

Human Rights Protections in Drawing Inferences from Criminal Suspects' Silence

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ABSTRACT

This article sheds comparative and contextual light on European and international human rights debates around the privilege against self-incrimination and the right to silence. It does so through an examination of adverse inferences from criminal suspect's silence in three European jurisdictions with differing procedural traditions: Ireland, Italy and the Netherlands. The article highlights the manner in which adverse inferences have come to be drawn at trial in the three jurisdictions, despite the existence of both European and domestic legal protections for the right to silence. It also explores differing approaches to the practical operation of inference-drawing procedures, including threshold requirements, varying evidential uses of silence and procedural safeguards. The authors argue that human rights' standard-setting institutions ought to provide clarity on the conditions under which adverse inferences may be tolerated, including the purpose(s) for which inferences may be used, and the necessary surrounding safeguards.

KEYWORDS: right to silence, privilege against self-incrimination, adverse inferences, procedural rights, Article 6 European Convention on Human Rights, EU Directive on the Presumption of Innocence

1. INTRODUCTION

The privilege against self-incrimination and the related right to remain silent are recognised across many jurisdictions, international conventions and the jurisprudence of both national and international courts as important guarantees of fair criminal proceedings. Although the right to silence is firmly embedded in the criminal procedural laws of

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European states, its scope and rationales are often debated. A prominent point of controversy around the right to remain silent is whether and to what extent reliance on this right can result in negative consequences for the suspect¹ within criminal proceedings, namely whether and under which conditions 'adverse inferences' may be drawn from the suspect's silence. We understand 'adverse inferences' as conclusions, negative for the suspect, drawn from their silence or failure to provide certain information in the course of criminal proceedings, which can impact upon the determination of criminal responsibility or the assessment of evidence.²

The question of whether and under which conditions criminal courts should be authorised to draw adverse inferences from the suspect's silence remains far from settled in European human rights law. This became evident in particular during the negotiations of the EU Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings ('EU Directive on the Presumption of Innocence'),³ which contains provisions on the right to remain silent.⁴ Mirroring the debates in European (human rights) law, the question of whether and to what extent adverse inferences from silence may be tolerated as a legitimate limitation on the right to remain silent sparks controversy in many national legal systems in Europe and beyond. Some common law legal systems, including England and Wales, Singapore and parts of Australia, expressly allow inferences to be drawn subject to safeguards or limitations,⁵ while other legal systems (common law, civil law and mixed) such as the United States, Germany and Scotland expressly prohibit the drawing of adverse inferences from a suspect's silence, although often subject to exceptions.⁶

In this article, we argue that the question to be posed by European human rights' standard-setting institutions is not whether adverse inferences from the suspect's silence in criminal proceedings should or should not be authorised. Rather, further development of the doctrine of adverse inferences lies in the refinement of the conditions under which such inferences may be tolerated, including the purpose(s) for which inferences may be used, and the surrounding safeguards. We base our argument on a detailed contextual analysis of the regime of drawing adverse inferences from

- 1 For consistency, we use the term 'suspect' throughout this article to refer to all persons suspected or accused of a criminal offence, who are subject to a criminal investigation or (called to) defend against an accusation in a criminal trial. 'Suspect' is used also where national law refers to 'defendant' or 'accused' at the specific stages of the proceedings.
- 2 We are not considering within this article any issue around failure to submit to provide bodily samples, but rather a failure to respond to police questions or provide information to the court of trial. It is also beyond the scope of this article to consider any impact that silence might have on charging decisions, applications for pre-trial release, or sentencing decisions post-conviction.
- 3 Directive (EU) 2016/313 of the European Parliament and of the Council of 6 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, OJ L 65, 11.3.2016 at 1–11.
- 4 See below at Section 2.
- 5 Daly, 'The Right to Silence: Inferences and interference' (2014) 47 *Australian & New Zealand Journal of Criminology* 59; Khee-Jin Tan, 'Adverse Inferences and the Right to Silence: Re-examining the Singapore Experience' (1997) *Criminal Law Review* 478.
- 6 Maclin, 'The Right to Silence v. the Fifth Amendment' (2016) *University of Chicago Legal Forum* 7; Glover, 'Proceed with Caution (s): A Critique of the Carloway Review's Rejection of Statutory Adverse Inference Provisions in Scottish Criminal Law' (2013) 4 *Aberdeen Student Law Review* 1; Bohlander, *Principles of German Criminal Procedure* (2012) at 173–5.

a suspect's silence in three EU legal systems: Ireland, the Netherlands and Italy.⁷ The chosen jurisdictions represent different legal procedural traditions: Ireland is a common law jurisdiction with an accusatorial criminal process; the Netherlands has a civil law system with an inquisitorial criminal process and Italy operates a civil law system with a hybrid—mainly accusatorial—criminal process.⁸

We begin by narrating the debate around adverse inferences from the suspect's silence from the historical and human rights' perspectives, with particular focus on European developments. Next, we examine the general provisions on the right to silence and adverse inferences from silence as they are interpreted and applied in legal practice within the three specified jurisdictions. We then discuss the use of adverse inferences and any attendant safeguards, and the evidential purpose to which they are put, focusing in particular on their actual practical purposes (as opposed to their characterisation in domestic law). In the concluding section, we reflect on the further development of the doctrine of adverse inferences from the suspect's silence in European and national legal systems.

2. THE DEBATE AROUND ADVERSE INFERENCE AND THE NEED FOR A CONTEXTUAL APPROACH

The issue of drawing adverse inferences from the suspect's silence in criminal proceedings creates obvious tensions from a human rights perspective. It is argued, on one hand, that allowing courts to draw negative inferences from silence penalises the use of the right and amounts to compulsion to speak.⁹ This is said to deprive the right to remain silent of any meaning.¹⁰ The opposite view is that inferences exert only a minimal or no pressure on suspects to speak.¹¹ Suspects must accept that remaining silent carries a higher risk of not being believed. This is derived from the 'common-sense' argument against the right to silence attributed to Bentham: 'Innocence claims the right of speaking, and guilt invokes the privilege to silence.'¹² In this sense, the restrictions placed by inferences on the right to silence are (only) indirect and not comparable to

7 These systems are central to a wider research project on the right to silence, funded by the European Commission, carried out by the authors and colleagues at Maastricht University, Antwerp University, Dublin City University and KU Leuven—'EmpRiSe: Right to Silence and Related Rights in Pre-Trial Suspects Interrogations in the EU: Legal and Empirical Study and Promoting Best Practice'.

8 Although Italy traditionally belongs to the group of civil law systems, having imported the French codes, it has moved to an adversarial system of criminal procedure with the 1988 Code of Criminal Procedure (Codice di Procedura Penale, Decree of the President of the Republic No 447, 22 September 1988).

9 See *Griffin v California*, 380 US 609 (1965); *John Murray v United Kingdom* Application No 18731/91, Merits and Just Satisfaction, 8 February 1996 at paras 41–42.

10 Maloney, 'The Criminal Evidence (N.I) Order 1988: A Radical Departure from the Common Law Right to Silence in the U.K.?' (1993) 16 *British Columbia International and Comparative Law Review* 425; O'Reilly, 'England Limits the Right to Silence and Moves towards an Inquisitorial System of Justice' (1994) 85 *Journal of Criminal Law and Criminology* 402; Patanè, 'Il Diritto al Silenzio dell'Imputato' (2006) at 214, 217–8.

11 Ingraham, 'The Right of Silence, the Presumption of Innocence, the Burden of Proof, and a Modest Proposal: A Reply to O'Reilly' (1996) 86 *The Journal of Criminal Law and Criminology* at 559; Bellin, 'Reconceptualizing the Fifth Amendment Prohibition of Adverse Comment on Criminal Defendants' Trial Silence' (2010) 71 *Ohio State Law Journal* 229.

12 Quoted in Greer, 'The Right to Silence: A Review of the Current Debate' (1990) 53 *Modern Law Review* 709 at 719.

other acts that directly violate the right to silence—for instance, compelling suspects to testify under the threat of immediate sanction.¹³

The inherent tension of adverse inferences with the rights of the suspect sparks considerable controversy around the issue in European and domestic law. To comparative lawyers, the concept of adverse inferences from the suspect's silence is mostly known from the law of England and Wales, and Northern Ireland, 'popularised' in a string of European Court of Human Rights (ECtHR) judgments on the topic, beginning with the case of *Murray v the United Kingdom*. In *Murray*, the ECtHR was called to examine whether the regime of drawing adverse inferences from the suspect's silence under the Criminal Evidence (Northern Ireland) Order 1988 was compatible with Article 6 of the European Convention on Human Rights. The ECtHR ruled that it would be incompatible with the right to silence if a conviction was based solely or mainly on the suspect's failure to answer police questions. However, it accepted that inferences can be drawn 'in situations which clearly call for an explanation' and they may be used to consider the persuasiveness of the prosecution evidence, provided that a number of safeguards are met. These were, namely: whether or not the suspect was informed about the consequences of remaining silent; whether they understood the caution; whether or not the suspect had access to legal advice and whether the inference was drawn fairly and reasonably by the court. Thus, under ECtHR case law, negative evidentiary inferences from silence are tolerated, as long as they are accompanied by safeguards,¹⁴ and only relied upon where a prima facie case has already been established independently of the inferences.¹⁵ Despite criticism,¹⁶ the Court has been consistent in applying this approach.

Although the issue seemed to have been settled in the ECtHR case law, the debate on adverse inferences from silence was recently re-opened during the negotiations of the right to silence provisions of the EU Directive on the Presumption of Innocence. The Directive represents one of a series of EU legislative instruments aimed at the harmonisation of domestic criminal procedural laws of member states in order to facilitate judicial cooperation in criminal matters.¹⁷ The European Commission and the European Parliament argued that the right to silence in criminal proceedings should be recognised as absolute and that drawing any sort of adverse inferences from suspects' silence should be prohibited by the Directive. The European Council and some

13 See the reasoning of the ECtHR in *John Murray* supra n 9 at para 49: 'The facts of the present case accordingly fall to be distinguished from those in *Funke* . . . where criminal proceedings were brought against the applicant by the customs authorities in an attempt to compel him to provide evidence of offences he had allegedly committed. Such a degree of compulsion in that case was found by the Court to be incompatible with Article 6 since, in effect, it destroyed the very essence of the privilege against self-incrimination', citing *Funke v France* Application No 10828/84, Merits and Just Satisfaction, 25 February 1993.

