Access to Legal Advice: Should PACE Go Further or Take a Step Back?

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I. Introduction

At present, the Police and Criminal Evidence Act 1984 (PACE) recognises the right of suspects to be given access to legal advice before being interviewed by the police and permits solicitors to be present during the police interview. This article analyses whether, in seeking to comply with Article 6 of the European Convention of Human Rights (ECHR), the current approach of PACE goes too far, or ought to be strengthened further.

The first part of the article will address whether Article 6 includes a right to legal advice prior to police interview and, if so, whether PACE ought to strengthen this right by making it mandatory for suspects to speak to a solicitor before they are interviewed by the police. The second part will address whether PACE goes beyond the United Kingdom's (UK) Article 6 obligations by permitting solicitors to be present during the police interview. This part will also address practical concerns about whether the presence of solicitors will encourage 'no comment' interviews, which are said to impede police investigation and ultimately be against the interests of the defence.

II. Right To Legal Advice Prior To Police Interview

A. Is the right to legal advice prior to interview required under article 6?

Under the ECHR, Article 6 paragraph (3)(c) provides for the right to legal assistance, which is fundamental to its guarantee of the right to a fair trial under Article 6.[1] Enshrining this under domestic law, section 58(1) of PACE provides for

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1 *Salduz v Turkey* (2009) 49 EHRR 19 [50].

the right of a suspect arrested and held in custody to "consult a solicitor privately at any time". Subject to exceptions, the suspect will generally not be interviewed until such advice has been received.[2] However, does PACE adopt a wider scope than what Article 6 of the ECHR requires?

First, one may argue that the right to a fair trial under Article 6 only applies to a criminal charge and not during the preliminary investigatory phase. However, both domestic courts and the European Court of Human Rights (ECtHR) have recognised that the term 'criminal charge' is an autonomous concept, satisfied where a suspect is "substantially affected" by steps taken against him.[3] In *John Murray v United Kingdom*, the ECtHR found Article 6 to apply during the "preliminary investigation into an offence by the police", since Northern Irish legislation allowed adverse inferences to be drawn at trial from the suspect's silence during interrogation.[4]

Since England and Wales' Criminal Justice and Public Order Act 1994 (CJPOA) is similar to the Northern Irish legislation which was in consideration in *Murray* in allowing adverse inferences to be drawn, the English court in *R v Stratford Justices, ex p Imbert* accepted that Article 6 would apply during the preliminary investigation stage.[5] *Murray*[6] was re-emphasised in *Salduz*, where the ECtHR expressed that "as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police", deeming such access to be fundamental to the right to a fair trial under Article 6.[7]

Even if Article 6 requires that legal access should be provided from the first interrogation of the suspect, does this require PACE to permit access to legal advice *before* any police interview has taken place? The concurring opinions in *Salduz* state that legal assistance ought to be provided "at the very beginning of police custody or pre-trial detention… not only while [the suspect is] being questioned".[8] This general principle was affirmed in *Dayanan v Turkey*.[9] But why is this so? In order to understand why such early access is fundamental to the right to fair trial under

[2] Home Office, 'Police and Criminal Evidence Act 1984 (PACE) – Code C: Revised Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (February 2017) [6.6] <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/592547/pace-code-c-2017.pdf> accessed 13 May 2017.

[3] *Deweer v Belgium* (1980) 2 EHRR 439 [46].

[4] *John Murray v United Kingdom* (1996) 22 EHRR 29 [62], [66].

[5] *R v Stratford Justices, ex p Imbert* [1999] 2 Cr App R 276, 285(g) (Buxton LJ).

[6] *Murray* (n 4).

[7] *Salduz* (n 1) [50], [55].

[8] ibid (concurring opinion of Judge Zagrebelsky, joined by Judges Casadevall and Türmen, concurring opinion of Judge Bratza).

[9] *Dayanan v Turkey App no 7377/03* (ECHR, 13 October 2009) [32].

Article 6, it is first necessary to consider the justification for the general existence of the right under this provision.

