly suggests an understanding of the prejudicial nature of silence as evidence and it represents a meaningful step towards protecting the integrity of the right to silence and the presumption of innocence. While the Commission appears to regard the right to silence as absolute, its conception of remedies is perhaps not as robust as one would expect. The Commission in a summary of the EU Directive state:

> Where the right to silence or the right not to incriminate oneself has been breached, EU countries must ensure that the rights of the defence and the fairness of the proceedings are taken into account when assessing the statements concerned.[1925]

[1921] Explanatory Memorandum of *Proposal for a Directive of the European Parliament and of the Council on the Strengthening of Certain Aspects of the Presumption of Innocence and of the Right to Be Present at Trial in Criminal Proceedings* (n 683), [36].

[1922] International Commission of Jurists JUSTICE and Nederlands Juristen Comité voor de, 'Briefing on the European Commission Proposal for a Directive on the Strengthening of Certain Aspects of the Presumption of Innocence and of the Right to Be Present at Trial in Criminal Proceedings COM(2013) 821', 14.

[1923] European Commission, 'Your Rights If Accused or Suspected of Criminal Offences in the EU: Fact Sheet' <https://ec.europa.eu/info/sites/default/files/factsheet_procedural_rights_package_en.pdf>, 3.

[1924] 'European Commission - Press Release - Right to a Fair Trial: New Rules to Guarantee Presumption of Innocence Brussels 12 February 2016' <http://europa.eu/rapid/press-release_IP-16-291_en.htm [Accessed 1/9/21]>.

[1925] European Commission, 'The Presumption of Innocence and of the Right to Be Present at the Trial' (2018) <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:130107_3 [Accessed 31/08/21]>.

It is disappointing that no further guidance is provided in relation to the extent to which a breach would be tolerated within the realm of the fairness of the proceedings. The stipulation that a breach would be 'taken into account' seems to be quite week and flexible. The Directive essentially leaves the issue of admissibility, in the event of a breach, up to the discretion of each Member State. Indeed, this approach to remedies for a breach undermines the absolute approach the EU is promoting as regards protecting the right to silence and the right not to self-incriminate in the first instance.

Notably, the explanatory memorandum observes that the rationale for these rights includes protection against 'improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 of the ECHR'.[1926] This rationale accords with the scholarly debates on the rationale of the presumption of innocence as discussed in Chapter 1. Legal Experts Advisory Panel (LEAP) observe that these rights protect individual dignity against coercive state power and they assist in ensuring that the prosecution bears the burden of proof.[1927] The next section will show how the position articulated by the EU in the impact assessment has been carried forward in the Directive.

6.2.3 The EU Presumption of Innocence Directive

It will be recalled that the EU Presumption of Innocence Directive is discussed generally in Chapter 2 of this thesis. Chapter 2 of the Presumption Directive is entitled 'Presumption of Innocence'. Articles 3 to 7 inclusive are contained within Chapter 2 of the Directive. Articles are '[t]he enacting terms, which constitute the normative part of the act'.[1928] The Presumption Directive also contains fifty one recitals which 'set out the reasons for the contents of the enacting terms (i.e. the articles) of an act'.[1929] Villamarín López observes that the recitals are important as

[1926] Explanatory Memorandum of *Proposal for a Directive of the European Parliament and of the Council on the Strengthening of Certain Aspects of the Presumption of Innocence and of the Right to Be Present at Trial in Criminal Proceedings* (n 683), [33]. See also LEAP (n 1920), 25 [43].
[1927] LEAP and Fair Trials, 'Joint Position Paper on the Proposed Directive on the Strengthening of Certain Aspects of the Presumption of Innocence and of the Right to Be Present at Trial in Criminal Proceedings November 2014' (2014), 14.
[1928] European Union, *Interinstitutional Style Guide* (Publications Office of the European Union 2021), 36 [2.3].
[1929] Ibid, 35 [2.2].

they ‘clarify many of the issues that have been resolved very succinctly or inaccurately—or even not resolved—in the final legal text’.[1930]

The right to silence and the right against self incrimination are provided for in article 7 of the Directive. Article 7 is in the following terms:

1. Member States shall ensure that suspects and accused persons have the right to remain silent in relation to the criminal offence that they are suspected or accused of having committed.

2. Member States shall ensure that suspects and accused persons have the right not to incriminate themselves.

3. The exercise of the right not to incriminate oneself shall not prevent the competent authorities from gathering evidence which may be lawfully obtained through the use of legal powers of compulsion and which has an existence independent of the will of the suspects or accused persons.

4. Member States may allow their judicial authorities to take into account, when sentencing, cooperative behaviour of suspects and accused persons.

5. The exercise by suspects and accused persons of the right to remain silent or of the right not to incriminate oneself shall not be used against them and shall not be considered to be evidence that they have committed the criminal offence concerned.

6. This Article shall not preclude Member States from deciding that, with regard to minor offences, the conduct of the proceedings, or certain stages thereof, may take place in writing or without questioning of the suspect or accused person by the competent authorities in relation to the offence concerned, provided that this complies with the right to a fair trial.

The close link between right to silence and the right against self incrimination and the presumption of innocence is pointed out in recital 24. It states ‘The right to remain silent is an important aspect of the presumption of innocence and should serve as protection from self-incrimination’. It appears that article 7 intends to provide a high level of protection to the right to silence consistent with the conclusions of the EU Commission in their impact assessment as discussed earlier. Article 7(5) is drafted in mandatory terms and therefore seems to prohibit the drawing of adverse inferences from silence. This is significant in that it is expressed in absolute terms that silence

[1930] López, V, Lusia (n 689), 338.

'shall not be used against them and shall not be considered to be evidence'. Not alone does this provision prohibit the use of silence as corroborative evidence, silence cannot be used as going to credibility where it states that silence 'shall not be used against them'. This is particularly relevant in the context of raising a fact at trial not previously mentioned during police questioning. Article 7(5) and this analysis echoes the dissenting judgment of Judge Pettiti in *Murray v United Kingdom*[1931] where he stated: 'The right to silence is a major principle. Any constraint which has the effect of punishing the exercise of this right, by drawing adverse inferences against the accused, amounts to an infringement of the principle'.[1932] In a similar vein, when the Directive was at draft stage Hodgson stated:

> It reflects the jurisprudence of the ECtHR in broad terms, though it goes further in some respects. For example, in articles 6 and 7 it stipulates that those exercising their right to silence should not have this used against them nor should this be used as a corroboration of facts.[1933]

There were significant changes in the Directive as enacted from when Hodgson was commenting. In particular, the proposed Directive stated 'Any inferences drawn from the fact that suspects or accused persons make use of these rights should be excluded'.[1934] Notably, this did not go so far as to state that inferences 'shall' be excluded which is contained in the enacted draft and discussed below. The proposal also contained the following within the same provision:

> Without this, the right would be merely illusory if the suspects or accused had to fear that their non-cooperation or their silence will be used against them later in the criminal proceedings. This is the sole way to ensure the effective exercise of these rights by suspects or accused persons without a fear that such exercise can be used against them at a later stage. Therefore, the Directive also provides a specific and immediate remedy that any use of evidence obtained in breach of these rights is not allowed, save in those very exceptional cases where the use of such evidence will not prejudice the overall fairness of the proceedings.[1935]

[1931] *Murray v United Kingdom* (n 626).
[1932] Ibid, 72 per Partly Dissenting Opinion of Judge Pettiti, Joined by Judge Valticos.
[1933] Hodgson (n 695), 180. Hodgson was referring to the *Proposal for a Directive of the European Parliament and of the Council on the Strengthening of Certain Aspects of the Presumption of Innocence and of the Right to Be Present at Trial in Criminal Proceedings* (n 683).
[1934] *Proposal for a Directive of the European Parliament and of the Council on the Strengthening of Certain Aspects of the Presumption of Innocence and of the Right to Be Present at Trial in Criminal Proceedings* (n 683), [36].
[1935] Ibid, [36].

The Commission was clear in its view in relation to the need to prohibit the use of silence in evidence except in 'very exceptional cases' as the right would otherwise be illusory. In this regard, the proposal relied on *Alan v United Kingdom* that admissibility in the event of a breach is limited to 'whether the proceedings as a whole, including the way in which the evidence was obtained, were fair'.[1936] This proposal which included the right and the admissibility aspect within the one proposed provision had the effect of significantly reducing the value of the right in the first instance.

However, it appears that the proposal was strengthened in the final draft as enacted by raising the standard of the right above the European Convention on Human Rights standard to a 'common minimum rule' of European Union law. It appears that article 7(5) went further in its protective nature in stating that the exercise of the right to remain silent or of the right not to incriminate 'shall' not be used as evidence. This would include both corroborative evidence and evidence going to credibility as discussed above. Secondly, it is important to note that the admissibility of silence aspect was removed and inserted into a separate remedies provision in Article 10. This arguably had the effect of clearly stating that the right is a standalone right in itself as distinct from being intimately connected to the rules that relate to admissibility in the event of a breach of the right within one provision.

Unfortunately, there is no reported Court of Justice of the European Union case on article 7(5) that is of assistance in relation to its interpretation. A search was conducted on Eur-Lex of the terms 'right to remain silent' as contained within article 7(5) to establish if this provision was considered in the case law of the Court of Justice of the European Union. The search returned 29 results. Five of the results related to the Presumption Directive. The results are categorised as follows:

Categories – Search of terms 'right to remain silent'	**Results**
Article 3 – Presumption of innocence	1
Article 4 – Public references to guilt	2
Article 7(4) – Members States may allow for judicial authorities to take into account, when sentencing, cooperative behaviour of	2

[1936] *Allan v UK* (2003) 36 EHRR 12, [42].

suspects and accused persons	

The decided cases do not offer any assistance with regard to the interpretation of article 7(5) of the Presumption Directive.

Moreover, recital 25 points out that '[s]uspects and accused persons should not be forced, when asked to make statements or answer questions...to provide information which may lead to self-incrimination'. This suggests that persons should not be forced to speak in the form for producing 'information' if it would lead to self-incrimination. The information may be verbal. This supports the intention of article 7(5) which is in absolute terms and protects the right to remain silent and the right against self incrimination therefore protecting against the drawing of adverse inferences from silence. This appears to raise the standard above the European Court of Human Rights standard. However, recital 27 creates some doubt by referring with apparent approval to the European Court of Human Rights jurisprudence. Recital 27 is in the following terms:

> The right to remain silent and the right not to incriminate oneself imply that competent authorities should not compel suspects or accused persons to provide information if those persons do not wish to do so. In order to determine whether the right to remain silent or the right not to incriminate oneself has been violated, the interpretation by the European Court of Human Rights of the right to a fair trial under the ECHR should be taken into account.