14 *John Murray* supra n 9; *Condon v United Kingdom* Application No 35718/97, Merits and Just Satisfaction, 2 May 2000.

15 *Telfner v Austria* Application No 33501/96, Merits and Just Satisfaction, 20 March 2011.

16 See e.g. partly dissenting opinion of Judge Pettiti in *John Murray* supra n 9; Michael and Emmerson, 'Current Topic: The Right to Silence' (1995) 1 *European Human Rights Law Review* 4.

17 Article 82(2) Treaty on the Functioning of the European Union [2012] OJ C 326/01; Council of the European Union 'Resolution of the Council on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings' [2009] OJ C 295/01.

Member States, however, argued for a less 'radical' approach in line with the ECtHR case law.¹⁸

The resulting text of the Directive reflected a compromise, which can, confusingly, be interpreted in both ways, namely as banning the drawing of adverse inferences from silence, or as authorising them under certain conditions. Thus, Article 7(5) states that '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'. Recital 28, however, contains a caveat to this (seemingly) absolute prohibition, stating that while the silence of the suspect/accused person cannot in itself be considered incriminating evidence, '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'. The Recital seems to refer to systems, which operate the principle of free proof (see below), and it would, as argued by two Dutch authors, authorise relying on adverse inferences for purposes other than serving as direct evidence of guilt.¹⁹

While legislation introducing adverse inferences to the criminal process was first enacted in Singapore in 1976,²⁰ in Ireland in 1984²¹ and in Northern Ireland in 1988,²² the most well-known inference provisions are those introduced in England and Wales under the Criminal Justice and Public Order Act 1994 (CJPOA).²³ Interestingly, Quirk suggests that, given its foundational heritage in terms of the common law, what happens within the legal system of England and Wales is of 'disproportionate global significance'. She observes that the 'right of silence was exported from [that jurisdiction] to most of the common law world and the position taken by England and Wales on the right of silence has caused "tremors" across the common law world.'²⁴ The level of critical attention given to the inference-drawing provisions of England and Wales, not least within the jurisprudence of the ECtHR, has heightened the awareness of interference with the right to silence as an issue in common law countries.

Historically, the doctrine of adverse inferences was unknown in civil law systems. However, this does not signify that courts in these jurisdictions were prohibited, in practice, from drawing inferences from a party's failure to provide information

18 Cras and Erbežnik, 'The Directive on the Presumption of Innocence and the Right to be Present at Trial' (2016) 1 *Eu crim* 25 at 31–2.

19 Meijer and ter Haar, 'Zwijgrecht en Procesopstelling: het Toenemende Belang van het Uitblijven van een Aannemelijke Verklaring op de Bewijsbeslissing' (2018) 23 *Tijdschrift Praktijkwijzer Strafrecht* at 62. In a recent case, the Dutch Supreme Court concluded that the use of inferences from silence to 'corroborate' other evidence is not incompatible with the Directive: Supreme Court 29 January 2019, NJ 2019/310 met annotatie van N. Rozemond.

20 Criminal Procedure Code (Spore) sections 122(6) and 123(1), as inserted by the Criminal Procedure (Amendment) Act 1976 (Spore).

21 Criminal Justice Act 1984, sections 18 and 19.

22 Criminal Evidence (NI) Order 1988, sections 5 and 6.

23 The Singapore provisions permitting inferences from silence, and those in Northern Ireland and Irish legislation took inspiration from the recommendations of the 11th report of Criminal Law Revision Committee in 1972. England and Wales had to wait 22 years before these recommendations were enacted in the CJPOA.

24 Quirk, 'The Case for Restoring the Right to Silence' in Child and Duff (eds) *Criminal Law Reform Now: Proposals and Critique* (2018) 253 at 269. See also Quirk, *The Rise and Fall of the Right to Silence* (2016) Chapter 6.

or evidence.²⁵ Rules for assessing the probative value of evidence are scarce within civil law systems,²⁶ where the traditional approach is based on the principle of free proof.²⁷ The standard of proof in such systems is that of 'intime conviction' (or 'intimate certainty'), where judges are expected to form an intimate (personal) conviction concerning the case before them, based on their own assessment of the evidence in its entirety.²⁸ Such evidence is generally presented by way of written dossier, as compared with the oral tradition of witness evidence before lay juries in common law systems. Traditionally, civil law judges were not expected to explain how each piece of evidence served to meet parties' legal and evidentiary burdens. As a result, they were relatively free to take into account a party's failure to provide an explanation when forming their judgment and were not obliged to mention that certain inferences had been drawn.²⁹

With the introduction of adverse inference provisions to the criminal procedural laws of many common law countries, it might well be thought that the right to silence is better protected in civil law jurisdictions. However, as demonstrated further in this article, adverse consequences can flow from silence in both types of system.

A thorough contextual examination of the law and practice around adverse inferences from silence is necessary to advance the debate around their use in criminal proceedings. A comparative approach, representing major European procedural traditions, is warranted to inform the discussion on the right to silence and adverse inferences on the European level. Consequently, the following sections present a comparative analysis of the domestic provisions on the right to silence and adverse inferences from silence in Ireland, Italy and the Netherlands, as they operate in the legal practice of these jurisdictions, situated within their respective institutional and procedural contexts.

3. GENERAL PROVISIONS ON THE RIGHT TO SILENCE IN THE THREE JURISDICTIONS

In each of the three jurisdictions under examination in this article, the right to silence has been legally recognised within important, foundational sources of law. In Ireland, for example, the right to silence is a recognised constitutional right, though there has been some confusion as to its exact constitutional locus. While it is generally viewed as a corollary to the right to freedom of expression,³⁰ it also draws protection both in the pre-trial investigative period of police detention and at trial from the right to a fair trial.³¹ In Italy, the right to silence was formally recognised in 1969, when the obligation to inform suspects of this right was introduced in an amendment³² to the 1930 Code of Criminal

25 Van Kessel, 'European Perspectives on the Accused as a Source of Testimonial Evidence' (1998) 100 *West Virginia Law Review* 800 at 821–3; Damaska, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study' (1973) 121 *University of Pennsylvania Law Review* 506 at 527.

26 Damaska, *ibid.*

27 Bard, *Fairness in Criminal Proceedings: Article Six of the European Human Rights Convention in a Comparative Perspective* (2008) at 301–2.

28 Sorvatzioti and Manson, 'Burden of Proof and L'intime Conviction: Is the Continental Criminal Trial Moving to the Common Law?' (2018) 23 (1) *Canadian Criminal Law Review* 107.

29 Bard, *supra* n 27.

30 Article 40.6 of *Bunreacht na hÉireann*, the Irish Constitution of 1937.

31 Article 38.1.

32 Law No 932, 5 December 1969.

Law.³³ Additional indirect protection for the right to silence was later found within the 1947 Italian Constitution, which safeguards the right to defence as 'inviolable' in every phase and instance of criminal proceedings.³⁴ The right to defence is unanimously recognised as underpinning the right to silence.³⁵ In the Netherlands, the 1926 Code of Criminal Procedure ('CCP')³⁶—which is still in force—provided for the right to remain silent, against strong opposition claiming that such a right would interfere with truth-finding.

The rules which govern police interrogations add some detail to the practicality of the operation of the right to silence across all three jurisdictions. For example, the law in each state requires relevant interrogating authorities to caution a suspect, before the start of any interview or questioning, in relation to their right not to answer any question.³⁷ In each of the jurisdictions, the right to silence protects both full and partial silence—suspects can refuse to answer all questions posed by a public authority in the context of criminal proceedings or only some of them. A recent Irish case, for example, confirmed the practical reality that many suspects detained for questioning by the police can and do waver between answering some questions and not others, and no particular form of words is required to properly assert the right.³⁸ However, once a suspect makes a statement or inculpatory remark (implicitly or explicitly waiving their right to silence), this may form part of the evidence presented at trial.³⁹

In Ireland, outside of the specific operation of certain statutory inference provisions (set out below), if a suspect maintains silence throughout police interrogation, the jury at trial will be told nothing about the interrogation.⁴⁰ If certain questions were answered and silence maintained otherwise, the jury will only be told of the answers, not the silence.⁴¹

In Italy, any exercise of the right to silence by the suspect during pre-trial questioning must be recorded within the minutes.⁴² However, trial judges do not generally have access to those minutes. The duty is to record the exercise of the right stems from the need to document all the circumstances of the questioning and it is not intended as facilitating any reliance at trial on the pre-trial silence of the suspect.⁴³ The admission of a suspect's pre-trial statement at trial (by request of a party) and the use that the

33 Codice di Procedura Penale, Royal Decree No 1399 of 19 October 1930, Article 78. See further Grevi, *Nemo Tenetur se Detergere: Interrogatorio dell'Imputato e Diritto al Silenzio nel Processo Penale italiano* (1972) at 3.

34 Article 24(2).

35 In the case law, see, *inter alia*, Constitutional Court, Decision No 34, 4 April 1973; in the scholarship, see e.g. Mazza, *L'interrogatorio e l'Esame dell'Imputato nel suo Procedimento* (2004) at 46; Moscarini, 'Silenzio dell'Imputato (Diritto al)' in *Enciclopedia del diritto. Annali* (2010) at 1081.

36 Article 29.

37 Italian Code of Criminal Procedure 1988 ('CCP'), Article 64(3)(b); Article 29 CCP in the Netherlands; in Ireland this is set out in the Judges' Rules 1918, as laid down in *People (Attorney General) v Cummins* [1972] IR 31.

38 *DPP v M* [2018] IESC 21, [2018] 1 IR 810.

39 See, for example, the Dutch Supreme Court case of 9 December 1986, NJ 1987/541. This is governed in Ireland by the common law rules relating to confession evidence.

40 *DPP v Finnerty* [1999] 4 IR 364.

41 *People (DPP) v Brazil* [2002] 3 JIC 2211 (Unreported, Court of Criminal Appeal, 22nd March, 2002); *DPP v M* supra n 38; *DPP v SM* [2020] IECA 170, 24 June 2020.