First, there can be more than one justification for the existence of Article 6.[10] In the decision of the UK Supreme Court in *Cadder v HM Advocate*, Lord Hope recognised that the right is a vital safeguard against ill-treatment whilst also accepting that it is closely linked with the protection against self-incrimination.[11] It will be argued that both the ECtHR and PACE's recognition of the right to legal advice prior to interview are based on the overarching notion of ensuring a fair procedure under Article 6.

In *Salduz*, the ECtHR stated that a suspect would be in a "particularly vulnerable position" during the interrogation stage, exacerbated by complex legislation on criminal procedure such as "the rules governing the gathering and use of evidence".[12] Such vulnerability could only be compensated by "the assistance of a lawyer whose task it is, among other things, to help ensure respect of the right of an accused not to incriminate himself".[13] This protection against self-incrimination was expressed in *Saunders v UK* to be a fundamental aspect of the notion of a fair procedure.[14]

Looking closer to home, the Royal Commission on Criminal Procedure 1981 (RCCP 1981) expressed a similar view. Prior to the enactment of PACE, a suspect's right to a solicitor was derived from the Judges' Rules.[15] It was subject to exceptions, rarely exercised, and most suspects did not know such a right existed.[16] Even if they did, there was limited legal aid available for police station legal advice.[17] The right to legal advice was identified by RCCP 1981 as a key safeguard that could have prevented miscarriages of justice such as the Confait affair,[18] where there was a wrong conviction for murder on the basis of confessions made by mentally impaired teenagers under oppressive police questioning. Enshrining the right to legal advice was thought to protect vulnerable suspects against self-incrimination and more broadly, to balance "the interests of the community in bringing offenders

[10] John Jackson, 'Responses to Salduz: Procedural Tradition, Change and the Need for Effective Defence' (2016) 79(6) MLR 987, 1001.

[11] *Cadder v HM Advocate* [2010] UKSC 43, [2010] 1 WLR 2601 [33], [44].

[12] *Salduz* (n 1) [54].

[13] ibid.

[14] *Saunders v UK* (1997) 23 EHRR 313 [68].

[15] Ed Cape, 'The Rise (and Fall) of a Criminal Defence Profession' [2004] Crim LR 72, 81.

[16] Henry Fisher, 'Report of an Inquiry into the Circumstances Leading to the Trial of Three Persons on Charges Arising out of the Death of Maxwell Confait and the Fire at 27 Doggett Road, London SE6' (London: HMSO, 1977).

[17] Cape (n 15) 82.

[18] *R v Lattimore* (Colin George) (1976) 62 Cr App R 53.

to justice and the rights and liberties of persons accused or suspected of crime",[19] ensuring a fairer procedure prior to trial. Thus, both the ECtHR and PACE's justification for the provision of legal advice *during* the interrogation stage is to protect the suspect from self-incrimination, which falls under the overarching notion of a fair procedure.[20]

Since the justification for legal advice is identified as ensuring a fair procedure, does it warrant the right to legal advice *prior* to interview? Fundamental to the notion of a fair procedure is the privilege against self-incrimination and right to silence.[21] In *Cadder*, Lord Rodger pointed out that the right to legal advice before being interviewed was "derived from the need for legal assistance for other purposes", and not for protection against self-incrimination.[22] It is submitted that one of the "other purposes" that Lord Rodger alludes to is the protection of the right to silence.

Leverick identifies that protecting the right to silence involves the legal adviser fulfilling two distinct duties prior to the interview: (i) ensuring that the suspect comprehends the right to silence, and (ii) aiding him in determining his best interests.[23] Duty (i) entails explaining the nature of the right to silence and how adverse inferences may work against him, while duty (ii) relates to assisting suspects "to make an informed choice about their best interests on the basis of the [right to silence] and the nature of the evidence against them".[24]

Consistent with the two duties identified by Leverick, the ECtHR in *Dayanan* expressed the view that "the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance", including "discussion of the case" and "preparation for questioning".[25] Lord Rodger also noted the link between protecting the right to silence and provision of legal advice prior to interview in *Cadder*, where he stated that such legal advice assisted in deciding "whether [the suspect] should say anything at all and, if so, how far he should go".[26] As explained above, the provision of legal advice is justified on the basis of ensuring a fair procedure.

