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The Impact of the Silence Provisions of the CJPOA 1994 on Practicing the Right to Silence by Suspects in Police Stations and Courts

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Abstract:-There is no doubt that the silence provisions of the Criminal Justice and Public Order Act 1994 have a significant impact on both pre and post-trial. The role of solicitors has become more complicated after such provisions. They now may be required to justify their advice of making no comments since courts made it clear that the legal advice to remain silent does not protect suspects' defence unless there are soundly-based objective reasons for such a decision. It is important for suspects to consider why they should follow their solicitors' advice. However, such advice should be given appropriate weight in deciding whether to draw adverse inferences in court. Moreover, it has become more common for police officers to disclose their case which subsequently helps solicitors to decide whether they should advise their clients to make no comments.
The fundamental principle here is that the defendant's silence is not itself evidence. What is absolute, however, is that inferences, which maybe drawn from suspect's silent, cause the evidence of the prosecution to remain unchallenged and therefore such evidence will be supposed by the jury to be true.

Keywords*: Adverse Inferences; Police Disclosure; Pre-Trial Stage; Silence Provisions*.

I. INTRODUCTION

The Criminal Justice and Public Order Act 1994 was enacted in April 1995. Since that time, courts have been issued some controversial decisions related to practicing the right to silence, the way that lawyers should advice their clients, police disclosure, and administering caution to suspects.[1] All of these aspects are covered by sections 34 to 38 of the CJPOA 1994.[2] These sections generally say that courts may draw inferences in four cases: when defendants rely (in their defence at trial) on facts which they did not mention during police questioning;[3] when they fail to testify in their own defence;[4] when they fail to provide explanations for incriminating objects, substances or marks;[5] and when they fail to explain their presence near the scene of a crime.[6] It has been widely argued that the general impact of these provisions is that the police 'put pressure' on suspects to be more cooperative in answering questions and providing information about their defence.[7]
This paper aims to consider the impact of the silence provisions in practice. It will examine their impact on practicing the right to silence by suspects in police stations and courts by looking at how police, suspects and solicitors may have had to change their practices as a result of the risk that inferences may be drawn. The paper will focus on pre-trial silence since most controversial evidence research findings and courts' decisions are related to this stage. One of the primary arguments which the paper will argue for is that the role of solicitors, after the CJPOA, has become more difficult.[8] On one hand, advising a suspect to remain silent may affect his defence later at trial. On the other hand, advising him to answer every question and disclose all information may

[1] See Jackson, J, *Silence and Proof: Extending the Boundaries of Criminal Proceedings in the United Kingdom,* 2001, 5 The International Journal of Evidence and Proof. P: 145; Dennis, I, *The Criminal Justice and Public Order Act 1994: The Evidence Provisions*, 1995, [1995] Crim LR 1 and Jackson, J, *The Right to silence: Judicial Responses to Parliamentary Encroachment*, 1994, 57 Modern Law Review 270.
[2] See Cape, E, *Defending Suspects at Police Stations*, fifth edition, 2006, the Legal Action Group. PP: 179-197. Also, see Kean, A, *the Modern Law of Evidence*, 6th edition, 2006, Oxford University Press. PP: 432-458.
[3] The Criminal Justice and Public Order Act 1994, section 34 (2).
[4] Ibid, section 35 (1).
[5] Ibid, section 36 (3).
[6] Ibid, section 37.
[7] Cooper, S, *Legal Advice and Pre-Trial Silence-Unreasonable Developments*, 10 The International Journal of Evidence and Proof, 2006. P: 61.
[8] Jakson, J, Wolfe, M and Quinn, K, *Legislation Against silence: The Northern Ireland Experience, 2000, Northern Ireland Office.* (Northern Ireland Study). P: 121.

force the suspect to incriminate himself.[9] It will argue, however, that such provisions have not abolished the right to silence, since suspects can still choose to remain silent in police stations and they can still refuse to testify in courts.[10] All of these issues will be considered by looking at evidence research and cases in which the right to silence has been a vital issue.