42 CPP, Article 65(3).

43 Mazza supra n 35 at 160.

trial judge can make of that statement will depend on a number of factors, including, amongst others, the circumstances of the pre-trial questioning, the suspect's presence or absence at trial, and their willingness to be questioned at trial. In some cases, the statement can be used as evidence against the suspect, in others only to challenge the credibility of the suspect.⁴⁴

In the Netherlands, the distinction between the pre-trial and trial phases is not as clearly drawn, and judges at trial have unrestricted access to the entire dossier of evidence. Accordingly, they are aware of what questions were asked and answered, or not, during the police interrogation. The Dutch courts consider the totality of the evidence across the entire proceedings. Like many civil law jurisdictions, the Dutch criminal process was based on the principle of free evaluation of evidence (still codified in CCP),⁴⁵ although in reality it has been largely undermined by case law establishing limits on the judge's freedom to freely assess evidence.⁴⁶

In Italy, there are no legislative provisions prohibiting (or allowing) the judicial drawing of a negative inference from a suspect's exercise of the right to silence at the trial stage.⁴⁷ The Code simply provides that if the suspect refuses to answer a question, this must be recorded within the minutes.⁴⁸ While certain scholars have argued that it would be impermissible to draw negative inferences,⁴⁹ the majority of the scholarship believes that the trial judge can attach probative value to silence at the trial stage, once the suspect has agreed to be questioned.⁵⁰ In Ireland, the suspect is fully entitled to refuse to give evidence at their own trial. While a trial judge may point out to a jury that the suspect failed to give evidence in court, it must be made clear that there is no obligation to do so and the judge must specifically inform the jury that they ought to draw no adverse inferences from the exercise of the right to silence in such a manner at trial.⁵¹

As we shall now see, however, while each of the three jurisdictions subscribes to the notion of defence rights, the presumption of innocence, the privilege against self-incrimination and the right to remain silent, each has introduced, in one manner or another, procedural and evidential consequences for suspects who do rely upon the latter right.

4. ADVERSE INFERENCES FROM SILENCE

A close examination of the Irish, Dutch and Italian criminal justice systems reveals the different ways in which adverse inferences from silence can become a feature of criminal procedure: by statutory development or through case law; framed as permission to

44 Articles 503 and 513 CCP.

45 Article 338.

46 Dreissen, *Bewijsmotivering in Strafzaken (dissertation Maastricht)* (2007) at 358.

47 Bonzano, *L'interrogatorio Investigativo* (2012) at 160.

48 CPP, Article 206(2).

49 See among others Sottani, 'Silenzio (Diritto al)', in Gaito et al. (eds) *Digesto delle Discipline Penali*, (2013) at 8.

50 E.g. Cordero, *Procedura Penale* (2006) at 254; Grevi supra n 33 at 356–7; Bonzano supra n 47 at 170–1 and Moscarini supra n 35 at 1096. This view is, however, not unanimously shared. See Moscarini at 1096–7 for a summary of the debate.

51 See *DPP v Finnerty* [1999] 4 IR 364; *DPP v Coddington* unreported, Court of Criminal Appeal, 31 May 2001; Walsh, *Walsh on Criminal Procedure*, 2nd edn (2016) at 1408–9.

draw inferences with safeguards and limitations, or as a prohibition from doing so with exceptions.

As noted earlier, the right to silence was protected under the common law and exported to the colonies of the British empire. Ireland was one such colony, and it traditionally subscribed to the notion of protecting the right to silence as part of the common law. However, while less well-known than the English interferences with the right to silence under CJPOA, Irish efforts to interfere substantially with that right significantly predate that legislation.

As far back as 1931, an amendment to the Constitution of the Irish Free State provided that it was a criminal offence for an arrested person to refuse to answer particular questions put to them by police officers acting under certain powers.⁵² However, when a new Constitution was enacted in 1937, this provision was not carried over and the right to silence regained its traditional common law protection. Just 2 years later, with rising tensions in Northern Ireland and concerns around threats to the legitimacy of the state, a new legislative provision made it an offence, punishable by up to 6 months' imprisonment, for a suspect detained under certain circumstances to fail to account for their movements and actions during a specified period.⁵³ This was challenged before the ECtHR in the 1996 case of *Heaney and McGuinness v Ireland*, where the Court found a breach of the Article 6 right to a fair trial, as the impugned provision 'destroyed the very essence of [the suspects'] privilege against self-incrimination and their right to remain silent'.⁵⁴

Since then, there has been a discernible shift away from offences based on failure to provide information, and, instead, the Irish parliament (the *Oireachtas*) has created a slew of statutory inference-drawing provisions. These are more acceptable to the ECtHR⁵⁵ and their constitutionality has been upheld by the domestic courts. The location of the right to silence primarily within the constitutional protection of the right to freedom of expression has led to the domestic judicial acceptance of legislative restrictions thereon which are deemed necessary in order to serve the exigencies of public order and morality.⁵⁶ Having said that the judiciary maintains a high level of respect for the right to silence in general terms and has insisted that any interference therewith goes only as far as clearly required by the relevant statute.⁵⁷

Briefly stated, the legislative provisions apply, with varying thresholds, caveats and safeguards, in the following circumstances. In relation to all serious offences, an inference may be drawn at trial from a pre-trial failure to account for objects, substances or marks on the suspect,⁵⁸ or from the suspect's presence in a particular place,⁵⁹ or, more broadly, from a failure to mention any fact in the pre-trial process which is relied upon in defence at trial.⁶⁰ In the specific contexts of a charge of membership of an

52 Article 2A as inserted by the Constitution (Amendment No 17) Act 1931.

53 Section 52 of the Offences Against the State Act 1939.

54 Application No 34720/97, Merits and Just Satisfaction, 21 December 2000 at para 55.

55 See for example *John Murray* supra n 9.

56 See *Rock v Ireland* [1998] 2 ILRM 35.

57 See, for example *DPP v Wilson* [2017] IESC 53.

58 Criminal Justice Act 1984, section 18, as amended by the Criminal Justice Act 2007.

59 Criminal Justice Act 1984, section 19, as amended by the Criminal Justice Act 2007.

60 Criminal Justice Act 1984, section 19A, as inserted by the Criminal Justice Act 2007.

unlawful organisation (most often the Irish Republican Army—IRA)⁶¹ or a charge of participating in or contributing to any activity of a 'criminal organisation',⁶² an inference may be drawn at trial from the pre-trial failure of a suspect to 'answer a question material to the investigation of the offence'.

In the two other jurisdictions, there are no statutory provisions specifying the circumstances in which inferences might be drawn at trial from any failure on the part of the suspect to answer certain questions or provide certain information. The emergence of inference drawing in those jurisdictions has been more bottom-up than top-down, emerging through the case law of the courts.

In the Netherlands, the right to silence contained in the CCP has previously been described as absolute.⁶³ However, since the late 1990s, the 'absolute' nature of the right has been eroded by the case law of the Supreme Court, which has allowed for a suspect's silence (including at police interviews) to be taken into account when assessing the evidence against them. In a well-known dictum, the Dutch Supreme Court stated that a suspect's refusal to make a statement or to answer certain questions cannot in itself be considered 'evidence' of guilt.⁶⁴ For instance, it would be improper to cite as directly incriminating evidence parts of police interrogation records, where the suspect expressly invokes the right to silence.⁶⁵ At the same time, the Dutch Supreme Court held that judges may draw (negative) conclusions from a refusal to answer certain questions, partial explanations or similar behaviours, which may be interpreted as a deliberate attempt to mislead the court or to provide a false statement.⁶⁶ Besides, courts may take the suspect's silence into account when the latter does not give a 'reasonable' explanation with regard to the circumstances which, taken separately or in conjunction with other evidence, are incriminating for them.⁶⁷

The 1997 *Strippenkaart* judgment of the Dutch Supreme Court was the first case to mention the possibility of drawing adverse inferences from suspect's silence. In this case, the Court held that it was lawful for the lower court to mention in its reasoning that the suspect failed to provide any explanation as to why he had a bus ticket in his pocket, validated close to the time and the location where the alleged offence had been committed.⁶⁸ An inference from this failure to account was said to strengthen the prosecution case, although it was already strong enough to allow conviction. The suspect was identified by several eyewitnesses, which, in conjunction with the bus ticket

61 Offences Against the State (Amendment) Act 1998, section 2.

62 Criminal Justice Act 2006, section 72A, as inserted by Criminal Justice (Amendment) Act 2009, section 9: A criminal organisation is defined by section 70 of the Criminal Justice Act 2006, as amended by section 3 of the Criminal Justice (Amendment) Act 2009, as 'a structured group, however organised, that has as its main purpose or activity the commission or facilitation of a serious offence'.

63 See, e.g. an influential Dutch commentary: Corstens, *Het Nederlands Strafprocesrecht* (2018), 9th edn.

64 Supreme Court, 24 July 1972, *DD* 72.176. The same facts and rulings were dealt with by the Supreme Court in: Supreme Court, 27 June 1972, *NJ* 1972, 492. See also: Supreme Court, 12 March 1996, *NJ* 1996, 539; Supreme Court, 10 November 1998, *NJ* 1999, 139 and Supreme Court, 1 June 2004, *NJ* 2004, 366. See also: Reijntjes, *Strafrechtelijk Bewijs in Wet en Praktijk* (1980) at 167–70, 200–1; Knoops, *Het Decryptiebevel en het Nemo-Teneturbeginsel* (2012) at 56–60, 78–82; Bemelmans, *Totdat het Tegendeel is Bewezen* (2018) at 384–7.

65 Supreme Court, 5 June 2004, *NJ* 2004, 464.

66 Supreme Court, 12 November 1974, *NJ* 1975, 41.

67 Supreme Court, 3 June 1997, *NJ* 1997, 584.

68 Supreme Court, 3 June 1997, *NJ* 1997, 584 (known as: *Strippenkaart*).

found on him, rendered the case against him provable 'beyond a reasonable doubt' even without taking into account his silence.

In Italy, as in the Netherlands, the courts have been the site of the introduction of inferences drawn from a suspect's silence. The majority of Italian scholarship on the right to silence has stressed that any form of negative assessment or inference following the exercise of the right should be impermissible since it is viewed as an expression of the inviolable right to defence, safeguarded by the Constitution.⁶⁹ This view has been adopted also by a minority line of cases.⁷⁰ However, the majority of the case law has taken a less emphatic approach.

