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Emergency Rule, Normalcy Exception: The Erosion of the Right to Silence in the United Kingdom

K.A. Cavanaugh†

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Introduction

International Human Rights Law, as expressed in the relevant international human rights instruments, guarantees the right to fair trial. The United Kingdom's domestic law recognizes the right to fair trial. Indeed, two basic principles underpin English Criminal Law. First, an individual is innocent until proven guilty. Implicit in this principle is that the prosecution carries the burden of proof in establishing the guilt of the accused. Second, an individual has the right against self-incrimination. Together these rights and obligations underpin the right to a fair trial and are inextricably linked; the abrogation of one right is likely to impact the other.

This article will concern itself with the curtailment of the right to silence in the United Kingdom. While centering on the specific experience of the Emergency Regime in Northern Ireland, the issues raised in this article have wider application. The proliferation of anti-terrorism legislation in the wake of the events of September 11 raise serious concerns regarding compatibility of these extraordinary measures with domestic and international human rights obligations. As this article reveals, the 'emergency rule, normalcy exception' can shift, leaving a temporary permanence of the emergency.

The first section of this article defines the right to silence. Section I examines the relevancy of this right in relation to the basic principles of

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criminal law, and provides a brief look at the American experience.¹ Section II focuses on the specific case of Northern Ireland, where the 1988 Criminal Evidence (Northern Ireland) Order ("Order") permits a court to draw adverse inferences when an accused exercises his or her right to silence. This section will look at history and substance, and survey the case law interpreting the Order. Section III concerns itself with the right of silence and international law,² with specific focus on relevant case law from the European Court of Human Rights as well as the Human Rights Committee's findings.³ In the concluding section, the article argues that the Order undermines fair trial principles and violates several international human rights treaties to which the United Kingdom is a signatory.⁴

I. What is the Right to Silence?

Two primary elements constitute the right to silence. The first, and most basic, is that an individual should not be compelled, during pre-trial or trial, to answer questions put before him or her. Specifically, during police questioning in pre-trial investigations an accused may decline to answer some or all queries, or simply may remain silent when asked about specific pieces of information. During trial, an accused may choose to remain silent under questioning or may refuse to testify in his or her defense. The second component follows; the exercise of this right does not establish evidence against the defendant.⁵

An accused's right to remain silent flows from basic principles, which have underpinned the United Kingdom's system of criminal law.⁶ These

1. It is important to note that while current protection of right to silence under domestic U.S. legislation remains, anti-terrorism legislation in Canada, see Anti-Terrorism Act, ch. C-36, Part II, § 83.28(10) (2001) (Can.), and in Australia, see Security Legislation Amendment (Terrorism) Act, 2002, No. 65 (Austl.), removes this protection.

2. While this section is confined to an examination of the jurisprudence related to international human rights instruments, note that safeguards against compulsion, and the presumption of innocence, are also found under international humanitarian law. See generally Geneva Convention on the Treatment of Prisoners of War, Aug. 12, 1949, art. 99, para. 2, 75 U.N.T.S. 135, 210; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Dec. 7, 1978, art. 75, para. 4(d) and (f), 16 I.L.M. 1391, 1424; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Dec. 7, 1978, art. 6, para. 2(d) and (f), 16 I.L.M. 1442, 1445-46.

3. The Human Rights Committee is a body of experts charged with monitoring implementation of the International Covenant on Civil and Political Rights. See International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) [hereinafter ICCPR].

4. See, e.g., *id.*; Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

5. See *R v. Gilbert*, 66 CRIM. APP. R. 237, 244 (1977) ("It is our opinion now clearly established by the decisions of the Court of Appeal and the Court of Criminal Appeal that to invite a jury to form an adverse opinion against an accused on account of his exercise of his right to silence is a misdirection . . .").

6. These principles remain the foundation of the criminal law system in the United States, but were effectively abrogated in Northern Ireland, see Criminal Evidence (Northern Ireland) Order, 1988, (N. Ir. 20) [hereinafter CENI Order], and in England

principles include the presumption of innocence until proven guilty, with the burden of proof resting with the prosecution, and protection against self-incrimination. The Royal Commission on Criminal Procedure (“Commission”) addressed the link between the right to silence and these two principles in a 1981 report:

In the accusatorial system of trial the prosecution sets out its case first. It is not enough to say merely “I accuse.” The prosecution must prove that the defendant is guilty of a specific offence. If it appears that the prosecution has failed to prove an essential element of the offence, or if its evidence has been discredited in cross-examination, there is no case to answer and the defence does not respond. There is no need for it to do so. To require it to rebut unspecific and unsubstantiated allegations, to respond to a mere accusation, would reverse the onus of proof at trial, and would require the defendant to prove the negative, that he is not guilty. Accordingly, “it is the duty of the prosecution to prove the prisoner’s guilt,” which is, in Lord Sankey’s words, the “golden thread” running through English criminal justice.⁷

In addressing the accused’s right to silence as a protection against self-incrimination, the Commission stated:

The second element in the right of silence is that no one should be compelled to betray himself. It is not only that those extreme means of attempting to extort confessions, for example the rack and thumbscrew, which have sometimes disfigured the system of criminal justice in this country, are abhorrent to any civilised society, but that they and other less awful, though not necessarily less potent, means of applying pressure to an accused person to speak do not necessarily produce speech or the truth. This is reflected in the rule that statements by the accused to be admissible must have been made voluntarily. . . .⁸

When a state rescinds a defendant’s right to silence, these two essential principles—the presumption of innocence and the right against self-incrimination—are abrogated. If a state requires an accused to testify or draws negative inferences when the accused invokes the right to silence, the burden of proof (which international standards lie squarely with the prosecution to prove guilt beyond a reasonable doubt) is shifted from the prosecution to the defendant. The ability of the fact-finder to draw adverse inferences from an accused’s exercise of the right to silence lowers the prosecution’s burden of proof needed to establish guilt. Theoretically, the prosecution must still establish guilt beyond a reasonable doubt. However, in practice, the prosecution’s burden is made easier.⁹ The fact-finder can consider adverse inferences alongside evidence, which alone may establish

and Wales, see Criminal Justice and Public Order Act, 1994, ch. 33 (Eng.), §§ 34–39 [hereinafter CJP].

7. ROYAL COMMISSION ON CRIMINAL PROCEDURE REPORT, 1981, Cmnd. 8092, at 80, para. 4.35 [hereinafter ROYAL COMMISSION].

8. *Id.* at 80–81, para. 4.36.

9. See John D. Jackson, *Silence and Proof: Extending the Boundaries of Criminal Procedure in the United Kingdom*, 5 INT’L J. EVIDENCE & PROOF 145, 152–157 (2001) [hereinafter Jackson, *Silence and Proof*].

guilt. This may enable the fact-finder to arrive at a guilty verdict on the basis of otherwise insufficient evidence.

Concomitantly, a system that permits compulsion is inconsistent with the right against self-incrimination. There is little doubt that permitting adverse inferences, drawn from an individual's exercise of his or her right to silence, is a method of compulsion. It allows law enforcement officials "undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to otherwise to incriminate himself, or to force him to testify against another person" ¹⁰ In such a system, the presumption shifts from innocence to guilt. Under this system, the accused must decide whether to remain silent, thereby subjecting oneself to adverse inferences, or to testify, which may amount to self-incrimination.