This recital appears to muddy the silence waters as protected by article 7(5). In contrast to article 7(5), it requires that the case law of the European Court of Human Rights is 'taken into account' to determine if a violation has occurred. On its face this appears to dilute the mandatory nature of article 7(5) as discussed above. However, as the standard approach of the European Court of Human Rights is to be 'taken into account' it does not mean that it determines the matter. Another point worth noting is that the European Council stated in its Roadmap on Procedural Rights, that any new EU legislative acts must be consistent with the minimum standards of the European Convention on Human Rights.[1937] Nonetheless, it will be noted that the purpose of the Presumption of Innocence Directive is to protect the presumption of innocence by

[1937] 'Resolution of the Council on a Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings 2009/C 295/01' (n 652), [13].

establishing 'common minimum rules'.[1938] It is unclear from the Presumption Directive whether the 'common minimum rules' equate to the minimum standards of the European Convention on Human Rights or whether it relates to the EU Directive itself setting out its own 'common minimum rules' that are of a higher standard. The Directive does not expressly state that the 'common minimum rules', that would apply in relation to the presumption of innocence, are the minimum standards of the European Convention on Human Rights. These matters appear to introduce a degree of uncertainty in relation to the operation of article 7(5). Nevertheless, it will be recalled that the EU Commission's impact assessment concluded that the 'common minimum rules' provide for a higher level of protection than the European Court of Human Rights.

Recital 28 appears to cast another layer of uncertainty on the mandatory nature of article 7(5). Recital 28 is as follows:

> The exercise of the right to remain silent or the right not to incriminate oneself should not be used against a suspect or accused person and should not, in itself, be considered to be evidence that the person concerned has committed the criminal offence concerned. This should be without prejudice to national rules concerning the assessment of evidence by courts or judges, provided that the rights of the defence are respected.

This recital contradicts article 7(5) in that it states that silence 'should not be used against a suspect or accused person', as distinct from stating it 'shall not' as required by article 7(5). The word 'should' is defined as:

> **1** used to indicate what is right or ought to be done. **2** used to indicate what is probable. **3**...used to state what would happen if something else was the case: *if you should change your mind, I'll be at the hotel*. **4** used with *I* and *we* to express a polite request, opinion, or hope.[1939]

The word 'shall' is defined as:

[1938] Recital 9 of *Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the Strengthening of Certain Aspects of the Presumption of Innocence and of the Right to Be Present at the Trial in Criminal Proceedings* (n 659).
[1939] Soanes (n 1032), 775.

> **1** used with *I* and *we* to express the future tense. **2** expressing a strong statement, intention or order. **3** used in questions to make offers or suggestions.[1940]

These definitions strongly suggest a difference in the meanings of the word 'should' and the word 'shall'. The word 'should' suggests that the outcome is not mandatory whereas the word 'shall' suggests the outcome is mandatory.

Furthermore, in relation to silence, recital 28 also points out that 'it should not, in itself, be considered to be evidence that the person concerned has committed the criminal offence concerned'. This implies that silence may be considered as evidence in conjunction with other evidence in line with the jurisprudence of the European Court of Human Rights and the Irish approach. The impact of article 7(5) is further diluted by recital 28 which points out that admissibility of evidence treated in accordance with national rules even though it states that the rights of the defence must be respected. Indeed, the admissibility aspect of recital 28 is provided for in the remedies provision in article 10 which is as follows:

> 1. Member States shall ensure that suspects and accused persons have an effective remedy if their rights under this Directive are breached.
> 2. Without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of the right to remain silent or the right not to incriminate oneself, the rights of the defence and the fairness of the proceedings are respected.

Therefore, while article 7(5) is mandatory as regards its protection of the right to silence and privilege against self incrimination as a higher standard than the European Convention on Human Rights standard, the value of this protection is undermined by article 10 and recitals 27 and 28. Firstly, this is due to the fact that the mandatory nature of article 7(5) is slightly blurred as to the true protection afforded to the presumption of innocence when read in conjunction with recitals 27 and 28. Secondly, evidence of silence obtained in breach of article 7(5) is to be treated in accordance with national rules on admissibility of evidence and respecting the rights of the defence and the right to a fair trial in accordance with article 10 and recital 28. The Presumption Directive therefore does not set 'common minimum

[1940] Ibid, 768.

rules' as regards the admissibility of evidence in the event of a breach of the right. Indeed, LEAP suggests that it 'does not preclude the possibility of judges taking into account the silence of the accused to evaluate other evidence or for the purpose of sentencing'.[1941] Cras and Erbeznik also suggest that reading recital 28 in conjunction with article 10(2) 'appears to indicate that *John Murray* is still hanging (a bit) around'.[1942] Notwithstanding the fact that there is a degree of uncertainty as discussed above, article 7(5) nonetheless indicates a progressive move to raise the standard of protection for the presumption of innocence above the standard afforded under the European Convention on Human Rights and the Constitution.

Indeed, this is significant as regards the reason for Ireland's position in not opting into the Presumption of Innocence Directive. In a recent answer to a parliamentary question the Minister for Justice, Equality and Law Reform, Mr Charlie Flanagan responded stating:

> Ireland did not opt-in to this Directive on the basis of its provision relating to the right to silence of an accused. The proposal provided that an exercise of the right to remain silent when questioned shall not be used against a suspect or accused person at a later stage in the proceedings and shall not be considered as a corroboration of facts, thereby making it an absolute right. This would affect our criminal law procedures fundamentally.
>
> Under Irish law, at trial inferences may be drawn as the result of the failure of a suspect, in particular circumstances, to answer questions when questioned by Gardaí. This legislation is a key tool in the investigation and prosecution of serious crime. Given that the drawing of inferences is peculiar to the Common Law system it was considered unlikely that any attempt to amend the Commission proposal in negotiations to provide for it would succeed.[1943]

As discussed earlier and in Chapter 5, the adverse inferences provisions in Irish law under sections 18, 19 and 19A of the 1984 Act apply in respect of ordinary criminal offences. In light of the parliamentary response above, it is clearly the case that the operation of the Presumption of Innocence Directive would mark a significant challenge to their operation. Indeed, it suggests that the continued use of silence as

[1941] LEAP (n 1920), 29 [51]. See also A Cras, S, Erbeznik, 'The Directive on the Presumption of Innocence and the Right to Be Present at Trial. Genesis and Description of the New EU-Measure. In: Eucrim 2016/1 Procedural Rights and Cooperation – New Tendencies' 25, 32.
[1942] Cras, S, Erbeznik (n 1941), 32.
[1943] 'Dáil Debates 17 September 2019 Written Answers, Parliamentary Question 265'. See also Daly (n 1092), 263.

evidence is in doubt in light of the Presumption of Innocence Directive if Ireland opts into the Directive and it becomes part of the Irish legal order. The view of the Minister for Justice is clearly consistent with the analysis above regarding the higher standard afforded to the presumption of innocence, and the right to silence in particular, by article 7(5) of the Directive than is currently the case under the Constitution and the European Convention on Human Rights. Despite the European Union's strong rationale for prohibiting the use of silence against a person or its use as corroborative evidence of guilt under the Presumption of Innocence Directive, the reluctance by Ireland to opt-in to the Directive represents another example of the ongoing erosion of the presumption of innocence in Irish law.

6.3 Reflections

This chapter has identified two important safeguards that the Review Group proposed as conditions precedent for the constitutionality of a new 'failure to mention' provision applicable to all arrestable offences in terms of protecting the right to silence and the presumption of innocence. The first relates to the restrictive nature of the recommended provision as going to the credibility of the defence. The second condition was the need for a prescribed caution as an extension of the 'failure to mention' provision.

The chapter provides a strong argument that suggests there was negligible discussion on the impact of the proposed 'failure to mention' provision on the right to silence and the presumption of innocence during the legislative process as opposed to the detailed discussion surrounding the seriousness and prevalence of serious crime. This strongly suggests a clear deference to crime control over the protection of the presumption of innocence as a fundamental constitutional right.

It appears that the speed at which the 2007 Bill progressed through the legislative process contributed to the lack of meaningful scrutiny in relation to its impact on the right to silence and the presumption of innocence. This is contrasted with the lengthy debates and objection across all Government parties to a provision of similar effect in relation to its impact on the right to silence and the presumption of innocence that the then Minister for Justice Mr Michael Noonan attempted to introduce in section 16

of the Criminal Justice Bill 1983.[1944] As a consequence, Minister Noonan dropped the provision for the 1983 Bill.

It has been strongly argued that the impact of the adverse inference provisions on the right to silence and the presumption of innocence is compounded by the lack of a simplified prescribed caution to warn a suspect of the effects of utterances made and silence during an inference interview. Even if there was a clear caution there would still be an issue with section 19A because of its effect in creating a de facto burden for the duration of the inference interview. Nonetheless, it is arguable that it was envisaged that the caution would be an extension of section 19A in order to give it constitutional validity by affording a high degree of protection to suspects and accused persons. If the effect of the legislation is not conveyed in the manner intended by the legislation, while also reminding the suspect of the right to silence, it could likely confuse the suspect adding to the compulsion to speak.

This chapter has shown that the EU Directive provides greater protection for the presumption of innocence than the Constitution and the European Convention on Human Rights in that it prohibits the use of silence against an accused and its use as corroborative evidence. While there is no reported Court of Justice of the European Union case on this aspect of the EU Directive, the views expressed by the Commission during the development of the Directive and indeed article 7(5) of the Directive strongly suggest distaste for the adverse inference provisions. In light of the recent parliamentary response above[1945] by the Minister for Justice, Equality and Law Reform, Mr Charlie Flanagan in answer to a parliamentary question on opting in to the Presumption of Innocence Directive, it is clearly the case that its operation in Irish law would mark a significant challenge to the inference provisions in sections 18, 19 and 19A of the 1984 Act. This is due to the higher standard of protection the Presumption of Innocence Directive affords to the presumption of innocence.

6.4 Conclusion

This chapter provides a strong argument that the 'failure to mention' provision in section 19A of the 1984 Act further erodes the right to silence and the presumption

[1944] Discussed in Chapter 5.

[1945] 'Dáil Debates 17 September 2019 Written Answers, Parliamentary Question 265' (n 1943). See also Daly (n 1092), 263.

of innocence. This is due to the fact that it applies for the duration of an inference interview irrespective of what questions are asked, that inferences from a fact relied on at trial not mentioned during questioning amounts to corroborative evidence and at a time when the State has not made out its case.

It has also been shown that the impact of the inference provisions on the right to silence and the presumption of innocence is compounded by the lack of a caution to effectively constitutionalise the 'failure to mention' provision in section 19A as an extension of that provision. The chapter observes that section 32 of the Criminal Justice Act 2007 was enacted to allow for the making of regulations for the administration of cautions and their withdrawal in certain circumstances. However, no such regulations have yet been made. It is also noted that Head 27 of the General Scheme of Garda Síochána (Powers) Bill 2021 proposes to change the wording of the traditional caution to dispense with the requirement to take a hand written note of anything said by a suspect. However, the proposed caution does not engage with the inference provisions as envisaged by the caution under section 32 of the 2007 Act. This thesis argues that section 19A is effectively a general abridgment of the right to silence and the presumption of innocence. As such, section 19A is so far reaching it therefore erodes these rights to the point that their very essence is effectively abolished.

Finally, the thesis provides a strong argument that the continued use of silence as corroborative evidence is in doubt in light of the European Union Directive on the presumption of innocence if Ireland opts into the Directive and it becomes part of the Irish legal order. It has been shown that the Minister acknowledged the effect of the Directive on the right to silence is absolute. He stated that this would fundamentally affect Irish criminal law procedures and that this is the reason why Ireland has not opted in to the Directive. This chapter provides a strong argument that the reluctance by Ireland to opt-in to the Directive, which affords greater protection to the presumption of innocence by prohibiting the use of silence against an accused or its use as corroborative evidence, represents another example of the ongoing erosion of the presumption of innocence in Irish law.