Therefore, it follows that the ECtHR and PACE are correct to recognise the right to legal advice before being interviewed by the police: it protects the suspect's

[19] Royal Commission on Criminal Procedure, The Investigation and Prosecution of Criminal Offences in England and Wales: The Law and Procedure (Cmnd 8092, 1981).

[20] *Saunders* (n 14) [68].

[21] ibid.

[22] *Cadder* (n 11) [70].

[23] Fiona Leverick, 'The Right to Legal Assistance During Detention' (2011) 15(3) Edinburgh Law Review 352, 366.

[24] ibid 369.

[25] *Dayanan* (n 9) [32].

[26] *Cadder* (n 11) [92].

right to silence, which is fundamental to the notion of a fair procedure under Article 6 of the ECHR.[27]

B. Should access to legal advice at the pre-interview stage be mandatory?

Given the importance of legal advice prior to interview, should PACE be strengthened by making it mandatory for the suspect to speak to a solicitor before an interview?

As Easton notes, there is no nation-wide data on request rates for legal advice.[28] Bucke and Brown's study in 1997 indicates a 40% request rate,[29] while Pleasence and others' study in 2011 suggests that the rate has increased to 44.9%.[30] Although Skinns' research in 2009 states that request rates for legal advice were about 60%,[31] Pleasance and others assert that this is not indicative of general request rates, since Skinns' study was based on only two police stations and there was a large variation (17%) on request rates between them.[32] However, Skinns' results corroborate studies done by Pleasance and others[33] and Brown[34] in illustrating that rates of request for legal advice vary considerably between police stations.

Brown suggests that the variation in request rates between stations may be due to arrangements and practices between them or due to differences in interpretation of PACE and the relevant Code of Practice provisions.[35] Pleasence and others note that a crucial driver of requests for legal advice is the seriousness of the offence,[36] which corroborates Maguire's early findings that detainees for minor offences do not generally request legal advice, since it was not seen as "likely to be of any benefit".[37] Additionally, in the time between Brown's 1997 study and Pleasence

[27] *Saunders* (n 14) [68].

[28] Susan Easton, Silence and Confessions: The Suspect as the Source of Evidence (1st edn, Palgrave Macmillan 2014) 93.

[29] Tom Bucke and David Brown, In Police Custody: Police Powers and Suspects' Rights under the Revised Codes of Practice (Home Office Research Study No. 174, 1997).

[30] Pascoe Pleasence, Vicky Kemp and Nigel Balmer, 'The Justice Lottery? Police Station Advice 25 Years on from PACE' [2011] Crim LR 3, 10.

[31] Layla Skinns, 'I'm a Detainee: Get Me Out of Here' (2009) 49(3) British Journal of Criminology 399.

[32] Pleasence and others (n 30) 12.

[33] ibid.

[34] David Brown, Detention at the Police Station under the Police and Criminal Evidence Act 1984 (Home Office Research Study 104, 1989).

[35] ibid 73.

[36] Pleasence and others (n 30) 11.

[37] Mike Maguire, 'Effects of the PACE Provisions on Detention and Questioning' (1988) 28(1) British Journal of Criminology 19, 31.

and others' 2011 findings, it is startling that the percentage of those who requested and actually consulted with a solicitor grew only from 34%[38] to 36.5%.[39] Given that the right to legal advice before the interview protects the suspect's right to silence and gives effect to a fair procedure, legal advice must not be precluded due to "arbitrary factors" such as the police station that the suspect finds himself in.[40] To prevent such a possibility from occurring and to strengthen the right to legal advice, there is a compelling argument that legal advice should be made mandatory before suspects are engaged in an interview.

However, it may be counter-argued that in reality, mandatory legal advice prior to the interview may not significantly strengthen the right to legal advice under Article 6. As stated above, one of the purposes of legal advice is to assist the suspect in identifying his best interests. In the context of deciding if the right to legal advice should include the presence of the solicitor in the interview room in order to identify the suspect's best interests, the minority of the Canadian Supreme Court in *R v Sinclair* pointed out that a solicitor is unlikely to be able to give effective advice on the suspect's best interests during the pre-interview stage, as the solicitor would have insufficient information about the evidence against the suspect.[41] Moreover, the suspect's best interests may only become apparent as questioning develops.[42] Therefore, mandatory legal advice may not significantly strengthen the right to advice. However, it would at least assist the suspect in understanding his right to silence, fulfilling the other objective of the right to silence at the pre-interview stage.