II. SILENCE PROVISIONS

A- Silence At Trial (s. 35):

Under section 35 of the CJPOA, suspect's failure or refusal to answer any question or to give evidence at trial, without a good reason, permits adverse inferences, as appear proper, to be drawn, [11] if the specified conditions are satisfied.[12] In fact, what inferences might be proper or might not is the question for which there is no general answer. Lord Mustill, in *Murray v UK*,[13] stated that it was impossible to have a general answer concerning this issue. [14]In considering the impact of s.35 on magistrates' courts practice, solicitors and legal advisors did not think that it had a key impact,[15] since most defendants used to testify at such courts.[16] However, the situation in the Crown court is different, since in those courts defendants have become more likely to testify.[17] This was mostly due to how solicitors' advised their clients,[18] as a defence counsel emphasized in the England Study that they would only advice defendants not to testify if there were significant risks, such as vulnerability.[19] It has been a concern, however, that as a result of the fact that defendants have become more likely to testify at court, vulnerable defendants will be unfairly disadvantaged. Nevertheless, some argue that the negative impact of such provisions on vulnerable defendants has been limited, since judges and juries are likely to be sympathetic to those defendants and are able to protect them from unfair cross-examination.[20]

B- Silence In Police Stations:

The relevant provisions in this stage are ss 34,[21] 36[22] and 37.[23] However, the most controversial is s. 34 which permits courts to draw inferences when defendants rely on facts not mentioned during police interrogation.[24] Under ss 36 and 37 adverse inferences may be drawn from suspect's failure to answer police questions about incriminating conditions. The purposes of drawing inferences under ss. 36 and 37 are mostly the

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[9] The right against self-incrimination is explicitly covered by Article 6 of the European Convention on Human Rights Act 1950. See Brown v Stott (Prosecutor Fiscal, Dunfermline) [2001] 2 All ER 97 (PC); Saunders v UK (1997) 23 EHRR 313.

[10] See Cape, *Supra* note 2. P: 180.

[11] CJPOA 1994, s.35(3).

[12] Section 35 is restricted in some respects: firstly, it does not apply to defendants under 14 years old, s.35(1). and the court must be satisfied at the conclusion of the evidence for the prosecution that the defendant understands that he/she may now give evidence and that adverse inferences may be drawn if he/she chooses not to do so. s.35(2). Secondly, in the case that it appears to the court that the defendant's physical or mental conditions make it undesirable for him/her to give evidence. s.35(1)(b). Thirdly, no adverse inferences should be drawn under this section if the defendant's guilt is not the issue and finally, if the defendant has a good reason for refusing to answer question (s) at trial. O'May, N, *The Criminal Justice and Public Order Act 1994: Evidence and the Right to Silence*, July 1995, Legal Action. P: 12.

[13] (1993) 97 Cr.App.R. 151.

[14] *Murray v UK* (1993) 97 Cr.App.R. 151. At p.155

[15] Bucke, T, Street, R and Brown, D, *The Right of Silence: The Impact of the Criminal Justice and Public Order Act 1994*, 2000, Home Office Research Study 199. (England Study). P: 47.

[16] The England study concluded that the use of such provision in magistrates' courts was seen mostly straightforward. Ibid.

[17]There is no numbers and facts to support that, however, in a study in Northern Ireland showed the impact of the silence provisions that provided by the Criminal Evidence (Northern Ireland) Order 1988. This study found that scheduled defendants who refused to testify had decreased from 64% in 1987 to 46% in 1991 and from 23% to 15% for non-scheduled.

[18] It is thought that this change was not due to the effect of the silence provisions on defendants behavior as it was due to its impact on solicitors who advice them. England study, P: 53.

[19] England study, P: 52.

[20] Ibid. P: 56.

[21] Section 34: (ii) suspect's failure to mention facts in the face of police questioning under caution or being charged.