The research will now conduct an analysis of the administration of justice to explain the broader context in which the erosion of the presumption of innocence has occurred.

Chapter 7 – Explanation of the broader context in which the erosion of the Presumption of Innocence has occurred

This research explores the broader context in which the erosion of the presumption of innocence has occurred. It will focus on the administration of justice and the judicial shift to giving weight to various rights of others at trial and the impact of this development on the presumption of innocence. It will be recalled from Chapter 2 that Article 38.1 has featured strongly in judicial discussion of the constitutional status of the presumption of innocence. Nonetheless, it will be clearly seen that the right to a fair trial including the presumption of innocence are not considered in isolation in the administration of justice, notwithstanding the fundamental nature of these rights.

Despite the fact that the presumption of innocence has been characterised as a bedrock principle and a cardinal principle in Irish law, it nevertheless has been the subject of significant erosion as discussed in Chapters 3, 4, 5 and 6. This chapter investigates the judicial shift in attitude regarding the requirements of the administration of justice from an exclusive accused focus to a more inclusive community focus using the concept of constitutional construction. The evidence suggests that the effect of this judicial development is driving the erosion of the presumption of innocence as an aspect of the constitutional right to a fair trial.

This trend has become increasingly visible where the courts have given greater weight to competing rights such as the community's right to prosecute, the emergence of victim's rights, the right of the State to maintain law and order as against the right to a fair trial.

7.1 Administration of Justice Explained

This section explains the courts approach to the administration of justice and the impact it has on the presumption of innocence. Hamilton observes that the superior courts have 'endorsed significant dilutions'[1946] of the presumption of innocence. While she acknowledges that her book does not examine the causes underlying the erosion of the presumption of innocence or provide a theoretical framework within which this development can be examined, she nevertheless contends that while

[1946] Hamilton, C (n 1), 238.

legislation has eroded the presumption of innocence judges must also 'accept their share of responsibility'.[1947] On its face it is difficult to disagree with this conclusion. Firstly, it is clear that legislation providing for reverse onus provisions, criminalising silence and providing for the drawing of adverse inferences from silence for 'failure to account' and 'failure to mention' facts during Garda questioning later relied on at trial, have eroded the right to a fair trial and particularly the presumption of innocence as strongly argued in Chapters 3, 4, 5 and 6 of this thesis. Secondly, as for the point that judges must accept their share of responsibility, it is clear that the courts have more recently changed their attitude from an exclusive accused focus to a more inclusive community focus for the purpose of achieving the modern understanding of administering justice. The problem with this approach is that it permits the legislature in the first instance to continue to test and indeed extend the erosion boundary. This was particularly seen in Chapter 5 in relation to the 'failure to mention' provision in section 19A of the Criminal Justice Act 1984.[1948] The problem with the modern understanding of the administration of justice is that increased recognition of rights and interests of others creates a significant risk of diluting the presumption of innocence as an aspect of the right to a fair trial.

It is important therefore to remind ourselves of the constitutional location of the presumption of innocence. As discussed in Chapter 2, it will be recalled that the evidence from the post 1937 case law clearly suggests that the presumption of innocence is not merely a procedural rule, applying only during trial but a substantive right as an aspect of the right to trial in due course of law in Article 38.1. In addition, it was shown that the presumption of innocence is not solely derived from Article 38.1. Edwards J in *Minister for Justice & Equality v Nolan*[1949] noted that while the presumption of innocence is an aspect of the right to trial in due course of law in Article 38 it is also a principle of higher law in its own right. His remarks are encapsulated in the following extracts from his judgment:

[1947] Ibid, 37.

[1948] Inserted by section 30 of the *Criminal Justice Act 2007* (n 34).

[1949] *Minister for Justice & Equality v Nolan* (n 287), [132]. See also *Minister for Justice and Equality v Marjasz* (n 578), [144]; *Minister for Justice and Equality v Jason Patrick Buckley* (n 552), [103], [104]. Note that O'Donnell J in *Minister for Justice v Balmer* (n 436) states that the distinction between the rights guaranteed in Article 38 (limited to Ireland) and rights guaranteed as personal rights is a superficial distinction.

> [A]nother important point in regard to the presumption of innocence is the fact that it is one of the means by which the State seeks by its laws "to protect as best it may from unjust attack and, in the case of injustice done, vindicate the...good name...of every citizen", as guaranteed in Article 40.3.2° of the Constitution...Accordingly, in addition to being a fair trial right to be afforded to an accused in this State as an aspect of his right to trial due course of law, Article 38.1 is also a higher principle of law in its own right and as such it is inextricably bound up with the fundamental right not to be deprived of liberty save in due course of law guaranteed in Article 40.4.1° and also with the right to one's good name as guaranteed under Article 40.3.2°. In the Court's view because of the presumption's status as a principle of higher law, any measure affecting the personal liberty of the citizen that fails to respect it must be regarded as being repugnant to the Constitution, and specifically Article 40.4.1° thereof, notwithstanding the fact that Article 38 does not have extra-territorial effect.[1950]

As a principle of higher law he essentially found that the presumption of innocence is inextricably bound up with the fundamental rights in Article 40.4.1° (liberty) and Article 40.3.2° (good name).[1951] The next point to consider is the meaning of the administration justice and how rights interact with one another when a court is administering justice. Under Article 34.1 of the Constitution, '[j]ustice shall be administered in courts...in the manner provided by this Constitution'. Fennell observes that 'A trial is ostensibly structured as a truth seeking process concerned with justice for the parties'.[1952] Therefore, justice demands that all relevant stakeholders must be heard in order to establish the truth. In *DPP v Gilligan*[1953] Denham J stated that '[t]he right of the accused to due process...is a right inherent in the concept of justice, which is at the core of the Constitution'.[1954] Forde argues that, '[i]n seeking to discover the safeguards demanded by 'due process', judges also rely on their intuitive sense of justice and fair play'.[1955] This therefore vests a degree of discretion in the courts in terms of the ambit of justice. A narrow concept of justice was described by O'Higgins CJ in *State (Healy) v Donoghue*[1956] where he stated as follows:

[1950] *Minister for Justice & Equality v Nolan* (n 287), [130]-[132] per Edwards J .
[1951] Ibid, [131]. See also *Attorney General v N.S.S* (n 581), [306], [307].
[1952] Fennell, C (n 757), [1.35] referring to Nesson, 'The Evidence or the Event? On juridical proof and the acceptability of verdicts' [1985] 98 7 Harvard Law Review 1357, 1360.
[1953] *DPP v Gilligan* (n 1604).
[1954] Ibid, 136.
[1955] Forde, M, and Leonard, D, *Constitutional Law of Ireland* (3rd edn, Bloomsbury Professional 2013), [17.02].
[1956] *State (Healy) v Donoghue* (n 193).

> [T]he concept of justice, which is specifically referred to in the preamble in relation to the freedom and dignity of the individual, appears again in the provisions of Article 34 which deals with the Courts. It is justice which is to be administered in the Courts and this concept of justice must import not only fairness, and fair procedures, but also regard to the dignity of the individual. No court under the Constitution has jurisdiction to act contrary to justice…[Article 38.1] must be considered in conjunction with Article 34; with Article 40, s. 3, sub-s. 1, under which the State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen and with sub-s. 2 of the same section...Being so considered, it is clear that the words 'due course of law' in Article 38 make it mandatory that every criminal trial shall be conducted in accordance with the concept of justice, that the procedures applied shall be fair, and that the person accused will be afforded every opportunity to defend himself. If this were not so, the dignity of the individual would be ignored and the State would have failed to vindicate his personal rights.[1957]

Forde observes that O'Higgins CJ 'appealed to a sense of fairness, human dignity and to tradition'.[1958] It is notable though that up to 1976 the concept of justice administered in the courts had a narrow accused focus. This extract is primarily focused on the rights of an accused to a fair trial, fair procedures and to be treated with dignity. This suggests that the rights of the accused to a fair trial may be said to be treated as fundamental to the administration of justice. However, O'Higgins CJ continued and remarked that the traditional concept of fairness was not a rigid one stating that, '[t]he general view of what is fair and proper in relation to criminal trials has always been the subject of change and development. Rules of evidence and rules of procedure gradually evolved as notions of fairness developed'.[1959] Indeed, Heffernan states:

> The principle that a person who is accused of crime is entitled to a trial that is fair overall is a mainstay in our systems of criminal justice and human rights. At the same time, the notion of 'fairness' has evolved to a degree in tandem with developments in societal understanding of the experience of victims and other witnesses who participate in the trial process.[1960]

Hogan et al observe that the right to fair procedures which is 'inseparable from – the administration of justice...has frequently been regarded as part of the latent content

[1957] Ibid, 348-349.
[1958] Forde, M, and Leonard, D (n 1955), [17.02].
[1959] *State (Healy) v Donoghue* (n 193), 350.
[1960] Heffernan (n 732), [6.76].

of Article 40.3, in relation to both civil and criminal proceedings'.[1961] The right to a fair trial therefore is not the only right that is bound up in the concept of justice. It involves the interest of various stakeholders.[1962] This is borne out by the decision of Walsh J in *DPP v JT*.[1963] While this case is more about the constitutional status of the family, the context is spousal compellability in criminal trials. Walsh J stated that 'the administration of justice itself requires that the public has a right to every man's evidence except for those persons who are privileged...by the provisions of the Constitution itself "or other established and recognised privilege"'.[1964] He continued and stated that the judicial power of compellability of witnesses to attend court 'is the ultimate safeguard of justice in the State, whether it be in pursuit of the guilty or the vindication of the innocent'.[1965] This shows willingness on the part of the courts to vindicate the rights of others, including innocent victims, even when faced with very strong constitutional rights where the family under the constitution is superior to all positive law. The Irish development in the modern understanding of justice can also be seen in the English House of Lords, Attorney General's Reference (No.3 of 1999), regarding overall fairness, where Lord Steyn stated:

> It must be borne in mind that respect for the privacy of defendants is not the only value at stake. The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public...A consideration of the public interest reinforces the interpretation which I have adopted.[1966]

The administration of justice in Irish criminal law can also be said to accommodate a triangulation of interests in pursuit of vindicating the rights of all relevant stakeholders particularly the accused, the victim and the community. Kilcommins et al observe that the 'Irish criminal process is increasingly having to accommodate the voices of victims/witnesses within a complex matrix of competing tensions that

[1961] Hogan, GW, Whyte, GF, Kenny, D, Walsh, R (n 286), [7.3.235].
[1962] Fennell, C (n 757), [2.103].
[1963] *DPP v JT* 1988 WJSCCCA 2089.
[1964] Ibid, 42.
[1965] Ibid, 43.
[1966] *Attorney General's Reference* (No.3 of 1999), [vi]. See also Fennell, C (n 757), [2.103]; Ward, 'Vulnerable Witnesses and Cross examination: A Path to Reform' [2017] IJLS 7 (1) 36, 44.

includes the state, society and accuseds/offenders'.[1967] They examine the rise of recognition afforded to victims as part of rebalancing process fairness.[1968] They observe that a 'state-accused logic of action...defined the accused as the primary (exclusive) rights bearer'[1969] in the nineteenth and twentieth centuries with the effect that it excluded victims.[1970] Similarly Charleton et al observe:

> In court, the voice of the victim had traditionally been silenced since the theory of criminal law tacitly operated in our courts up to the last century was that the perpetrator of an offence committed a wrong against society...But more recently the emphasis has shifted to victims being entitled to seek vindication, as best the State may do that, and of the justice system being there for the purpose of recourse by those who suffer from crime.[1971]

Kilcommins remarks that in the last four decades the inclusion of victims has increased in judicial systems.[1972] He also observes that 'process fairness now includes the victim'[1973] and the 'courts are now becoming more explicit in specifically identifying victims and competing rights'.[1974] In particular, he argues that this recognition has developed to correct the imbalance where the victim only had a depersonalised role in reporting the crime and giving evidence as a witness in court.[1975] This rebalancing of the system in favour of giving due weight to other rights bearers was considered by the Balance in Criminal Law Review Group in 2007 as discussed in Chapter 5.[1976] Kilcommins argues that victims are now recognised as a 'community of identity'.[1977] Furthermore, he argues extensively that the needs and

[1967] Kilcommins, S, O'Donnell, I, O'Sullivan, E, Vaughan, B (n 1796), 151.
[1968] For a discussion on a two system victim and offender approach to justice in England and Wales see H Lacey, N, and Pickard, 'A Dual-Process Approach to Criminal Law: Victims and the Clinical Model of Responsibility without Blame' (2019) 27 Journal of Political Philosophy 229.
[1969] S Kilcommins, 'The Victim in the Irish Criminal Process: A Journey from Dispossession towards Partial Repossession' (2017) 68 Northern Ireland Legal Quarterly 505, 512.
[1970] Ibid, 512. See also Leahy, S, and Spain, E, 'Exploring the Impact of the Victims' Directive on Service Provision for Victims of Crime in Ireland' (2017) 68 Northern Ireland Legal Quarterly 519.
[1971] Charleton, P McDermott, PA, Herlihy C, Byrne (n 872), [1.02].
[1972] Kilcommins (n 1969), 513.
[1973] Ibid, 516. See also S Kilcommins, 'The Victim in Law – The Emergence of a New Juridical Subject in the Crime Conflict' in D Heffernan, L, and Prendergast (ed), *Criminal Law Practice and Review* (2nd edn, Clarus Press 2018).
[1974] Kilcommins (n 1969), 516.
[1975] Ibid, 509, 516. See also Kilcommins (n 1973).
[1976] 'Balance in the Criminal Law Review Group Final Report' (n 35); 'Balance in Criminal Law Review Group The Right to Silence Interim Report' (n 35).
[1977] Kilcommins (n 1969), 516 citing David Garland, The Culture of Control: Crime and Social Order in Contemporary Society (OUP 2001) 12, 179.

interests of victims have been increasingly recognised in law.[1978] In support of this argument he cites a significant array of domestic legislative protections for victims and the positive obligation on the State under the European Convention on Human Rights to conduct effective crime investigations.[1979]

Fennell discusses the administration of justice in the context of sexual offences cases. She argues that:

> Popular wisdom...leans in a prosecution direction and accommodates the victim's voice at the expense of the defendant's claim to a fair trial...there is a current consistency of opposition between state and the individual accused, community and the accused, victim and the accused. The orthodoxy of the past has, therefore, turned full circle on fairness.[1980]

Although Fennell is writing about the changing attitudes in relation to sexual cases and measures which have eased the prosecution task, it is arguable that what she says bears some resemblance to treatment of the right to a fair trial by the courts more broadly. She also argues that the finding by O'Flaherty J in *Heaney* of locating the right to silence in the freedom of expression as a qualified right and discussed in Chapter 4, had the effect of lowering its ranking within the hierarchy of rights compared with locating it within Article 38.1 which is considered a stronger fundamental right.[1981]

The modern understanding of the administration of justice as discussed above means that not only is the right of an accused to a fair trial to be vindicated; so too are rights of other persons to be vindicated. This arguably has implications for the right to a fair trial generally and the presumption of innocence in particular. The Constitution does not provide any guidance as to how rights are to be interpreted when they interact or compete with one another. The courts therefore employ two key concepts for constitutional construction which will be discussed in the next section.

[1978] Kilcommins (n 1973).
[1979] Ibid.
[1980] Fennell, C (n 757), [5.210].
[1981] Ibid, [3.190]. *Heaney and McGuinness v Ireland* (n 1069), 123 per O'Flaherty J.

7.2 Hierarchy of Rights v Harmonious Interpretation

This section analyses the approach of the courts when considering competing rights using constitutional construction. The two key concepts for constitutional construction are the concepts of the hierarchy of rights and harmonious interpretation. This section will argue that there is an increasing trend by the courts across a range of areas to give greater weight to some rights at the expense of the right to a fair trial and the presumption of innocence in particular. It will also argue that this approach is underpinned by the modern understanding of the administration of justice and the vindication of the rights of victims and society as a whole.

As a first step, a search on westlaw.ie[1982] for the word 'hierarchy' under the cases tab revealed 528 cases containing this word dating back to the early 1990's. A total of 392 of the cases returned were Irish reported cases. The reference to the word in a large percentage of the cases was not relevant to this research: for instance, 136 of the cases were cases of the European Court of Human Rights. The seminal case identified in this research was *D v DPP.*[1983] There are two earlier relevant cases *The People (AG) v O'Brien*[1984] and *DPP v Shaw*[1985] that are worth referencing to set the scene.

There is a long line of authority across a broad range of areas where the right to a fair trial has been found to be a superior right in the hierarchy of rights but other rights have incrementally been given greater weight. As far back as 1964 the Supreme Court in *The People (AG) v O'Brien*[1986] considered the question of the admissibility of illegally obtained evidence. Kingsmill Moore J agreed[1987] with the judgment of Walsh J where he discussed the interaction of competing rights with the right to a fair trial. Walsh J stated:

> The defence and vindication of the constitutional rights of the citizen is a duty superior to that of trying such citizen for a criminal offence.[1988]

[1982] This search was conducted on the 11th October 2021.
[1983] *D v DPP* [1994]1 ILRM 435.
[1984] *The People (AG) v O'Brien* [1965] IR 142.
[1985] *DPP v Shaw* [1982] IR 1.
[1986] *The People (AG) v O'Brien* (n 1984).
[1987] Ibid, 162.
[1988] Ibid, 170 per Walsh J.

Walsh J was particularly concerned with the right to a fair trial as against the community's right to prosecute. He considered that the superior constitutional right to a fair trial would only give way where 'extraordinary excusing circumstances exist, such as in the imminent destruction of vital evidence or the need to rescue a victim in peril'.[1989] Therefore, in the hierarchy of rights concept the community's right to prosecute was ranked below the right to a fair trial.

Subsequently, in the Supreme Court case *DPP v Shaw*[1990] the issue of concern related to the lawfulness of detention of a suspect in Garda custody for murder in circumstances where the Gardaí believed the victim may have been alive. The Gardaí also hoped the suspect might be able to assist in finding the victim. The Court found by a majority[1991] that the evidence obtained during the period in detention beyond the lawful period was admissible in evidence on the basis that the hierarchal value placed on the deliberate endeavour to save a life outweighed the right to liberty. It is notable that it chose the hierarchy approach over the application of an extraordinary excusing circumstance. This approach may have been considered necessary in order to protect a more important right.[1992] Kenny J stated that '[t]here is a hierarchy of constitutional values and, when a conflict arises between them, that which ranks higher must prevail'.[1993] Nonetheless, Griffin J acknowledged the following:

> [I]t is a fundamental canon...that rights...are prone to come into conflict with one another to such an extent that in particular circumstances one of them must yield right of way to another. If possible, fundamental rights under the Constitution should be given a mutually harmonious application, but when that is not found possible, the hierarchy or priority of the conflicting rights must be examined, both as between themselves and in relation to the general welfare of society. This may involve the toning down or even the putting into temporary abeyance of a particular guaranteed right so that, in a fair and objective way, the more pertinent and important right in a given set of circumstances may be preferred and given application.[1994]

[1989] Ibid, 170 per Walsh J. Kingsmill Moore J concurred.
[1990] *DPP v Shaw* (n 1985).
[1991] per Henchy, Griffin, Kenny and Park JJ. Walsh J dissented.
[1992] See McGrath, D, and Egan McGrath, E (n 720), [7.5].
[1993] *DPP v Shaw* (n 1985), 63.
[1994] Ibid, 56 per Griffin J.

Griffin J[1995] essentially concluded that the doctrine of harmonious interpretation should be applied first in order to reconcile the competing constitutional rights and that the application of a hierarchy approach should only be adopted where this is not possible. More recently Denham J for the majority in the Supreme Court in *D v DPP*[1996] choose to apply the stricter hierarchy approach when expressing her views on the superior nature of the right to a fair trial in the context of other interests. She stated:

> The...right to a fair trial is one of the most fundamental constitutional rights afforded to persons. On a hierarchy of constitutional rights it is a superior right. A court must give some consideration to the community's right to have this alleged crime prosecuted in the usual way. However, on the hierarchy of constitutional rights there is no doubt that the applicant's right to fair procedures is superior to the community's right to prosecute. If there was a real risk that the accused would not receive a fair trial then there would be no question of the accused's right to a fair trial being balanced detrimentally against the community's right to have alleged crimes prosecuted.[1997]

Denham J made it clear that the right to a fair trial occupies a higher position in the constitutional order than the right of the State to prosecute an individual. While it appears from her statement that the community's right to prosecute is an important competing consideration it is nevertheless ranked lower than the right to a fair trial in terms of importance. A similar approach was applied by Finlay CJ in *Z v DPP.*[1998] He considered that there was no question about balancing these rights.[1999] The Supreme Court again addressed the hierarchy of rights in *Larkin v O'Dea.*[2000] This was an appeal from the High Court in an extradition case in which the Supreme Court refused to order the extradition of Larkin to Northern Ireland on the basis that unconstitutionally obtained evidence might be used against him. The Court considered the balance between the legislative scheme of extradition and the constitutional right of a citizen. In refusing the appeal Denham J[2001] in her judgment stated:

[1995] Henchy and Park JJ agreed.
[1996] *D v DPP* (n 1983).
[1997] Ibid, 442.
[1998] *Z v DPP* [1994] 2 IR 476.
[1999] Ibid, 507 per Finlay CJ.
[2000] *Larkin v O'Dea* [1995] 2 IR 485.
[2001] Costello, O'Flaherty and Blaney JJ agreed.