The most authoritative section of the Court of Cassation—the so-called *Sezioni Unite*—has held that trial judges can draw inferences from the general behaviour of the suspect during the proceedings.⁷¹ However, in so doing, they cannot reverse the burden of proof (which lies on the prosecutor) and cannot substantially undermine the exercise of the right to defence.⁷² Another section of the Court has more recently underlined that a suspect's behaviour during the proceedings must be assessed in conjunction with other evidence or relevant elements.⁷³ Although this particular line of cases did not refer to silence specifically, more generally across the case law, silence is considered to constitute relevant behaviour.⁷⁴ Accordingly, trial judges can draw negative consequences from the silence of the suspect, with certain limitations.

The principle of free interpretation of evidence is a recurring theme in the Italian case law concerning the right to silence.⁷⁵ Inferences from silence are justified by the need to avoid limiting the 'intime conviction' of the judge, which should allow the judge to assess the behaviour of suspects throughout the proceedings and, in particular, their silence in the face of evidence against them.⁷⁶ However, some scholars have found this reference unpersuasive because the principle cannot undermine the right to silence.⁷⁷ To put too much emphasis on the principle of free interpretation of evidence carries the risk of giving judges carte blanche on the drawing of negative inferences from silence that would undermine (or breach) the right itself and other related rights, such as the right to defence and the presumption of innocence. Considering the possible evidential significance to be attached to silence, the case law has been firm in drawing a distinction between the use of silence as evidence to prove the guilt of the suspect and other evidential uses. The first is impermissible: the silence of the suspect during pre-trial questioning (or the refusal to be questioned at trial) can never be used as an element

69 Patanè supra n 10 at 214, 217–8; Conso, Grevi and Bargis, *Compendio di Procedura Penale* (2014) at 110; Moscarini supra no 35 at 1093, who also refers to a substantial literature; Cordero supra n 50 at 254.

70 Cass., Sez. III, 19 January 2010, n. 9239, in *CED Cass.*, n. 246,233; Cass., Sez. V, 22 December 1998, Sica, in *CED Cass.*, n. 212,618.

71 Court of Cassation, sez. un., 21 October 1992, n. 1653, *Marino ed altri*.

72 *ibid.*

73 Court of Cassation, Section II, Decision No 16563 of 1 March 2017, in *CED Cass.*, 269507, Cazanave e altri.

74 Court of Cassation, Section II, Decision No 6348 of 28 February 2015, *Drago*; Sez. 2[^], n. 22651 del 21 April 2010, *Di Perna*.

75 Most recently, see Corte di Cassazione, Section No VI, Decision No 28008 of 19 June 2019.

76 E.g. Court of Cassation, Section VI, 9 February 1996, *Federici ed altro*; Court of Cassation, Section III, 1 March 1982, *Di Bitetto*, n. 5863

77 Nobili, *Il Principio del Libero Convincimento del Giudice* (1974) at 345.

of guilt against the suspect, as this would breach the rules on the burden of proof.⁷⁸ However, the case law has opened to the recognition of other evidential meanings (discussed below).

5. THRESHOLD REQUIREMENTS

Varying threshold requirements for the drawing of inferences seem to have been established across the three jurisdictions. The Dutch courts, for example, have followed the ECtHR insistence that a *prima facie* case should exist against the suspect before an inference from their exercise of the right to silence can be drawn.⁷⁹ An illustrative case from 2012 involved a suspicion of arson (setting fire to a shop), where there was no direct evidence placing the suspect, the shop owner's son, at the crime scene.⁸⁰ There were, however, several pieces of circumstantial evidence, including the fact that the suspect's hair was burnt, while the camera recordings of the perpetrator (which were not clear enough to identify him) showed that his head had caught fire; a witness stated that the perpetrator's hair resembled that of the suspect and the shop door had been opened with a remote control, suggesting the involvement of someone from the victim's family. The suspect remained silent throughout the proceedings. The district court drew an inference from the suspect's silence and convicted him. On appeal to the Supreme Court, it was held that the *prima facie* standard does not presuppose that the burden of proof should be fully met before allowing an inference to be taken into account. The fact that there were 'several pieces of incriminating evidence' against the suspect and that he failed to account for circumstances that clearly called for an explanation was deemed sufficient to validly draw an inference from silence.

In another case, the Court of Appeal held that an inference from the suspect's silence could not be drawn on the basis of circumstances which were 'remarkable' but did not clearly tie him to the commission of the offence. In such a case, the suspect could invoke his right to remain silent in full and the court could not draw anything of evidential value from his failure to make a statement.⁸¹

More recently, the Dutch Supreme Court has suggested that the evidentiary threshold for allowing inferences from a suspect's silence is lower than proof beyond a reasonable doubt.⁸² The Court defined this standard, citing relevant ECtHR case law,⁸³ as a *prima facie* case, which it interpreted as 'a circumstance, which by itself or in combination with other evidence calls for the conclusion that the suspect has committed the offence.'⁸⁴ Where the suspect fails to provide a reasonable explanation to raise doubt about this conclusion, the burden of proof is met. In other words, the

78 Court of Cassation, Section III, Decision No 43254 of 19 September 2019, C. (Unfortunately, this decision has not yet been made public, so further details are not given); Court of Cassation, Section VI, Decision No 8958 of 27 January 2015, *Scarpa*; Cass. Sez. 3[^], n. 9239 del 19 January 2010, B; Court of Cassation, Section VI, 9 February 1996, *Federici*; Court of Cassation, Section II, Decision No 6348 of 28 February 2015, *Drago*.

79 *Telfner*, supra n 15.

80 Supreme Court, 5 June 2012, ECLI:NL:HR:2012:BW7372.

81 Appellate Court of Amsterdam, case of 12 January 2011, ECLI:NL:GHAMS:2011:BP1003.

82 Supreme Court 5 July 2016, ECLI:NL:HR:2016:1381. In this case, involving a suspicion of burglary, the suspect's blood was found on the backdoor of the relevant house.

83 E.g. *John Murray*, supra n 9; *Krumpoltz v Austria* Application No 13201/05, Merits and Just Satisfaction, 18 March 2010; *Telfner*, supra n 15. See Meijer and ter Haar supra no 19.

84 Supreme Court, 5 June 2012, *NJ 2012/369*.

evidence must be such that, in combination with the suspect's failure to provide an explanation, the only reasonable or common sense conclusion is that the suspect is guilty. This suggests that an inference can be the 'tipping point' which tilts the scales from a position below the burden to proof, to reaching the burden of proof in the particular case.

The Irish legislative inference provisions have differing in-built threshold requirements. While each insists that a suspect should not be solely or mainly convicted on the basis of an inference from silence, along with other safeguards, the specific circumstances in which an inference might be drawn differs across the provisions. Some require only that, during pre-trial interrogation, when requested to do so, 'the accused failed or refused to give an account [of the specific matter covered by the provision], being an account which in the circumstances at the time clearly called for an explanation from him or her'.⁸⁵ The meaning of 'clearly called for' has not been defined with any clarity in Irish law. The broadest of the provisions, s 19A, has a double threshold, whereby an inference may be drawn only if (i) a specific omitted fact is relied on in defence at trial, and (ii) that fact 'clearly called for' explanation in the relevant pre-trial circumstances. The provisions allowing for an inference to be drawn from a failure to 'answer a question material to the investigation of the offence', in the context of the offence of membership of an unlawful organisation, or participating in or contributing to any activity of a criminal organisation do not specify that an answer to the particular question should be 'clearly called for' or that the failure to provide such an answer is specifically relevant in the context of the subsequent trial. On a literal reading at least, silence alone in the face of a question deemed to be 'material to the investigation' gives rise to the inference. Of course, in order to be compliant with the jurisprudence of the ECtHR, a prima facie case must be established in the evidence at trial before any inference can properly be drawn.

The ECtHR jurisprudence (specifically, *John Murray*) has been recently referred to also by the Italian Court of Cassation.⁸⁶ However, the reference was meant to support its decision to uphold a judgment which attached negative consequences to the suspect's silence throughout the proceedings and there was no specific reference to the threshold requirement of the prima facie case. The Court of Cassation has, however, addressed the appropriate threshold requirement in other cases. Most notably, it is argued that silence can be taken into account only together with probative accusatory elements with an unequivocal meaning (that admit a single explanation, that point in only one direction).⁸⁷ The threshold in Italy then seems to be higher than the prima facie case required by the ECtHR.

85 Sections 18 and 19 of the Criminal Justice Act 1984 as substituted by sections 28 and 29 of the Criminal Justice Act 2007. The sections require that the questioning garda should reasonably believe that the relevant object, substance, mark or presence in a particular place may be attributable to the suspect's participation in the commission of a relevant offence, and the garda should inform the suspect of this belief.

86 Court of Cassation, Section VI, Decision No 28008 of 19 June 2019, *Arena Giuseppe*, in *Ced. Cass.*, para 5; *Murray* is also cited in Sez. 6, n. 40347 del 02/07/2018, *Berlusconi*.

87 Court of Cassation, Section II, Decision No 6348 of 28 February 2015, *Drago*.

6. EVIDENTIAL PURPOSE: UNDERMINING THE CREDIBILITY OF A DEFENCE

One of the evidential purposes, which inferences from silence serve, is to undermine the credibility of defences or exculpatory information raised at trial. A court may infer from the suspect's pre-trial failure to mention a fact which is relevant to their defence at trial either that such defence is a recent construction, to suit the prosecution case, or that the defence is simply untrue and/or that the suspect is guilty.

Under Irish law, the defence must provide the prosecution with advance notice of any alibi on which they will seek to rely at trial.⁸⁸ Failure to do so will preclude the defence from introducing such evidence at trial, unless the trial judge gives leave. This generally plays out as part of the administrative preparation for trial, rather than as part of the police (garda) interviewing of a suspect. However, failure to mention an alibi defence which is later relied on at trial would also be covered by the terms of the broadest Irish inference-drawing provision, s 19A, as would any other failure to mention a fact relied on at trial which 'clearly called for an explanation' at the point of garda questioning.