[22] Section 36: (iii) suspect's failure or refusal to account for objects, substances or marks.

[23] Section 37: suspect's presence at a particular place.

[24] CJPOA 1994, section 34 (1).

same as those of s. 34. However, unlike s. 34, they do not require suspects to rely upon facts at trial that they did not mention to the police. Under ss. 36 and 37 the jury and judge may draw inferences only if a suspect failed to provide a satisfactory account to the police.[25] In order for inferences to be drawn under these provisions a suspect must have been given 'a special warning.'[26] Furthermore, ss. 36 and 37 apply when a suspect is arrested, while under s. 34, the suspect does not necessarily have to have been arrested.[27] Moreover, reasonableness is required for inferences to be drawn under s. 34, but not under ss. 36 and 37.[28] It is important to notice that s. 34 does not talk about silence or failure to answer police questions, but failure to mention facts that are used as defensive evidence at trial.[29] The significance of this distinction has been made clear by the court in the case of *R v Brazzalari*[30] where the defendant failed to mention two key facts during the police interrogation which he subsequently relied upon at trial. Although the police did not specifically ask the defendant about such facts, the court held that the defendant could reasonably be expected to have mentioned them. Therefore, the judge's direction under section 34 could not be criticised.

C- The Silence Provisions and Article 6 of ECHR:

In spite of the fact that there is no specific mention of the right to silence in the European Convention on Human Rights Act 1950, it has been stated by the European Court of Human Rights in many cases that it is implicit in the right to a fair trial, which is covered by Article 6 of ECHR. For example, in *Murray v UK*[31] the ECtHR expressed that these principles[32] are "recognized international standards which lie at the heart of the notion of a fair procedure under Article 6."[33] However, the court held that drawing inferences did not itself constitute a breach of ECHR.[34] It was emphasized, nevertheless, to base conviction solely or mainly on the defendant's silence is incompatible with Article 6 of ECHR.[35] This, in fact, is reinforced by the CJPOA 1994 when it states that conviction cannot be based solely on inferences drawn from silence.[36] The court or jury cannot draw inferences unless there is other evidence to establish a prima facie case or there is a case call for a testimony from the defendant.[37] Moreover, in *Condron v UK*[38] it was held that in order for adverse inferences to be drawn, the judge must direct the jury with particular care about drawing such inferences from the suspect's silence.[39] The court held that jury should be told that they should not draw an adverse inference unless they believe that the defendant's failure to mention facts later relied on could only be sensibly attributed to his having no good answer to police questions.

III. SILENCE PROVISIONS: CHALLENGES TO LEGAL ADVICE

[25] These two sections, particularly, relate to the cases that a suspect failed to account for incriminating objects, marks or substances, (s 36 of the CJPOA 1994) or his/her presence at a particular place (s 37 of the CJPOA 1994).

[26] The special warning require the police officer to explain to suspects: the offence they are facing, the fact that they are asked to account for, the police belief that the fact may be due to suspects' participation in the commission of the offence, inferences may be drawn if they fails or refuse to account for the fact in question and interviews have been recorded and it may be used as evidence against them at trial. The Code of Practice C 10.5B.

[27] For more details see Cape, *Supra* note 2. P: 194.

[28] Ibid.

[29] See ibid. P: 183-193.

[30] [2004] EWCA Crim 310. See also, *R v Johnson* [2005] EWCA Crim 3540.

[31] *Murray v United Kingdom* (1996) 22 E.H.R.R. 29

[32] The right to silent and the right against self-incrimination which they are covered implicitly by Article 6 of the ECHR.

[33] The Lord Justice-General considered in his judgment in Brown case [2001] 2 All ER 97 that although the right to silence is not directly mentioned by the Convention, they had been recognized in "capitall crymes". *Murray v United Kingdom* (1996) 22 E.H.R.R. 29.