The privilege against self-incrimination served as the basis for the landmark 1966 U.S. Supreme Court decision in *Miranda v. Arizona*,¹¹ which affirmed an individual's right to remain silent in both pre-trial and trial stages of a criminal procedure. In *Miranda*, the Court held that protection against self-incrimination has been "long recognized and applied in other settings."¹² The *Miranda* Court upheld two basic constitutional rights first laid out in *Escobedo v. Illinois*:¹³ "No person . . . shall be compelled in any criminal case to be a witness against himself,' and that, 'the accused shall . . . have the Assistance of Counsel.'" ¹⁴ Chief Justice Warren's majority opinion held that in the pre-trial 'custodial interrogation' procedure:

It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles - that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of free choice.¹⁵

The Court held that an individual must, prior to interrogation, "be informed in clear and unequivocal terms that he has the right to remain silent,"¹⁶ and "that anything said can and will be used against the individual in court."¹⁷ The Court continued, the individual "must be clearly

10. Concluding Document of the Moscow Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe, 1991, at 23. This document was signed by the United Kingdom.

11. 384 U.S. 436 (1966).

12. *Id.* at 442.

13. 378 U.S. 478 (1964).

14. *Miranda*, 384 U.S. at 442, quoting U.S. CONST. amend. V and VI.

15. *Miranda*, 384 U.S. at 457-58 (making a clear reference to individual's constitutional right to counsel).

16. *Id.* at 467-68.

17. *Id.* at 469.

informed that he has the right to consult with a lawyer and to have his lawyer with him during interrogation."¹⁸ Moreover, "if he is indigent, a lawyer will be appointed to represent him."¹⁹ If a statement is made without the presence of an attorney, the 'burden' rests with the Government to demonstrate that this statement was made of his or her free will.²⁰ Furthermore, the Court held that if an individual provides partial answers or explanations, he or she has not waived the right to silence and may still invoke the right at any future point.²¹ *Miranda* clearly states that the right to remain silent is protected throughout the pre-trial and trial phases of a criminal investigation.²²

The American experience, while comprehensive, is not unique. In *Herbert v. The Queen*,²³ the Supreme Court of Canada held that Section 7 of the Canadian Charter of Rights and Freedoms includes the right to silence.²⁴ Provisions protecting the right to silence can also be found in various European jurisdictions. Both the Dutch and German Procedure Codes have provisions allowing the accused to exercise the right to silence without adverse inference. Furthermore, even though it is not codified, the right to silence has been protected in Belgian Courts.²⁵

In contradistinction to these experiences, operative legislation in Northern Ireland, England, and Wales²⁶ does not protect the right to silence in either the pre-trial or trial stage.²⁷ Note the caution the Order gives to an accused in circumstances delineated under Article 3 of the Order:

You do not have to say anything unless you wish to do so but I must warn you that if you fail to mention any fact which you rely on in your defense in court, your failure to take this opportunity to mention it may be treated in

18. *Id.* at 471.

19. *Id.* at 473.

20. *See id.* at 475.

21. *Id.* at 475-76.

22. *See id.* at 467.

23. [1990] 2 S.C.R. 151.

24. *Id.* at 186 (describing the right as the "essence of the right to silence is that the suspect be given a choice; the right is quite simply the freedom to choose - the freedom to speak to the authorities on the one hand, and the freedom to refuse to make a statement to them on the other.").

25. Under Article 29 of the Dutch Criminal Procedure Code:

[I]n all cases in which a suspect is interrogated, the questioning judge or official should refrain from any act aimed at provoking a statement, of which it cannot be said that it was freely given. The suspect is not required to answer. Before the interrogation, the suspect is informed that he/she is not required to answer.

For similar protection in Germany, see German Criminal Procedure Code, § 243, para. 4, StGB, reprinted in English in THE GERMAN CODE OF CRIMINAL PROCEDURE 119 (Dr. Horst Niebler trans., Sweet & Maxwell Ltd. 1965) (Vol. 10 of *The American Series of Foreign Penal Codes*).

26. For examination of the relevant legislation in England and Wales, see CJPO, *supra* note 6, para. 34-39.

27. Note that until 1996, when amendments to the Code of Practice were issued, the Order permitted, *inter alia*, silence to be corroborative of other evidence against an accused. To review how the CENI Order treats an accused's silence, see, for example, CENI Order, *supra* note 6, arts. 3, 4, and 5.

court as supporting any relevant evidence against you. If you do wish to say anything, what you say may be given in evidence.²⁸

However, the British government maintains that “[t]he legislation does not alter the burden resting on the prosecution to prove the case against the accused beyond a reasonable doubt or in any way affect the presumption of innocence.”²⁹ Nonetheless, as one commentator noted, this legislation and subsequent legislation in England and Wales, “was neither a fair nor an effective means of bringing terrorist offenders to justice . . . [with studies raising] doubts about the fairness and effectiveness of drawing inferences from silence under the interview regime which exists for both terrorist and ordinary suspects in Northern Ireland and England.”³⁰ The government has maintained that during police interviews, measures “including tape recording, access to outside contact and to legal advice at public expense” continue to safeguard subjects deemed vulnerable.³¹ However, suspects detained under emergency legislation may not receive such safeguards.³²

Under the Terrorism Act 2000, investigators may detain a suspect for up to forty-eight hours without charge, and extend the initial period of detention up to seven days.³³ Under the accompanying Code of Practice, an investigator may interrogate a suspect without the presence of legal counsel for up to forty-eight hours.³⁴ Until legislation was amended in 1999, a court or jury could deduce adverse inferences even when the accused was denied access to legal advice. In 1999, silence legislation changed in Northern Ireland, England, and Wales to prevent a court or jury from drawing adverse inferences, unless the accused had access to legal advice during questioning in a police station or “other authorized

28. *Murray v. U.K.*, 22 Eur. H.R. Rep. 29, 31 (Eur. Ct. H.R. 1996) (quoting an example of a police cautioning under Article 3 of the Order).

29. Fourth Periodic Reports of States Parties Due in 1994: Addendum. *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: United Kingdom of Great Britain and Northern Ireland*, 1994, para. 324, U.N. Doc. CCPR/C/95/Add.3 (1994) [hereinafter Fourth Periodic Reports].

30. Jackson, *Silence and Proof*, *supra* note 9, at 147; *see also*, John Jackson et al., *Legislating Against Silence: The Northern Ireland Experience*, 1 NIO Research and Statistical Series (2000) [hereinafter Jackson, *Legislating Against Silence*].

31. *See* Fourth Periodic Reports, *supra* note 29, para. 325.

32. This remains in cases where suspects are questioned outside of a police station. *See infra* Section III.

33. Terrorism Act, 2000 c. 11, (Eng.), § 41(3) and sched. 8, Part III, para. 29(3) [hereinafter Terrorism Act 2000].

34. *See Murray*, 22 Eur. H.R. Rep. at 32 (denying accused access to a solicitor for a period of forty-eight hours); *see also* Northern Ireland (Emergency Provisions) Act, 1996, c. 24, § 47 (Eng.) [hereinafter EPA] (granting to a person detained and held in police custody under the terrorism provisions of this Act the right to consult a solicitor privately); Prevention of Terrorism (Temporary Provisions) Act, 1989, c. 4, § 14(4) (Eng.) (providing that a suspect could be held for up to forty-eight hours without charge, and the initial period of detention extended for up to seven days); *id.* § 14(5) (allowing the initial forty-eight hour period to be extended, for no longer than five days with written notice to defendant).

place of detention.”³⁵ However, even with this additional protection, several questions remain “about the fairness of the procedural environment in those cases where, for whatever reason, the suspect has not chosen to avail himself or herself of the legal advice offered.”³⁶ Additionally, as discussed below, the 1999 amended provisions seem to fall short of the European Court’s requirement, set forth in *Murray v. United Kingdom*. It is clear that the ‘emergency rule, normalcy exception,’ increasingly found in instances of protracted conflicts, such as has existed in Northern Ireland, has a profound and indelible impact on the criminal justice apparatus, thereby creating a temporary permanence of the emergency. The erosion of the guarantee to the right to silence, which spilled over from Northern Ireland to England and Wales, is only one symptom in an ever-increasing trend toward domestic absorption of emergency legislation.