In the Netherlands, there is no statutory rule obligating suspects to give notice of alibi or other defences; however, Dutch commentators note that when a suspect invokes a defence ground such as a justification or excuse, in practice, this implies that the suspect must provide details of the defence from the first interrogation. If, instead, the suspect invokes the right to silence, this is likely to make their defence in court unsuccessful.⁸⁹ Furthermore, when the suspect invokes the right to silence, the court will be more reluctant to accept a so-called *Meer en Vaart* defence.⁹⁰ This is a defence in which it is argued that the facts and circumstances used for a conviction also fit within an alternative (not highly improbable) scenario in which the suspect cannot be blamed for the offence.⁹¹ Clearly, invoking the right to silence at the early stages of the investigation undermines the credibility of a *Meer en Vaart* defence when it is presented at a later stage. Thus, in one case, the suspect's explanation that he was sleeping in the back of the car when the burglary was being committed, presented for the first time at the hearing, was considered to be 'unbelievable', and the conviction was upheld by the Dutch Supreme Court.⁹²

In addition, an alternative scenario may not be considered credible by the court if the suspect invokes his right to silence and refuses to answer any more questions

88 Criminal Justice Act 1984, section 20.

89 Jörg, 'Artikel 29 Sv- Aantekening 17.2' in Melai and Groenhuijsen (eds), *Tekst en Commentaar- Wetboek van Strafvordering* (2016).

90 The term 'Meer en Vaart defence' originates from the so-called 'Meer en Vaart-judgment' of the Supreme Court. 1 February 1972, ECLI:NL:HR:1972:AB3369. This case involved a traffic accident, where the suspect, accused of causing the collision, provided an alternative (innocent) explanation, which was plausible given the existing evidence.

91 Supreme Court, 1 February 1972, *NJ* 1974/450.

92 Supreme Court, 6 June 2017, ECLI:NL:HR:2017:1020.

after having invoked this defence,⁹³ or where they remain silent with regard to crucial elements of their own narrative.⁹⁴

In Italy, the adversarial principle and the presumption of innocence allow that where the defence wishes to provide exculpatory evidence, it may do so after the prosecution case has been presented. As a consequence, the suspect can, in principle, provide their own explanation of the facts, for the first time, after the prosecution has disclosed the probative elements on which it seeks to rely at trial.⁹⁵ While the Italian system has accepted (as outlined below) that a suspect's pre-trial silence in relation to potentially exculpatory facts may be considered a relevant matter in the overall context of proceedings, it is not altogether clear, at least considering the case law of the Court of Cassation, if a suspect's initial silence can be relied upon to undermine the later revelation of a defence.

7. OTHER EVIDENTIAL PURPOSES

Beyond their use as a means to undermine a defence raised for the first time at trial, it is somewhat difficult to unpick the case law across the three jurisdictions so as to be fully clear on the other evidential purposes of inferences from silence. At times, courts seem to use inferences as corroborating or supporting evidence, sometimes to assist the interpretation of other evidence, and, on other occasions, as validation of the prosecution case in the absence of a counter-narrative from the defence.

Under Irish legislation, the exact nature of the inferences which can be drawn has not been clarified. However, safeguards attaching to the operation of the provisions state that while an inference from pre-trial silence may act as corroboration (i.e. independent, supporting evidence), it cannot be the sole or main basis for a conviction. 'Corroboration' has a specific meaning at common law,⁹⁶ but the Irish courts have not required strict adherence to the traditional rules around 'corroboration' in the context of drawing inferences from silence. Rather, the courts have held that inferences are

deemed by statute to be capable of amounting to corroboration, so that in such cases where corroboration is required as a matter of law or practice, it is capable of being supplied by inferences being drawn pursuant to the relevant statutory provisions.⁹⁷

93 Supreme Court, 19 March 1996, ECLI:NL:HR:1996:ZD0413. However, the court must provide reasons as to why it does not consider an alternative scenario put forward by the suspect credible, unless the scenario is highly improbable. Supreme Court 16 March 2010, ECLI:NL:HR:2010:BK3359.

94 Likewise, if suspects keep changing their explanations, these explanations might be considered not credible as an attempt to align the statement with the existing evidence. Lettinga, 'Recht Doen aan de Alternatieve s-Scenario's' (2015) 94(1) *PROCES* 50 at 57–8.

95 See also Carboni, 'La valutazione probatoria del silenzio: critiche e prospettive' (2018) 5 *Processo Penale e Giustizia*, www.processopenaleeggiustizia.it/valutazione-probatoria-del-silenzio-critiche-e-prospettive [last accessed 18 January 2021].

96 In general terms, corroboration refers to an independent, credible item of evidence which tends to implicate the suspect in the crime. See the foundational case of *R v Baskerville* [1916] KB 658. See further *People (DPP) v Power* [2020] IESC 13.

97 *DPP v Donnelly* [2012] IECCA 78 at para 38, per O'Donnell J. See also McGillicuddy 'Restrictions on the Right to Silence under the Criminal Justice Act 2007—Part 2' (2008) 18 *Irish Criminal Law Journal* 112

In essence, this seems to simply allow for an inference from a suspect's silence during garda interview to be counted as additional evidence for the prosecution. Certainly, there are thresholds of varying natures to be satisfied and safeguards to be fulfilled under the legislation, but, essentially, the trier of fact is invited to view the silence as an item of evidence in and of itself, which gives additional weight to the prosecution. To give an example, in line with the relevant legislation, if a suspect is found to have a blood stain on their jacket in the context of an assault charge, the evidence of the blood stain, and any forensic analysis thereof, will be evidence in the case, as will the suspect's failure or refusal to give an explanation for the presence of the blood on the jacket. There are varying views as to whether or not it is fair to attach consequences for such a failure to account. Some would say that the evidence is strong, and therefore, the request for an account is reasonable and it would be expected that an innocent explanation could be provided, if one existed. Others would point to the presumption of innocence and the burden of proof and insist that the suspect should be under no compulsion to provide a defence.

Dutch courts are careful to stress that silence cannot be used to fill in gaps in a weak prosecution case, but it can strengthen the judge's conviction of the suspect's guilt.⁹⁸ However, they also allow other, more indirect, uses of inferences from silence—or rather, the absence of a credible and verifiable exculpatory explanation from the suspect—for evidential purposes in certain circumstances. In cases involving alleged 'co-perpetration', for example, the Dutch courts have allowed a suspect's silence, or failure to account, to effectively be used as indirect proof, where the prosecution case lacks concrete evidence of the suspect's role or other elements of the offence.

To prove 'co-perpetration' under Dutch law, it must be shown that the suspect engaged in a conscious, complete and close collaboration with others and made a sufficiently significant contribution to the principal offence.⁹⁹ However, sometimes, co-perpetration can be presumed, even if the prosecution does not supply concrete information about the suspect's role in the offence, provided that there is some evidence of their involvement. This construction is typically used in burglaries, where several people are found in the same car under suspicious circumstances close to the time and place of the offence, and where traces of the offence are found in the car. In such situations, all those found in the car are presumed to be co-perpetrators—which is considered the most logical explanation—unless they provide a 'believable' explanation as to why they only had a subordinate role, or were not involved in the offence at all.¹⁰⁰ Whether or not the suspect has given this explanation can be decisive in determining whether co-perpetration or the lesser participatory level of complicity is accepted as proven by the court.¹⁰¹ This is based on the premise that it is impossible for the authorities to establish exactly what the division of roles was without input from the

at 115; *People (DPP) v Binead and Donohue* [2007] 1 IR 374; *People (DPP) v Matthews* [2007] 2 IR 169; *People (DPP) v Birney and others* [2007] 1 IR 337.

98 See e.g. Appellate Court of Arnhem 18 September 2012, ECLI:NL:GHARN:2012:BX8202. See also the conclusion of Advocate-General Hofstee in the case of Supreme Court, 5 July 2012, ECLI:NL:PHR:2012:BW7372.

99 See also: Supreme Court, 2 December 2014, ECLI:NL:HR:2014:3474, NJ 2015/390.

100 Meijer and ter Haar supra n 19 at 56.

101 This was determined in the so-called 'July decisions', see Supreme Court, 5 July 2016: ECLI:NL:HR:2016:1403, ECLI:NL:HR:2016:1315, ECLI:NL:HR:2016:1316, ECLI:NL:HR:2016:

(co-)suspects. Invoking the right to silence in such situations would almost inevitably result in a conviction for co-perpetration.¹⁰²

In an illustrative case, involving a burglary of a dental surgery, a suspect was found to be a co-perpetrator due to his presence in a car (together with three other persons), which was stopped by police near the place where the burglary was committed and the occupants attempted to flee. A laptop from the burglary was found in the car. The suspect was convicted as a co-perpetrator, although there was no direct evidence of his contribution nor of the fact that the burglary was committed by several persons.¹⁰³ This kind of evidential construction offers a solution in cases where the concrete circumstances cannot be determined by the judge himself, but the most logical explanation is that the suspect was criminally involved in the offence. If the suspect fails to fill that gap and provide an explanation, the judge may rely on their prima facie judgment and consider co-perpetration to be proven.¹⁰⁴ In these, and other similar cases, a suspect's failure to provide a credible account is routinely mentioned in the evidentiary part of the judgment. The silence of the suspect, or the failure to provide a contradictory narrative, is taken as indirect proof of a more aggravated form of criminal participation.

The Dutch courts have also utilised a suspect's reliance on their right to remain silent as indirect proof in cases involving alleged money laundering or trading in stolen goods, where suspects were found in possession of goods or money of illegal or 'suspicious' origin. In such circumstances, a suspect may be presumed to be engaged in intentional trading of stolen goods or money laundering.¹⁰⁵ The only way to avoid conviction is to provide a credible explanation (which should not be too general)¹⁰⁶ to refute this presumption, and any silence or failure to give such an explanation is specifically mentioned in the court's evidentiary reasoning. Interestingly, the ECtHR has ruled (in

1318, ECLI:NL:HR:2016:1319, ECLI:NL:HR:2016:1321, ECLI:NL:HR:2016:1322 and ECLI:NL:HR:2016:1323.

102 Supreme Court, 18 February 2014, ECLI:NL:HR:2014:347 at paras 3.1–3.3.2.

103 Supreme Court, 28 November 2017, ECLI:NL:HR:2017:3022.

104 See for instance, the District Court of Limburg case where the suspect was convicted for co-perpetration of running a drugs lab. According to the court, the suspect should have given an explanation as to how his DNA could be found on gloves, lighter and a cigarette at the crime scene, and since he failed to do so, the court found co-perpetration proven, see District Court Limburg, 19 June 2018, case no 03/866021-16.

