RIGHTS OF THE ARRESTED PERSON IN ENGLAND AND THE POLICE AND CRIMINAL EVIDENCE ACT 1984*

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Most writers[1] on criminal law invariably address, if not initiate, a discussion on the powers of the police to investigate crime, by asserting the necessity to strike a balance between those powers and the rights of the citizen. In other words any statute purporting to regulate the investigation of crimes should reflect a balance between the powers necessary for police officers to fulfill their duties and the protection of a person's civil and political rights.

The tendency shared by criminal law commentators to emphasise the importance of maintaining this balance, may perhaps be attributed to the knowledge that the statute book has not in the past been very convincing in its legislative efforts to strike a just and equitable balance. Regrettably, in practice, the path where the powers of the protectors and rights of the protected cross, reflects a grey area. Two schools of thought depict the situation. One school of thought calls for the stengthening and the enlargement of police powers necessary to deal with professional criminality as a means of curbing international narcotic circles, terrorism, homicides and other offences of a 'serious and grave nature'. Nevertheless, not all criminals deserve the notoriety enjoyed by the perpetrators of heinous offences, and therefore should not be treated in the same manner. Otherwise, wide ranging powers enjoyed by the police would, in all probability, have

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1 Among others see "Criminal Procedure" by C. Hampton 3rd ed. 1982; "Criminal Procedure" by J.B. Bishop 1st ed. 1983; "Police Interrogation in England and Wales" by Dr. P. Morris, 1978; "The Criminal Law in Canadian Society" published by the Canadian Government in 1982.

ill-fated effects and consequences not merely on the suspect and on the petty criminal, yet particularly in those cases where a person is fortuitously present in the wrong place at the wrong time. The main concern, therefore, of those who belong to the so-called libertarian school, comes as a direct result of the possibility that police officers may abuse of the powers they have been entrusted with. On the other hand, the authoritarian school calls for the reaffirmation of the suspects' rights, for the establishment of effective means for review, and for accountability of the already existing and far too strong powers entrusted to those officially involved in the maintaining of law and order.[2] As the Lord Chancellor succinctly points out, "there are the law and order boys (and girls) at one end of the pitch, and the human and civil rights lobby on the other".[3]

The main issue which confronts the harmonisation of the views propagated by the two schools of thought, is to seek the way in which the most appropriate form of compromise between their polar opinions can best be formulated. The necessary equation must reinforce the basic purpose of criminal law in regulating the acts of individual members of society with each other and in their relations with society as a whole. Furthermore it must protect the law abiding citizens from the transgressors of well defined and predetermined laws and the perpetrators of socially reprehensible acts. Above all, it should ascertain that the powers entrusted to those whose duty is to secure the detention of transgressors, are kept in check. The enforcement of criminal law provisions of necessity allow a certain degree of encroachment upon the freedoms of individuals. Nevertheless, the extent to which the basic rights may be encroached upon is not limitless and far from unqualified, particularly to trespassers who would like the public to think that they do so in the name of justice and the maintenance of law and order. Above all, the delineation of the confines within which police powers may be exercised in relation to the protection of citizens' rights, poses an added dimension to an already complex problem movinig in a vicious circle. It is not sufficient for a limit to be set, up to which certain behaviour of an inquisitorial nature is allowed. The absence of any limit may be intolerable, yet any ill-defined and obscure wide-ranging power, the exercise of which is left at the discretion of the executing officer is equally unacceptable. In defence of the exercise of such arbitrary powers one view put forward rather naively, is that it would be better to have enforceable wide powers rather than none at all. Again other views taken up, reaffirm the necessity principle, which apparently justifies the promulgation of statutorily controlled boundaries large enough to combat criminality on any level, high and low. However, what lies at the heart of the matter is the rather utopian quest to provide enough room for the police to go about their duty without violating the civil and political rights of the

2 Vide comments by Lord Hooson in the debate of the 2nd reading of the Police and Criminal Evidence Bill 1984 (No. 303), House of Lords Debates Weekly Hansard 4 June, 1984 cols. 415 – 421.

3 2nd reading, opening speech on the Police and Criminal Evidence Bill 1984 in the House of Lords Weekly Hansard 4 June, 1984 col. 405.

laymen and in the wake rekindle public confidence in the police force.

Regretably the last decade did not venture far in securing the ideal solution to the fight against crime in England. A decade largely dominated by the 11th Report of the English Criminal Law Revision Committee (1972),[4] which called for the abolition of the suspect's right of silence during police questioning. However, it also proposed a number of safeguards which did not seem to approach the equilibrium of power with apprehension and caution, but seemed to tip the balance in favour of the defence to the extent that hardened criminals could escape the accusatorial arm of the law with virtually little difficulty. Moreover the Confait case as commented upon in the Fisher Report[5] imparted clearly the picture that the police did not follow, perhaps were even ignorant of, the rules of regulating the investigation of crime. Dr. MacBarnet opines that the 11th Report did not succed to suggest the need for a criminal justice system tailored for providing decisive and categorical scope to investigatory powers. On the contrary, an image was portrayed, where due to the manipulation of those very same powers by police officers during questioning periods, crime suspects could be induced to confess to crimes that they had never committed.[6] Professor Leight confirms, that antagonistic and oppressive attitudes adopted by police officers during interrogations cannot always be brushed aside in the hope that their justification rests with "errors made in good faith rather than consciously overbearing conduct".[7]

The position regulating the questioning of criminal suspects by the police in England, prior to the rules laid down by the Police and Criminal Evidence Act 1984, could hardly have been called statutory, at the utmost administrative. The situation was regulated by a set of rules and directions issued by the Home Office to guide police officers in the conduct of their investigations.[8] They were devoid of any legal force or statutory power, their purpose was to serve as a guideline to the investigating officer when obtaining a statement from a detained person in connection with the commission or otherwise of an offence. In addition the evidence obtained therefrom may or may not have been admissable in a court of law at the discretion of the trial judge. Actually the admissibility of evidence is immune to a certain degree from the fact that it may or may not have been obtained in breach of the Judges' Rules.[9] Needless to say that the position could be described as permissive and in need of reform. Quoting Glanville Williams, Professor Leigh advocates the abolition of the rules.[10] One

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4 Command. 4991.
5 1977/78 H.C. 90.
6 Vide "Balance & Clarity; has the Royal Commission on Criminal Procedure achieved them" in C.L.R. (1981) 445.
7 Report on the Report of the R.C.C.P. – L.H. Leigh 44 Mod. L. Rev. (1981) at pp. 303.
8 Judges' Rules and Administrative directions to the Police H.O. Circular No. 89/1978.
9 For further reading vide "Police Powers in England and Wales" by L.H. Leigh 1975, at Chapter VIII pp 141 et seq.
10 VIde P. Morris on the Judges' Rules in "Police Interrogation in England and Wales" 1978 pp 29; vide also R.C.C.P. Research Study nos. 3 & 4 on Police Interrogation at pp. 31 – 32.

suggestion for reform, which seemed to be inevitable, and was to a certain extent always in the offing, concerned the desperate need to codify by statutory instrument the entire area dealing with the interrogation of suspects. In other words it was felt necessary to provide for the enactment of provisions categorically establishing the basic safeguards due to the detainee or the accused, and above all regulating the admissability of confessions made in police custody. Furthermore the compromise so much yearned for in striking that balance, between the rights of the suspect and the limits within which police officers could carry out their investigations, was lacking and very much necessary for the 1970's. A period described by Dr. MacBarnet to be "characterised by the rise of a powerful law and order lobby". [11]

A Royal Commission on Criminal Procedure was set up "with the unenviable task of seeking a balance". [12] In its Report [13] the Royal Commission makes that purpose clear. Its goals were admirabe, the research work carried out on various aspects of crime investigation novel, and of unprecedented value in an area which would not be unjustly described as to have been wanting. Nevertheless the end result attracted a fair amount of criticism despite the fact that it based the construction of its report on a triangular premiss of "fairness", "openess" and "workability". Whether or not the Royal Commission succeded in striking the balance it set out to obtain, cannot be answered in a categorical fashion. Admittedly certain aspects of the law on criminal investigation have been gathered with a view to be implemented and endowed with legislative force. On the other hand it is extremely doubtful whether any equilibrium at all has been preserved in the balance. Indeed, if at all, the balance seems to have been tipped in favour of alleviating the police from any obstacle they may meet in the course of their enquiries.

Some writers take the extreme view that the Royal Commission actually failed to achieve both tasks with which it was entrusted. Namely, in striking the balance between police powers and civil rights; and also in its attempt to clarify precisely those powers vis-a-vis the suspect. [14] Mr. S.P. Best has summed up the position by stating that "attempts at compromise, often well intended, frequently fail to achieve the desired end of pleasing everybody." He further adds that many of the Commission's features seemed to be the result of "woolly thinking and will" and if enacted would make a bad situation worse. [15]

However, to strike that proper balance, is not simply a question of finding the middle line between two poles. "The golden mean between efficiency in law enforcement and protection of the rights of accused persons in criminal cases is not easy to find, nor is it likely to have any

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11 op.cit. at fn. 6 pp. 446.
12 ibid.
13 "The Investigation and Prosecution of Criminal Offences in England and Wales: the Law and Procedure Vol." Command 8092 – 1, 1980.
14 vide MacBarnet op.cit. fn. 6 at p. 447.
15 "Compromise by the R.C.C.P." 125 Solicitor's Jnl. (1981)70.

permanent resting place". [16] The line of demarcation is elusive and very much determined by political and social values. [17] As the Lord Chancellor confirms "law and order must be on the menu of every political party". Indeed the noble Lord together with other colleagues in the House of Lords, emphasised almost to the point of rhetorical boredom, that the whole policy behind the Police and Criminal Evidence Bill was to strike a balance. [18] On the other hand some commentators have gone as far as to imply that the Police and Criminal Evidence Act hardly fulfilled, if at all, the purpose it was being enacted for. As opposed to epitomising the policy of fight against crime, adopted as an election issue by the Government of the day in proposing the Police and Criminal Evidence Act, it was claimed that the new law had nothing to do with the so-called war on crime. At best, its supporters could only consider it as an attempt, perhaps an abortive one at that too, to refurbish the present state of police law in relation to suspects' rights. [19] The ascertainment and the extent to which such a statement is true in relation to the rights of the arrested is the task that now lies ahead.