> The Constitution has created a hierarchy of rights. The personal right protected in this case is an important right in that hierarchy. The applicant's right to a fair trial — constitutional procedures — is superior to the community's right to prosecute.[2002]

It is clearly the case that the right to a fair trial trumped the community's right to prosecute. In 1997 the Supreme Court in *B v DPP*[2003] appeared to loosen its tone in relation to the weight given to other rights in balancing competing rights. In her judgment, with which the majority agreed, Denham J stated:

> It is not the applicant's interests only which have to be considered. It is necessary to balance the applicant's right to reasonable expedition in the prosecution of the offences with the community's right to have criminal offences prosecuted. The community's right to have offences prosecuted is not absolute but is to be exercised constitutionally, with due process. If there is a real risk that the applicant would not receive a fair trial then, on the balance of these constitutional rights, the applicant's right would prevail.[2004]

Denham J considered that the right to a fair trial was superior; however, she was prepared to consider the harmonious interpretative approach in considering the competing rights.[2005] This represented a change of position on her uncompromising comments in *D v DPP.* The hierarchy concept was applied again in 1998 by the Supreme Court in the case of *Irish Times Ltd v Ireland.*[2006] That case had to balance the constitutional right to a fair trial of the accused against the right of the public to receive information. In his judgment, O'Flaherty J relied on Denham J's statement in *D v DPP* and stated that '[i]n the context of a criminal trial...Article 38.1...must have paramountcy over the requirement that a trial is held in public'.[2007] However, while Denham J acknowledged the right to a fair trial of an accused as a superior right to the rights of others, she nevertheless appeared to invoke a more inclusive approach to the administration of justice by considering competing rights. She stated that 'categorising the rights and placing them in the appropriate hierarchy does not dispose of the matter'.[2008] Indeed, in her analysis, she stated

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[2002] *Larkin v O'Dea* (n 2000), 509.
[2003] *B v DPP* [1997] 3 IR 140.
[2004] Ibid, 195-196 per Denham J. Finlay CJ and Barrington, Keane, O'Flaherty JJ agreed.
[2005] Ibid, 195-196 per Denham J. Finlay CJ and Barrington, Keane, O'Flaherty JJ agreed.
[2006] *Irish Times Ltd v Ireland* [1998] 1 IR 359. (Unanimous decision of Hamilton CJ, O'Flaherty, Denham, Barrington and Keane JJ)
[2007] Ibid, 392 per O'Flaherty J.
[2008] Ibid, 399 per Denham J.

that a 'mutually harmonious application of competing rights'[2009] should first be considered and where this is not possible the 'hierarchy of rights should be considered both as between the conflicting rights and the general welfare of society'.[2010] This suggests a changed position of Denham J in respect of the right to a fair trial as a superior right.

The privileged position of the accused's right to a fair trial and the presumption of innocence were significantly chilled by a concerted application of the concept of justice in 1999 in *PC v DPP*[2011] a historical sex abuse case. In 1995 the complainant reported to Gardaí that she had been sexually abused between 1982 and 1984 by the applicant. At the time of the offences the complainant felt unable to make the complaints. The applicant lived locally to her. He was a coach driver who drove the complainant and other girls to school and to swimming lessons where he occasionally taught them swimming. He was charged on five counts of indecent assault and three counts of unlawful carnal knowledge. He sought to restrain his prosecution on grounds including that the delay in his prosecution was excessive and violated his right to a fair trial in due course of law. The State argued that the reason for the delay was as a result of the control and dominance of the applicant over the complainant.

In the High Court McGuinness J granted an order prohibiting the trial finding that the delay in reporting the alleged offence lay with the complainant. Nonetheless, in considering the impact of such delay on the right of the accused to be presumed innocent, McGuinness J's stated, 'The presumption of innocence has to play a part in the Court's considerations'.[2012] Notwithstanding the outcome for the applicant, these comments suggest that there was little weight given to the presumption of innocence in the sense that it only 'played its part' in the overall consideration by the High Court. This is arguably far removed from being treated as a superior right in the hierarchy of rights. Interestingly, Fennell argues that McGuinness J's decision 'serves as a litmus test for the meaning of justice as fairness in context'.[2013] However,

[2009] Ibid, 399 per Denham J.
[2010] Ibid, 399 per Denham J.
[2011] *PC v DPP* [1999] 2 IR 25.
[2012] Ibid, 40.
[2013] Fennell, C (n 757), [5.202].

the decision of the Supreme Court in this case suggests a different approach to the administration of justice and fairness in context.

On appeal by the Director of Public Prosecutions the Supreme Court allowed the appeal and reversed the order prohibiting the applicant's trial. Denham J for the majority of the Supreme Court[2014] considered a range of fundamental principles in the context of ensuring justice, namely:

> [T]he community's right to legal issues being determined in the courts;...the right and duty of the prosecutor to bring to the courts for adjudication allegations of serious child sexual abuse alleged to have taken place; the community's right to have its society protected, especially its most vulnerable – children. Also at the core of this case is the rule of law; the right of the applicant to a fair trial; the right of the community to the rule of law for all, including the applicant.[2015]

Contrary to the finding of the High Court, Denham J found that the delay was the fault of the accused due to the alleged abuse and that the accused could not profit from this.[2016] The court also found that there was no real risk of an unfair trial on the grounds that there was sufficient evidence notwithstanding the delay. This case provides a strong argument that the interests of the community generally and the victim in particular, the right of the prosecutor to prosecute crime and the public interest in the control of sex abuse crime clearly weighed heavily in the decision. It is unclear though as to what weight was apportioned the presumption of innocence. It is also apparent from Denham J's statement that the rule of law requires more than a consideration of the rights of the accused but also weighing up the impact of the accused's contribution to the delay and the community's right to have society protected. Moreover, assuming the credibility of complainants is another shift in judicial thinking in pursuit of justice. In this case Keane J stated that the trial court should have approached the case 'on the assumption that the complaints were true'.[2017] Similarly, Lynch J stated that where there are difficulties the court should 'consider the case on the assumption that what the complainant had said was

[2014] Hamilton CJ and Barrington J concurred.
[2015] *PC v DPP* (n 2011), 61.
[2016] Ibid, 63.
[2017] Ibid, 70.

true'.[2018] The Supreme Court decision in this case strongly suggests that the right of the accused to be presumed innocent was trumped by the presumptions of credibility and truth of an alleged victim in pursuit of the administration of justice. In *J O'C v DPP*[2019] Keane CJ for the majority in the Supreme Court[2020] in judicial review proceedings went further and rejected the presumption of innocence where the delay in making a complaint was caused by the accused. He stated that 'the court must proceed on the assumption that the allegations are well founded and, to that extent only and solely in the context of these specific proceedings, the presumption of innocence does not apply'.[2021] Hamilton states that this is the second question in a three-pronged test developed by the Supreme Court in *PC v DPP* and *J O'C v DPP* and argues that 'at this stage the defendant will be presumed guilty of the offences'.[2022] This is a clear instance in which the hierarchy of rights is turned on its head, with the victims and community's interest ranking as superior to the right to a fair trial and more particularly the presumption of innocence. This is clearly at variance with the requirement of treatment consistent with innocence as an aspect of the broad conception of the presumption of innocence which extends beyond the trial setting.[2023] These cases provide a strong argument in favour of the dangers in accommodating a triangulation of interests in pursuit of vindicating the rights of all relevant stakeholders. Not alone was the right to a fair trial significantly diluted, the presumption of innocence was effectively abolished. However, the Supreme Court quickly changed its position on the assumption of the truth of complainants in *SH v DPP.*[2024] The judgment was delivered by Murray CJ. He stated: 'The inquiry which should be made is whether the degree of prejudice is such as to give rise to a real or serious risk of an unfair trial'.[2025] This suggests that the presumption of innocence will be considered at all stages including during judicial review proceedings. Nonetheless, it is unclear what weight is afforded to the presumption in light of all the other rights and interests that must be considered.

[2018] Ibid, 78.
[2019] *J O'C v DPP* [2000] 3 IR 478.
[2020] Denham J agreed and Murphy J delivered a separate judgment.
[2021] *J O'C v DPP* (n 2019), 486. Hardiman J dissented and Barron J agreed.
[2022] Hamilton, C (n 1), 53.
[2023] As discussed in Chapter 1.
[2024] *SH v DPP* [2006] 3 IR 575, (Murray C.J., Denham, Hardiman, Geoghegan, Fennelly JJ).
[2025] Ibid, 620, [79] per Murray CJ.

In another sex abuse prosecution Denham J in *DPP v McNeill*[2026] accommodated a triangulation of interests in pursuit of administering justice and stated:

> Facing into these types of prosecutions, which were becoming more common, the courts sought to achieve a fair trial with justice for all concerned. Those concerned include the People of Ireland for whom the prosecution is brought, the accused who has the fundamental right of a fair trial, and the victims.[2027]

It is clearly the case from this statement that the administration of justice is not served by focusing on the rights of the accused to the exclusion of all others. It suggests that the avoidance of a disproportionate and distorted application of justice requires that consideration must also be given to the interest and rights of community's and victims. This is arguably driven by the need to vindicate the victim's right to dignity as imported into the concept of justice. Indeed, it arguably embraces the victim's right to privacy and participation in the criminal justice process. However, the problem this presents is that the administration of justice cannot be reduced to retaliation or the perception of revenge by affording greater weight to the rights of others than the right of the accused to be presumed innocent and the requirement on the prosecution to prove its case beyond reasonable. As discussed in Chapter 1, the competing rights of the accused as against communities generally and victims in particular, must be carefully balanced by ensuring respect for the relationship between the State and the citizen thereby securing the individual's right not to be placed at an increased risk of wrongful conviction. Indeed, it is difficult to reconcile the judicial shift in the administration of justice approach with the constitutional right to fair procedures as interpreted by Costello J in *Donnelly v Ireland*[2028] and discussed in Chapter 2. In that case, Costello J relied on the notion of fairness in 'due course of law' as interpreted by O'Higgins CJ in 1976 in *State (Healy) v Donoghue.*[2029] He stated:

> If the constitutional guarantee of fair procedures is breached then the court will declare a statute which does so to be unconstitutional...there can be no

[2026] *DPP v McNeill* [2011] 2 IR 669.
[2027] Ibid, 683 [25].
[2028] *Donnelly v Ireland* (n 1236), 334.
[2029] *State (Healy) v Donoghue* (n 193), 349-350.

> question of balancing conflicting rights - if the procedures are unfair this section must be condemned.[2030]

Costello J clearly rejected the notion of balancing of rights where the constitutional right to fair procedures are concerned.

The administration of justice, including the hierarchy of rights, was yet again considered by Denham J in the context of the Witness Protection Programme in *DPP v Gilligan.*[2031] When administering justice to protect the rights of an accused, Denham J stated:

> [T]he court will also have regard to the right of the people that offences be prosecuted. This may require the court to balance competing rights. On a hierarchy of constitutional rights, the accused's right to a fair trial is superior to the community's right to have the matter prosecuted...In balancing competing positions the test is whether there is a real or serious risk of an unfair trial for the accused...The right of the people is also part of the equation. This incorporates the right to have an accused prosecuted; the right to have a fair trial system in the community; and to guard against unfair trials which may lead to miscarriages of justice. The position of victims (and their families) should not be excluded from this equation either. Thus in these few words of Article 38.1 is the root of our justice system, of a fair trial system.[2032]

It is notable that Denham J is still using the language of *D v DPP* (hierarchy, superior etc) to describe the constitutional position of the right to a fair trial but is surrounding it with statements about the need to weigh other rights and interests in the balance. In balancing the right to a fair trial, the nature of the victim's place in the process was considered by Charleton J in the High Court in *DPP (Walsh) v Cash.*[2033] He stated:

> The rights of a victim of a crime are subsidiary to those of the community. When a crime is committed, it is the legal rights of the entire people of Ireland that are being attacked: hence, crimes are prosecuted in the name of the people under Article 30.3…Such acknowledgement as there has been in Irish law that the victim also has a right, because of the commission of a crime against her or him, to ensure that the prosecution is conducted fairly has been very limited.[2034]

[2030] *Donnelly v Ireland* (n 1236), 334.
[2031] *DPP v Gilligan* (n 1604).
[2032] Ibid, 137.
[2033] *DPP v Cash* [2008] 1 ILRM 443.
[2034] Ibid, [43] per Charleton J.