II. Right to Legal Advice During Police Interview

A. Does article 6 require PACE's present approach?

Does PACE go too far in permitting solicitors to be present in the police interview? To address this, the justification behind the right to legal advice must first be analysed.

As Jackson points out, the Canadian Supreme Court in *Sinclair*[43] decided that the right to legal advice is merely "informational rather than protective".[44] Therefore, a solicitor's presence during the interview was unnecessary as its role could be discharged prior to the interview. In contrast, since PACE's justification for legal advice is to ensure a fair procedure (as argued above), it is submitted

[38] Brown (n 34) 8.
[39] Pleasence and others (n 30) 10.
[40] ibid 6.
[41] *R v Sinclair* [2010] 2 SCR 310 [104] (Binnie J).
[42] ibid [87] (Binnie J).
[43] ibid.
[44] Jackson (n 10) 1006.

that presence of a solicitor during the police interview is necessary. In *Salduz*, the ECtHR held that "as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police".[45] Lord Hope in *Cadder* explained that the rule in *Salduz* was laid out "to protect a detainee against duress or pressure of any kind that might lead him to incriminate himself" and "to help to ensure that the right of an accused not to incriminate himself is respected".[46] This necessitates a lawyer's presence and advice during the interrogation in order to protect the suspect's privilege against self-incrimination, thus ensuring a fair procedure.

Despite permitting a solicitor's presence during the interview, in substance, it is submitted that PACE, in fact, falls short of ensuring that such presence secures a fair procedure. As stated above, the right to a fair trial under Article 6 applies at the interrogation stage. Fundamental to Article 6 is the equality of arms,[47] which seeks to ensure that "procedural resources enjoyed by the parties are fairly matched" and "must be respected at each stage… where Article 6 is found to be applicable".[48] It is submitted that this is not met due to lack of evidential disclosure and effective legal assistance.

The first argument is that the interrogation stage lacks procedural clarity in relation to evidential disclosure, infringing the notion of equality of arms. First, the primary legislation on disclosure, the Criminal Procedure and Investigations Act 1996 (CPIA), does not govern disclosure by the police and leaves a lacuna in terms of statutory coverage. In addition, PACE and Code C "offer no guidance to the police or defence lawyers on the use of evidence at custodial interrogation".[49] Although the courts have implied that the extent of disclosure required depends on the factual complexity of the case, it has avoided elaborating on how this is to be decided.[50] Without knowledge of the available evidence against the suspect, it is unlikely that the solicitor present during the interrogation can provide any effective advice, rendering the right merely theoretical and illusory.

Secondly, it may be argued whether PACE complies with Article 6 paragraph (3)(c) when providing for legal assistance during the police interview. Jackson observes that more cases are being disposed of before reaching trial; the trial has effectively been brought forward to the investigatory phase, since "formal sentence after trial is being replaced by a negotiated sentence or sanction after investigation".[51] Furthermore, the result of CJPOA and the new caution is that

[45] *Salduz* (n 1) [55].

[46] *Cadder* (n 11) [33].

[47] *Jasper v UK App no 27052/95* (16 February 2000) [51].

[48] Raymond Toney, 'Disclosure of evidence and legal assistance at custodial interrogation: what does the European Convention on Human Rights require?' (2001) 5(1) International Journal of Evidence & Proof 39, 48.

[49] ibid 52.

[50] *R v Argent* [1997] 2 Cr App R 27.

[51] Jackson (n 10) 1017.

suspects are accountable at a much earlier stage than at trial.[52] It follows that relevant procedural safeguards, such as qualified legal assistance, ought to be brought forward to the investigatory phase. However, for purposes of PACE, a solicitor is defined wider than in the traditional sense, including "an accredited or probationary representative" regulated by the Legal Aid Agency.[53] Would such persons meet the requirement for the provision of legal assistance in Article 6(3)(c)? Although Harris[54] argues that Article 6(3)(c) does not necessitate the use of qualified lawyers, due to the Convention's legislative background and the use of the term "legal assistance" instead of "qualified representative", it is noted that legal assistance must still rise to the level of "effective assistance".[55] Given that the trial is effectively brought forward and taking into account the complexities introduced into custodial interrogation by CJPOA, it is submitted that "only an experienced and robust defence at custodial interrogation will ensure that the suspect's best interests are fully represented"[56] and that PACE's definition of a solicitor may not satisfy Article 6(3)(c) and thus may not provide for equality of arms.