The Police and Criminal Evidence Act in essence reflects the adoption of a substantive part of the recommendations proposed by the Commission's Report. [20] It omits, however, the amendments proposed in the Report on the establishment of a new independent prosecution system. Nevertheless any hope would be alien to the notion of expecting the Act to succeed where the Report failed. Similar to the Commission's work, the Act's scope is to strike a balance between the powers, necessary for the maintenance of public order on the one side and the protection of citizens' rights on the other. In addition, it concerns itself with providing a codified framework with the, previously absent, power of legislative force to clarify and delineate once and for all the legal position on arrest, detention, search and seizure together with other related areas of crime detection. The Act is said to "redefine and adjust the law in respect of powers that are required by the police for the prevention and investigation of crime.... However, the exercise of these powers renders people, who may or may not be criminal, vulnerable to invasion of their liberty and abuse of their rights. A balance must be struck and it must permeate the whole structure from first principle to last detail". [21]

In fact as the proposed law approached the ultimate opportunity of undergoing any radical and official amendment in the House of Lords, Lord Elwyn-Jones pointed out that the Police and Criminal Evidence Bill's most vital failure was to secure the restoration of public confidence in the

16 Vide "The Rights of the Accused in Criminal Cases" by Linvingston Hall in 'Talks on American Law', Voice of America Forum Series, edited by Harold J. Berman, Washington, 1978.
17 Vide MacBarnet op.cit. fn. 6 pp. 53.
18 Vide Weekly Hansard 4/6/84 col. 405; vide also The Times Editorial comment of the 30/3/84.
19 Editorial comment in Vol. 133 N.L. Jnl. (1983) 429.
20 Command. 8092.
21 See The Times leading article 30/3/84.

police. The noble Lord rests his case by quoting from a leading paper "not famous for criticising a Tory government", which described the Bill at that stage as "an unlovely measure raising in almost every clause prickly questions about the balance between authority and liberty. Beyond.... dispute, it tilts the balance towards the police". Aware of the differing views espoused by most of its readers, the newspaper attempts to justify its comments by adding that the tilt of the balance of power is inevitably due to the ever increasing rate and change in the nature of crime. However, the newspaper could not help itself from drawing the conclusion that at that moment in time the Bill seemed to go too far in allowing the police to exercise powers whose only safeguard is based on trust.

The struggle between the authoritarian and the libertarian schools, like the two families of Verona, echoes incessantly, and haunted the Act in its entire route through the legislative process.

Arrest and Detention

The rights of the suspect begin where the powers of the investigating officer come into operation. The Police and Criminal Evidence Act mainly considers these rights in Parts IV and V relating to Detention and the Questioning and Treatment of Persons by Police. On the other hand, the Act's provisions concerning the powers entrusted to officers regulating their entry and search into the suspect's property, together with the added facility of seizing and retaining that property, manifest the wide gap which subsists in the suspect's protection from the discretionary exercise of investigative powers. An examination of the relevant clauses which purport to provide adequate safeguards to the suspect seeks to show that the legislator's intention was to envisage a situation where a person who could help police in their investigations would not be detained unnecessarily in police custody unless, of course, his presence there is further required. The contemplation of such a situation, however, begs the question as to what circumstances warrant an extended period of detention and if so, for how long and whether the suspect can be kept in ignorance of the reasons for which he is detained without being formally charged with having committed a particular offence. [23]

The starting point of what may be an unforgettable ordeal for the person concerned, lies with the moment of arrest. The position and the law of arrest as Lord Denning puts it, "is a hopeless muddle and in a confused state". [24] The Police and Criminal Evidence Act attempts to elucidate the complex state of affairs. At the outset it, however, regrettably fails to provide a clear definition of what constitutes or is meant by arrest. The established principle at common law is that arrest necessarily consists in the seizure or touching of the person's body with a view to his restraint. [25]

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22 Refer to the House of Lords Weekly Hansard 4 June, 1984 cols. 411 – 412.
23 Vide clauses 40 to 43.
24 Vide House of Lords Debates Hansard 4/6/84 col. 426.
25 Vide art. 99 on Arrest in Halsbury's Law of England 4th Ed. Vol. 11 at pp. 73.

Words to the effect that a person is under arrest do not necessarily amount to the actual arrest of that person unless uttered in a manner which in the circumstances are calculated to make quite clear to that person that he is under arrest and he so submits.[26] As early as 1704, the English courts laid down the principle that for a proper arrest to subsist, it is necessary that corporal seizure or physical contact of the suspect's body by the arresting officer actually takes place.[27] However it has also been held, that although words to the effect that a person has been placed under arrest, are not "per se" sufficient to constitute arrest, that person's consequent restraint is lawful as long as he submitted voluntarily to accompany the arresting officer as a direct result of the words addressed to him.

A more recent case[29] makes the position at law clearer in emphasising the point that a person is lawfully under arrest irrespective of how the words addressed to that person are formulated as long as they are explicit enough to make the addressee aware that he is not free to leave the officer's presence. If the words uttered by the arresting officer are not to that effect and fail to convey the message, arrest is considered not to have taken place. It is suggested that due care and effort is necessary to make the positiion quite clear to the person concerned particularly in cases where the suspect may be under the effect of intoxicants or alcohol.[30] In actual fact as Bishop sums it up "it all depends upon the circumstances of each case and whether it has been shown that a person has been arrested. It is not possible to speak of a magic formula".[31]

In its Report on the law of arrest, the Royal Commission on Criminal Procedure, omits any discussion on the definition of that concept. It seems to be rather more concerned with "the ultimate purpose of arrest i.e. in bringing a person to trial for committing or having been reasonably suspected of committing a criminal offence".[32] It in fact dwells on what standards should be applied in order to determine what amounts to reasonable suspicion, and as far as providing a definition as to what constitutes arrest there seem to be no comments made available by the Commission.

Nevertheless, it must be pointed out that mention is made of the right

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26 Vide L.H. Leigh on "Arrest in Police Powers in England and Wales" at pp 37; vide also R.W. Harding on "The Law of Arrest in Australia" in "The Australian Criminal Justice System" ed. by D. Chappell, and P. Wilson 2nd Ed. 1977 pp. 243 – 244.

(27) Vide *Genner v Sparks* (1704), 6 Mod. Rep. 173.

(28) *Russen v Lucas* (1824) 1 C & p 153, and in *Horner v Battyn* (1939) Bull. N.P. 61, the principle of defendant's submission to bailiff's authority was upheld.

(29) *Alderson v Booth* (1969) 2 All. E.R. 271.

(30) In *Wheatley v Lodge* (1971) 1 ALL E.R. 173, it was held that as long as the arresting officer does all in his power that a reasonable man is expected to do in the circumstances upon realising that the person in his custody was deaf even if that person could not lip-read or otherwise communicate with the officer.

31 J.B. Bishop "Criminal Procedure" 1st Ed. 1983 Chapter 2 at pp. 43; vide also *R v Inwood* on this particular point in 2 ALL E.R. (1973) 645 and L.W.L.R. (1973) 647.

(32) Report para 3.65 at pp. 40.

to be informed of the reasons for one's arrest.[33] Indeed, the Commission stresses the proposed restriction of the circumstances in which police can exercise the powers it entrusts to them. Nevertheless, it equally makes clear the point that it has no intention of doing that at the expense of hindering the police from fulfilling their functions.[34] Thus, despite the admission by the Commission that the law on arrest is "lacking clarity and found in an uneasy and confused mixture of common law and statutory powers.... the latter having grown piecemeal and without any consistent rationale",[35] it must be seen to what extent it has fallen short of precisely altering that situation. In this light the balance between powers and rights, about which so much ado has been made, would seem to incline towards the protectors rather than the protected.

The Police and Criminal Evidence Act, being the legislative image of the Commission's work, gives statutory expression to a rule established under English common law which comes in the form of a safeguard to the suspect. That safeguard, subject to certain exceptions, is the right to be informed of the reasons for arrest.[36] The principle has been well established by the leading case on this aspect in *Christie v Leachinsky*.[37]

The courts in *R v Weir*[38] again upheld the rule that a valid arrest consisted of two ingredients: (a) physical restaint and (b) a valid and true reason for the arrest. Where a person had been arrested on suspicion of one offence and although already under restraint, it is still absolutely necessary to inform him of any other reason if he is to be restrained on suspicion of having committed a different offence. Failure to inform him of a different reason for a different offence does not amount to arrest and would therefore not be entitled to be held in custody. As recent as the case *Pedro v Diss*[39] it was again upheld on the basis of *Inwood* (1973) 53 Cr. App. R. 529 and of *Christie v Leachinsky* (1947) A.C. 543, that a police officer could not detain a person without conveying to him that he was under arrest and the reasons for being so.

Yet as early as 1828, emerged the first ground where an exception to the general rule of being informed of the reasons for the offence, was allowed. *In re Howarth* had established, that if in the circumstances it is quite obvious, for a person to realise the reason for which he is or is about to be apprehended, any subsequent restraint shall be lawful and any resistance thereto illegal even if no words are actually said as to indicate why he is under control.[40] Although if *Howarth* was once right, it had been overshadowed by *Christie v Leachinsky*. In fact, Stanley Cohen writing on the "Investigation of

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33 Ibid para 3.69.
34 Report para 3.75.
35 Ibid para 3.68.
36 Vide clause 28 of the Act.
37 1 ALL E.R. (1947) 567.
38 (1972) 3 ALL E.R. 906.
39 1980 Q.B. & C.L.R. 1981 236 - 238.
40 In *R v Howarth* (1828) 1 Mood CC 207; vide also *Gellberg v Miller* (1961) 1 ALL E.R. 291.

Offences and Police Powers" lays down the principle that "in theory an arrest consists of the actual seizure or touching of a person's body with a view, to detention", and confirms that "it may in fact entail far less than this. So long as there is submission to the process the mere pronouncing of words by the arresting officer will suffice".[41] However sub-section 4 of clause 28 in the Police and Criminal Evidence Act amends the whole position radically. It makes it quite clear that a person shall be informed of the reasons for his arrest irrespective as to whether the fact of the arrest is in itself quite obvious. Such amendments are commendable and in fact Section 28 extends the obligation of the police officer to inform the person that he is under arrest dispite the fact that he may have realised it or that the circumstances may have so indicated.[42]

In essence a detainee's right to know that he is under arrest and the reasons therefor, have been upheld by the Act. It is further stipulated that where the detainee escapes from police custody before the arresting officer had opportunity to inform him of his rights, the offender should not later, if apprehended, invoke that ommission as amounting to a violation of this right.[43] What is rather disappointing, in an otherwise reformed state of the law, is that both rights of the detainee shall be made known to him as soon as practicable after his arrest and thus leaving a certain amount of discretion in the hands of the police officers in determining what may or may not be practicable. As the Royal Commission rightly admits, the lack of a definition of such a term allows for flexibility but produces uncertainty for both police and suspect.[44] On the whole, however, clause 28 has been enacted including certain welcome changes, in line with the main principles enunciated in *Christie v Leachinsky*,[45] having somewhat taken into consideration also the Commission's proposals of eliminating a "helping the police with their inquiries" situation.

As a matter of fact clause 29 of the Act allows for clarification of the position of a person who voluntarily attends at a police station or at any other place in the presence of a constable without having been formally arrested. The principle it seeks to establish is to make categorically certain that any person who voluntarily presents himself at a police station or at another place to assist the Police in the investigation of an offence, is free to leave at any time and without any restriction. In its Report the Royal Commission makes it clear that its intention was to do away with the grey area of having a half-way house between liberty and arrest. It would be desirious to establish a situation where a person is either under arrest or he is not. Referring to the judgment delivered by the Canadian Supreme Court in *Reg. v. Whitfield*,[46] Cohen adds that "there is no room for sub-division of the concept of 'arrest' into 'custodial' arrest and 'symbolical' or

41 Op.cit. 13 Ottawa L. Rev. (1981) 549 at 559.
42 Vide clause 28 sub-section 2.
43 Section 28 sub-section 5.
44 Report para. 3.98.
45 (1947) A.C. 578 – 579.
46 (1970) S.C.R. 46, (1970) 1. C.C.C. 129, 7 D.L.R. (3d) 97 (1969).