While Charleton J recognised the right of victims as an important consideration, this statement nevertheless indicates that their rights are included within the rights of the community in the context of the administration of justice. Nonetheless, the vindication of victim's rights was more recently singled out by Humphreys J in the High Court in *Casey v DPP and Others*[2035] as a key constituent part of a criminal trial. He stated that 'the criminal trial is a mechanism to vindicate the legal, constitutional, EU and ECHR rights of a victim of crime. The strengthening of these rights has been a growing theme in recent legal developments'.[2036] However, he did not comment on the interaction of victim's rights with the right to a fair trial. This is a clear recognition by both the legislature and the courts of the strengthening of victim's rights falling within the realm of the administration of justice.

Humphreys J also emphasised the High Court's view of the status of victim's rights in *PF v DPP;*[2037] a historical sex abuse case in which the applicant sought to prohibit his trial due to an inconsistency between dates given by the complainant and the dates in the indictment. Indeed, he went further and described what Denham J meant in *D v DPP* when she found that the defendant's right to fair procedures is a superior right to the community's right to prosecute in the hierarchy of rights. He stated:

> [T]hat is simply another way of saying that this country does not subject people to unfair trials. It is not to be taken, as it occasionally seems to be by defendants, as a statement that the rights of the accused are a trump card which can outbid any competing interest of victims of crime or the Director as a prosecutor on behalf of the People. A court faced with a conflict of rights must first seek to balance and accommodate all sets of interests in a proportionate manner as appropriate to a democratic society...It is only in limited and in practice exceptional circumstances where...a balance cannot be arrived at that the prevention of significant and irremediable unfairness would require a trial to be stopped either by the trial judge or on prohibition. The "hierarchy of rights" issue is not an answer to a criminal charge except in those very limited circumstances.[2038]

This statement suggests that Humphreys J did not view the rights of an accused as superior to the rights of others. Indeed, it appears that he was equating the right to a fair trial with the rights of victims. He made it clear that the balance of competing

[2035] *Casey v DPP and Others* [2015] IEHC 824.
[2036] Ibid, [10].
[2037] *PF v DPP* [2016] IEHC 98.
[2038] Ibid, [25].

rights must first be considered and that it is only in circumstances where this could not be achieved that the hierarchy of rights is to be applied, but only in very limited and exceptional circumstances. This statement presents a very narrow meaning of the right to a fair trial as a superior right and a clear view by the courts' of the need to consider other rights in order to avoid a disproportionate and distorted application of justice in a democratic society. Therefore, notwithstanding the fact that the right to a fair trial was found to be a superior right in *D v DPP,* Humphreys J was clear in setting out strict limitations of that superiority in stating that it is not to be taken as a 'trump card' except in exceptional circumstances. This arguably endorses a broad understanding of the meaning of the administration of justice and raises the threshold for an accused to demonstrate a real risk of an unfair trial. As a consequence, the right to a fair trial has been demoted from its 'superior right' status to one of almost equal status to the rights of other parties under the modern approach by the courts to the administration of justice. This position effectively endorses the continuous erosion of the presumption of innocence as an aspect of the right to a fair trial which is demoted from its superior position.

In the area of evidence gathering and admissibility in the context of a fair trial, a similar pattern in favour of the broad understanding of the meaning of the administration of justice can be seen. In *DPP v JC*[2039] the Supreme Court modified the exclusionary rule of unconstitutionally obtained evidence to permit the admissibility of evidence where there has been a breach of constitutional rights due to inadvertence.[2040] A key driver for this change was the interest of the community in the prosecution of crime. McMenamin J for the majority stated:

> The rights, which are to be vindicated in a manner which is "as far as practicable", are not simply those of the State and the accused, but rather encompass a broader range of interests and rights, including the right of the community to have crime prosecuted when offences have been committed, and the interests of victims of crime. An exclusionary rule broadly applied militates against these considerations being taken into account.[2041]

[2039] *DPP v JC* [2017] 1 IR 417. For further reading see Daly YM, 'Overruling the Protectionist Exclusionary Rule: DPP v JC' (2015) 19 International Journal of Evidence & Proof 270; O'Connell, A, 'Case Comment – DPP v JC' (2017) 1 Irish Judicial Studies Journal 66.
[2040] Denham CJ, O'Donnell, Clarke and MacMenamin JJ concurred; Murray, Hardiman and McKechnie JJ dissented.
[2041] *DPP v JC* (n 2039), 806 [954].

This is a clear statement of the interests of others that fall to be considered particularly, the interests and rights of the community and victims in administering justice. McMenamin J further stated that the exclusionary rule was disproportionate and it distorted 'the application of the Constitution...by focusing on one constitutional principle to the exclusion of all others'.[2042] He continued and stated that the modified rule now 'redresses the balance so as to encompass community interests'.[2043] This suggests it was necessary to ensure community confidence in criminal trials. This is another indication by the Supreme Court of the demotion of the right to a fair trial from its 'superior right' status for the purpose of securing the concept of justice. In the words of Kilcommins et al, it suggests 'the 'axis of individualism' has rotated away from a plot centered upon perfectibility and needs of the offender to one more closely connected with the symbolically significant interests of the victim'.[2044]

The Supreme Court has recently expressed reservations about the application of the hierarchy of rights concept of interpretation. In 2017 the Supreme Court in *Gilchrist v Sunday Newspapers Limited,*[2045] a civil case, had to consider the constitutional standard of trial in public under Article 34.1 where there were other competing rights such as the right to life of members of the Gardaí and persons in the Witness Protection Programme and the legitmate interest of the State in maintaining the secrecy of the programme. This case has broad application to criminal cases. O'Donnell J[2046] gave judgment on behalf of the Supreme Court. Notably, this was a unanimous decision by five Supreme Court judges including Denham CJ. This represents further evidence of Denham CJ's changed position from her decision in *D v DPP* as discussed above. Indeed, O'Donnell J referred to Denham J's (as she then was) position in *Irish Times Ltd* where she said that 'categorising the rights and placing them in the appropriate hierarchy does not dispose of the matter'.[2047] While he acknowledged the Supreme Courts approach in *Irish Times Ltd* in ranking the constitutional right to a fair trial as 'the highest in the hierarchy of constitutional

[2042] Ibid, 806 [958].
[2043] Ibid, 806 [959].
[2044] Kilcommins, S, O'Donnell, I, O'Sullivan, E, Vaughan, B (n 1796), 143.
[2045] *Gilchrist v Sunday Newspapers Limited* [2017] 2 IR 284.
[2046] Denham CJ, Clarke, MacMenamin, Dunne JJ agreed.
[2047] *Irish Times Ltd v Ireland* (n 2006), 399 per Denham J; *Gilchrist v Sunday Newspapers Limited* (n 2045), [28] per O'Donnell J.

rights',[2048] he noted that 'other constitutional rights could be weighted in the balance and if sufficiently substantial and pressing, could outweigh the provisions of Article 34.1'.[2049] Nonetheless, he made it clear that he did not favour the balancing of rights and the hierarchy of rights approach.[2050] Instead he favoured the harmonious concept of interpretation stating:

> I have reservations about the language of balancing of rights and the hierarchy of rights...The Constitution does not itself rank the rights and obligations it provides for, nor does it tell us how to divine any hierarchy...The Constitution was intended to function harmoniously, and where there were points of potential conflict between the rights and obligations provided for, that should be sought to be resolved without the subordination or nullification of one provision. There is a danger that this approach could lead to an overriding of constitutional rights where their application is inconvenient, or when asserted by unpopular and undeserving parties. It should be remembered that the essence of constitutional rights is that they call for enforcement precisely when inconvenient, contrary to the wishes of the Government...the public mood more generally.[2051]

O'Donnell J clearly disfavoured balancing of rights and the hierarchy of rights approach of interpretation given the adverse effect such approach can have on rights that conflict with one another. However, O'Donnell J's statement falls short of providing clarity on the method of interpretation where a conflict of rights cannot be resolved. While the balancing of rights and the hierarchy of rights concept of interpretation are unclear in themselves, the sentiments expressed by O'Donnell J offer even less clarity in relation to manner of interpretation. Indeed, a subsequent judgment of the Court of Appeal in *Director of Public Prosecutions v Independent News and Media Plc, Claire Grady, Stephen Rae and Internet Interactions Limited*[2052] Edwards J observed that 'there is no hierarchy of constitutional rights'[2053] as emphasised by the Supreme Court in *Gilchrist*. Edwards J continued:

> O'Donnell J further expressed reservations in Gilchrist about *"the language of balancing of rights"*, implicitly on the basis that it requires the attribution of a weighting to competing rights and relevant circumstances, in an almost

[2048] *Gilchrist v Sunday Newspapers Limited* (n 2045), 297 [15] per O'Donnell J.
[2049] Ibid, 297 [15] per O'Donnell J.
[2050] Ibid, 310-311 [37] per O'Donnell J.
[2051] Ibid, 310-311 [37] per O'Donnell J.
[2052] *Director of Public Prosecutions v Independent News and Media Plc, Claire Grady, Stephen Rae and Internet Interactions Limited* [2017] IECA 333.
[2053] Ibid, [13].

> arithmetic or empirical exercise, with a view to seeing if the notional scales are tipped in one direction or the other. He appears to be of the view that issues around competing rights cannot properly be resolved in that way. Though he does not articulate it in exactly these terms, I understand him to be advocating the taking into account of all potentially relevant values, interests and material considerations in a kind of instinctive synthesis...and finding the right course of action on the basis of strengthened awareness.[2054]

Edwards J has effectively interpreted O'Donnell J's judgment in *Gilchrist* as rejecting both the balancing of rights and the hierarchy of rights. Indeed, his interpretation of *Gilchrist* appears to be broadening the scope of matters to be taken into consideration in the administration of justice. Not alone must it take account of the rights of others, it takes account of 'potentially relevant values, interests and material considerations'. Unfortunately, there was no description given by Edwards J as to the meaning of each of these terms. It is assumed that he was referring in particular to taking the Witness Protection Programme into account. Nonetheless, the ambit of these considerations is unclear and appears to be extensive. It is unclear how the mix of rights, values, interests and material considerations along with the right to a fair trial and the presumption of innocence are weighed. Furthermore, Edwards J stated that the purpose of considering these matters is to strengthen awareness. Again, this is ambiguous as he did not state what awareness is strengthened. The lack of guidance in these respects is extremely unhelpful for the presumption of innocence. This situation can only have potential to lead to a diminution of the right to a fair trial including the presumption of innocence as there is a competing mix of rights, values, interests and material considerations that must be considered in the decision making process.