II. The Right to Silence and the United Kingdom

The right to silence was not curtailed in Northern Ireland until 1988. Nonetheless, intense debate on the issue can be found as early as 1972, when the Criminal Law Revision Committee (“CLRC”) recommended amendments to the law that would allow a judge or jury to draw adverse inferences if an accused exercised his or her right of silence in the pre-trial stage.³⁷ Specifically, the CLRC recommended that if, during a police interrogation, an accused failed to mention a fact, which he or she later relied upon in court, the fact-finder could draw adverse inferences from the accused’s failure to mention said facts. Furthermore, the CLRC suggested that an accused be cautioned that his or her failure to disclose such a fact would impact the credibility of their defense, and thus have a negative effect on the case.

In 1981, the Commission rejected the CLRC’s recommendations, along with other calls to abolish or limit the right to silence.³⁸ Despite the Commission’s findings, the then Home Secretary, Douglas Hurd, reopened the debate on the right to silence in July 1987.³⁹ In May of 1988, Mr. Hurd, in a written reply in the House of Commons, stated:

I am not convinced that the protection which the law now gives to the accused person who ambushes the prosecution can be justified. The case for change is strong. But I am persuaded by some of the comments which have been made that more careful work needs to be done before we can bring forward with confidence a specific proposal for legislation. . . .⁴⁰

35. Youth Justice and Criminal Evidence Act 1999, c. 23, § 58 (Eng.); CENI Order, *supra* note 6, art. 3(6); Criminal Evidence (Northern Ireland) Order 1999 (SI 1999 No. 2789), art. 36.

36. Jackson, *Silence and Proof*, *supra* note 9, at 150.

37. See generally CRIMINAL LAW REVISION COMMITTEE: EVIDENCE (GENERAL), ELEVENTH REPORT, 1972, Cmnd. 4991, at 16-34.

38. ROYAL COMMISSION, *supra* note 7, at 87, para. 4.53.

39. See REPORT OF THE WORKING GROUP ON THE RIGHT OF SILENCE, 1989, Div. C4 (Home Office London), at 4.

40. *Id.* at 5.

That same month, Mr. Hurd set up a Working Group on the Right to Silence ("Working Group") whose remit was to examine, with the aim of recommending amendment or abrogation, the right to silence. *In advance* of the Working Group's deadline for submission of views, the Government introduced to Parliament a draft Order, curtailing the right to silence in Northern Ireland.⁴¹ The Order could not be amended. As justification, the Government used an argument similar to Lord Colville's argument, which he raised the previous year in his review of the PTA.⁴² The Government argued that due to the emergency situation in Northern Ireland, and the particular problems posed by 'terrorists,' it was necessary to expedite the procedure.⁴³ The Government passed the Order through an extraordinary procedure called Order in Council.⁴⁴ After a short debate in the House of Commons, the House of Lords approved the Order in November of 1988 and it came into effect in December of 1988.

Under the Order, the fact-finder can draw an inference of guilt if a defendant chooses to remain silent. An adverse inference may be drawn from pre-trial silence in three situations, and from silence during the trial in one situation. Thus, the accused can either provide potentially self-incriminating information, or remain silent, which can be inferred as an admission of guilt.

Article 3 of the Order permits adverse inferences when a defendant bases his or her criminal defense on a fact which he or she failed to disclose during police questioning, but which the defendant could reasonably⁴⁵ have been expected to mention when questioned.⁴⁶ The trial court determines *ex post facto* what constitutes an unreasonable failure to dis-

41. See generally *id.* While the Working Group submitted five primary recommendations for reform, similar to those submitted earlier by the CLRC in 1972, they were less extensive than the changes made by the legislation; see also John Jackson, *Recent Developments in Northern Ireland*, in *THE RIGHT TO SILENCE DEBATE: PROCEEDINGS OF A CONFERENCE HELD AT THE UNIVERSITY OF BRISTOL ON 27 MARCH 1990* 44, 46-48 (Steven Greer & Rod Morgan eds., 1990).

42. REVIEW OF THE OPERATION OF THE PREVENTION OF TERRORISM (TEMPORARY PROVISIONS) ACT 1984, 1987, Cm. 264 [hereinafter the Colville Report]. Lord Colville states that the proper procedures instituted to protect both detainees and police from abuse "solve nothing if the detainee is trained to say nothing." *Id.* at 13. He went on, "[t]errorist training manuals now contain detailed techniques whereby a person under interrogation may devote his mind to something which enables him to resist the temptation to answer even the most innocent sounding question." *Id.*

43. CRIMINAL EVIDENCE (NORTHERN IRELAND), 1988, 140 PARL. DEB., H.C. (6th ser.) (1988) 184. In the short debate that followed on the Order, the then Secretary of State for Northern Ireland, Tom King, noted that this legislation was necessary to deal with what he described as a "sustained and systemic assault on the rule of law" faced by police when interrogating those suspected of terrorist offences. *Id.* at 185.

44. An Order in Council is a command or a decision taken by the Privy Council.

45. There is some judicial direction regarding the notion of 'reasonableness' deriving from, what has come to be known as, the *Wednesbury* principle. See *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.* 1 K.B. 223 (Eng. C.A. 1948) (defining the term unreasonable as, "a general description of the things that must not be done . . . something so absurd that no sensible person could ever dream that it lay within the powers of the [acting] authority." *Id.* at 229.).

46. CENI Order, *supra* note 6, art. 3.

close a fact. Article 3 applies before and after an accused has been charged or informed of prosecution proceedings. The Order does not expressly require the accused have access to legal counsel or advice. However, as previously detailed, subsequent legislation does not allow a court or jury to draw adverse inferences where a defendant has been denied access to legal counsel.⁴⁷

Article 3 does not expressly require investigators to inform a defendant of the potential consequence of his or her silence.⁴⁸ However, the Secretary of State issued guidance requiring that law enforcement officials warn defendants of the consequences of remaining silent in Article 3 situations.⁴⁹ This 'guidance,' incorporated under a Code of Practice issued pursuant to the PACE Order, requires police to inform individuals of the potential adverse effects of refusal to answer questions. This rule is as if a failure to respond after receiving a *Miranda* warning from a police officer in the United States would be admissible evidence of guilt.⁵⁰ However, the guidelines detailing when to administer this caution are broad. For instance, the law enforcement official may administer the caution informing the accused of the charges or the evidence against him or her, and before the accused has a chance to consult with an attorney.⁵¹

Article 5 of the Order permits adverse inferences when a defendant fails to give the police an explanation for forensic evidence found on or near his or her person that could reasonably be believed to result from the defendant's participation in a crime.⁵² Under Article 6, a defendant risks adverse inferences by failing to account for his or her whereabouts at the time a crime was committed.⁵³ Finally, Article 4 permits the fact-finder to draw adverse inferences from the defendant's refusal to answer questions at trial.⁵⁴

Article 2 of the Order specifies that adverse inferences, drawn from an accused's exercise of the right to silence in Article 3-6 circumstances, can supplement, but not serve as the foundation of the prosecution's case.⁵⁵ Ostensibly, this requirement appears reasonable. However, the Order grants the fact-finder wide discretion and provides little guidance as to when inferences can be drawn. The Order states only that inferences should be drawn "as appear proper."⁵⁶ As the following review of the case law suggests, since the enactment of the Order, the scope permitting the

47. *But see* Jackson, *Legislating Against Silence*, *supra* note 30 (discussing that one caveat to this exists when a suspect is questioned outside of a police station).