'technical' arrest. An accused is either arrested or he is not''.[47] In the case where a person accompanies a police officer of his own volition, he should be free to leave unless there exist grounds on the basis of which he will be, at least temporarily, deprived of the enjoyment of his right to freedom of movement.[48] The Commission also called for the introduction of a novel scheme used (generally) in Canada by the Ontario Police which simply involves a so called "appearance notice." It would allow the police to obtain appearance of the person at the station without actually arresting him. The Commission further recommended, that failure of appearance should be met with the same predicament that befalls any one who fails to answer to bail without the prior need of arrest.[49] Regrettably such a measure was not taken up. Rather the Act limited itself to asserting a person's possibility of leaving police custody unless he is technically put under arrest and informed as such at once.[50]

Actually, Section 29 can be seen as to impart a totally different picture altogether in practice. The police can ask a person down to the police station for a short conversation, and on going to the station willingly, under the impression that it is a short visit, the person concerned may still be there in 'conversation' for an unlimited period of time answering questions without being formally arrested or charged. Section 29 may, therefore, in practice undermine the whole scope of the Act to regulate the period of a suspect's detention in police custody.

Once again the legislator fills in a lacuna by doing away with what was a precarious situation but at the same stroke omits to provide any safeguard from any possible abuse by the investigating officers. As Professor Zander indicates, generally speaking a suspect would not know of his right to leave the station unless he is formally placed under arrest. In practice, therefore, a suspect will not take advantage of that right and by the time he is placed under arrest he may have prejudiced his position gravely. The learned writer suggests that the suspect should be told that despite his accompanying an officer to the station, this does not in any way imply that he is under arrest.

The Royal Commission recommends that upon arrest the person concerned should be taken to the police station immediately.[52] Section 30 of the Act caters for the implementation of such a proposal and indeed it marks the first occasion under the provisions of the new law whereby an arrested person is held in police detention. The section stipulates that a person on arrest must be taken to the station as soon as practicable. The station to which the arrested person is taken, must be a designated one and in cases where a person is not taken to such a designated police station he

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47 Vide 13 Ottawa L. Rev. (1981) 559.
48 Report para. 3.97.
49 Ibid para 3.80.
50 Clause 29 paras. (a) & (b).
51 Vide M. Zander on "P.C.E.B. – III: Arrest" in a series of articles explaining the various provisions of the Police and Criminal Evidence Bill at 133 N.L. Jnl. (1983) 246.
52 Report para 3.102.

shall be taken to one not more than six hours after his arrival to the first station. However, if the person is arrested by a constable not attached to a designated station, he may take the arrested person to any other "unless it appears to the constable that it may be necessary to keep the arrested person in police detention for more than six hours". [53] The act seems to take up the Commission's proposal of ensuring the possibility that arrested pesons should be taken to police stations where the enquiry is to be undertaken [54] by the selection of certain designated stations. [55] However, it fails at such an early stage in the process of arrest to provide any safeguards or to impart some sort of explanation for the legislature's choice of a six-hour time limit. The only readily acceptable explanation, upon a first impression, is that it reflects the time limit proposed by the Royal Commission after the lapse of which and in cases where no charge is made, an officer not connected with the investigation of the particular case and preferably holding the rank of inspector should look into the case to satisfy himself whether the grounds for arrest still exist. [56] As far as section 30 is concerned one last point which deserves mention is the case where a constable sees fit to delay taking the arrested person to a police station if the latter's presence is required for investigation purposes at any other place. [57] This sub-clause undermines the immediacy of proceeding to a police station in the first place. It enables the police to take, what Professor Zander describes as "the scenic route to the police station". [58]

Part IV of the Police and Criminal Evidence Act contains the main provisions purporting to codify the law on detention after the arrest of a person has taken place. As Lord Hutchinson of Lullington remarked, this segment of the new law represents "the very centre and kernel of the Bill". [59] It lays down the principle that no person may be detained for an offence except insofar as the conditions stipulated are met with. It primarily provides for the appointment of custody officers at designated police stations as suggested in paragraph 3.112 of the Commission's Report, whose duty is the overall responsibility for the detention and the treatment of detainees as specified in the various provisions of the Act on detention. A detainee is entitled to be released if the grounds for his detention do not require his continued detention. If,however,it appears to the custody officer that there is need for further investigation of the offence in connection with which the person was detained, or that proceedings may be taken against that person then he shall be released only on bail unless it happens that he was seen to be unlawfully at large when first arrested, in which case he shall not be released at all. [60]

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53 Section 30 (3).
54 Report para. 3.102.
55 Section 35 of the Act defines what is intended by 'designated police stations'.
56 Report para. 3.104.
57 Section 30 (10).
58 N.L. Jnl. 1983 at pp. 246.
59 Vide House of Lords Debates Hansard 4/6/84 col. 465.
60 Vide Section 34 (4).

Prior to the enactment of the new Act, as with other aspects of the criminal process such as arrest, the legal situation concerning persons in police detention was, to quote C. Munro, "... in the absence of authority, for long notoriously unclear". Nevertheless, the general principle was that a person in police custody could not be kept in detention for questioning, whether in the street or at the police station, unless arrested and brought before a Magistrates' Court within 24 hours from his detention in custody. Before the new provisions contained in the Police and Criminal Evidence Act 1984, the two main sources of law regulating a detainee's length of duration were, (i) rule 'B' of the Judges' Rules which laid down that "police officers, otherwise than by arrest, cannot compel any person against his will to come or to remain in a police station". [62] The other provision by virtue of which a person could be detained is found in section 43 of the Magistrates' Court Act 1980. It caters for the case where a person is taken into custody without a warrant and on being taken to the police station, is to be brought before a Magistrates' Court within 24 hours from the time when he was taken into custody unless an officer, at least holding the rank of an inspector or the officer in charge of the station to which he has been brought, shall inquire into the case and release him on bail if the offence is not a serious one, that is if it was not practicable to bring the person in custody before a Magistrate within 24 hours from the moment he was taken into custody. If, however, the person is retained in custody he must be taken before a Magistrates' Court as soon as practicable. Of course, this provision has now been abolished, and although a critical examination of its effects is indicative of the pitfalls and inadequacies of its practical application, it is only meant to represent the legal position as it stood prior to the 1984 Act.

The main defects with such a provision are, that firstly it fails to define what is or may be considered a "serious offence" and secondly allows any decision to be taken, on the nature which the offence assumes, up to police discretion. Furthermore detention in cases of serious offences was open-ended. As Munro adds, "where section 43 sub-section 1 of the Magistrates' Court Act does not cater for an unqualfied 24 hour limit, the tendency is to turn to sub-section 4 of that section and seek refuge in the application of a rule open to general interpretation, that arrested persons are to be brought before a court as soon as practicable". [63] The courts interpreted the latter phrase as to denote a period of not more than 48 hours duration. The same author implies that the English courts may have deduced such a time-limit from the same period of time stipulated under the Prevention of Terrorism (Temporary Provisions) Act 1976. [64] Munro further adds that the time-limit was a misconstruction produced by reading sub-sections 1 and 4 of section 43 of the Magistrates' Court Act in conjunction. Quoting from a

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61 Vide note by Munro on 'Police Detention' in Public Law (1982) at 210.
62 Vide App. A of the H.O. Circular No. 89/1978.
63 Op.cit. at pp. 211.
64 Vide ***Houghton v Franciosy*** (1978) 68 Cr. App. R. 197; ***R v Hudson*** (1981) 72 Cr. App. R. 163 and in ***Re Sherman and Apps*** (1981) 72 Cr. App. R. 266, 271.

recent case the writer points out that Lord Lane sitting in the Court of Appeal confirms, "that the particular section of the Magistrates' Court Act does not only not speak of 48 hours, yet there is no mention of 48 hours at all". [65]

By way of comparison, a 'peace officer' in Canada may arrest a person without warrant only if he has reasonable and probable grounds to believe that the suspect may have been or was about to commit an indictable offence. [66] Nevertheless, the arresting officer is required to bring the person arrested with or without a warrant, within 24 hours after the arrest before a judge and if a judge is not available, than as soon as practicable after that. [67] The flaw in this situation is that Canadian officers tend to take the arrested person to Court irrespective as to whether or not they have gathered enough evidence to secure a conviction. This gives rise to a high proportion of persons being detained unnecessarily. Consequently, it was suggested that the arrested person should be released from police custody if further investigation failed to produce enough evidence to justify his continued detention without the need to be brought capriciously before a judge. [68]

In the light of that Canadian proposal, the Police and Criminal Evidence Act seeks to provide, having taken into consideration the Commission's comments on the issue, for a period of detention where police interrogation can be carried out after arrest has taken place, yet before any charge of an offence has been made against the arrested person. [69] The detention scheme in the Act embodies the necessity principle which in practical terms allows the investigating officer to proceed to the continued detention of the arrested where it is expedient to do so in order to secure the evidence required for the charge of that person with an offence. However, as Professor Leigh notes in his report on the Royal Commission's work, the situation envisaged is to end abuses in a delicate area "by institutionalising the practice under controls". [70]

On arrival of the arrested person at the police station, the custody officer will see whether sufficient evidence is already available at that time to charge him with the offence for which he was arrested. If that evidence is lacking he may be kept for a period long enough to enable the investigating officer to secure that evidence. [71] The custody officer is to release the arrested person without bail if no evidence is available. On the other hand he may again order the detention without charge of the detainee, if he has reasonable grounds for believing that his detention without charge is necessary to obtain or preserve the evidence, through further questioning

65 In *Molcherek and Steel* (1981) 73 Cr. App. R. 187.
66 cf. Section 435 of the Canadian Criminal Code, 1982.
67 Ibid. Section 438.
68 Vide the Report of the Canadian Committee on Corrections. Toward Unity: Criminal Justice and Corrections, at pp.55 – 57, Information Canada, 1972.
69 Prof. L.H. Leigh in his Memorandum on Evidence to the R.C.C.P. at p. 23.
70 44 Mod. L.Rev. (1981) 300.
71 Clause 37(1).

connected with the offence for which the detainee is arrested. [72] The Act at this stage, does not mention a time-limit for detaining a person. It only provides for the custody record to be kept wherein the grounds for the detainee's further detention is noted, and even then, this is only carried out as soon as practicable. The detainee, if it is any consolation, has the right to be present when the record of his detention is noted down and he is also to be informed of the grounds for his detention. However, if he is incapable of understanding the custody officer, or is violent or likely to so become, or in urgent need of medical attention, his right to be told of the reasons for his detention shall not apply. It may seem, therefore that one's rights are done away with as easily as they were granted in the first place. Unfortunately the Act fails to provide a sub-clasue by virtue of which it would be possible for these rights to be merely suspended and brought back later into operation once the condition of the detainee improves. Nevertheless, at a certain point in time a person must be charged or released with or without bail. [73] If he is released without charge and at the time of his release a decision was not taken as to his prosecution on an offence for which he finds himself detained, he has a right to be so informed. The Act here carries out to the letter what the Royal Commission suggested. It does away with the half-way house situation, of determining whether or not a person is charged.