Notably, Hogan et al state, in relation to the hierarchy of rights, that it is 'to be hoped that O'Donnell J's judgment in *Gilchrist* marks the end of this concept in constitutional law'.[2055] They argue that the hierarchy considers rights in 'abstract importance of the right'[2056] whereas 'proportionality and similar balancing doctrines...assume the opposite: that rights are best considered in context'.[2057] As noted above, O'Donnell J in *Gilchrist* expressed grave reservations about the

[2054] Ibid, [14].
[2055] Hogan, GW, Whyte, GF, Kenny, D, Walsh, R (n 286), [7.1.120].
[2056] Ibid, [7.1.120].
[2057] Ibid, [7.1.120].

hierarchy of rights and the language of balancing rights. Indeed, Hamilton argues that the 'use of balancing tests to achieve fairness in criminal trials has proved particularly susceptible to the winds of public opinion on controversial issues'.[2058] Nonetheless, Hogan et al acknowledge that some rights are more important than others and that where there is a clash of rights in borderline value cases that they should be considered in context rather than in abstract.[2059] Their view suggests that in such circumstances the balancing of rights should apply and where there is a conflict with competing rights, that the most important rights should be considered in context. On this basis the presumption of innocence should be given greater protection if its importance is to be given meaningful effect. It is unclear therefore how this differs from harmonious interpretation in the first instance and the application of the hierarchy of rights where a conflict of rights cannot be resolved by harmonious interpretation.

Notwithstanding the decision in *Gilchrist* and the interpretation by Edwards J in *Director of Public Prosecutions v Independent News and Media Plc, Claire Grady, Stephen Rae and Internet Interactions Limited,* it is notable that the hierarchy of rights specifically in the context of Article 38 has since been applied in eight judgments of the Supreme Court, High Court and Court of Appeal.[2060] While nothing substantially turns on this, the continuing consideration of the hierarchy of rights nevertheless suggests an element of confusion as to the appropriate approach to constitutional construction. It also indicates deference to the hierarchy of rights which appears to be for the purpose of protecting more important rights. If this assessment is correct, it will offer some hope for the right to a fair trial as a superior right and the presumption of innocence as an aspect of that right.

[2058] Hamilton, C (n 1), 237.
[2059] Hogan, GW, Whyte, GF, Kenny, D, Walsh, R (n 286), [7.1.120].
[2060] *Brian Nolan v Sunday Newspapers Limited (trading as Sunday World)* [2019] IECA 141; *PC v The Minister for Social Protection, Ireland and The Attorney General* [2018] IESC 57; *SOTA Suing through his Mother and Next Friend OA and OA v The Child And Family Agency (Respondent) and LA (Notice Party)* [2019] 2 I.L.R.M. 201; *Gulsanga Delsoz v The Garda National Immigration Bureau* [2018] IEHC 492; *Merriman & ors v Fingal County Council & ors; Friends of the Irish Environment Clg -v- Fingal County Council & ors* [2017] IEH; *MH v Governor of Cork Prison (Respondent) and Ireland and The Attorney General (Notice Parties)* [2017] IEHC 618; *Maloney v The Member In Charge of Finglas Garda Station & Ors* [2017] IEHC 279; *Rory Eccles v The Director of Public Prosecutions* [2017] IEHC 379.

The Irish approach to resolving competing rights is to be contrasted with the approach of the European Court of Human Rights which has not gone as far as the Irish courts in terms of placing the right of the accused, the community and the victim in a hierarchy. Jackson and Summers observe that the European Court of Human Rights has stopped short of:

> proclaiming any status rights for victims over and above the rights to which all persons are entitled under the Convention, especially in this context the need to protect the victim and respect her private life, the ECtHR has been able to maintain this balance without treading too deeply into the defendant's procedural rights.[2061]

In particular, Jackson and Summers rely on the decision in *Doorson v The Netherlands*[2062] where the European Court of Human Rights held that 'the principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify'.[2063] They argue that the determination of guilt collides directly with the rights of the defence as victims are given 'greater rights to have crimes against them pursued and to have the perpetrators brought to justice and punished'.[2064] In particular, this obviously emanates from the positive obligation on the State to act and conduct an effective and efficient investigation where the rights of a victim are allegedly violated. Jackson and Summers also observe that the notion of fairness in Article 6 of the European Convention on Human Rights 'presupposes interaction between parties and requires more than one actor'.[2065] This accords with the triangulation of interests in the administration of justice as discussed above. They observe that applying fairness takes account of other interests such as those of the victim and the prosecutor as distinct from conceiving it as a 'right of an individual in isolation'.[2066] They argue that this is supported by the European Court of Human Rights case *Al-Khawaja and Tahery v UK*[2067] which recognises that fairness requires a 'balancing of competing interests of the defence, the victim, witnesses and the public administration of

[2061] Jackson, JD, & Summers, SJ (n 648), 4.
[2062] *Doorson v The Netherlands* (1996) 22 EHRR 330.
[2063] Ibid, [70].
[2064] Jackson, JD, & Summers, SJ (n 648), 4.
[2065] Ibid, 10 citing Stephan Trechsel, 'Chapter 2' in John D Jackson and Sarah J Summers (ed), Obstacles to Fairness in Criminal Proceedings: Individual Rights and Institutional Forms (Oxford: Hart Publishing 2018), 35.
[2066] Ibid, 10.
[2067] *Al-Khawaja v United Kingdom* (2012) 54 EHRR 23.

justice'.[2068] This is at variance to the constitutional administration of justice. It is arguable that the constitutional administration of justice is not balanced against any other right. Justice is the ultimate objective and the rights of the accused and the rights of others are balanced in order to secure the administration of justice. It is also at variance to *Gilchrist* where O'Donnell J expressed reservations about the balancing of rights. When one considers all the rights bearers that must be considered within the administration of justice, it is difficult to see how justice can be administered without balancing the competing rights of all those at stake particularly where rights are not given superiority. However, in these circumstances, while justice may be served it will arguably be at the expense of the presumption of innocence. If the right to a fair trial is treated as a superior right in a hierarchy of rights the presumption of innocence would be protected more robustly. Indeed, Edwards J's finding in *Minister for Justice & Equality v Nolan,*[2069] as discussed above and in Chapter 2, that the presumption of innocence is also a principle of higher law in its own right and is inextricably bound up with the fundamental rights in Article 40.4.1° (liberty) and Article 40.3.2° (good name)[2070] offers some hope for treating the presumption of innocence as a superior right in itself in the hierarchy of rights.

7.4 Reflection

It is clearly the case that the courts have more recently changed their attitude from an exclusive accused protective focus to a more inclusive community protective focus with the underlying purpose of securing the administration of justice. The difficulty for the presumption of innocence in this regard is that while it has been considered a bedrock and cardinal principle, it is considered among the rights of other parties. In this regard, the presumption of innocence is essentially demoted from the 'superior right' status within the general right to a fair trial. The right to a fair trial of an accused including the presumption of innocence continues to be eroded by their treatment in almost equal status to the rights of others. It has been strongly argued that the courts have increasingly given greater weight to community rights to

[2068] Jackson, JD, & Summers, SJ (n 648), 10.

[2069] *Minister for Justice & Equality v Nolan* (n 287), [132]. See also *Minister for Justice and Equality v Marjasz* (n 578), [144]; *Minister for Justice and Equality v Jason Patrick Buckley* (n 552), [103], [104]. Note that O'Donnell J in *Minister for Justice v Balmer* (n 436) states that the distinction between the rights guaranteed in Article 38 (limited to Ireland) and rights guaranteed as personal rights is a superficial distinction.

[2070] *Minister for Justice & Equality v Nolan* (n 287), [131]. See also *Attorney General v N.S.S* (n 581), [306], [307].

prosecute, victim's rights and the State's right to prosecute grounded in the administration of justice. Indeed, the drive to place greater weight on vindicating the rights of other parties in pursuit of justice is evident in judicial acceptance of the significant legislative incursions on the presumption of innocence as an aspect of Article 38.1, as discussed and analysed in Chapters 3, 4, 5 and 6 of this thesis. The expansive nature of these legislative devices and the consideration given to victims, in the words of Kilcommins et al, appear to align with 'the state's result orientated needs and its desire to control more effectively'.[2071] They state, 'The rights of accuseds are restricted to facilitate a finding of guilt'.[2072] It is arguable therefore that the findings in Chapters 3, 4, 5 and 6 in respect of the legislative devices reversing the onus of proof, criminalising silence and providing for adverse inferences to be drawn from a suspects silence give effect to or complement the results based approach. It is arguable therefore that the results based approach is at the heart of the modern understanding of the administration of justice which has significant implications for the presumption of innocence in terms of its ongoing erosion.

Given that the balancing of rights and the hierarchy of rights now appears to be out of favour with the Supreme Court in light of *Gilchrist*[i]*,* it is arguably the case that this will lead to a greater diminution of the right to be presumed innocent in particular and the right to a fair trial generally. A court is required to consider a competing mix of rights, values, interests and material considerations. However, it is unclear as to how they will be weighed where the presumption of innocence as an aspect of the right to a fair trial is concerned. There is a lack of clarity how this is to be achieved. It has been strongly argued that the superior courts nevertheless continue to apply both the hierarchy of rights and balancing rights since *Gilchrist.* It has also been shown that the European Court of Human Rights applies the balancing of rights concept. The outcome from the balancing approach depends on the particular facts of the case. The problem therefore is that it is unclear where the line is drawn as to the importance of the presumption of innocence as a fair trial right when considered in the mix with other competing rights. This lends itself to the risk that the administration of justice could potentially disfavour the rights of an accused and be reduced to retaliation or even the perception of revenge by affording greater weight

[2071] Kilcommins, S, O'Donnell, I, O'Sullivan, E, Vaughan, B (n 1796), 163.
[2072] Ibid, 173.

to other rights than the accused's right to a fair trial and the presumption of innocence.

It remains to be seen whether the courts have any appetite to develop the privileged position of the presumption of innocence within the context of a higher principle of law in its own right as identified by Edwards J in *Minister for Justice & Equality v Nolan*[2073] and discussed above and in Chapter 2. He stated that the presumption of innocence 'is in itself a higher legal principle of universal application'[2074] He remarked that the presumption of innocence 'is much more than a mere procedural trial right. It is recognised in the vast majority of the world's legal systems as being a fundamental principle of the justice to which every person is entitled as an aspect of their humanity'.[2075] On this understanding of the presumption of innocence, it appears that Edwards J placed it as a fundamental aspect of justice which should not compete with other rights. However, Edwards J's position does not seem to be a mainstream one within the Irish judiciary at present.