105 Supreme Court, 15 June 2004, ECLI:NL:HR:2004:AO963; Supreme Court, 14 June 2016, ECLI:NL:HR:2016:1197; Supreme Court 8 September 2015, ECLI:NL:HR:2015:2476; Supreme Court, 5 July 2016, ECLI:NL:HR:2016:1315; Supreme Court, 29 January 2019, NJ 2019/310 met annotatie van N. Rozemond. See also the conclusion of Advocate-General Hartelvelde in the case of Supreme Court, 11 July 2017, ECLI:NL:PHR:2017:635. Certain evidential presumptions are also allowable in relation to the offence of money laundering in Ireland, which requires that an individual knew or believed or was reckless as to whether or not relevant property was the proceeds of criminal conduct. In a money laundering trial, it can be presumed that the suspect had the required state of mind, where they engaged in certain conduct in relation to relevant property in circumstances where it is reasonable to conclude that they knew, believed or were reckless about the fact that the property was the proceeds of crime. The relevant conduct includes (a) concealing or disguising the true nature, source, location, disposition, movement or ownership of property, or any rights relating to property; (b) converting, transferring, handling, acquiring, possessing or using property and (c) removing property from, or bringing property into, the State or a place outside the State. See Criminal Justice (Money Laundering and Terrorist Financing) Act 2010, ss 7 and 11. Walsh has observed that the Irish legislature is increasingly resorting to provisions which shift legal or evidential burdens 'to overcome difficulties of proof'; Walsh, *supra* n 51 at para 22–09.

106 Supreme Court, 7 April 2015, ECLI:NL:HR:2015:888.

an inadmissibility decision and without providing detailed reasoning) that the use of such evidentiary constructions in money laundering cases does not amount to shifting the burden of proof on to the suspect or a breach of the presumption of innocence, and it does not interfere with the right to silence, as long as there is a 'convincing body of circumstantial evidence' implicating the suspect, as the inferences from failure to provide an explanation are only used to 'corroborate' this evidence.¹⁰⁷

The outlined line of judicial reasoning in the Dutch courts, whereby certain presumptions of fact are made and evidentiary weight is attached to the absence of an exculpatory explanation, emerged around 2015, and the body of such case law is steadily growing.¹⁰⁸ The reasoning has been criticised.¹⁰⁹ Of particular relevance is that in these situations, inferences from silence are used not simply to strengthen an already strong prosecution case, but, as it seems, to fill in gaps in the court's reasoning, or the body of proof.¹¹⁰ In the absence of a credible explanation from the suspect, the nature of certain crucial elements of the offence is presumed without requiring the prosecution to attach concrete proof. Arguably, here inferences from silence play a role similar to private litigation, namely to serve as indirect proof of allegations made by a party, where it is difficult for that party to prove them, because the relevant evidence is (deemed to be) controlled by the other party. An inference thus effectively penalises the party in control of the evidence for the failure to produce it. It is questionable, however, whether this use of inferences from the suspect's silence in criminal proceedings is compatible with underlying principles, namely the requirement that the burden of proof of all elements of the offence must be on the prosecution, and the presumption of innocence. In such situations, introducing a presumption of fact by statute would arguably be a more transparent solution.

While Italian law prohibits the use of silence as direct evidence to prove guilt, as in Ireland and the Netherlands, the use of such silence for other evidential purposes is widespread within the case law. Over the years, the different sections of the Court of Cassation have variously described the phenomenon. In a 1996 case, the Court of Cassation stated that a guilty verdict can legitimately be based on the appreciation of evidence with reference to which silence operates as a form of 'objective corroboration'.¹¹¹ The meaning of the term 'objective corroboration' is unclear. No definition or explanation is provided, either in the case law or in the Code.¹¹² Some scholarship has underlined its 'enigmatic' meaning.¹¹³ It remains unclear whether silence in such cases

107 *Zschüschen v Belgium* Application No 23572/07), Admissibility, 2 May 2017.

108 Meijer and ter Haar, *supra* n 19 at 56.

109 Crijns and Dubelaar, 'Erosion of the Right to Silence in Dutch Criminal Justice?' in Eidam, Lindemann and Ransiek (eds), *Interrogations, Confessions and Truth* (2020) 123 at 139–147.

110 See, e.g. conclusion of Advocate-General Hofstee (not followed) in case of 5 July 2016 ECLI:NL:HR:2016:1315 detailing which elements courts must justify, with evidence, to prove co-perpetration, and demonstrating that crucial elements of proof were missing in this and other similar cases upheld by the Supreme Court. See likewise, conclusions of Advocate-General Spronken (not followed) in cases of 8 September 2015, ECLI:NL:PHR:2015:1365 and of 29 January 2019, ECLI:NL:PHR:2018:1234.

111 Court of Cassation, Section VI, 9 February 1996, *Federici ed altro*.

112 The Code uses the term 'corroboration' only to refer to those elements that confirm the reliability of what the declarant has affirmed in case of complicity; this meaning is not applicable to this context. See Ubertaini, *Profili di Epistemologia Giudiziaria* (2015) at 170.

113 *Marafioti, Scelte Autodifensive dell'Indagato e Alternative al Silenzio* (2000) at 320.

is to be taken as increasing the probative weight of other evidence or whether, instead, it could corroborate other evidence which has the potential in itself to lead the court to consider the suspect guilty 'beyond any reasonable doubt'.

More recently, the Court has abandoned this vague wording and adopted a clearer stance on the issue. The silence of the suspect at the pre-trial stage has been considered an 'argomento di prova'—a means to interpret other, otherwise collected, evidence.¹¹⁴ As clarified by the Court of Cassation in a 2015 case, silence may be taken into account in a residual and complementary manner, and respecting the threshold requirement (together with probative accusatory elements which have an unequivocal meaning).¹¹⁵ The Court also underlined that the burden of proof cannot be reversed.¹¹⁶ In such cases, silence is not given an autonomous probative meaning, and some safeguards are provided for. Hence, the Court of Cassation seems to allow the drawing of a rather 'light' adverse inference from silence in these cases (as a residual and complementary tool to interpret other evidence).

Recent Italian case law has addressed the situation where a suspect refuses to provide exculpatory explanations or remains silent throughout the proceedings in relation to potentially inculpatory circumstances. In one such case, the judge of first instance had reconstructed the facts of an offence of aiding a dangerous individual to escape justice on the basis of the available evidence.¹¹⁷ The suspects had been seen entering an empty building—where the person was later found—with a voluminous plastic bag, allegedly containing supplies for the individual at large, turning off their phones before entering the building and afterwards switching them on when out.¹¹⁸ The Court stated that it was not possible to reconstruct the facts in a way that would exculpate the suspects, because the latter did not clarify the reasons behind the described behaviour, missing an opportunity to exculpate themselves.¹¹⁹

The Court of Cassation upheld the judgment—it considered it possible to assess silence, but always together with any other relevant element.¹²⁰ The Court of Cassation argued that although silence should initially be considered a 'neutral' element within proceedings, it can acquire a more significant relevance, in the context of other accusatory elements in the case.¹²¹ Hence, where the evidence points to the responsibility of the suspect, their failure throughout the proceedings to offer an explanation of the events would represent an implicit validation of the existing evidence. Another judgment also specifies that, in cases of this nature, a judge is not obliged to verify hypotheses that are alternative to the one advanced by the prosecution.¹²² The weight of the inference is thus rather heavy and seems to carry a sort of punitive meaning.

114 Court of Cassation, Section II, Decision No 6348 of 28 February 2015, *Drago*; Court of Cassation, Section III, Decision No 43254 of 19 September 2019, *C*.

115 Court of Cassation, Section II, Decision No 6348 of 28 February 2015, *Drago*.

116 *Ibid.*

117 *Arena supra n 86*.

118 *Ibid.*

119 *Ibid.*

120 *E.g. Di Perna supra n 74*; *Sez. 5*, Court of Cassation, Section V, Decision No 12182 of 14 February 2006, *Ferrara*.

121 *Berlusconi supra n 86*.

122 Court of Cassation, Section III, Decision No 30251 of 15 July 2011, *Allegra*.

Suspects are almost expected to provide counter-evidence, as challenging the evidence presented by the prosecution seems to be more of an obligation than a right.

Our comparative analysis demonstrates differences in how the examined jurisdictions approach the evidential value of adverse inferences from silence. In certain circumstances, Italian courts consider inferences to be of little value, arguing that they are only used to interpret other incriminating evidence, which is already strong. However, the weight of inferences seems to be more substantial when the suspect fails to provide exculpatory explanations in the face of potentially inculpatory evidence. Dutch courts appear to attach relatively significant value to inferences, expressly stating that an inference may 'tip the scales' in favour of a conviction, where the available evidence is insufficient to meet the evidentiary burden for a conviction. In Ireland, it is impossible to tell what weight juries give to inferences, but it is quite possible that an inference could play a significant role in the totality of the evidence in a given case, as the applicable standard is simply that an inference should not to be the sole or main grounds for a conviction. In the three-judge Special Criminal Court, an exceptional court in the Irish context which presides over cases of an related to paramilitary or organised crime, there have certainly been cases where inferences were relied on within the totality of the evidence in arriving at the ultimate outcome.¹²³ In general, however, it would appear that the actual value of inferences as an item of proof (at the trial stage) is significantly low, as compared with items of real evidence.¹²⁴ If the prosecution has a strong case against a suspect, an inference from silence is not likely to have decisive impact on the determination of guilt. If the prosecution case falls short of the standard of proof—beyond reasonable doubt or a 'formidable case'—should the fact that the suspect has said nothing tip the scales enough to reliably find against them?

8. PROCEDURAL SAFEGUARDS

The Irish statutory inference-drawing provisions come with a list of safeguards which reflect both Irish constitutional and ECtHR jurisprudence on the right to silence:

- An inference drawn at trial may not be the sole or main basis for a conviction, but it may serve as corroboration of any evidence in relation to which the failure is material;
- The suspect must be told in ordinary language that it may harm the credibility of their defence if they do not mention—when questioned, charged or informed that they may be prosecuted—something which they later rely on in court;

123 See, for example *DPP v Cumberton*, Special Criminal Court, 29 January 2018. Notably, judges of the Diplock courts in Northern Ireland were found to more commonly draw inferences to 'copper-fasten' a strong case than to bring a case up to the required standard of proof: see Jackson, Wolfe and Quinn, *Legislating Against Silence: The Northern Ireland Experience* (2000).