The Police and Criminal Evidence Act is the pointer on the law reform scale which marks, on the one hand, the precise point which previously reflected a totally chaotic situation of the law, very much in need of clarification, relating to the period of time spent by a suspect in police detention without charge. On the other hand, it reflects the statutory version of this detention period in the statute book; however, practice will show that the scope and effort made by the Act for its codification have failed to strike the intended balance. One consolatory remark is, however, provided by Professor Leigh. He states that proper statutory control of the period of arrest without charge is necessary in order to curb possible abuses of police powers. However, the quest for coming up with the ideal proposed structure whereby the police officers are given the minimum possibility of reasonably and adequately obtaining information from the public, yet at the same time securing the citizens' rights from what the learned writer terms "overbearing conduct", is, to say the least, utopian. [74]

Commenting on 'Modern Trends in the American Law of Arrest', Leon Radzinowicz and Cecil Turner, explain that a police officer is entitled to stop a person in the early hours of the morning, at a place where the latter's presence may within reason amount to implication in criminal involvement, without arresting or infringing that person's freedom of movement. The officer is entitled to follow such a suspect and ask him to explain his business abroad. [75] The Model Code of Pre-Arraignment

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72 Ibid. para. (2).

73 A person at the most can only be detained up to 24 hours, unless detention is further reviewed as provided by clauses 42 and 43.

74 Memorandum on Evidence to the R.C. at p. 17.

75 Vide op.cit. Vol. 20 Canadian Bar Review (1943) 205.

Procedure proposed by the American Law Institute in 1966 suggested a brief on the spot detention of persons found in suspicious circumstances or reasonably suspected of having committed or being about to commit a serious offence. [76] Detention of the suspect would be authorised only if it is necessary: (i) to obtain that person's identification; (ii) to verify that identification; (iii) to provide an alibi for his presence at the time of commission of the offence and (iv) to request that person to furnish information or co-operate with the investigation of the offence. A limit of twenty minutes was proposed, after which the suspect cannot be compelled to stay in or near the place of the crime. Thereafter he is free to leave unless arrested. The Australian Law Reform Commission on Criminal Investigation proposed a similar measure which would enable the police to ask for a person's name and address if they reasonably believe that the person would be able to help them in their inquiries into the commission of an offence. [77]

The whole scope of these proposals for reform is to cut down as much as possible on long periods of detention in police custody and to avoid if possible police harassment of questioned persons. As attractive as much measures seem to be on first impression, they are far from watertight. [78] One preoccupying factor which undermines the whole aim behind the measures, is that to a large extent they depend on the application of the "reasonable" test. "Reasonable cause is a nebulous standard; it depends on what the suspect is seen or reported to have done, taken without the relevant circumstances, but in a doubtful case weight, perhaps undue weight, may be given to circumstances which are not particular to the suspect". [79]

In blissful ignorance of, and with little apprehension to the pitfalls of the 'reasonable cause' standard, clause 38 of the Act provides that a person who is arrested other than by a warrant endorsed for bail and not being a juvenile shall not be released if:

1. his name or address could not be ascertained or where the custody officer has reasonable doubts in believing whether the particulars given by him were true.

2. his continued detention is necessary where the custody officer has reasonable grounds for believing it to be safer for the detainee's self-protection or for preventing him from causing harm or damage to property.

3. the custody officer has reasonable grounds to believe that the arrested person will fail to answer to bail or his detention will stop him from interfering with witnesses or the course of justice.

If, on the other hand, the arrested person is a juvenile, it shall be sufficient if any one of the above three requirements is satisfied or further still if the officer again has reasonable grounds for believing the juvenile to be better off, "for his own interests", in police custody. The detained person kept in custody by virtue of this clause has the same rights as when he first arrived

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76 Vide Section 2.02 of the proposed Code.
77 Report (Interim) 1975 para. 80.
78 Vide Professor Leigh's discussion at pp. 17 – 24 of his Memo. on Evidence.
79 L.H. Leight at p. 299 Vol. 44 Mod. L. Rev. 1981.

at the police station, namely, to be informed of his continued detention and the reasons therefor, together with the custody officer's duty to make note of them in the custody record in the detainee's presence. The situation is, however, far from satisfactory. The questions that follow are: by what standards is the custody officer to determine the significance of the detainee's "own interests" or his protection? How should the truth or falsity of one's own particulars be determined? And how will the criteria for a prolonged detention, necessary for the prevention of any tampering with the administration of justice, be tailored? Above all, decisions affecting a person's restriction of liberty are left up to a custody officer, without any mention whatsoever of judicial intervention. [80]

The relevant section of the Act which most affects the initial stages of a detainee's liberty is section 40, concerning itself with the reviews of detention periods while in police custody. The Royal Commission, on the basis of research evidence, undertaken on its behalf and relating to police practice, concludes that 6 and 24 hour review periods are likely to be satisfactory to supervise internal and external conduct of police discretion in the detention of a suspect. [81] The Act faithfully follows the Commission's proposals, and it does clarify the situation in certain respects. However, it negatives its own merits in the sense that, in its attempt to provide clarity it has enacted rather discretionary grounds on which prolonged detention of the arrested person is asserted. Clause 40, first of all clarifies the previous position of detention without charge as it equally applies to an arrested and charged person, and to a person arrested though not yet charged, by an officer of at least the rank of an inspector. The first review of detention comes after the first 6 hours spent in detention and then detention is reviewed again 9 hours later and subsequently at 9 hour intervals. However, not all reform is a step in the right direction.

The Act, typically conveys the impression of giving rights and curtailing, if not abrogating them with a stroke of the same pen. Sub-section 4 of this section allows postponement of a review on extremely flexible and discretionary grounds. The latter are: (i) if it is not practicable to carry out the review at the particular time when the review is due; (ii) where the review officer at that time considers harmful the interruption of questioning by the investigating officer for the purposes of review as it may prejudice the entire investigation; finally, (iii) the review will also be postponed "if no review officer is readily available". [82] As Geraldine Van Bueren opines, such grounds for allowing postponement of detention reviews would appear to deprive individuals of their liberty for the purposes of administrative convenience. [83]

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80 Vide comments made by the H.O. Briefing Guide on the Police and Criminal Evidence Bill published in 1983 at pp. 35 – 38.

81 Report para. 3.105.

82 Section 40 sub-section (4b ii).

83 "Once more unto Strasbourg" L.A.G. Bulletin 1983 at p. 10.

Such grounds for postponement beg the question. What is the purpose of establishing review periods in the first place? It may not seem to be altogether difficult to appreciate Lord Morris's comment in the House of Lords debate on the Police and Criminal Evidence Bill, when he remarked "whenever a Bill grants a power to an individual or group of people and it also contains safeguards against the abuse of that power then the fundamental question we must eternally be asking ourselves is, 'is that power as it is designed in the Bill absolutely necessary?' If there have to be safeguards against that power one must ask oneself, why have the power in the first place?" [84] Nevertheless, the Police and Criminal Evidence Act does introduce a fundamental safeguard which will play a vital role when the new law is applied in practice. It expressly engraved into the statute book that, before a person's continued detention is authorised by the review officer, the detainee or his solicitor may make representations relating to the detention. These representations may be made orally or in writing, athough they may be refused in the former form if it is considered by the review officer that the suspsect is unfit to do them, due to his condition or behaviour. The Act therefore, does give statutory status to the period of questioning by police officers of a suspect in their custody without charge. Nevertheless, it must be borne in mind that "overbearing conduct is not necessarily a function either of powers or of lack of powers". [85] Therefore, the presence of a solicitor during such a period is more than welcome. [86]

The 24 hours detention limit proposed by the Commission was also taken up by the Act's legislators and clause 41 limits any officer in withholding a suspect in detention for more than 24 hours without charge. The Commission was rather cautious in indicating which moments in time should mark the beginning and the end of a detention period. Problems would arise where arrests take place outside police stations, but the Commission decided in favour of the point where the arrested person arrives at a police station as being the start of his proper detention and from which the 24 hours are to be calculated. Section 41 further stipulates that a person's detention period is to start either from the moment he arrives at the station or from the lapse of 24 hours after arrest whichever is the earlier, and as such does not allow for a period to develop where the person is although arrested yet not detained and consquently the suspect may spend far more than 24 hours before being charged. The Act further dismisses any time spent by the accused travelling to hospital, if in need of medical treatment; during his stay in hospital and on his way back to the police station as being part of the 24 hour limit, unless he was being questioned by the police during that time. This provision is not altogether unreasonable. It

84 House of Lords Debates Weekly Hansard 4/6/84 col. 440.

85 Leigh Memo. on Evidence at pp. 22.

86 Prior to the Police and Criminal Evidence Act a detainee's contact with a solicitor was by means of a telephone call, and only where no hindrance was reasonably likely to be caused to the processes of investigation or the administration of justice. Vide App. B. on Administrative Directions on Interrogation and the Taking of Statements in H.O. Circular No. 89/1978.

can be considered as a corollary of the principle that a person is questioned during detention without charge, a corollary which although seems logical but may equally be disagreeable. In fact it may show the Act to be in the critical light viewed by Mr. S. Best. The writer urged that the provisions of the Bill on detention were "nothing more than an endorsement of the long standing claim by the police to detain persons for up to 24 hours without charge and without having the sanction of the Courts as they de facto do at present". [87] The author adds that the suspect's rights would be further eroded on the applications sought by the police to extend the 24 hour period without charge and without much preoccupation given by the Magistrates' official rubber-stamping of those applications.

The Commission, in fact, did recommend an extension of the 24 hour time-limit upon recourse by application to the Magistrates' Court. However, it suggested that this period should be limited in its use only in cases of grave and serious offences. To the same effect, Professor Leigh contends that although police interrogation is relatively infrequent, yet it is found necessary in cases of great complexity, or cases involving organised crime where a number of suspects are involved and there is danger of violence being caused to witnesses or the destruction of evidence. [88] In its Report the Commission had in mind a complex situation where statements or information given by the detainee have to be checked in the light of forensic findings. A task in itself which takes quite some time to verify. [89]

The Act, however, goes much further than the Commission's proposals regarding the extension of the 24 hour period for questioning. If a police officer holding the rank of superintendent or above, who is responsible for the station where the arrested person is detained, has reasonable grounds to believe that:

(i) that person's detention without charge is necesary to secure or preserve evidence relating to the offence for which he is kept under arrest or to obtain that evidence by questioning him;

(ii) if the offence for which he is arrested is a serious arrestable offence;

(iii) if the investigation is being conducted diligently and expeditiously, that officer has the authority to order the continued detention of a suspect for a period expiring at or before 36 hours from the beginning of the detention. If, however, he authorises it for less than 36 hours, he may again authorise a further period, expiring not more than 36 hours after the relevant time and as long as the same three grounds still subsist. [90] Therefore, the situation contemplated by the Commission, where a suspect is brought before a Magistrate after 24 hours, has been modified by making it quite possible if the conditions subsist, for a suspect to be kept in detention

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87 Vid Vol. 125 Solicitors' Jnl. 1981 at pp. 71.

88 Professor Leigh's comments were made prior to the report issued by the R.C.C.P., further still, prior to the enactment of the Act and to that extent should be considered in that light. Vide his Memo. on Evidence at pp. 24 – 25.