[34] Wadham, J, *THE HUMAN RIGHTS ACT: ONE YEAR ON*, European Human Rights Law Review, 2001, Sweet and Maxwell Limited and Contributors.

[35] Article 6 of the ECHRA 1950 covers the right to a fair trial.

[36] TCJPOA 1994, S 38 (3).

[37] See Cape, E, *Police Station Advice: Advising on Silence*, January 2006, the Law Society, Criminal Practitioners' Newsletter, No. 63. P: 4.

[38] (1996) 22 EHRR 29.

[39] At para. 61. More about s.34 and ECHR, see Dennis, *Supra* note 2. P: 149.

There is no doubt that the right to access to a solicitor is one of the most significant safeguards that should be provided to suspects from the beginning of the criminal proceedings.[40] This right was significant in the case of *Murray v UK* [41] when it was determined that adverse interferences should only be drawn if a suspect had the opportunity to access to a solicitor.[42] After this, silence legislation has significantly changed in England and Northern Ireland. [43] Issues arise, however, if a suspect has been offered such opportunity but choose not to have a legal advisor.[44] Are the safeguards given by The Police and Criminal Evidence Act 1984 [45] enough to ensure the fairness of the procedural environment in this case?[46] It has been argued, indeed, by the police that rights given to suspects by PACE are enough to apply the silence provisions.[47]Some writers and reporters have argued that exercising the right to silence in police stations is 'back down' to the 1985-1994 levels.[48] The use of such a right before and after the introduction of the silence provisions came into force has been compared.[49] It was found that there was a clear decrease of suspects that remained completely silent while interviewed from 10% to 6%.[50] Also, 13% of suspects selectively answered questions compared with 10% after the silence provisions was made possible. Both studies have shown that the right to silence was mostly exercised by certain people: those who were arrested for serious offences, those arrested in London, blacks and those who received legal advice.[51] Moreover, the study that was carried out after CJPOA showed that the clearest decrease in the use of such a right was among those groups.[52] From this point it can be argued that the silence provisions achieved the goal that they had been established for, which is to prevent professional criminals from hiding behind their rights.[53]

Sanders and Young (2006) state that the clear decrease of exercising such a right is a result of the fact that solicitors have become less prepared to advice suspects to remain silent than before.[54] Studies in England, before the silence provisions have clearly shown that practicing the right to silence by suspects was connected to their solicitors' advice.[55] Legal advisors considered that their task has become more difficult since silence provisions came into force.[56] Despite that fact, the right to silence still, in many cases, is strongly advised by

[40] This has been confirmed in the case of R v Samuel [1988] QB 615, where Hodgson J stated: "perhaps the most important right given to a person detained by the police is his right to obtain legal advice. That right is given in section 58 of the Act, subsection (1) of which is precise and unambiguous….. in this case this appellant was denied improperly one of the most important and fundamental rights of a citizen." At page: 625-630.

[41] [1996] 22 E.H.R.R. 29. In this case, the applicant argued that drawing adverse inferences from his silence without giving him the opportunity to have a solicitor while he was at police station for 48 hours, was a clear breach of his right to a fair trial, which is covered by Article 6 of the ECHR.

[42] The court's statement in Murray was upheld in many cases such as *Averill v UK* (2001) 31 EHRR 36; *Beckles v UK* (2003) 36 EHRR 13, that inferences should not be drown against defendants until he/she has been given the opportunity to access to legal advice.

[43] Section 34 (2A) of the CJPOA 1994 as amended by section 58 of the Youth Justice and Criminal Evidence Act 1999, this section states that adverse inferences may not be drawn if the suspect had not the opportunity to access to a solicitor prior to any questioning proce sections

[44] Jackson, *Supra* note 1. P: 150

[45] The Police and Criminal Evidence Act 1984 give suspects some rights, one of the most important of them is the right to have a solicitor.

[46] Jackson, *Supra* note 1. P: 150.

[47] Ibid.

[48] England Study.