48. Other provisions of the Order have specific requirements giving defendant caution of the consequences of his or her silence. *See, e.g.*, CENI Order, *supra* note 6, art. 4(2), 5(5), and 6(3).

49. *See supra* Section II.

50. *Miranda*, 384 U.S. at 467-79.

51. Terrorism Act, *supra* note 33, § 7, para. 109.

52. CENI Order, *supra* note 6, art. 5.

53. *Id.* art. 6.

54. *Id.* art. 4.

55. *Id.* art. 2(4).

56. *Id.* art. 3(2)(i), 4(4)(a), 5(2)(b)(i), and 6(2)(b)(i).

drawing of adverse inferences from an accused's exercise of a right to silence has gradually expanded.

The initial reaction of Diplock Court⁵⁷ judges in Northern Ireland was to apply the Order with restraint. In *R v. Smith*, one of the first test cases for application of the Order, it appeared that the Court was willing to apply the Order with a view to strict implementation of Article 2.⁵⁸ In this case Lord Justice Kelly held that a fact-finder should draw adverse inferences under the Order only where the other evidence approaches the beyond a reasonable doubt standard; what has been since termed the 'on the brink of the necessary standard of proof' criterion.⁵⁹ The judgment stated:

It seems to me that in some cases the failure of an accused to give evidence may justify a finding of guilt where the weight of the prosecution evidence just rests *on the brink of the necessary standard of proof*. In other cases the failure to give evidence may merely heighten suspicion. For it is nothing novel to say that courts have long recognised that there may be many reasons, innocent as well as sinister, for the refusal of an accused to give evidence.⁶⁰

In this particular case, forensic and identification evidence presented linked the accused to the crime of murder. However, the trial judge did not feel the evidence, as presented, was sufficient and the trial ended with an acquittal.⁶¹

In the wake of *Smith*, it appeared that judges were prepared to only apply the Order in specified circumstances. In *R v. Gamble*, for example, the judge factored the accused's exercise of silence when questioning a previously stated defense claim, but did not apply an adverse inference to strengthen the prosecution's case.⁶² This case involved a fatal paramilitary punishment shooting.⁶³ The defendants were members of the proscribed loyalist Ulster Volunteer Force ("UVF").⁶⁴ In pre-trial questioning, one of the accused, Douglas, made a statement indicating that he had transported three men who he thought would inflict bodily harm on the victim.⁶⁵ He stated that he heard one of the three men threaten the victim with a knee-

57. See The Northern Ireland (Emergency Provisions) Act, 1973, ch. 53 (Eng.) [hereinafter the EPA]. Following a review by a government commission led by Lord Diplock in 1972, a series of recommendations was made culminating in the Northern Ireland (Emergency Provisions) Act (EPA); an infrastructure of 'emergency' began. Many of the provisions of the repealed Special Powers Act were resurrected in the EPA. Under this legislation a system of trial without jury, commonly known as the Diplock Courts, was established. *Id.* § 2.

58. See *R v. Smith*, Transcript, (N. Ir. C.A. (Kelly, J.) Oct. 20th, 1989) (LEXIS Northern Ireland Reported and Unreported Cases) (6 page un-paginated LEXIS printout) [hereinafter *Smith Transcript*].

59. *Id.* at 5 of 6.

60. *Id.* (emphasis added).

61. *Id.*

62. See *R v. Gamble & Others*, Unreported Judgment, (Belfast Crown Court, Oct. 27th, 1989, (Carswell, J.)) (LEXIS, Northern Ireland Reported and Unreported Cases) (15 page un-paginated LEXIS printout) [hereinafter *Gamble Judgment*].

63. *Id.* at 2 of 15.

64. *Id.*

65. *Id.* at 5 of 15.

capping, but added that he did not take the threat seriously.⁶⁶

Douglas refused to testify and remained silent during trial.⁶⁷ Lord Justice Carswell held that Douglas was guilty of inflicting grievous bodily harm on another, but was not satisfied beyond a reasonable doubt that the defendant had considered killing the victim.⁶⁸ In factoring Douglas' silence during trial, the judge specifically limited the adverse inference to discount the exculpatory part of his admission, and did not extend the adverse inference to give weight to the prosecution's case.

For present purposes I think it sufficient to say that where the extent of the knowledge of an accused may be ambiguous or uncertain on the wording of the admissions made by him, the court may be entitled to draw an adverse inference about the true extent of that knowledge in consequence of his refusal to give evidence. . . . I consider that when Douglas refused to give evidence . . . the court is entitled to discount the exculpatory part of these remarks.⁶⁹

The first case to mark a notable shift in the application of the Order came in *R v. Kane & Others*.⁷⁰ The details of this case are as follows: in March of 1990 (in what is commonly referred to as the Casement Park trial) Kane, Timmons, and Kelly were convicted of the murders of Corporals Wood and Howes, and of two counts of false imprisonment and grievous bodily harm.⁷¹ At no time did the court accuse Kelly, Kane, or Timmons of shooting either of the soldiers.⁷² In fact, it is agreed the accused were not in the vicinity where the shootings occurred.⁷³ Instead, it appeared that in convicting these individuals, the court relied solely upon the doctrine of *common purpose*.⁷⁴ Under this doctrine, the accused were convicted of murder on the grounds that they had participated in an agreed upon illegal-joint-enterprise from which murder was a foreseeable result (even though they were not present when the murder actually took place).⁷⁵ While this case raises a number of fair trial issues,⁷⁶ this discus-

66. *Id.* at 5-6 of 15.

67. *Id.* at 6 of 15.

68. *Id.* at 7-8 of 15.

69. *Id.* at 8 of 15.

70. *R v. Kane & Others*, Unreported Judgment, (Belfast Crown Court Mar. 30th, 1990, (Carswell, J.)) (LEXIS, Northern Ireland Reported and Unreported Cases) (24 page un-paginated LEXIS printout) (hereinafter *Kane Trial Judgment*). Sean Kelly and Michael Timmons were co-defendants in this case. *Id.* at 1 of 24.

71. *Id.*

72. *Id.* at 4 of 24.

73. *Id.*

74. *Id.* at 4-6 of 24.

75. *Id.* at 6 of 24.