89 Report para. 3.06.

90 Clause 42 of the Police and Criminal Evidence Act.

for up to 36 hours without charge. Once again the Act leaves it up to police officers to determine, on applying their powers of reasonableness, whether further interrogation is necessary to secure evidence or whether the continued detention is necessary where the investigation is being conducted diligently and expeditiously. Although, it does seem to be rather awkward to reconcile the need felt, on reasonable grounds, to prolong a person's detention period where the reason for his presence in that situation is being dealt with expeditiously. However, with regard to serious arrestable offences, the Act only provides clarification by way of enumeration rather than by way of definition. It lists a number of crimes in schedule 5 to the law; a number of offences mentioned in the Prevention of Terrorism (Temporary Provisions) Act, 1984, and includes any act or threat, if it had to be carried out, which leads or is likely to lead to any of the following consequences: (1) serious harm to the security of the State or to public order; (2) serious interference with the administration of justice or with the investigation of offences or of a particular offence; (3) the death of any person; (4) serious injury to any person; (5) substantial financial gain to any person; and (6) serious financial loss to any person. The Act goes on to explain that loss is serious if it is serious to the person who suffers it, an explanation which does not take us very far in determining what degree of seriousness it really is. [91]

The Act does on the whole, put in some effort to strike a balance in order to safeguard the detainee's right during his second stage of further detention. Section 42 goes on to state that he may not be subject to further detention on the expiry of the first 24 hours nor at least before the second review of the first phase of the detention. He also has the right to be informed of the grounds for his continued detention. More important, once again, is his right to make representations about the detention. At this point a solicitor is once again available and the detainee has also the right to inform a third party about his detention. However comforting these rights may be, there is more here than meets the eye. The detainee may have spent up to 36 hours without being charged; may have seen a lawyer when it was too late; and his position may already have been gravely prejudiced. In addition his rights to legal advice and to inform a third party may be refused by the officer who authorised his continued detention up to 36 hours from the moment of detention at the station. In this light, it would be frivolous to claim that the suspect's position is safeguarded [92] by the fact that the

91 Cf. clause 116(7) of the Act.

92 Professor Leigh confirms the scepticism which the exercise of the arrested person's right to seek legal advice and the right to inform a third party, attract when they are considered in the circumstances explained. He writes "... vu de cet angle, la législation anglaise est fortement critiquable. Il est vrai qu'elle donne au suspect le droit de contacter sa famille et à l'assistance d'un juriste. Mais il est vrai aussi que la police peut, pendent une période de 36 heures, le tenir incommunicado si elle l'estime nécéssaire pour les besoins de l'enquête." vide Leigh's article, entitled "Observations sur une reforme fondamentale a la procédure penale anglaise: Police and Criminal Evidence Act 1984", to appear in 1985 in the Revue de Droit Penal et de Criminologie.

authorising officer is duty bound to take note of the decision and the grounds therefor, in the custody record. Furthermore, the fact that the detainee must be released with or without bail not later than 36 hours since the beginning of his detention, i.e. unless he is either charged with an offence or detained up to the maximum period of 96 hours, does not, to say the least, seem to be very assuring.

'Detention-time' does not stop here. On an application substantiated with information and made on oath by a constable before a Magistrate's Court, a warrant of further detention may be issued by the Court if it believes that there exists reasonable grounds warranting that extended detention. Although an element of judicial review finally creeps into the process of police investigation, it is certainly not the classical case of better being late than never. The grounds upon which further detention is to be granted, are identical to those where the suspect may be detained up to 36 hours from the relevant time. The indication is quite clear that the legislator puts on the same footing an authorisation for further detention by a senior police officer as that to be made by a judicial officer, presumably under the long overdue guise of bringing the detainee before a court of law as recommended by the Commission. The information submitted in the application must state:

(1) the nature of the offence for which the person's extended detention is sought;

(2) the general nature of the evidence on which that person was arrested;

(3) the inquiries made and proposed to be made by the police relating to the offence; and

(4) the reasons for believing the continued detention to be necessary.

The application may be made either before the 36 hour period expires, or during a period of the first 6 hours after the expiry of the 36 hours, where the Magistrates' Court could only sit during those 6 hours if it was not practicable for the Court to sit immediately upon the expiry of the 36 hours from the relevant time. If, however, the application is made beyond the 36 hour period the court may refuse to issue the warrant if it reasonably believes that it could have been filed earlier. In such a case the detainee is still to be kept in detention during adjournment and the custody officer shall have to report the continued detention and the reason therefor, until the application is heard. If, on the other hand, the application is granted, the warrant shall state the time of its issue, authorise the continued detention and shall not be for a period exceeding 36 hours. In practical terms this means that, it is quite possible for a detainee to spend up to 72 hours without being charged and so held incommunicado, possibly without the right to see his solicitor until his appearance in court and [94] without

93 Sub-section 10 of section 42.

94 Section 43(2) and (3), however, allow the arrested person to be present in court and legally represented and furnished with a copy of the information relating to the application for his extended detention.

informing any relatives or friends of his whereabouts and state of health. [95] In this respect it is hard to appreciate the conviction with which the Lord Chancellor claims that the whole philosophy of the Act is to provide clarity, workability and above all, balance, in the interest of freedom under the law. [96]

Furthermore if the Magistrate's Court is not satisfied with the existence of the conditions necessary for extending the period, it has the option of either dismissing the application or adjourning the hearing of the application for a period not longer than 36 hours after the relevant time. Rather than catering for an outright dismissal of the application, the Act allows for the detainee to be kept up to the end of the 36 hours after the relevant time as sub-section 9 of section 43 points out, "that during the adjournment the arrested person may be kept in police detention." If, on the other hand, the application were to be dismissed, the detainee's right to immediate release with or without bail unless charged, is not a foregone conclusion. If the arrested person was detained for a period of less than 36 hours after the relevant time or in any other case the application under Section 43 is made before the expiry of 24 hours after the relevant time, he shall not be released **even if the application was dismissed**. The end to a person's detention without charge is far from near. It is possible for a constable to file a new application supported with information to ask a Magistrates' Court to extend once again the detention period now possibly in its 72nd hour for an extra 24 hour period of detention, which cannot, therefore, end later than 96 hours since the person first arrived at the police station. [97]

In the light of these provisions, the equilibrium between the conduct and behaviour of two entities within a larger one, namely society, as a community, is hardly visible let alone maintained. Safeguards will receive legislative force with pyrrhic effect when translated into practice and are far from adequate. In addition to an already unsatisfactory state of affairs, the Act refrains from any mention of the suspect's right to remain silent during questioning, a right absolutely necessary once the law seek to elevate the concept of detention without charge to the statute book.

'Right to Silence'

The right to remain silent during police questioning did not receive any consideration by the Criminal Law Revision Committee's Eleventh Report on evidence in criminal cases. [98] However, it did come under the critical lens

95 Section 42 (9) stipulates that if a detainee is held up to 36 hours after the relevant time and at the time of the extension of his detention, he had not exercised his right to see his solicitor and to inform a third party, the officer authorising the extension of his detention may refuse him these rights. Vide sections 56 and 58 for the conditions on which the authorising officer may refuse these rights.

96 Vide House of Lords Debates of the 4/6/1984.

97 Cf. Section 44.

98 Command 4991 (1972) for an extensive discussion vide "The Right of Silence in the

of the Royal Commission on Criminal Procedure. [99] Nevertheless, it is unfortunate that the legislators of the Police and Criminal Evidence Act chose on this occasion to follow in the footsteps of the Criminal Law Revision Committee and consequently the right against self-incrimination finds no statutory provision in the new law. It is only therefore, the Report of the Royal Commission on Criminal Procedure which concerns itself with the question as to whether the detainee should be told during interrogation of his rights not to answer any questions put to him and if he chooses to do so of his own volition, they may be brought as evidence in court. The Royal Commission was faced with the difficulty of reconciling two different views that emanated as a result of the debatable recommendations of the Criminal Law Revision Committee which suggested a substantial alteration of the legal implications involved in the right to silence. The two sides to the issue, reflecting the everlasting debate on the balance of powers, advocated the preservation of the principles of presumption of innocence and onus of proof on the one hand and on the other, the administration of justice as being a means to an end in bringing the guilty to trial.

The common law position on the right to silence is epitomised by Lord Devlin's dictum that a person's duty to assist the police is a social and moral one but not a legal duty. The whole basis of the common law is the right of the individual to refuse to answer any questions at all put to him by persons in authority. [100] However, the position radically changes once the suspect is arrested and taken into detention. The detainee must be submitted to questioning (particularly in the light of the provisions of the Police and Criminal Evidence Act) although he may still remain silent. However, as Professor Leigh observes "the real issue is whether and to what extent inferences can be drawn against him from his silence". [101] The Commission indicates that during interrogation no inference could be drawn as to the guilt or innocence of the accused from his silence. However, it was found that juries would draw inferences in suspicious circumstances where the arrested refused to explain or answer certain questions. With this in mind the Commission came to the conclusion that it would not suggest that an inference should be made from a detainee's silence as it would not change the position in practice and therefore decided to leave the legal situation as it stands at present. [102]

The Commission felt, that the legal position was therefore satisfactory and that the caution enunciated in Rule III of the Judges' Rules was sufficient, except for a few changes that were necessary. First of all it proposed that the suspect should be cautioned at a moment much earlier in time than when he is usually cautioned in practice. The implication is that police wait until they have evidence which gives rise to reasonable grounds

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Police Station and the Caution" by M. Zander in "Reshaping the Criminal Law" Ed. by P.R. Glazebrook, (1978).

99 Command 8092 (1980).

100 *Rice v Conolly* (1966) 2 Q.B. 414.

101 Memo. on Evidence to R.C. at p. 63.

102 Report para. 4.48.

for suspecting that person of committing an offence. The caution should tell the suspect that he is going to be questioned and that he has no need to reply but if he decides to and is later prosecuted, anything he may have said will be reported in Court. [103] This, in a nutshell, is the proposal which the Commission recommended for reform. Actually the report, although it deals considerably with the topic, had a negative effect. It found other proposals for reform to be unconvincing and came to the conclusion that the situation as it stood was acceptable. The Commission could in this regard only be guilty of an omission rather than of having committed a wrong, an accusation which equally may very well be directed to the legislators of the Police and Criminal Evidence Act. Similarly unconvincing are Lord Elton's comments during the opening debate of the second reading of the Police and Criminal Evidence Bill in the House of Lords. His Lordship held that the Bill reinforces the right to silence substantiated solely by the introduction of certain codes of practice intended to ensure that detained persons are made aware of their safeguards and rights under the new law. [104] As emphatically put by Lord Hooson in that same debate, "it would be a bad day for the country if the boy in the famous painting was under a legal obligation to reply to the infamous question", 'when did you last see your father?' and could be made, by one means or the other to answer. On that kind of issue there can be no compromise. It is not a question of balance then; it is a question of fundamental principle". [105]

Admissibility of Confessions

One area of law regulating crime investigation, which has had an effective impact on securing that "fundamental principle" of the right to silence has been the admissibility of confessions or statements made by the accused during custody. The classic exposition of the rules governing the admissibility of statements is found in *Ibrahim v R.* [106] Lord Sumner held that "it has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or of hope of advantage exercised or held out by a person in authority". [107] Hence, the development in English common law of the voluntary rule, subsequently confirmed by principle 'e' in the preamble to the Judges' Rules [108] and a string of judicial decisions. However, the Judges' Rules

103 Report para. 4.57.

104 House of Lords Hansard 4/6/1984 col. 476.

105 House of Lords Hansard 4/6/1984 col. 416.

106 (1914) A.C. 599.