Therefore, it is submitted that PACE does not go too far in allowing a solicitor's presence during the interview, because it is necessary to ensure a fair procedure. Instead, it is arguable that PACE falls short in ensuring that the substance of the right is effective.

B. Does a solicitor's presence encourage 'no comment' interviews?

Historically speaking, Moston[57] notes that 'no comment' interviews are more likely for suspects who have legal advice than for those who do not. Given Ashworth's observations that the number of suspects "having an adviser with them, has risen dramatically",[58] and given that Pleasence and others' recent research indicates that request rates for legal advice have risen to 44.9%,[59] one would expect that the number of no comment interviews ought to have increased. However,

[52] John Jackson, 'Silence and Proof: Extending the Boundaries of Criminal Proceedings in the UK' (2001) 5 International Journal of Evidence & Proof 145, 168.

[53] Code C (n 2) [6.12].

[54] David John Harris, Michael O'Boyle and Colin Warbrick, Law of the European Convention on Human Rights (1st edn, Butterworths 1995) 265.

[55] *Artico v Italy* (1981) 3 EHRR 1 [34].

[56] Toney (n 48) 40.

[57] Stephen Moston, Geoffrey Stephenson and Thomas Williamson, 'The Effects of Case Characteristics on Suspect Behaviour During Questioning' (1992) 32(1) British Journal of Criminology 23, 36.

[58] Andrew Ashworth and Mike Redmayne, The Criminal Process (4th edn, OUP 2010) 244.

[59] Pleasence and others (n 30) 10.

whilst comparing almost the same police stations, Bucke notes that the percentage of no comment interviews decreased from 10% in 1998 to 6% in 2000.[60] In addition, Bucke found that one of the areas which has seen the greatest decline in the use of silence was from suspects who received legal advice; and amongst that group, the proportion who engaged in no comment interviews dropped from 20% to 13%.[61] Thus, recent studies do not support the view that a solicitor's presence would encourage no comment interviews.

The decline in no comment interviews where legal advice is sought can be explained by two closely related reasons. First, the enactment of CJPOA means that under the new caution, adverse inferences can be drawn from a suspect's failure to mention facts to the police that he later relies on in defence.[62] Bucke observes that post-CJPOA, it is more probable that legal advisers will advise suspects to respond to questions.[63] As Jackson notes, keeping absolutely silent "could be a risky strategy as the case law is by no means clear as to how a court or jury should view a lack of disclosure".[64] Secondly, the enactment of CJPOA has altered the solicitor's previous practice of leveraging on the threat of silence in order to obtain information from the police.[65] Post-CJPOA, executing the threat of silence may harm the defence's interests through adverse inferences. As Sanders explains, "neither limited disclosure of the police case nor legal advice to remain silent necessarily insulates the suspect from adverse inferences".[66] Given the threat of adverse inferences and that the police are under no clear duty of disclosure (as explained above), Ashworth[67] notes that legal advisers now advise cooperation with the police; to get information from the police, the suspect needs to offer information in return.

However, in certain situations the solicitor may indeed encourage no comment interviews, such as when the case is "conducted by the police on the basis of fishing expeditions and there [is] no real evidence against the client".[68] Additionally, no comment interviews may not be significantly influenced by legal advice at all. Baldwin asserts that suspects are unlikely to change their initial position of silence