76. This was especially at issue in the custodial interrogation of Patrick Kane whose conviction was later overturned. For a detailed critique of this case, see AMNESTY INTERNATIONAL, INTERNATIONAL SECRETARIAT, NORTHERN IRELAND: FAIR TRIALS IN CASEMENT PARK TRIALS (1993); see also review of case commission by the Committee on the Administration of Justice [hereinafter CAJ], undertaken by Peter Thornton QC, (31 May 1996) (unreported, on file in CAJ offices).

sion is limited to the Court's approach to one of the accused—Sean Kelly.⁷⁷

On the day of his arrest, police interviewed Sean Kelly seven times.⁷⁸ Kelly initially remained silent, but under caution gave a brief statement indicating he attended the funeral, witnessed the car being attacked, and saw a man brought into Casement Park.⁷⁹ After witnessing these events, Kelly stated that he rejoined the funeral procession.⁸⁰ Kelly, under advice of his attorney, remained silent during the trial.⁸¹

A television crew's video recording and a British Army's helicopter "heli-teli" footage provided a significant portion of the prosecution's case against Kelly.⁸² Judge Carswell acknowledged the poor quality of film made it difficult to clearly identify Sean Kelly in the video recordings.⁸³ However, he believed that in total, the facts established Kelly as one of the members of the Casement Park group.⁸⁴ Moreover, in convicting Kelly of murder, Carswell held that pursuant to Article 4 of the Order, the court was allowed to "draw such inferences as appear proper" from Kelly's refusal to testify at trial.⁸⁵

In my opinion, the Court is entitled to place together and consider in sum the evidence of the film taken outside Casement Park up to the point when the soldiers were taken inside, the film taken when the taxi was leaving, the heli-teli film of events inside Casement Park, the falsity of Kelly's statement and his refusal to give evidence. When that is done, I am satisfied that Kelly not only took part in bringing Corporal Wood to the gates of Casement Park, but took part as an active participant in the events that occurred inside.⁸⁶

Clearly, the evidence presented did not satisfy the "on the brink of proof" standard established in *Smith*. That is, it did not establish beyond a reasonable doubt that Kelly was an "active participant" in the events that led to the deaths of the two soldiers. The judge gave Kelly's silence weight and strengthened the prosecution's case. In so doing, the court, under Article 4, lowered the prosecution's burden of proof. Kelly was convicted of murder, despite the fact he clearly did not participate in the final phase of the killings.⁸⁷ It is also worth noting, Kelly remained silent during his trial on the advice of his solicitor.⁸⁸

77. Kane Trial Judgment, (Belfast Crown Court Mar. 30th, 1990, (Carswell, J.)), at 17-20 of 24.

78. *Id.* at 17 of 24.

79. *Id.* at 17-18 of 24.

80. *Id.* at 18 of 24.

81. *See id.* at 18 of 24.

82. *Id.* at 18-19 of 24.

83. *Id.* at 19 of 24.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 19-20 of 24 (applying the doctrine of common purpose to find Kelly guilty of murder).

88. *Id.* at 18 of 24. A decision based, in part, on the experience of Patrick Kane during questioning at the trial. Kelly appealed the conviction but the Court of Appeal upheld the lower court's findings. In their deliberation, the Court of Appeal concluded that Kelly was clearly identifiable through the 'heli-teli' video and therefore, they did not need to weigh his refusal to testify. *See R v. Kane & Others*, Transcript, (N. Ir. C.A., July

Just over one year after *Smith*, the court in *R v. McLernon* continued to relax its application of the Order.⁸⁹ This case involved a defendant charged with possession of a firearm with intent to endanger life.⁹⁰ The defendant remained silent for six days, but gave a partial account on the seventh day.⁹¹ This was the first case in which an adverse inference was drawn from both an exercise of pre-trial silence under Article 3, and silence during trial under Article 4.⁹² In *McLernon*, the court held a refusal to answer questions, “may well in itself, *with nothing more*, increase the weight of a prima facie case to the weight of proof beyond a reasonable doubt.”⁹³ Judge Kelly’s decision argued, in contradistinction to subsequent interpretation, that *Smith* was never intended to limit the application of the Order when introducing the “on the brink of the necessary standard of proof” guideline.⁹⁴ Yet, *McLernon* did indeed weaken the standard of proof criterion that *Smith* introduced.

That Article 4 is in the widest terms. It imposes no limitation as to when it may be invoked or what result will follow if it is invoked. Once the court has complied with the preliminaries in Article 4(2) and called upon the accused to give evidence and a refusal is made the court has then a complete discretion as to whether inferences should be drawn or not. . . .

In *Raymond Smith I* gave such instances in broad and general terms as what may be the consequences of the application of Article 4. But I add to these another instance only to show the width of the parameters of Article 4; that is, that *in certain cases a refusal to give evidence under the Article may well in itself, with nothing more, increase the weight of a prima facie case to the weight of proof beyond a reasonable doubt.*⁹⁵

Judge Kelly, in arguing against providing guidelines for the Order’s application, stated that “[i]t would be improper and indeed quite unwise for any court to set out bounds of” whether to “decide to draw inferences or not” in an individual case, and the “nature, extent and degree of adversity,” if it decides to draw inferences.⁹⁶

McLernon introduced a trend which commentators have termed the Court’s ‘commonsense’ approach of the application of the Order. This approach was delineated in *R v. KS Murray*.⁹⁷ At trial, the defendant Kevin Murray, was convicted of attempted murder of a part-time member of the Ulster Defence Regiment (“UDR”).⁹⁸ While his house was being searched,

5th, 1991, Kelly, J.) (LEXIS, Northern Ireland Reported and Unreported Cases) (18 page un-paginated LEXIS printout), at 14-16 of 18 [hereinafter Kane Appellate Transcript].

89. See *R v. McLernon & Others*, Transcript, (Belfast Crown Court, Dec. 20, 1990, Kelly, J.) (LEXIS, Northern Ireland Reported and Unreported Cases) (7 page un-paginated LEXIS printout) [hereinafter *McLernon* Transcript].

90. *Id.* at 1 of 7.

91. *Id.* at 3-4 of 7.

92. *Id.* at 3, 6 of 7.

93. *Id.* at 6 of 7 (emphasis added).

94. *Id.*

95. *Id.* (alluding to *Smith* Transcript, *supra* note 58) (emphasis added).

96. *Id.*

97. See *R v. KS Murray*, 1993 N. Ir. L.R. 105 (C.A. (Hutton, J.) 1991).

98. *Id.* at 107.

Murray made a short statement in which he told police he had been at a friend's house at the time of the murder.⁹⁹ Murray further explained that the mud on jeans found in his possession resulted from a hunting trip that had occurred two days before.¹⁰⁰ Murray made no further statements after his arrest, and remained silent during his trial.¹⁰¹ Judge Kelly not only drew adverse inferences from Murray's failure to give testimony, but also signaled that silence equaled guilt.

In the instant case it seems to be [sic] that what the prosecution has proved in evidence calls for evidence from the accused in the witness box. . . . It is only *commonsense* . . . to infer as proper inference that he is not prepared to assert his innocence on oath because that is not the case.¹⁰²

Murray's appeal focused his defense on the application and interpretation of Articles 3 and 4 of the Order.¹⁰³ Murray argued Article 4 of the Order was only "declaratory of the common law," and therefore, did not change the "scope of the inferences which can be drawn at common law."¹⁰⁴ Therefore, Article 4 allowed for adverse inference to be drawn from silence only when the prosecution's evidence was sufficiently strong, such that the accused's exercise of silence amounted to "a 'confession and avoidance' situation at common law."¹⁰⁵ The Court of Appeal rejected this argument, however, and stated the Order had changed the common law.¹⁰⁶ The court held, in contradistinction to *Smith*, evidence produced need not "be 'on the brink' of proving guilt."¹⁰⁷ Additionally, unlike common law, the evidence did not have to amount to "a 'confession and avoidance' situation."¹⁰⁸ Rather, the court argued, it was sufficient that a *prima facie* case was established.