107 For an historical survey of the development of the rule as applied to persons prior to and after detention in police custody – vide Leigh "Police Powers in England and Wales" 1975 at p. 143 et seq.

108 H.O. Circular No. 89/1978 states "That it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that

introduced the new notion of 'oppression', which added a new dimension to the issue, in the sense that it was questioned whether 'voluntariness' and 'oppression' were synonymous. The cases of *Collis v Gunn* [109] and *R v Praeger* [110] confirmed that there was no distinction between the two concepts. The most recent authoritative case on the subject is *D.P.P. v Ping Lin.* [111] The House of Lords confirmed that the issue whether a statement was voluntary or not was basically one of fact. *R v Hudson* [112] reaffirmed the notion of oppression as amounting to an involuntary statement was to be proved beyond reasonable doubt by the prosecution. Furthermore *Wong Kam-Ming v The Queen* [113] and again in *R v Brophy* [114] the House of Lords held that a detainee in custody had the right to enjoy a total freedom in giving evidence during the 'voire' dire' without affecting in any way his right to silence during the substantive trial. However, the latest judicial decision, *R v Rennie* [115] is seen at the beginning of a development sending to restrict the interpretation of the voluntary rule by the courts. The case was decided in the Court of Appeal where the appellant was convicted on obtaining pecuniary gain by deception, alleged that his confession was made in the hope that by giving in to police questioning they would not implicate his relatives by taking steps against them. The Court held, per Lord Lane, that often the motives of an accused person are mixed and include a hope that an early decision may lead to an earlier release or a lighter sentence. If it were the law that the mere presence of such a motive, even if prompted by something said or done by a person in authority, led inexorably to the exclusion of a confession, nearly every confession would be rendered inadmissible. The essence as Professor Leigh points out, is that the 'root question in every case is whether the admission was voluntary'. [116]

With a view of ascertaining precisely whether the underlying rationale of the principle of voluntariness is whether to control interrogation practices, protect the legitimate interests of the accused, provide reliable evidence, or any combination of these justifications, particularly in the light of the decision by the Court of Appeal in *R v Rennie.* Mr. Smith claims the impossibility of predicting on which basis the admissibility of confessional statements will in future be determined by the courts and hence advocates swift clarificatory action. [117]

The Royal Commission does not categorically and specifically deal

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person to a question put by a police officer and of any statement made by that person, that is shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage exercised or held out by a person in authority, or by oppression."

109 (1964) 1 Q.B. 495.
110 (1972) 1 All. E.R. 114 & 45 Mod. L.R. (1982) 575.
111 (1976) A.C. 574.
112 (1981) 72 Cr. App. R. 163 and (1981) C.L.R. 107.
113 (1980) A.C. 247, 261.
114 (1981) C.L.R. 831 & in 45 Jn. of Criminal Law 1981, 211.
115 (1982) 1 All E.R. 385 & 1 W.L.R. 64.
116 "Police Powers in England and Wales" at p. 145.
117 45 Mod. L. Rev. (1982) 577.

with the admissibility of confessions under a separate heading. It advised against the existing framework of the Judges' Rules if "the maximum possible reliance for evidential purposes can be placed upon suspects' statements." It also recommended instead, that proposals of reform should be on the lines of police training schemes dealing with interviewing. Furthermore in the eventual implementation of such schemes the Commission took one bold step by recommending that the reliability of the confessional evidence should be left to be determined by the jury and Magistrates, upon the facts presented to them. [118] It may be worthwile to point out in this regard that whereas the position in England, by virtue of the Judges' Rules the discretion of the admissibility or otherwise of confessional statements lies at the judicial level, [119] the position in Scotland [120] shifted from judicial to jury discretion with the case of *Chalmers* [121] in 1954 to a more liberal acceptance of statements in *Miln v Cullen* [122] and *Murphy v H.M. Advocate.* [123]

The implementation of the guidelines mentioned by the Commission comes in the form of a Draft Code of Practice, issued by the Home Office on the Detention, Treatment, Questioning and Identification of persons by the Police and for Searching of Premises and Seizure of Property. The Code suggests amendments to the taking down of statements as laid down in the Judges' Rules [124] and takes up the Commission's ideas on improving note-taking practice. [125] The latter reform is worded very subjectively and above all reflects the tedious burden of having to make notes in custody records. Nevertheless, even this practice may be stopped if it appears to the interviewing officer that such a measure could interfere with the conduct of the interview. This provsion transfers discretionary power into the hands of the police and according to Mirfield "even in such remote circumstances, the court would be unlikely to exercise its discretion to exclude incriminating statements by virtue of section 76(3) of the Act. [126] In addition to a situation permeated with discretion, apprehension is also directed to the accuracy of

118 Report para. 4.75.

119 Vide Leigh on "Police Powers in England and Wales" at p. 142; vide also the case of *Dansie v Kelly: ExParte Dansie* (1981) Qd. Rl. where the Supreme Court of Queensland dealt with judge's discretion is exerciseable in regard to the question of fact whether the confessional statement was voluntary or otherwise. Vide also Vol. 56 Australian Law Jnl. (1982) 247. For a succinct review of Australian Law on confessional statements vide paper presented by Mr. Johnston to the A.B.A. in Vol 54 Australian Law Jnl. (1980) 466.

120 Vide "The Admissibility of Answers to Police Questioning in Scotland" by G.H. Gordon an essay in "Reshaping the Criminal Law" ed. by P.R. Glazebrook, 1978.

121 J.C. 66.

122 1967 J.C. 21.

123 1975 S.L.T. 17.

124 See paras. 13.5 (d) and 13.6 of the H.O. Draft Code.

125 Report of Commission paras. 4.12 to 4.15.

126 vide "The Future of the Law of Confessions" C.L.R. 1984 at 64. However, it is interesting to point out that a new provision which will have novel effects when put to practice, has been inserted in the Police and Criminal Evidence Act, 1984. Section 78 will ease the apprehension foreseen by Dr. Mirfield with respect to the judicil reluctance in exercising discretionary powers to exclude inadmissible statements. It is a provision

the record to be kept by the Police.[127] The Commission having been aware of such growing concern[128] considers the feasibility of tape-recording interviews, which the Act actually takes up in Section 60 and goes to the extent of burdening the Secretary of State with a duty to issue a Code of practice on tape-recording interviews. This innovation goes to show that the advantages in its implementation would seem to outweigh its disadvantages. The Commission also went as far as to consider the feasibility of introducing video-recordings of police questioning, a measure which undoubtedly would go a long way to help ascertain the voluntariness of a statement and would also have an immense deterring effect on police conduct during detention periods. Nevertheless, financial questions overshadow any possibilities of this proposal's implementation in the immediate future.[130]

With reference to the voluntariness rule, the Commission went as far as to suggest its total dismissal. It based its conclusion in the light of the conflicting case-law as to what constitutes a violation of the voluntary nature of a statement. The Commission also based its decisions on the results of a research study carried out by B. Irving[131] which suggested that in psychological terms custody in itself and questioning in custody develop forces upon many suspects which so affect their minds that their wills crumble and they speak when otherwise they would have stayed silent.[132] On the basis of the findings, the Commission, although aware of the need to exercise control on police interrogation, opted for the view that it would be better to concentrate on the behaviour of the police rather than to purpose "the vain attempt to distinguish between voluntary and involuntary confession". This is why it proposed the introduction of police interrogation guidelines mentioned earlier. The Act does not concur with the Royal Commission on the abolition of the voluntary rule,[134] and rightly so, although it does give the Secretary of State power to make delegated legislation; that is the draft codes of practice recommended by the Commission. Therefore, if a confession made by an accused is tendered in court by the prosecution, it shall be dismissed if it is shown to the court that it was obtained (i) by oppression or (ii) in consequence of anything said or done which in the circumstances,

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which goes beyond the exclusion of irregularly obtained statements. Section 78 purports to empower the Court to exclude all evidence which considering all the circumstances, including those in which the evidence was obtained, would have an adverse effect on the fairness of the proceedings. A section which seems to undermine the rules regulating the admissibility of confessions and will give defence counsels the opportunity to make a lot of mileage in support of their.casue.

127 "The Future of the Law of Confessions" C.L.R. 1984 at 64.

128 Report paras. 4.2. to 4.11.

129 Report paras. 4.16 to 4.30 and vide problems posed by Leigh in Memo. on Evidence to R.C.C.P. at pp. 68.

130 Report para. 4.31.

131 "Police Interrogation: A Case Study of Current Practice" R.C. Research Study No. 2, 1980.

132 Report para. 4.73.

133 M. Zander in N.L. Jnl. 133 (1983) 367.

134 Clause 76 (2).

was likely to render it unreliable.

Although under ground (i) there is an echo of the notion of oppression introduced by the Judges' Rules, the Act adds to it by defining the notion as to include "torture, inhuman or degrading treatment and the use of threat of violence whether or not amounting to torture". [135] Clearly this is a case of phraseology borrowed from article 3 of the European Convention on Human Rights which stipulates that "no one shall be subject to torture or inhuman or degrading treatment or punishment." As Mirfield observes [136] it is presumed that English courts will interpret "the provision in the light of the European Convention, although they would not be bound to do so". [137]

The second ground which the Act provides for the inadmissibility of a confession is the "test of reliability". A standard of proof, was set out in clause 2(2) (b) of the Draft Bill proposed by the 11th Report of the Criminal Law Revision Committee. Yet, in the latter draft clause an added ingredient is found in the words ".... in the consequence of any threat or inducement of a sort likely....," which is omitted in the Police and Criminal Evidence Act, 1984. In Mirfield's view this ommission is a revolutionary measure which expands the width of the 'reliability test' so much that it would prejudice any consideration as to whether a confession is reliably obtained, particularly in the light of Irving's research for the Commission on the rigorous techniques of police investigation. This uncertainty would most likely necessitate frequent judicial intervention. [138] Therefore, if on the basis of the law as stipulated in the Act, the judge were now to address himself to the question of reliability, the question to be asked is not whether the confession is unreliable, but whether it may be so in consequence of anything said or done during detention by the police, which in the circumstances, was likely to render it inadmissible. Furthermore, this would lead to situations where, if the judge would come to a decision that a confession obtained in those circumstances was actually unreliable, then it shall be dismissed outrightly even if it were true, unless, of course, the prosecution succeeds to prove the contrary beyond reasonable doubt. Nevertheless, it is stipulated in the Act that the dismissal in part or in whole of a statement shall not prejudice the admission of any facts discovered by virtue of that statement nor where it is demonstrative of particular mannerisms or individual characteristics of the accused. In addition evidence as to how these facts were discovered must be adduced either by the accused himself or on his behalf.