[60] Tom Bucke, Robert Street and David Brown, The Right of Silence: The Impact of the Criminal Justice and Public Order Act 1994 (Home Office Research Study No. 199, 2000) 31.
[61] ibid 32.
[62] Criminal Justice and Public Order Act 1994, s 34.
[63] Bucke and others (n 60) 25.
[64] Jackson (n 52) 160.
[65] ibid 169; David Dixon, 'Common Sense, Legal Advice and the Right of Silence' [1991] PL 233.
[66] Andrew Sanders, Richard Young and Mandy Burton, Criminal Justice (4th edn, OUP 2010) 268.
[67] Ashworth and Redmayne (n 58) 245.
[68] Jackson (n 52) 161.

or co-operation, despite the conduct of the interview.[69] This corroborates Bucke's[70] findings that professional criminals and terrorists are still unlikely to answer police questions despite the provision of legal advice and the introduction of CJPOA. Therefore, it is submitted that generally, a solicitor's presence discourages no comment interviews, but in certain situations a solicitor may encourage silence or have no effect on the suspect.

C. Do 'no comment' interviews impede police investigations?

In considering whether the right to silence ought to be modified, the Runciman Commission noted the police's view that the suspect's refusal to answer questions would "seriously impede the efforts of investigators to fulfil their function of establishing the facts of the case".[71] By speaking during the interrogation, it was asserted by the police that it allowed them to seek the truth by confirming any exonerating assertions by the suspect and to "direct [their] attention towards the guilty".[72] A refusal to speak prevents any such evidence from emerging. This concurs with Bentham's sentiment more than a century ago, that the suspect is "the most satisfactory species of evidence" since he would not speak falsely to his own detriment.[73] Similarly, Bentham argued that as much "light of evidence" should be let in since "the end it leads to, is the direct end of justice, rectitude of decision".[74]

Despite the above, it is submitted that no comment interviews do not, in fact, impede police investigation. As Jackson states, "just as the right to silence can be grossly exaggerated as a mechanism for protecting the innocent, it can also be grossly exaggerated as an obstacle for convicting the guilty".[75] The police's argument is premised on the fact that the suspect is the best source of evidence in the police's supposed search for truth, which may not necessarily be true. First, given the availability of other forms of evidence such as video footage or forensic evidence, Easton argues that there are few situations where the suspect's account is the sole or best source of evidence.[76] Next, suspects may not be the best source of evidence since the pressures of interrogation may taint the quality of the evidence.[77] This is backed up by Bucke's findings, where some police officers commented that

[69] John Baldwin, 'Police Interview Techniques: establishing Truth or Proof?' (1993) 33 British Journal of Criminology 325, 333.

[70] Bucke and others (n 60) 36–37.

[71] Royal Commission on Criminal Justice, Report, Cm 2263 (1993) 51.

[72] ibid.

[73] Jeremy Bentham, The Works of Jeremy Bentham: Published under the Superintendence of His Executor, John Bowring (W Tait; Simpkin, Marshall & Co 1843) 451.

[74] ibid 336.

[75] John Jackson, 'Reconceptualising the Right of Silence as an Effective Fair Trial Standard', (2009) 59 International & Comparative Law Quarterly 835, 850.

[76] Easton (n 28) 14.

[77] ibid.

CJPOA's effect was to substitute silence for "a pack of lies" and that suspects "[lied] a little better… instead of saying no comment".[78] Furthermore, if no comment interviews impeded police investigations, one would expect an inverse relationship between the use of silence and admission rates or convictions secured. Instead, Bucke found that the decrease in use of silence has not affected the admission rates and convictions secured.[79] On the contrary, Williamson notes that it is more likely for suspects who are silent to plead guilty and that a majority of such suspects end up getting convicted.[80] This supports Leng's study, which indicates that only a minority of non-prosecuted cases and acquittals involved the exercise of silence, and those outcomes were not truly a product of silence itself.[81] Therefore, it is submitted that no comment interviews cannot be said to impede police investigation, since it is backed up by neither qualitative nor quantitative evidence.