124 At the investigative stage, as suggested particularly in research from England and Wales, the (risk of the) use of inferences might act as a factor persuading suspects to provide an early explanation (including through the intermediary of legal advice) and therefore waive their right to silence. See, e.g. Quirk *supra* n 24; Pivaty, *Criminal Defence at Police Stations: A Comparative and Empirical Study* (2019) at 125–30. However, ascertaining whether they operate to this effect in other jurisdictions requires empirical research.

- The suspect must be afforded a reasonable opportunity to consult a solicitor prior to the relevant silence;¹²⁵
- The court or jury in deciding whether or not to draw inferences ought to consider when the account or fact concerned was first mentioned by the suspect;
- No inference shall be drawn in relation to a question asked in an interview unless either the interview was electronically recorded or the detained person consented otherwise in writing.

In order to facilitate the proper administration of these safeguards, current garda practice in Ireland is that separate and specific interviews are held during which the inference provisions are explained and particular, relevant questions are put to the suspect.¹²⁶ A suspect will often have been interviewed twice or three times before an inference interview is held. Generally, only a failure or refusal to answer questions during that specific interview will be used to ground an inference at trial.

The express provision of the above-outlined safeguards is one benefit of an overt, legislative approach to the drawing of inferences from silence in the criminal process. In Italy and the Netherlands, where the emergence of inferences from silence has occurred piecemeal through the judgments of the courts, the limitations and safeguards concerning inferences specifically are less clearly spelled out.

Having said that the Italian system does provide relatively strong protections for the right of access to a lawyer, which has always been tied by the ECtHR to the protection of the right to silence.¹²⁷ Italian law requires that prior to any questioning of a suspect, the relevant interrogating authority (either the police, the prosecutor or the judge) must verify that they have nominated a defence lawyer (if this is not the case, a public defender is appointed); the suspect's lawyer has the right to be present during the questioning and, in some cases, such presence is compulsory (for example, when the police takes the initiative to question the suspect).¹²⁸ Furthermore, any questioning must be documented through minutes¹²⁹ and must be audio-visually or audio recorded when the suspect is in detention and is questioned out of hearing.¹³⁰ In all other cases, the questioning can be audio-visually recorded when absolutely necessary.¹³¹

In the Netherlands, although the right of early access to a lawyer has been recently strengthened,¹³² courts do not seem to consider formal procedural guarantees as

125 On the right of access to legal advice in Ireland, see Conway and Daly, 'From Legal Advice to Legal Assistance: Recognising the Changing Role of the Solicitor in the Garda Station' (2019) *Irish Judicial Studies Journal* 103.

126 See Garda Code of Practice on Access to a Solicitor by Persons in Garda Custody, Section 7, available at: www.garda.ie/en/About-Us/Publications/Policy-Documents/Code-of-Practice-on-Access-to-a-Solicitor-by-Persons-in-Garda-Custody.pdf [last accessed 31 October 2020].

127 *John Murray*, supra n 9; *Beckles v United Kingdom* Application No 44652/98, Merits and Just Satisfaction, 8 October 2002; *Condrón*, supra n 14; *Salduz v Turkey* Application No 36391/02, Merits and Just Satisfaction, 27 November 2008.

128 CCP, Article 350(3).

129 CCP, Article 134.

130 CCP, Article 141 *bis*(1).

131 CCP, Article 134(4).

132 Namely, it was extended to the periods before and during first interrogations of the suspect by police. See, for an account of these developments in law and in practice, Pivaty, supra n 124, at 35–65.

separate and independent safeguards when drawing inferences from suspects' full or partial silence. This is mostly due to the fact that the (possibility of) drawing of adverse inferences is not considered independently by Dutch courts, but it is only one factor in the (often complex) decision on suspect's guilt, based on the 'holistic' assessment of the evidence. (Common law judges, in contrast, consider the issue of adverse inferences separately, as they must decide whether or not, and in with what warning, if any, it should be put to the jury.) The procedural circumstances in which statements were (or were not) given at the investigative stage are considered only insofar as they are deemed relevant to assessing the 'sincerity' of suspect's explanations given at later stages. For instance, a Dutch court might accept the argument that the suspect failed to tell the 'whole story' to the police because they were subjected to unlawful interrogative pressure.¹³³ Other procedural circumstances of suspects' interrogations, such as whether or not they had adequate access to legal assistance, or were informed about the accusation or evidence against them (among others), are unlikely to be considered relevant. Thus, Dutch courts do not appear to subject pre-trial silence to greater scrutiny or more stringent requirements for drawing adverse inferences, than silence at trial.¹³⁴ Dutch courts also seem suspicious of the suspect's reasons for remaining silent. For example, in a 2018 Supreme Court case, the suspect's desire not to implicate their sister and co-suspect was not considered valid to justify silence, because protecting a family member was not their only motive: the silence was also self-serving.¹³⁵ Invoking fear of reprisals, likewise, is unlikely to be considered a valid reason.¹³⁶ All in all, the Dutch approach to adverse inferences from suspect's silence reveals, on the one hand, great confidence in the ability of judges and prosecutors to establish material 'truth', and on the other hand, a great deal of mistrust of suspects who choose to remain silent. This appears consistent with the prevailing inquisitorial tradition.

Under the Irish legislative safeguards, a suspect must be told, in ordinary language, that a failure to provide certain information in the garda station can be later drawn to the attention of the jury (or Special Criminal Court). Accordingly, such person is in a position to consciously consider their options. By comparison, the 1997 Dutch case of *Strippenkaart* suggested that no warning of the potential adverse consequences needs to be given during police questioning, as the suspect should know as a matter of common sense that a failure to provide exculpatory evidence might have negative consequences at trial. In Italy, the law requires the questioning authority to caution the suspect, before the start of the questionings, of their right not to answer any question, although the proceedings will continue anyway.¹³⁷ The suspect needs also to be cautioned of their

133 In a similar way, the circumstances of interrogation may be considered relevant to assess the credibility of a confession. See van Toor and Lestrade, 'De Beoordeling van Betrouwbaarheidsverweren bij Ingetrokken Bekenende Verklaringen' (2020) 11 *Delikt en Delinkwent* 132 at 162.

134 See, in contrast, Royal Commission on Criminal Procedure, *Report* (1981) at para 4.64: 'The issues which arise in relation to silence at the court stage are different from those in connection with silence in the face of police questioning. The accused person is by then aware of the case against him; the prosecution will have had to make out a prima facie case against the accused; he will have had an opportunity to consider his defence and usually to consult a lawyer; the proceedings are open to public scrutiny and it is unlikely that anyone can take advantage of an accused who is unaware of his rights.'

135 Supreme Court 25 September 2018, *NJ 2018/437* met annotatie van W.H. Vellinga.

136 Court of East Brabant 5 October 2018, ECLI:NL:RBOBR:2018:4922.

137 CPP, Article 64(3)(b).

right to silence in writing by the police while executing a pre-trial detention order¹³⁸ and when they arrest the suspect in the act of committing certain crimes ('arresto') or stop them in execution of a prosecutorial order ('fermo').¹³⁹ The Code does not detail the consequences of exercising the right to silence. This has been identified as one of the sore points of the regulations concerning the right to silence.

While we have discussed, above, the threshold requirements for reliance on inferences from silence in coming to the ultimate conclusion in a criminal trial, the threshold requirement for a suspect response during police interrogation is less clear. At what point can it be said that a suspect ought to respond, in the pre-trial process, to the evidence which has been gathered at that stage? A detained suspect, and indeed perhaps even an experienced lawyer, might struggle to foresee how a prosecution might ultimately be constructed and how a subsequent trial might ultimately play out. Indeed, the issue as to what facts objectively call for revelation or explanation during the pre-trial stage of investigation is surely linked to the disclosure provided at the relevant time. If a suspect has not been confronted with all of the evidence in existence against them, are they to be expected to provide all sorts of facts to the police so as to avoid a potential future inference being drawn? This would likely be contrary to the presumption of innocence and would involve a significant shift in the burden of proof. Jackson has suggested that a threshold of evidence ought to be reached before a suspect in police detention should be invited to respond.¹⁴⁰ In Ireland, there has not as yet been a case which looked closely at the issue of disclosure prior to interview in the garda station and there is no legislation directly on this point.¹⁴¹

In the Netherlands, as explained above, pre-interview disclosure is not considered a relevant factor when deciding to draw an adverse inference from silence at the investigative stage. According to the established practice, suspects and their lawyers obtain access to the case file once the case is referred to court (for suspects at liberty), or shortly before first pre-trial detention hearing before the judge, if detention is envisaged. No disclosure is usually provided before initial police interrogations.¹⁴² On the contrary, failure to provide sufficient details to police (for example, concerning suspects' whereabouts or actions around the time of the offence); or changing these details at the later stages after suspects obtain access to the case file may contribute to the finding that the suspect's exculpatory account is not credible.¹⁴³ This is based on the premise that suspects who

138 CPP, Article 293(1)(d), as amended by the *decreto legislativo* No 101, 1 July 2014, which transposed the 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] OJ L 142/01.

139 CPP, Article 386(1)(d) and (1 bis).

140 Jackson, 'Re-Conceptualizing the Right to Silence as an Effective Fair Trial Standard' (2009) 58 *International and Comparative Law Quarterly* 835 at 853–854.

141 The Garda Code of Practice on Access to a Solicitor by Persons in Garda Custody does set out some procedural guidelines in relation to disclosure in advance of an adverse inference interview. See *supra* n 126 at section 7.3.

142 For a description of this practice, see Pivaty *supra* n 124 at 50–52.

143 See e.g. Appellate Court of the Hague, 23 July 2019, ECLI:NL:GHDHA:2019:1974; District Court of East Brabant, 5 October 2018, ECLI:NL:RBOBR:2018:4922.

speak later or change their statements aim to 'adjust' their version to the 'official' account of the events.¹⁴⁴

In Italy, full disclosure is not provided at the initial point of pre-trial questioning. After the administration of the necessary caution, the questioning authority notifies the suspect—in a clear and precise manner—of the provisional charges, the evidentiary elements against them and, where this does not undermine the investigation, the sources of evidence.¹⁴⁵ Even this 'partial' disclosure, however, is not required when the police take the autonomous decision to interview the suspect ('*assunzione di sommarie informazioni*', meaning 'collection of brief statements').¹⁴⁶ Later on, at the end of the pre-trial investigation, a suspect can make a request to be questioned by the prosecutor, and the prosecutor is obliged to invite the suspect to an interrogation.¹⁴⁷ In this case, the suspect and the defence lawyer have—for the first time—access to all the documents concerning the activities carried out by the prosecutor during the investigation.