Two important rights of the arrested which may help minimise the effect of police interrogation provoking dubious and unreliable statements,

135 Clause 76 (8).

136 Op.cit. from fn 125 at pp. 69.

137 It is pointed out however by G. Van Bueren that in so far as section 55 is concerned, the Police and Criminal Evidence Bill (No. 303) goes against England's commitment to international obligations and violates article 3 of the European Convention on Human Rights; Vide L.A.G. Bulletin 1983, 10; vide however also *Tyer v U.K.* in Vol. 2 Eur. Rep. 9 – 12, *& Ireland v U.K.* Vol. 2 Eur. H.R. Rep. 25, 73 – 85.

138 Vide op.cit. at fn. 125 at pp. 70.

are dealt with in Part V of the Act on the Questioning and Treatment of Persons by the Police. They refer to the right to have someone informed of the suspect's arrest [139] and the right to have access to legal advice. [140]

Right to Inform a Third Party

Prior to Section 56 of the Act, the basis upon which the right to have someone informed was founded on (i) administrative direction no. 7 (a) of the Judges' Rules which allows an arrested person in custody to telephone his friends as long as no hindrance is likely to be caused to the process of investigation, (ii) the second basis from which is derived the right to have someone informed of one's detention under English Law, is Section 62 of the Criminal Law Act, 1977. This section provides that a person under arrest has the right to inform one person, named by him, without delay unless delay is necessary as not to interfere with the investigation or prosecution of crime. The Commission recommended the confirmation of section 62 together with the retention of the guidelines set out in administrative rule No. 7a of the Judges' Rules. The Act follows suit by providing that an arrested person is entitled upon his own request to have someone told of his detention. In this respect, the Act improves the position by expanding on the notion of a friend or relative or other person known or likely to take an interest in the welfare of the detainee. Such right should be exercised as soon as practicable except on grounds where delay is allowed. The Draft Code of Questioning also makes provision for the detainee to nominate two alternative persons in case the first one cannot be contacted. [141] A similar provision is found in the American Law Institute's Proposed Draft Code of Pre-Arraignment Procedure where an arrested person shall be given reasonable opportunity from time to time to consult with a relative or friend. It must be pointed out, however, that this provision is directed more towards the situation where a friend substitutes for a solicitor. [142]

Delay in granting the request to inform a third party arises in the case of a person arrested for a serious arrestable offence and if a superintendent authorises it. The reasons for the delay, as the Commission observed, [143] are to prevent any harm done or interference with evidence connected with the serious offences; to prevent the detainee from alerting his associates and providing them with the opportunity to destroy, conceal or distort evidence; cause harassment to witnesses and, most important of all, escape prosecution.[(144)] In any case once the particular ground warranting delay ceases to exist the right shall be applicable afresh. Above all the detainee has the

139 Section 56.
140 Section 58.
141 Draft Code of Questioning para. 4.1.
142 Op.cit. Section 5.07 at p. 47.
143 Report para. 4.80.
(144) It is of particular interest to note the apprehension which Prof. Leigh employs in his comments with respect to the justifications given by the Commission, for the grounds allowing for a delay in the exercise of a suspect's right to seek legal advice and to inform a third party of his arrest. Prof. Leigh writes, "La police nous donne à penser que parmi les juristes, certains peuvent être de connivence avec le suspect, et donc avec le milieu de

right to be told of the reason for the delay and such reason shall be recorded in the custody record. This right is renewable every time the arrested person is transferred from one police station to another. The right, however, must be exercised before the expiry of 36 hours from when his period of detention commences. However, in the case of persons detained under the Prevention of Terrorism (Temporary Provisions) Act, 1984, the delay may be extended up to 48 hours where it is considered that the use of this right will

(i) lead to interference with the gathering of information about the commission, preparation or instigation of a terrorist act or,

(2) lead to alerting persons who will prevent the investigation of terrorist acts or worse still proceed to their execution. Nevertheless, in the case of children or young offenders, as the Commission proposed,[145] a parent or guardian is to be informed of the arrest, the reason for it and the place where the juvenile is being detained.

The Act makes it quite clear that these rights are additional to those afforded to other offenders by the law itself.[146] In addition, the Draft Code on Questioning entitles Commonwealth citizens or aliens to benefit from this right by communicating without delay with their High Commission, Embassy or Consulate. The Draft Code, however, distinguishes between foreigners in three ways. In the case of a national of a country which is bound by a Consular Convention binding as well on England, the appropriate consulate shall be informed as soon as practicable; where the detainee is any other foreigner he shall be informed of his rights without delay; and in the case of Commonwealth citizens they shall be told that if they wish the police will inform their High Commission of the detention together with brief details of the reasons thereof. They shall be told of such a right, however, after they have been detained for more than 24 hours. The procedure of communication is curiously far from uniform and leaves the present writer uncomfortable with the state of affairs, particularly as regards the third category of foreigners.

The position, prior to the proposed statutory inclusion in the Police and Criminal Evidence Act, of the right to seek access to legal advice during police detention, was devoid of any legislative force. There was no statutory rule guaranteeing that right except under the Scottish Criminal Procedure Act 1975, although this was restricted to cases when the suspect was already charged. Apart from that Act, the position in England and Wales was restricted to point (c) in the preamble to the Judges' Rules and reinforced by Administrative Direction No. 7a(I) of the same rules. However, despite the

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crime organisé, afin en toute probabilité de notifier l'arrestation du suspect à ses complices. Le gouvernement, devantage circonspect nie ce motif; il constte que cell-ci est, plutôt, même un juriste, puisse, par malchance, avertir un complice. Gouvernement nevrosé, ou malhonnête? Nous ne savons pas, mais nous pensons qu'une société libre n'accepte qu'a à contrecoeur et seulement en cas d'extrème nécéssité (tel que le terrorisme auquel une législation particulière s'applique), l'incommunicado. vide op. cit at fn. 92.

145 Report para. 4.78.

146 Section 57 sub-section 9.

fact that the right could be exercised also when the suspect in custody but not necessarily charged, it was only allowed if no hindrance or unreasonable delay was likely to be caused to the processes of investigation or the administration of justice. Furthermore there is the implication that police officers only have a duty in bringing these rights to detainees' knowledge by simply having signs and notices of them set up in conspicuous and convenient places in police stations, [147] a state of affairs rightly, described by Professor Leigh as being monstrous. [148]

The other statutory sources to be found in English law regulating this right in section 62 of the Criminal law Act 1977, a provision that seems to consolidate the exercise of two rights into one. Section 62 of that Act only caters for the intimation of one person reasonably named by the detainee, to be informed of his arrest and custody in police detention. To this extent the Police and the Criminal Evidence Act clearly provides for the separate facility of having someone informed of the arrest and the right to ask for legal advice. Furthermore, the previous sources of rules regulating both rights had two main weaknesses as pointed out by the Home Office in its Memorandum [149] to the Royal Commission on Criminal Procedure.

The first point is that the rights they advocate are restricted only to persons arrested and in custody but not during questioning. Professor Leigh adds that "the directions do not purport to impose any obligation on the part of the police to allow the suspect's solicitor to be present during interrogation or even to allow the suspect access to a solicitor before interrogation. [150] A second flaw is that the right as it stands presently is hampered in its effective use by provisions based largely on the 'nebulous standard' of reasonableness. In addition there is one overall weakness, particularly insofar as the Judges' Rules are concerned as Professor Zander points out, that "the courts seem never to have given authoritative guidance as to what constitutes circumstances that justify the police in refusing a suspect the right to speak to his lawyer."

In the *People (D.P.P.) v Madden and Ors*, the Irish Court of Criminal Appeal held that a person has a right of reasonable access to his legal advisers when held by the Gardái. The judge added that "in this context the word 'reasonable' must be construed as having regard to all the circumstances of each individual case and, in particular, as to the time at which access is requested and the availability of the legal adviser sought". [151] Professor Zander expressed concern that in the absence of judicial guidance in this respect, abuse is most likely to occur, if at least by the police taking upon themselves the broad interpretation of the rules in their favour. [152]

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147 H.O. Circular No. 89/1978.

148 Leigh Memo. on Evidence at pp. 65.

149 Memo. No. IV on the Law and Procedure relating to the Questioning of Persons in the Investigation of Crime.

150 "Police Powers in England and Wales" at pp. 155.

151 (1977) I.R. 366 at 355.

152 A suspicion which was confirmed by Professor Zander through a number of research studies carried out with a view to discover (i) the extent to which suspects were allowed to

One proposal for reform put forward by the Australian Criminal Investigation Bill 1977 and supported by Professor Leigh, is in virtue of clause 20 of that Bill. It obliges the officer to provide reasonable facilities for the detainee to communicate with a lawyer if the latter so requests and to make possible the presence of that lawyer during any investigative action taken against the suspect. However attractive such a proposal may seem, it is unlikely to be welcomed by the police authorities in view of the great possibility of impeding investigation. [153] It is worthwile to point out that similar obstacles are encountered by New York Policemen in which State, exist very wide measures catering for the protection of detainees, by virtue of both the 6th Amendment to the U.S. Constitution as well as para. 6 of the New York State Constitution which allows a counsel to assist the suspect at every stage of the legal proceedings. [154] In sharp contrast to such proposals are Lord Widgery's views put forward to the American Bar Association in 1971. He was quoted as saying that: "any rule requiring the presence of the suspect's lawyer during interrogation is quite unacceptable". [155] However, his Lordship did further add to the possibility of having an independent third party during questioning time so as to be able to testify later in court as to what had taken place. The implication clearly is that a lawyer is far from considered to be an independent third party during questioning. This view was considered though rejected as a proposal by the Royal Commission. [156] As far as the presence of a third party is concerned the Home Office Memorandum on Crime Investigation and the Questioning of Persons [157] deals extensively with the advantages and difficulties involved with the implementation of such a proposal. The Commission swiftly dismissed the proposal on the basis of organisational problems rather than on the substantive issue of attempting to improve a situation so much in need of a compromise to strike the balance of power in the suspect's direction. [158]

The Home Office Memorandum sees three initial difficulties which such a proposition may involve. These are: (i) the possible view that suspects in police detention may not want the presence of a friend or relative as a third party, (ii) third parties who have no connection whatsoever with the case, usually tend to be unwilling to act as witnesses during police interrogation. The reason mainly being that such sessions seem to enjoy a certain notoriety particularly with regard to police behaviour towards members of local communities; (iii) finally, security problems may be caused which add to the interruption of questioning. One further problem is envisaged by the Home Office. Undoubtedly the presence of any person foreign to the whole

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consult a solicitor and (ii) to find out how far the police went to provide facilities for consultations with solicitors, and for actually informing suspects of their rights; vide "Access to a solicitor in a Police Station" C.L.R. 1972 at pp. 342.