Under art 4 it would be improper for the court to draw the bare inference that *because* the accused refused to give evidence in his own defence he was *therefore* guilty. But where commonsense permits it, it is proper in an appropriate case for the court to draw the inference from the refusal of the accused to give evidence that there is no reasonable possibility of an innocent explanation to rebut the *prima facie* case established by the evidence adduced by the Crown, and for the drawing of this inference to lead on to the conclusion, after all the evidence in the case has been considered, that the accused is guilty.¹⁰⁹

99. *Id.* at 112-13.

100. *Id.*

101. *Id.* at 113-15.

102. *Id.* at 149, quoting *R v. KS Murray*, Transcript, (Belfast Crown Court, Jan. 18, 1991, Kelly, J.) (LEXIS, Northern Ireland Reported and Unreported Cases) (20 page unpaginated LEXIS printout), at 11 of 20.

103. *See id.* at 134.

104. *Id.*

105. *Id.*

106. *Id.* at 141-147 (stating: "Accordingly, we are satisfied that art 4 has changed the law and is not merely declaratory of it.").

107. *Id.* at 148.

108. *Id.*

109. *Id.*

In November 1991, the Court of Appeal referred the case to the House of Lords. In October 1992, the House of Lords held that Article 4 of the Order empowers a judge in a bench trial to draw adverse inferences from a defendant's silence at trial if the prosecution has made out a prima facie case.¹¹⁰ A prima facie case exists when "aspects of the evidence taken alone or in combination with other facts clearly call for an explanation which the accused ought to be in a position to give . . ."¹¹¹ That same year, in *R v. Morrison & Others*, the Court of Appeal held the Order permitted adverse inferences, even where the defendant explained that he refused to answer police questions on principle to protest inequities in the administration of justice.¹¹²

III. Under International Law

The relevant international human rights instruments which provide fair trial guarantees include the Universal Declaration of Human Rights¹¹³ ("UDHR"), the International Covenant on Civil and Political Rights¹¹⁴ ("ICCPR"), and the European Convention on Human Rights¹¹⁵ ("ECHR"). To what extent is the Order compatible with the fair trial provisions found in these human rights instruments?

A. Burden of Proof: Innocent until proven guilty

In the primary human rights instruments, an accused is innocent until proven guilty, with the burden of proof falling on the State. The relevant sections are as follows:

Article 11.1 of the UDHR:

Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law¹¹⁶ in a public trial at which he has had all the guarantees necessary for his defence.¹¹⁷

Article 14.2 of the ICCPR:

110. See *Murray v. Dir. of Pub. Prosecutions*, 99 Crim. App. R. 396, 405 (H.L. 1994) (appeal taken from N. Ir.), also available at 1994 WL 1061736.

111. *Id.*

112. See *R v. Martin & Others*, Transcript, (N. Ir. C.A., July 7, 1992, Kelly, J.) (LEXIS, Northern Ireland Reported and Unreported Cases) (49 page un-paginated LEXIS printout), at 41 of 49.

113. *Universal Declaration of Human Rights*, G.A. Res. 217A, 3d Sess., U.N. Doc. A/810 (1948) [hereinafter UDHR].

114. ICCPR, *supra* note 3.

115. ECHR, *supra* note 4.

116. The question may logically follow, according to what "law"? The answer, it seems, is according to national law. The challenge for relevant enforcing international mechanisms is to look at the compatibility of the relevant national law with the respective international human rights instruments. While the ECHR has indicated its role is not to test the compatibility of national law with the Covenant, it has shown a willingness to challenge the compatibility of a national law through the specifics of individual cases. See, e.g., *Murray v. United Kingdom* 22 Eur. H.R. Rep. 29, 75.

117. UDHR, *supra* note 113, art. 11.1.

Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to the law.¹¹⁸

Article 6.2 of the ECHR

Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.¹¹⁹

As we have discussed, under the Order the court may draw adverse inferences from an accused's silence. Is it possible to argue that drawing such an inference is incompatible with these international fair trial obligations? A review of the supervising mechanisms for these instruments provides some direction. In General Comment on Article 14, the Human Rights Committee, the body responsible for oversight and implementation of the ICCPR, stated:

By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proven *beyond reasonable doubt*. Further the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial.¹²⁰

In *Barberà v. Spain*¹²¹ the European Court for Human Rights held that underpinning the presumption of innocence was the requirement "*inter alia*, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, *and any doubt should benefit the accused*."¹²²

In *Murray*, the government denied the applicant access to a solicitor for the first forty-eight hours of the applicant's detention, pursuant to the Northern Ireland (Emergency Provisions) Act 1987.¹²³ Murray was cautioned under the Order and interviewed on twelve different occasions.¹²⁴ He remained silent throughout this period.¹²⁵ At trial, he refused to testify.¹²⁶ The trial judge, using the discretionary powers afforded under the Order, drew adverse inferences from Murray's silence.¹²⁷ The court found the denial of access to a solicitor, coupled with the power under the Order to draw adverse inferences from silence, constituted a violation of fair trial provisions enumerated under Article 6 of the Convention.¹²⁸ Under the

118. ICCPR, *supra* note 3, art. 14.2.

119. ECHR, *supra* note 4, art. 6.2.

120. *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, Human Rights Committee, 21st Sess., General cmt. 13, Article 14, para. 7, U.N. Doc. HR1/Gen/1/Rev.1 (1994).

121. See 11 Eur. H.R. Rep. 360 (1988).

122. *Id.* at 387 (emphasis added).

123. *Murray*, 22 Eur. H.R. Rep. at 32.

124. *Id.*

125. *Id.* at 32-33.

126. *Id.* at 34.

127. *Id.* at 35.

128. *Id.* at 48. Under the emergency powers operating in Northern Ireland, individuals can be detained for up to seven days without arraignment, can be denied access to legal counsel for up to the first 48 hours and can be further denied access for 48-hour

particular circumstances outlined in *Murray*,¹²⁹ the drawing of adverse inferences did not amount to a violation under either Articles 6(1) or 6(2). However, it is worth examining the Court's general comments relating to the right to silence.

Although not specifically mentioned in Article 6 of the Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aim of Article 6.¹³⁰

The reasoning in *Murray* strongly suggests the Court was content to accept the Court of Appeal's conclusion that evidence against Murray "[c]onstitute[d] a 'formidable' case against him."¹³¹ The Court then focused solely upon "the role played by the inferences in the proceedings against the applicant and especially in his conviction."¹³² This suggests that in cases where the burden of proof for establishing guilt is lowered, and where greater weight is placed on adverse inferences, the Court will probably find augmented roles of adverse inferences incompatible with Article 6. Indeed, some dissenting members of the Court clearly challenge the compatibility of the Order with ECHR fair trial provisions. "To rely upon it afterwards appears to me to negative the whole intent of Article 6(2). To permit such a procedure is to permit a penalty to be imposed by a criminal court on an accused because he relies upon a procedural right guaranteed by the Convention."¹³³

Following *Murray*, two cases allowed the European Court to consider the limits of drawing adverse inferences under Article 6. The first, *Condron v. United Kingdom*, involved drawing adverse inferences in a jury trial.¹³⁴ This case involved two heroin addicts who, on the advice of their attorney who believed they were unfit for questioning, refused to answer police

intervals thereafter. See all sources, *supra* note 34. The Court in *Murray v. United Kingdom* ruled that this practice was incompatible with Article 6 of the Convention. *Murray*, 22 Eur. H.R. Rep. at 48. Specifically, the Court stated: "To deny access to a lawyer for the first 48 hours of police questioning, in a situation where the rights of the defence may well be irretrievably prejudiced, is—whatever the justification for such denial—incompatible with the rights of the accused under Article 6." *Id.* at 67. There is no doubt that during periods in which detainees are held virtually incommunicado, an atmosphere conducive to ill treatment exists.