D. Do 'no comment' interviews turn out to be against the interests of the defence?

As stated earlier, section 34 CJPOA allows adverse inferences to be drawn from the suspect's failure to mention facts when questioned, which he later relies on in his defence. Although the provisions state that a suspect shall not have a case to answer or be convicted solely on an inference,[82] the court in *Murray*[83] emphasised that a suspect cannot be convicted solely *or mainly* from such an inference. Thus, the statutory framework suggests that no comment interviews can be against the interests of the defence due to the operation of CJPOA, but it will "play no more than a supporting role" for the prosecution.[84]

How does the theoretical framework of CJPOA apply in reality? Firstly, Jackson notes that some prosecutors perceive the legislation as merely assisting them indirectly by weakening the defence case, despite the potential for such silence to form part of their case.[85] Further, prosecutors may not even rely upon the legislation. Such abstinence can be explained by several reasons; "tactical (the danger of over-kill), presentational (the risk of diverting the jury from the thrust of the case) and personal (some indicating that they believed the provisions were

78 Bucke and others (n 60) 32.

79 Bucke and others (n 60) 34, 66–67.

80 Thomas Williamson and Stephen Moston, 'The Extent of Silence in Police Interviews' in Greer and Morgan (eds), The right to silence debate: Proceedings of a Conference held at the University of Bristol on 27 March 1990 (Bristol Centre for Criminal Justice 1990) 36–43.

81 Roger Leng, The Right to Silence in Police Interrogation (Royal Commission on Criminal Justice Research Study No. 10, 1993).

82 Criminal Justice and Public Order Act 1994, s 38(3).

83 *Murray* (n 4).

84 Ian Dennis, 'Silence in the Police Station: The Marginalization of Section 34' [2002] Crim LR 25, 29.

85 Jackson (n 52) 162.

unfair)".[86] Despite the above, the prosecution believes that silence could "tip the balance" in their favour in borderline cases.[87]

Secondly, it is unclear what a jury makes of the provisions. Although there is a view that juries may "place too much weight" on adverse inferences,[88] Jackson asserts that the primary view is that juries do not use the provisions to "plug a large gap in the prosecution case", but merely to draw adverse inferences against the defence.[89] In contrast, practitioners perceived that the provisions had an insignificant impact on juries[90] and that they were hesitant to draw inferences where a defendant was silent during interrogation but testified in court, since the defendants were not silent in front of them[91]. Additionally, practitioners identified that it was difficult to get the jury to pay attention to the judge's directions.[92]

In relation to the judiciary, Bucke[93] identifies that judges in the Crown Court are divided in opinion between those who are receptive and those who are concerned with the provisions. Although there is a general consensus that a more consistent judicial attitude will result after a passage of time, practitioners have expressed concern that the present divergence in judicial attitude may result in an inconsistent application of the provisions.[94] Additionally, some of the senior judiciary appear to be resistant to the provisions. Lord Bingham commented in *Argent* that "Parliament in its wisdom has seen fit to enact [s 34]",[95] and subsequently expressed in *Bowden* that the provision "should not be construed more widely than the statutory language requires".[96] Dennis[97] notes that post-*Bowden* cases have indeed reflected a restrictive approach towards the provisions.

Therefore, considering the view of the jury, prosecution, and judiciary towards the provisions, it is submitted that no comment interviews can be against the interests of the defence, albeit to a limited extent. Given the limited effect of the provisions, Dixon aptly states that CJPOA was enacted "for more symbolic than instrumental reasons in order to regain political ground lost by safeguards provided under PACE".[98]

[86] ibid 153.
[87] Bucke and others (n 60) 45.
[88] Jackson (n 52) 157.
[89] ibid 157.
[90] ibid 155.
[91] ibid 156.
[92] ibid 157.
[93] Bucke and others (n 60) 60.
[94] ibid 60.
[95] *Argent* (n 50) 32.
[96] *R v Bowden* [1992] 2 Cr App R 176, 181.
[97] Dennis (n 84) 30.
[98] David Dixon, 'Politics, Research and Symbolism in Criminal Justice: The Right of Silence and the Police and Criminal Evidence Act' (1991) 20 Anglo-American Law Review 27.

III. Conclusion

This article has argued that PACE does not go too far in recognising the right to pre-interview legal advice, and that making such advice mandatory would strengthen the right to a certain extent. Further, PACE is justified in allowing the presence of a solicitor during the police interview and it does not encourage no comment interviews; even if it does, it does not impede police investigation and has a limited impact against the interests of the defence. However, there is a possible argument that PACE in fact needs to go further in order to comply with Article 6 during the interview stage.