153 Vide Leigh Memo. on Evidence at pp. 67.

154 Vide "The Expanding Right to Counsel in N.Y." by D.M. Zverins in 10 Fordham Urban Law Jnl. 1982 351 – 353.

155 Vide op.cit. by Zander in C.L.R. 1972 at 347.

156 Report para. 4.99.

157 Memo. No. V.

158 Vide fn. 155 at para 4.100.

incident, will definitely have an effect not solely upon the interview but particularly on the interviewee especially if that person is related to the third party which would make him feel all the more uncomfortable and consequently prolong the interview by making it that much more difficult for the police to get at the facts. As the Memorandum puts it "the presence of a familiar face in unfamiliar surroundings can have a supportive effect on the suspect, which is likely to make him less inclined to answer police questions".[159] On the other hand, it is possible to envisage one advantage at least from the presence of a third party, that is he may be the only safeguard in the circumstances against gross misconduct on behalf of the police. Regrettably, however, the Memorandum, as with the Commission, does not go as far as to conclude that such a person would in practice prove his purpose namely to be an independent party at the trial. [160]

As far as young offenders and mentally handicapped people are concerned, both the Home Office Memorandum and the Report of the Commission take a more sympathetic, if not an understanding attitude, towards the presence of a parent, guardian or other person responsible for the offender in question. Administrative direction No. 4 of the Judges' Rules provides for the presence of that party during questioning of offenders under the age of parent/guardian to be of the same sex as the detainee; and the second the same sex as the detainee, other than a police officer, will be allowed as a substitute and in addition it is recommended that if possible arrest should not take place at school. If such a measure cannot be prevented from taking place, the interview at school will be held only with the consent and in the presence of the head teacher or his nominee. However, there is one problem with these safeguards, namely, that they are to be executed only insofar as they are practicable. The Royal Commission in fact proposes only two changes to the existing provision. Apart from the Home Office's suggestion to reduce the age-limit from 17 to 16 which the Commission did not take up, it proposed the following changes: the first proposal is to do away with the unnecessary obligation of requiring the person substituting for the parent/guardian to be out of the same sex as the detainee; and the second proposal which states that the proposed safeguards can only be executed where practicable, needs clarification. As regards the first point, it is preferable that the person present during interrogation should be someone known to and who enjoys the confidence of the young interviewee, and he should always be present when the interview commences. Therefore, the proviso "as far as practicable" should be limited only to cases in which waiting for the arrival of an adult will involve a risk of harm being caused to persons or serious damage to property. [161]

As regards mentally handicapped persons undergoing questioning by policemen, the Commission could not come forward with such easily available solutions as are available with young offenders. Administrative

159 Op.cit. No. V issued by the H.O. on Law and Procedure of the Questioning of Persons at p. 136.

160 Vide fn. 157.

161 For discussion of the consideration vide report paras. 4.102 – 4.104.

direction 4A(a) of the Judges' Rules burdens the officer with the unenviable responsibility of determining how to deal with persons suffering from mental handicap, particularly in how to treat their answers when considering the possible gullible nature of such persons and their susceptibility to suggestion. For this reason the Commission suggests the presence of a medical doctor. In addition a social worker should also be called in, "in loco parentis", unless, of course, it would be more appropriate for the parents or guardian to be there instead. [162]

Nevertheless, these reform proposals, if ever transformed into safeguards for the interviewee, should be made available in addition to the overriding and more effective right to seek legal advice. If at all, Judges' Rules far from being abolished or restricted in providing access to a solicitor, should be re-defined and enforced so as to give some practical effect to the policy that a man should be entitled to legal advice when facing the police. [163]

Right of Legal Advice

The Home Office reaffirms the principle that if a person in custody wishes to consult a solicitor, he shall be granted the opportunity, although administrative and financial issues may cause problems. The Commission set out to settle such interrelated problems and in attempting to follow suit the Police and Criminal Evidence Act provides the statutory framework for that settlement.

On the conclusions reached by the Commission, [164] the Act stipulates that a solicitor may be consulted by a detainee privately [165] and "at any time". However this Act does not, at any point mention the fact as suggested by the Commission that the suspect should be formally notified of his right and for that notification to be recorded. What the Act provides is for the request to be made by the suspect and for that request to be notified. Rather than making it illegal for any questions to be put to the suspect before legal advice can be sought, the Act provides that the right should be carried out as soon as practicable, unless of course a total suspension of the right altogether is issued.

A case recently decided by the Ohio Supreme Court in the *State v Strickler*, reaffirmed that the right to counsel under the U.S. Constitution arises upon the initiation of a formal indictment. Therefore, "when one is advised and thus presumed to be aware of his right to counsel and does not exercise that known right, but instead submits to a line-up prior to formal

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162 Vide Report paras. 4.105 to 4.108.

163 M. Zander "Access to a Solicitor in a Police Station" 1972 C.L.R. 347.

164 Report paras. 4.81 to 4.93.

165 Byrne, Hogan and Macdermott in "Prisoners' rights – A Study in Irish Prison Law" 1981 at pp. 14, refer to the case of *The State (Harrington) v Garda Commissioner*, where it was held that "having regard ... to the extreme importance of this right and to the major inroad on the liberty of the individual which its denial or restriction would involve ... a detained person is entitled to access to his legal adviser, this must be achieved in privacty and out of the hearing of any member of the Gardia Siochana".

charges being lodged against him, he cannot be said to have been deprived of his constitutional right to counsel". [166]

The position in American Law, by virtue of the outstanding cases of *DiBiasi* [167] and *Donavan-* [168] *Arthur* [169] which stipulated that the right to counsel should be exercised at the arraignment stage rather than at the indictment stage of the proceedings, is now interpreted as to signify that any line of police questioning attempting to extricate a statement or to induce the suspect to waiver his rights in the absence of a counsel, should not be allowed. The landmarks in U.S. jurisprudence therefore extend constitutional protections of the suspect, reaffirm the Miranda warnings and by virtue of *People v Hobson* [170] expands the Miranda principles by not allowing a person to waive his rights without the presence of a lawyer. In fact, Mr. Kamisar in his essay "The Right to be Informed of Legal Rights: The Miranda Warnings", observed that the U.S. Supreme Court "was in the process of re-shaping 'a novel right not to confess except knowingly and with the tactical assistance of counsel' ". [172]

Section 5.07 of the Model Code on Pre-Arraignment Procedure, drafted by the American Law Institute, provides an acceptable compromise as to the debate at which point or for how long during police questioning should a lawyer be allowed to make his entrance. The proposed article calls for "prompt access" to a legal adviser by the detainee, and counsel is not to be prevented from staying at any place where the detainee is kept. The latter shall also be given reasonable opportunity from time to time to consult in private with his counsel. The Institute's main intention by the introduction of such a provision was not solely related to ensuring that the suspect is not held incommunicado, but concern was also forthcoming in order to prevent any exercise of abuse or coercion being made upon the detainee. However, this condition of having a counsel present is not absolute nor is it applicable during the first four hours of initial questioning as proposed in article 4 of the same Draft Code. [173]

It is only fair to point out that the Draft Codes of Practice for Detention, Treatment, Questioning, and Identification of Persons by the Police and for the Searching of Premises and Seizure of Property, issued by the Home Office provide a set of rules very similar to the rule applied in American Law. Paragraph 5.3 of the Draft Codes of Practice clearly shows a detained person not to be inteviewed by an officer until he receives legal advice where he so requested it and this was granted to him. It would, of course, be naively presumptuous to assume that such a rule is unqualified, particularly in relation to the Police and Criminal Evidence Act which

166 63 Ohio st. 2d 47 406 N.E. 2d 1110.
167 7 N.Y. 2d 544, 166 N.E. 2d 825, 200 N.Y.S. 2d 21 (1960).
168 13 N.Y. 2d 148, 193 N.E. 2d 628, 243 N.Y.S. 2d 841 (1963).
169 22 N.Y. 2d 325, 239 N.E. 2d 537, 292 N.Y.S. 2d 663 (1968).
170 39 N.Y. 2d 479, 348 N.E. 2d 849, 384 N.Y.S. 2d 419 (1976).
171 Vide also 10 Fordham Urban L.Jnl. (1982) at 359 et seq.
172 Vide "The Supreme Court and Human Rights", Edited by Burke Marshall. Forum Series, 1982.
173 Vide op.cit. at pp. 184 – 187.

epitomises the use and function of provisos. Therefore, where an officer (at least holding the rank of a superintendent) has reasonable grounds to believe,

(i) that delay in questioning would mean running a risk to harm persons or cause serious loss or damage to property; or

(ii) waiting for a solicitor will disturb the process of investigation; or finally,

(iii) if the detainee consents in writing to commence the interview, the right to see his solicitor shall not apply. However, although the solicitor may attend the interview, if the superintendent or a higher ranking officer considers his behaviour to be of an obstacle to the questioning he shall be asked to leave.

A relaxation of the right to have a solicitor present during questioning is also found in the Police and Criminal Evidence Act, although with graver consequences, on two separate grounds which allow for the suspension of the right under discussion. These two grounds found in Section 58(6), which allow a delay in fulfilling the detainee's right to seek legal advice, are (i) where the suspect is in detention for a serious arrestable offence, and (ii) where a superintendent authorises it. In the words of the Commission, these grounds are dictated by limited and exceptional circumstances where the interests of the suspect have to be subordinated to those of other individuals who may be at risk, and in favour of the wider interests of society.[174] It would not seem difficult to appreciate that such a statement justifies the criticism directed against the Commission's Report, accusing it of tipping the balance in favour of the police. The reasons for the two grounds warranting a delay to grant the right, were tailored presumably to clothe the same apprehensions involved with the similar right under the Act to have someone informed of one's arrest. Nevertheless, it is strongly suggested, that where basic human rights are concerned, no matter how heinous or grave certain offences are, as Lord Hooson reminded us, it is not a question of balance or equilibrium but a matter of fundamental principles of dignity and humane treatment. The grounds for authorising a delay in the exercise of the right to seek legal advice are once again identical to those reasons which under the Act deny the suspect his right to have someone informed of the arrest. Also identical is the time limit of 36 hours from the relevant time after which the right to seek counsel must be carried out.

However, the Act's provisions regulating persons in detention suspected of having committed terrorist acts leave much to be desired. The time limit of 36 hours within which the right to legal access should be exercised is extended up to 48 hours. Furthermore, where a suspect is detained under terrorism provisions which may give rise to the grounds upon which his rights may be delayed, he will only be allowed to speak to his solicitor in the sight and hearing of an officer who has nothing to do with the case and at least holds the rank of an inspector.

In essence, the Police and Criminal Evidence Act has three veins, all running like a silver thread through most, if not all, of its main clauses. The

174 Report para, 4.90.

first, touches upon the unreliable standard of reasonableness usually left at the discretion of police officers to decide whatever the provisions may mean. A second point relates, mainly to decisions being taken by officers in higher ranks. Third, the decisions and acts taken by police officers must be recorded in a custody record. All three purport to guise, if not to minimise, the real effect of the large, discretionary powers entrusted to the police by the new law. These three points were observed by Lord Scarman in the debate of the second reading of the Police and Criminal Evidence Bill in the House of Lords. [175] His Lordship pointed them out with the hope to meet what he aptly described "a historical challenge for the House to exercise its revising skills on the Bill." If, however, there is any reason as to why the skills of revision were not put to test, they do not certainly lie with the various extra-parliamentary voices of admonition and perhaps neither with the Royal Commission on Criminal Procedure, although the mills of commission authorities usually grind slowly. However, the challenge will only be affronted gradually, as the "Blindfolded Lady" is very old and the proces of face lifting is therefore of necessity slow and gentle. Other rheumatic pains and wrinkles of age remain. Only successive legislatures may help the Act in easing an ache here and smoothing a wrinkle there. [176]

175 Vide Debates in House of Lords Weekly Handsar, 4th June, 1984 col. 433 – 434.

176 M. Belli "The Belli Files", Prentice-Hall, Inc., New Jersey, 1983.