129. The *prima facie* case against the defendant was strong which allowed the Court to adopt the national court's commonsense reasoning and argue that under the circumstances of the case an expectation of an explanation by the defendant was reasonable and, therefore, drawing adverse inferences as a result of his decision to remain silent was not unfair. *Id.* at 63.

130. *Id.* at 60.

131. *Id.* at 62.

132. *Id.* at 61.

133. *Murray*, 22 Eur. H.R. Rep. at 75 (Walsh, J., dissenting). I disagree with Judge Walsh's argument insofar as it suggests that conviction is sufficient with a *prima facie* case.

134. [2000] CRIM. L. REV. 679 (Eur. Ct. H.R. 2000).

questions.¹³⁵ On appeal, the judge indicated that while the trial judge's direction may have been inadequate, the conviction was safe in light of the other presented evidence.¹³⁶ In its ruling, the European Court found the judge's jury instruction had failed to reflect the balance between the right to silence and circumstances in which adverse inference may be drawn from silence and, therefore, was in violation of Article 6.¹³⁷ Particularly, the Court noted the judge should have indicated to the jury that if there was a potential innocent reason for the defendants' silence during pre-trial interviews, then no adverse inferences should be drawn.¹³⁸

While the *Condrón* decision flows from *Murray*, it differs in a number of regards. In *Murray* the issue was the defendant's denial of access to a solicitor. However, in *Condrón*, the Court argued that "adequate weight" should be given to the content of the legal advice, including the advice to remain silent.¹³⁹ The Court noted such legal advice might hold "special significance."¹⁴⁰ Specifically, the clients were simply unfit to answer questions posed to them. Additionally, the Court scrutinized the judge's jury instruction on the use of adverse inferences and found it wanting.¹⁴¹

In *Avrill v. United Kingdom*, the Court expanded on *Murray* by stating there may be circumstances which require an explanation.¹⁴² In *Avrill*, police held the applicant near the scene of a double homicide.¹⁴³ Initially, he was denied access to a solicitor during questioning.¹⁴⁴ He failed to account for his whereabouts at the time of the murder, or to explain why there were fibres and hairs found on his clothing that matched the gunman's.¹⁴⁵ The Court found a violation of Article 6(1) in conjunction with Article (3)(c) in the denial of access to a solicitor, but did not find a breach of Article 6(2) in respect to the drawing of adverse inferences.¹⁴⁶ The Court held there was sufficient strength in the forensic evidence linking the applicant to the murders to allow for adverse inferences.¹⁴⁷

There are a number of points that emerge from *Avrill*. First, as mentioned, the Court made clear there are certain circumstances where a suspect may be called upon to provide an explanation.¹⁴⁸ There are acceptable and unacceptable reasons for a suspect to remain silent. One acceptable reason, as argued in *Condrón*, was that a suspect remains silent

135. *Id.* at 679.

136. *See id.*

137. *Id.* at 679-80.

138. *Id.* at 679.

139. *Id.* at 680.

140. *Id.*

141. *Id.* at 679.

142. [2000] CRIM. L. REV. 682 (Eur. Ct. H.R. 2000).

143. *See id.* at 682.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 682-83.

148. *Id.* at 683 (stating, "the presence of the incriminating fibres in his hair and clothing did call for an explanation from him, and so this is one circumstance in which the right [to silence] gives way . . .").

on the advice of a solicitor. However, in this case, the applicant chose to remain silent simply for the purpose of not cooperating with police. According to the Court, this was not a sufficient ground.¹⁴⁹ However, this ruling also suggests that drawing adverse inferences from the accused's failure to answer police questions must be limited.¹⁵⁰ It acknowledged justifications for provisions limiting the right to silence, such as those in Northern Ireland and in the 1994 Criminal Justice and Order Act.

Notwithstanding these justifications, the Court considers that the extent to which adverse inferences can be drawn from an accused's failure to respond to police questioning must be necessarily limited. While it may no doubt be expected in most cases that innocent persons would be willing to co-operate with the police in explaining that they were not involved in any suspected crime, there may be reasons why in a specific case an innocent person would not be prepared to do so.¹⁵¹

A review of these Court cases clearly reveals that fair trial provisions enumerated in both the ECHR and the ICCPR encompass the right to silence. Judge Walsh's observations in *Murray* are clear and compelling: if the Order is not meant to lower or shift the burden of proof (as the U.K. government argues), and it remains that "the burden of proof beyond a reasonable doubt always rests on the prosecution,"¹⁵² then silence cannot lower the burden of proof, and its role in establishing guilt becomes essentially irrelevant. If, in theory, this remains the case (as has been argued), then in practice the legislation, "has had the effect of shifting the balance of power between prosecution and defense more in the direction of the prosecution by giving the police the *authority* as well as merely the *power* to persuade suspects to answer police questions"¹⁵³ Indeed a review of two research studies on the effect of the silence legislation in Northern Ireland and England and Wales indicates:

Although there was no change in the formal burden of proof, prosecutors were aware of the advantage they gained by being able to stress to the court or jury that the defendant had provided no explanation or was refusing to testify.

Defence lawyers, on the other hand, were in no doubt that the legislation had put defendants at a psychological and tactical disadvantage.¹⁵⁴

B. Protection against self-incrimination

Article 14.3(g) of the ICCPR:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality . . . not to be

149. See *id.* ("The decision itself could be taken to suggest that merely standing on one's right to silence may not be a sufficient justification").

150. *Id.*

151. *Id.* (COMMENTARY, quoting *R v. Averill*, Unreported Trial Transcript, reprinted in para. 47).

152. *Murray*, 22 EUR. H.R. REP. at 74 (Walsh, J., dissenting).

153. Jackson, *Silence and Proof*, *supra* note 9, at 164.

154. *Id.* at 165.

compelled to testify against himself or to confess guilt.¹⁵⁵

Principle 21 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* states: "It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person."¹⁵⁶

While the ECHR provides no explicit provision, the Court has generally accepted that the right to remain silent and the right against self-incrimination are "generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6," and applies to all types of criminal proceedings.¹⁵⁷ In *Funke v. France*, an applicant refused to disclose incriminating documents to customs authorities.¹⁵⁸ The applicant stated his right to withhold these documents was protected under Article 6, as the right against self-incrimination was guaranteed under fair trial provisions.¹⁵⁹ The Court concurred.¹⁶⁰ It held: "The special features of customs law cannot justify such an infringement of the right of anyone 'charged with a criminal offence,' within the autonomous meaning of this expression in Article 6, to remain silent and not to contribute to incriminating itself."¹⁶¹

In *Saunders v. United Kingdom*—a corporate case involving an illegal trading and share operation—an applicant to the ECHR had been legally compelled, under the threat of penalty, to make incriminating statements to the Department of Trade and Industry (the "DTI") Inspectors.¹⁶² These statements were, in turn, used against him in subsequent criminal proceedings.¹⁶³ The applicant was charged with a number of offences relating to this operation, and he was tried and convicted on twelve counts of conspiracy, false accounting and theft, and sentenced to five years imprisonment.¹⁶⁴ A substantial part of the prosecution's case was based on the statements Mr. Saunders gave to the DTI Inspectors.¹⁶⁵ These statements were later entered into evidence.¹⁶⁶ The applicant in this case petitioned the Court stating that his Article 6 right to a fair trial had been violated.¹⁶⁷ The Commission concurred with the applicant.¹⁶⁸

155. ICCPR, *supra* note 3, art. 14.3(g).

156. *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, G.A. Res. 43/173, U.N. GAOR, 76th plen. mtg., at Principle 21, U.N. Doc. A43/173 (1988).