9. CONCLUDING OBSERVATIONS

International human rights are 'practical and effective'¹⁴⁸ when they operate according to their nature and purpose in domestic legal contexts. The above examination of the practical application of adverse inference provisions and the right to silence in criminal proceedings in Ireland, the Netherlands and Italy has led to a number of interesting revelations. First, while two of the examined jurisdictions (Netherlands and Italy) prohibit the use of adverse inferences from silence in criminal proceedings as a general rule, all three jurisdictions have introduced evidential consequences for suspects who remain fully or partially silent. In Ireland, such consequences have been introduced by way of legislation, whereas their emergence in the Netherlands and Italy has been through the decisions of the courts. One observation which might be made from this is that even in jurisdictions which appear not to have inference-drawing provisions, inferences from silence might yet be a matter of practice. It is likely, drawing particularly from the Irish and English experience, that their use will grow rather than decrease in the future. Particularly in civil law jurisdictions, such as the Netherlands, adverse inferences might increasingly surface in court decisions due to erosion of the free proof principle.¹⁴⁹

Given that the momentum, both on the European level and domestically, is towards tolerating adverse inferences from silence rather than entirely banning them, we argue that appropriate limits, in the form of safeguards, should be placed on their use. This follows in particular from the requirement of transparency and foreseeability of law, including clarity on the limitations imposed by the legal system on individual rights.

A central safeguard with regard to drawing adverse inferences according to both ECtHR case law and domestic laws is the so-called evidentiary threshold. Our anal-

144 This reasoning is regularly invoked in case law when discussing credibility of suspects' statements. For numerous examples, see Lettinga *supra* n 94. See also van Toor and Lestrade *supra* n 133 at 155.

145 CCP, Article 65(1). If this notification is omitted or insufficient, the 'interrogatorio' is invalid (Article 178(1)(c)).

146 CCP, Article 350(1)–(4).

147 CCP, Article 415 *bis*.

148 *Artico v Italy* Application no 6694/74, Merits and Just Satisfaction, 13 May 1980 at para 33.

149 Sorvatzioti and Manson, *supra* n 28.

ysis, however, reveals that it might be challenging to compose one legally meaningful definition of this threshold, which would resonate across all European jurisdictions. In each of the examined jurisdictions the decision as to whether or not the required threshold has been met to allowing the drawing of an inference from the suspect's silence requires an often nuanced case-by-case analysis. To define the 'tipping point', courts use formulations like 'a circumstance, which (clearly) calls for an explanation', 'the existence of a prima facie case' or 'no other reasonable explanation (than the one unfavourable to the suspect) is possible'. All these definitions reflect an idea that inferences should not be used to camouflage shortcomings or gaps in the prosecution evidence. On the European level, it might be suitable to provide general guidelines to this effect, along with procedural requirements of how the evidentiary threshold should be assessed.

Another potential safeguard around the use of adverse inferences is defining the purpose(s) for which inferences from silence can be used. The purposes for which the inferences are used is not discussed in any detail in the respective ECtHR case law or the EU Directive on the Presumption of Innocence. Our comparative analysis shows that inferences from silence, as they operate in practice, have differing evidential purposes, which are particularly difficult to discern. Across all three jurisdictions, we looked at the use of inferences to undermine the credibility of a defence, to interpret other evidence, as corroboration, and/or to be used as validation of the prosecution case. Often these purposes are not expressly stated in the law or case law, but they must be inferred from the courts' reasoning. Sometimes, there are inherent contradictions. In the Netherlands, for instance, although there is a general rule that silence ought not to be used to fill gaps in the evidence presented by the prosecution, in the context of co-perpetration, money laundering and aggravated trading of stolen goods cases at least, it seems that inferences from silence are being used to such effect. We therefore call for more reflection with regard to the legitimate purpose(s) of inferences from silence both on the European level and domestically, along with a requirement of transparency in respect of these purpose(s).

Thirdly, particular attention should be paid, on European and domestic levels, to procedural safeguards around the use of adverse inferences in criminal proceedings. These safeguards should stretch further than the assessment of whether the suspect invoked the right to remain silent due to unlawful interrogative pressure. These include, as a minimum, informing suspects about the (possible) downstream consequences of silence, sufficient disclosure of evidence before calling the suspect to account, and ensuring access to effective legal assistance.

An inference from silence ought not to be drawn where no evidence, or none of significant probative value, had been put to the suspect at that point.¹⁵⁰ Furthermore, effective legal advice for detained suspects, so that they can make fully informed decisions on their approach to questioning, in light of any adverse consequences which might later flow therefrom, should be considered as another associated safeguard. Coupled with this, we think it important that if inferences are becoming the norm in a jurisdiction, explicit warnings of that fact ought to be given to suspects at the relevant

150 See also Jackson, 'Responses to Salduz: Procedural Tradition, Change and the Need for Effective Defence' (2016) 79 *Modern Law Review* 987.

time. It cannot be presumed that an individual knows that adverse consequences might follow from their silence, especially where there is no overt legislative basis for that in their jurisdiction. Indeed, the notion of a right to remain silent is so prevalent in popular culture, tv and movies that the public presumption might well be to the opposite effect. Having said that it is important that such information is not provided in a threatening manner so as to elicit a response, which would undermine the voluntariness of any statement made thereafter. Procedural safeguards against inappropriate use of adverse inferences from suspect's silence are not merely 'formal' requirements, which distract fact-finders from establishing the 'truth'. They are meant to ensure that persons in contact with the justice system, and the public in general, have confidence that exercising their right to silence would not be unduly penalised or lead to unfair treatment.

Finally, in considering the effects of inferences from silence in the criminal process, it is important to pay attention to the procedural and institutional context of that process. As our analysis suggests, certain rules and practices, which are not immediately relevant or specific to the right to silence, might have a great practical effect on the operation of adverse inferences. These are, for instance, those related to the assessment of evidence, burden of proof, or the relationship between pre-trial and trial stages of the proceedings. One important example is the laws and practices related to whether and under which conditions the triers of fact (judges or juries) can obtain access to the suspect's pre-trial statements, including the information about whether or not the suspect remained silent, or partially silent. For instance, in the Netherlands, the right to silence might be more effectively protected by limiting the judges' access to this information, than by the existing ban on the use of silence as 'direct evidence of guilt'. It is also of relevance whether inferences are drawn by (professional) judges as part of the holistic assessment of evidence as in civil law countries or whether they are treated as a separate procedural issue, to which a distinct set of safeguards and rules applies (for instance, because a judge must make them explicit to a jury), as in common law countries. In the latter scenario, there is a greater chance that due attention would be paid to the procedural safeguards against inappropriate use of inferences.

The research presented in this article shows the value of cross-jurisdictional, contextual study, especially in a European context. All three jurisdictions are subject to the ECHR and are EU member states. While Ireland has not opted in to all of the same EU Directives on procedural rights of suspects as Italy and the Netherlands (e.g. Ireland has not opted into the Directive on Access to a Lawyer in Criminal Proceedings¹⁵¹ or the Directive on the Presumption of Innocence¹⁵²), its membership of the EU and its new position as the largest common law jurisdiction therein, means that even when it does not opt in to such measures, they have a soft influence on the Irish criminal justice system. Notwithstanding the fact that all three systems have subscribed to and been influenced by the European fair trial rights' frameworks, we observed important differences in their inference-drawing regimes, some of which may be attributed to the nature of their legal procedural system (common law or civil law; inquisitorial or adversarial). None of the three systems, however, *de facto* consider the right to silence

151 Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings [2013] OJ L294/1.

152 Directive 2016/343/EU on the strengthening of certain aspects of the presumption of innocence [2016] OJ L65/1.

as 'absolute'. This 'case study' thus demonstrates the potential limits of harmonising the right to remain silent on the European level. More specifically, we would argue that instead of trying to achieve 'stronger' formulations of the scope of the right to silence in the national laws of member states, further 'harmonisation' could be achieved through encouraging member states to provide greater transparency and foreseeability of the provisions on adverse inferences from silence, as well to introduce appropriate safeguards for their use.

This could be achieved in a number of different ways.¹⁵³ One possible option is the case law of the ECtHR, wherein, while considering the overall fairness of proceedings in appropriate Article 6 cases, attention could be paid to the procedural protections afforded to suspects (e.g. their knowledge and understanding of any potential adverse consequences of their pre-trial silence, the level of disclosure provided during the interrogational stage of the criminal process, along with access to legal assistance); the appropriate threshold in evidence at which an inference may be invoked; and the proper purpose to which evidence of pre-trial silence may be put. However, relying on the jurisprudence of the ECtHR is a rather passive method of achieving progress on this important procedural rights issue, which requires the right case to come along in order to give rise to the necessary arguments. The same applies to the alternative avenue of litigation on the issues before the Court of Justice of the European Union. An alternative, more assertive approach, would be for the European Commission to issue (non-binding) recommendations or guidelines to member states, pursuant to the Directive on the Presumption of Innocence, to clearly establish European-wide minimum standards on the actual operation and use of inferences drawn from silence and to require the clear implementation of procedural protections such as those outlined herein across member states. This ought not to be seen as an encouragement to introduce inferences where none currently exist, but to clarify their operation and related procedural protections where they do. Such an approach would shine a light on the issues highlighted throughout this article and would actively further the overall objective of the Procedural Roadmap Directives to establish minimum standards across member states so as to facilitate mutual trust.

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Yvonne Daly led the comparative analysis and undertook the analysis of the Irish jurisdiction, Anna Pivaty led the European law and human rights analysis and oversaw/contributed to the analysis of the Dutch jurisdiction, Diletta Marchesi undertook

153 See further the discussion of options for achieving change in relation to the right to access the case file or the materials of the case under Article 7 of Directive 2012/13/EU on the right to information in criminal proceedings in Pivaty and Soo 'Article 7 of the Directive 2012/13/EU on the Right to Information in Criminal Proceedings: A Missed Opportunity to Ensure Equality of Arms in Pre-Trial Proceedings?' (2019) 27 *European Journal of Crime, Criminal Law and Criminal Justice* 126–154. See also Tinsley 'Protecting Criminal Defence Rights through EU Law: Opportunities and Challenges' (2013) 4 *New Journal of European Criminal Law* 461–480.

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