7.5 Conclusion

This research provides a strong argument in favour of the broader context in which the erosion of the presumption of innocence has occurred. It has explained the meaning and judicial shift in attitude regarding the requirements of the administration of justice[2076] which has contributed to the erosion of the presumption of innocence. It is arguably the case that the balancing of rights in pursuit of achieving justice aims to avoid a disproportionate and distorted application of the Constitution. As a consequence, this increasing development helps explain the erosion of the presumption of innocence by legislation as discussed in Chapters 3, 4, 5 and 6 in the first instance, and secondly by the judicial approval of such measures within the meaning of the administration of justice. The increasing development of the administration of justice suggests that a decreasing commitment is given to the individual fundamental rights of an accused, including the presumption of innocence

[2073] *Minister for Justice & Equality v Nolan* (n 287), [132]. See also *Minister for Justice and Equality v Marjasz* (n 578), [144]; *Minister for Justice and Equality v Jason Patrick Buckley* (n 552), [103], [104]. Note that O'Donnell J in *Minister for Justice v Balmer* (n 436) states that the distinction between the rights guaranteed in Article 38 (limited to Ireland) and rights guaranteed as personal rights is a superficial distinction.
[2074] *Minister for Justice & Equality v Nolan* (n 287), [124].
[2075] Ibid, [125].
[2076] *State (Healy) v Donoghue* (n 193), 348-349.

in isolation. This arguably had significant implications for the presumption of innocence. While acknowledging the position that the courts do not subject people to unfair trials as stated by Humphreys J in *PF v DPP,*[2077] this chapter shows that the erosion of the presumption of innocence cannot be discussed without reflecting on the changed attitude of the courts to the administration of justice and right to a fair trial more generally. This includes the presumption of innocence. It is therefore inevitable that the inclusionary approach of all relevant rights, values and interests will lead to a greater diminution of the right of an accused to a fair trial generally with the result that there is little light at the end of the erosion tunnel for the presumption of innocence.

[2077] *PF v DPP* (n 2037), [25].

Conclusion

The detailed analysis of the presumption of innocence in this thesis strongly suggests that the protection against wrongful conviction and avoidance of miscarriages of justice is the dominant rationale for the presumption as a fundamental and bedrock principle of Irish law. The thesis agrees with Hamilton's view of the broad conception of the presumption of innocence and rejects the narrow view that the presumption only applies at trial. It has been strongly argued that the presumption of innocence extends to the pre-trial investigation stage from the moment a suspect is identified. The evidence suggests that a criminal investigation is intimately connected with the trial stage as both stages are part of the overall trial process.

The historical research in this thesis offers an important original contribution in that it has shown that the presumption of innocence and the burden and standard of proof played an important role in Irish law as far back as the mid 1800's, approximately eighty years prior to *Woolmington v DPP*[2078] in 1935, unlike the position in England and Wales. The rationale for the presumption of innocence as preventing miscarriages of justice was discussed by Pigot CB.[2079] The judiciary in Ireland were in the habit of advising juries on the presumption of innocence and the burden and standard of proof at trial. This indicates that the Irish judges valued the presumption of innocence and regarded the burden and standard of proof as important safeguards against erroneous convictions. It has been suggested that *Woolmington* did not introduce new law in an Irish context apart from clarifying the exceptions to the burden and standard of proof.

Against this backdrop, this thesis has argued that the erosion of the presumption of innocence is ongoing by the operation of legislative devices which require suspects and accused persons to assist in the investigation and prosecution of the State's case against them. These devices undermine the presumption of innocence thereby increasing the risk of wrongful convictions and miscarriages of justice.

[2078] *Woolmington v DPP* (n 2).
[2079] As discussed in Chapter 2. See *The Queen v Redmond* (n 442); *Bell v Parke. [Exchequer.]* (n 449); *Magee v Mark. [Exchequer.]* (n 453).

Despite decades of judicial statements on the importance of the presumption of innocence, the evidence suggests that the presumption has been eroded by the use of reverse onus provisions and confusion arising as to how to interpret these provisions. The thesis provides a strong argument in favour of an incoherent approach by the courts to the interpretation of reverse onus provisions and confusion amongst judges, lawyers and academics as to their impact on the presumption. The analysis in this thesis shows that the manner in which the courts have interacted with reverse onus provisions has evolved over three stages. Notwithstanding the general guidance laid down in stage 3 by the Supreme Court judgment in *Forsey*, there remains a lack of clarity as to how reverse onus provisions should be interpreted. The indications from the post-*Forsey* cases arguably show how the interpretation of reverse onus provisions risks eroding the presumption of innocence. This was illustrated where the High Court found a reverse legal burden to be constitutional[2080] and where the Court of Appeal found that a reverse legal burden may be applied in relation to a specified element of an offence.[2081]

Case law clearly confirms that a reverse legal burden of proof on a non-core/non-essential element of a true criminal offence is permitted. It has been strongly argued that this is problematic for the presumption of innocence as an accused will be required to prove their innocence on the balance of probabilities and they are at risk of conviction where a doubt exists.[2082] The thesis argues that this extinguishes the 'very essence'[2083] of the right to be presumed innocent. The lack of clarity as to what is a core/essential element is also shown to be problematic which may only be determined on a case by case basis. This presents a difficulty for judges in terms of interpretation and a risk of confusion, particularly in borderline cases.

It has been strongly argued that evidential burdens are considered by the courts to be consistent with the presumption of innocence because they only impose a legal requirement or obligation to prove/show/adduce evidence sufficient to create a doubt about the correctness of the presumption or to point to an innocent explanation. Nonetheless, the thesis has shown that an accused is required to actively participate

[2080] *O'Byrne & Neville v DPP* (n 21), [49], [78] per Ní Raifeartaigh J.
[2081] *DPP v Galvin* (n 21), [31] per Collins J.
[2082] For further discussion see Stumer A (n 46), 15, 16.
[2083] *Heaney and McGuinness v Ireland* (n 611), [48].

at trial to establish a reasonable doubt in order to avoid conviction even though the presumption of innocence requires the prosecution to prove its case without the assistance of the accused.

The thesis has strongly argued that the right to silence is an extension of the presumption of innocence which requires the State to respect individuals, thereby requiring the State to discharge its burden of proof without assistance from the accused. There has been much judicial discussion around the constitutional location of the right to silence at the pre-trial and trial stages. The thesis argues that locating the right to silence within the ambit of Article 38.1 as extended to the pre-trial interview setting is favoured, as distinct from locating it in Article 40.6.1 freedom of expression as was found in a number of cases. Interference with freedom of expression is subject to the proportionality principle and therefore potentially weakens the protection afforded to the right to silence if the right is located within the freedom. While locating the right to silence within Article 38.1 may be more restrictive in terms of its reach, it would nevertheless be triggered when a person is a suspect and for all other persons where there is a risk of self-incrimination.

The thesis also provides a strong argument that there is a significant threat of erosion of the presumption caused by the voluntariness test in the context of statutorily compelled answers. Discretion is vested in the courts to consider the admissibility in evidence of statutorily compelled answers on a case by case basis as there is no automatic exclusion of compelled answers obtained on pain of punishment. It has been suggested that there is a continued reluctance by the Irish courts to be influenced by the European Court of Human Rights in *Heaney* for a legislative exclusion of compelled answers. It will be recalled that the European Court of Human Rights case in *Heaney* found that a statement obtained on pain of punishment destroys the very essence of the right to silence and the presumption of innocence and should not be admitted in evidence. This thesis argues that a legislative exclusion of compelled answers would remove discretion from the courts on the admissibility of such answers and would provide for their automatic exclusion. The European Court of Human Rights approach offers greater protection for the presumption of innocence than the constitutional approach notwithstanding that the presumption of innocence has consistently been described as a bedrock

constitutional principle. The thesis therefore identifies evidence which suggests that there has been a continued failure to meaningfully deal with safeguards to reduce the degree of compulsion that extinguishes the right to silence and presumption of innocence in Irish law both by the courts and the legislature.

This thesis provides a strong argument in favour of the impact of the adverse inferences provisions, namely 'failure to account' and 'failure to mention' provisions on the presumption of innocence. It has been shown that despite the limited nature of the 'failure to account' provisions (Sections 18 and 19); the use in evidence at trial of silence obtained at the pre-trial questioning stage continues to significantly erode the right to silence and the presumption of innocence. They effectively impose a de facto reallocation of the burden of proof on an accused contrary to the requirement of the presumption of innocence that the burden of proof remains on the prosecution at all times. It has been strongly argued that the Supreme Court in *DPP v A McD*[2084] has shifted to the position that the right to silence at the pre-trial setting is now protected by Article 38.1, particularly so when an adverse inference provision is invoked. Nonetheless, it has been shown that the presumption of innocence and the right to silence are treated less favourably when exercised at the pre-trial questioning stage than at trial, even though these rights are protected by Article 38.1 in both settings. In relation to the 'failure to mention' provision (Section 19A); the thesis provides a strong argument that it further erodes the presumption of innocence and the right to silence in respect of ordinary criminal offences which is compounded by the lack of a standard caution. The theoretical framework of this thesis, regarding the impact of using silence as evidence, is supported by the approach taken in the European Union Directive on the presumption of innocence which effectively prohibits the use of silence against a person or as corroborative evidence. This thesis provides a strong argument that the failure of Ireland to opt-in to the EU Directive represents another example of the ongoing erosion of the presumption of innocence in Irish law. The case analysis in this thesis suggests that the public interest in the protection of the State interests and the common good to investigate crime or protect public peace and order are preferred over due process rights which are pursued in legislation and permitted by the courts aided by the presumption of constitutionality.

[2084] *DPP v A McD* (n 32), [79] per McKechnie J.

Notwithstanding the fact that the presumption of innocence has been described as a cardinal, fundamental and bedrock principle, this thesis provides an analysis of the administration of justice to explain the broader context in which the erosion of the presumption of innocence has occurred. Chapter 7 has shown that the approach of the courts has shifted from being almost exclusively focused on the right to a fair trial to considering a whole range of other interests, many of which compete with the rights of the accused. This broader criminal justice development has had significant implications for the presumption of innocence. While acknowledging the position that the courts do not subject people to unfair trials, the erosion of the presumption of innocence cannot be discussed without reflecting on the changed attitude of the courts to the administration of justice and right to a fair trial more generally.

In conclusion, the thesis provides a strong argument that the presumption of innocence continues to suffer a significant threat of erosion by the continued use of investigative and prosecutorial aids such as, reverse onus provisions, provisions which criminalise silence and those that provide for the drawing of adverse inferences from silence during pre trial questioning. In terms of the overall status of the presumption now, there is a significant gap between judicial rhetoric about its importance and the reality of how it is treated by the courts and the legislature. It is apparent that the erosion of the presumption of innocence will continue to the point that the presumption is meaningless. However, there are two measures which suggest that there is hope that some of recovery from the ongoing erosion of the presumption is achievable. The first being that of giving meaningful effect to the finding by Edwards J in *Minister for Justice & Equality v Nolan*[2085], that the presumption of innocence 'is in itself a higher legal principle of universal application',[2086] and that it 'is much more than a mere procedural trial right. It is recognised in the vast majority of the world's legal systems as being a fundamental principle of the justice to which every person is entitled as an aspect of their humanity'.[2087] This suggests that it is a superior substantive right in itself and not

[2085] *Minister for Justice & Equality v Nolan* (n 287), [132]. See also *Minister for Justice and Equality v Marjasz* (n 578), [144]; *Minister for Justice and Equality v Jason Patrick Buckley* (n 552), [103], [104]. Note that O'Donnell J in *Minister for Justice v Balmer* (n 436) states that the distinction between the rights guaranteed in Article 38 (limited to Ireland) and rights guaranteed as personal rights is a superficial distinction.
[2086] *Minister for Justice & Equality v Nolan* (n 287), [124].
[2087] Ibid, [125].

merely a procedural trial right which cannot be diluted when administering justice. The second measure is to op-in to the EU Directive on the presumption of innocence which protects the presumption by prohibiting the use do silence against an accused or its use as corroborative evidence.

Appendix A

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