157. *Saunders v. United Kingdom*, 23 Eur. H.R. Rep. 313, 337 (Eur. Ct. H.R. 1996) (Judgment, para. 68); *Murray*, 22 Eur. H.R. Rep. at 60.

158. See 16 Eur. H.R. Rep. 297, 299-300 (Eur. Ct. H.R. 1993).

159. *Id.* at 324.

160. *Id.* at 326.

161. *Id.*

162. See *Saunders*, 23 Eur. H.R. Rep. at 318-19.

163. *Id.* at 320.

164. *Id.* at 321.

165. *Id.* at 320-21.

166. *Id.*

167. *Id.* at 326.

168. *Id.* at 331.

In the instant case, the incriminating material, which the applicant was compelled to provide, furnished a not insignificant part of the evidence against him at trial, since it contained admissions which must have exerted additional pressure on him to take to the witness stand. The use of this evidence was therefore oppressive and substantially impaired Mr. Saunders' ability to defend himself against the criminal charges he faced, thereby depriving him of a fair trial.¹⁶⁹

In its review of the case, the Court stated:

The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6(2) of the Convention.

The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent.¹⁷⁰

In finding for the applicant, the Court stated the prosecution made "extensive use" of statements in a way "which sought to incriminate the applicant Accordingly, there has been an infringement in the present case of the [applicant's] right not to incriminate [him]self."¹⁷¹

The cases discussed above deal with different levels of compulsion. In one case refusal to provide information resulted in imprisonment, while in *Murray*, the result was the inference of guilt from silence. It follows, that in regard to compulsion, as outlined in *Saunders* and *Funke*, the rights to remain silent and against self-incrimination have merit. According to this argument, the 'right' to silence is not blanket, and there are indeed significant differences in pre-trial and trial stages.

[T]here is still an enormous difference between the criminal trial itself where it may be considered reasonable to draw inferences from an accused's failure to testify once a *prima facie* case has been proved against him or her and the pre-trial police interview where there is no impartial adjudicator and there is no requirement on the police to disclose the details of the evidence they have against suspects.¹⁷²

Therefore, during the trial stage, the question should be not whether adverse inferences should be allowed to be drawn from silence but rather what *degree* and *weight* should silence be given.

The merits of this argument are clear, and the dangers equally compelling. It is true that during the pre-trial stage the dangers of fair trial violations are greatest in the presence of coercive methods of interrogation. Nonetheless, the danger that silence may be given undue weight and consideration during the trial stage remains. As the Commission accurately observed, a jury (and indeed a judge) are already likely, even without

169. *Id.* at 336 (summarizing the findings of the Commission).

170. *Id.* at 337.

171. *Id.* at 339-40.

172. Jackson, *Silence and Proof*, *supra* note 9, at 150.

instruction, to factor a defendant's use of silence when deliberating.¹⁷³ That said, allowing further instruction directing a jury or judge (under Diplock) to weigh such silence in determining guilt does, in effect, shift the burden of proof. As previously noted with the Casement Case, the judiciary has demonstrated that it will convict on the basis of a *prima facie* case coupled with the accused's silence.

Conclusion

Examination of the history and substance of U.K. case law, as well as relevant international human rights instruments, lends weight to the argument that the Criminal Evidence (Northern Ireland) Order 1988 undermines fair trial principles and is, therefore, incompatible with several international human rights treaties to which the United Kingdom is a signatory.

Under the Terrorism Act 2000 statements, even those that are involuntary in nature, can be admitted as evidence unless the defense can produce *prima facie* evidence which shows that the statement was obtained by torture, inhumane or degrading treatment, or by using or threatening violence.¹⁷⁴ This standard suggests, as noted by the UN Special Rapporteur on the Independence of Judges and Lawyers, "that physical deprivation or psychological pressure short of outright violence is permissible."¹⁷⁵ As was compellingly argued by the Supreme Court in *Miranda*:

Again we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented. As we have stated before, 'Since *Chambers v. Florida*, 309 U.S. 227, this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition.' *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960). Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms.¹⁷⁶

Measures afforded by the anti-terrorism legislation taken together with curtailment of the right to silence by the Criminal Evidence (Northern Ireland) Order are in contradistinction to international fair trial provisions, which prohibit the use of compulsion to obtain evidence from an accused. The power to draw negative or adverse inference from silence is a form of compulsion as it "exert[s] undue influence upon a detainee to compel a confession of guilt,"¹⁷⁷ or to provide evidence which then may be used to incriminate. It follows that these practices impact the Article 6 fair trial provisions of the ECHR and are "a violation of the principle of right to

173. See ROYAL COMMISSION, *supra*, note 7, at 90-91, para. 4.64-4.66.

174. See Terrorism Act 2000, *supra* note 33, § 7, para. 76(3)(b).

175. See *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Mr. Param Cumaraswamy, Submitted Pursuant to Commission on Human Rights Resolution 1997/23. Addendum: Report on the Mission of the Special Rapporteur to the United Kingdom of Great Britain and Northern Ireland*, Economic and Social Council Commission on Human Rights, 54th Sess., Agenda Item 8, para. 82, U.N. Doc. E/Cn.4/1998/39/Add.4 [hereinafter CUMARASWAMY].

176. *Miranda*, 384 U.S. at 448.

177. See CUMARASWAMY, *supra* note 175, para. 79.

silence set forth in Article 14 of the ICCPR.”¹⁷⁸

The erosion of the right to silence is just one casualty in the ‘war on terrorism.’ The use of political violence against the State has been a staple in Northern Ireland since the political unit was created, and has left, “emergency [to constitute] the virtual norm with normalcy forming a mere (somewhat theoretical) exception.”¹⁷⁹ This paradigmatic shift is evident in the temporary permanence of current emergency legislation operating in the United Kingdom. Whilst the shift may simply reflect the realities of entrenched emergencies (as has existed in Northern Ireland), a review of the repressive measures invoked to combat the ‘terrorist’ threat suggest that whilst human rights protections have been impacted, indeed eroded, the benefits of these extraordinary measures are far from certain.¹⁸⁰ What is clear is that whilst there must be recognition and accommodation for states facing periods of emergency, “this accommodation ought to take place *within* the confines of legality,” with parameters that balance “state security with the demands of individual freedoms, liberties, and rights.”¹⁸¹

178. *Id.*

179. Oren Gross, “Once More unto the Breach”: *The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies*, 23 *YALE J. INT’L L.* 437, 500 (1998).

180. For an overview of research studies on the right to silence, see Jackson, *Legislating Against Silence*, *supra* note 30. For an overview of the effect of anti-terrorism legislation in the United Kingdom, see generally Kevin Dooley Kent, *Basic Rights and Anti-Terrorism Legislation: Can Britain’s Criminal Justice (Terrorism and Conspiracy) Act 1998 Be Reconciled with Its Human Rights Act?*, 33 *VAND. J. TRANSNAT’L L.* 221 (2000).

181. Gross, *supra* note 179, at 499.