[49] Phillips. C and Brown, D, *Entry into the criminal justice system: a survey of police arrest and their outcome (1998)*, home office research study No. 185.

[50] England Study (2000: 31)

[51] Ibid. P: 32.

[52] Ibid. P: 32.

[53] One of the most important aims of the silence provisions is to prevent professional suspects to hide behind the right to silence. See Paper on the Right to Silence, Report N: 25, March 2002, Northern Territory Law Reform Committee. See, Also, Leng, R, *Silence Pre-trial, Reasonable Expectations and the Normative Distortion of Fact-finding*, 2001, 5 The International Journal of Evidence and Proof, PP: 240-256. P: 240.

[54] Phillips and Brown (1998) found that, following the CJPO, the use of silence fell from 39 to 22% among legally advising co-operation more frequently and that suspects are being cowed by the adverse inference warnings. Phillips and Brown, *Supra* note 49. PP: 32-33.

[55] See Sanders, A, Bridges, L and Mulvaney, A, *Advice and Assistance at Police Stations and the 24 Hour Duty Solicitor Scheme* (1989), Moston et al.

[56] In Northern Ireland study some solicitors considered that silence provisions had made their job harder. Northern Ireland Study. 121.

solicitors.[57] In accordance with both Northern Ireland and England studies solicitors stated that there were some cases in which they still advice their clients confidently to remain silent, for example, when there was no real evidence against their clients.[58] The issue that should be considered, however, is whether solicitors' advice to their clients plays any role in preventing the court and jury to draw inferences against suspects at trial. The court of Appeal in *Condron v UK*[59] held that drawing inferences under s 34 cannot be prevented simply because the defendant has been advised by his solicitor to remain silent. The court stated that the nature of any legal advice given was only one factor to be considered among a wider assessment of the reasonableness of an accused conduct in remaining silent. However, in the present case the ECtHR stated that it would be unfair to allow the jury to draw an adverse inference from the defendant' silence that is based on his solicitor's advice unless the jury were told that they must not do so unless they believed that silence could only 'sensibly' be 'attributed' to the suspect having no good answer to the questions.[60] The court clearly stated that the defendant's decision to make no comments based on his solicitor's advice, should be given "due weight" when deciding whether to draw inferences.

In *R v Howell*[61] it was held that a defendant genuinely relying on his solicitor's advice to remain silent does not prevent inferences from being drawn.[62] It was made clear that a suspect's silence during police questioning on the basis of legal advice would only provide a protection to later adverse inferences if there were soundly based reasons for making no comments. Moreover, in *R v Roble,*[63] it was considered that an explanation for advising a suspect to remain silent needs to be included in the defence. This is important since if the reasons behind such advice are not clear it would be impossible for the jury to decide whether the silence was attributable to the advice or to the fact that the defendant had no answer. Giving reasons for such advice, however, may require waiving a legal professional privilege. In other words, the details of any conversation between the defendant and his solicitor may be disclosed in open court.[64] Solicitors, now, should think carefully before advising their clients to make no comments and if they decide to do so, they must have a good reason. However, even if solicitors believe that there was a sufficient reason for advising their clients to make no comments, such as, if the client has been unlawfully detained, this does not necessarily prevent inferences from being drawn. In *R v Hoare and Pierce,*[65] Pierce's solicitor argued that his client's 12 hour detention was unlawful and therefore the interrogation was unlawful. Accordingly, he advised the defendant to remain silent. This, however, did not prevent inferences to be drawn by the court.In addition, in the case of *R v V* [66] the defendant refused to answer all questions during police interrogation based on his solicitor advice. The solicitor explained that it was based on three main reasons: the defendant's state of health; the police disclosure of the complainants' evidence was not sufficient; and the defendant argued that he had not understood the consequences of silence. Although these reasons seemed valid, judge left it open to the jury to decide if inferences should be drawn.From these cases, it is clear that silence, on the ground of legal advice, is unlikely to be seen as sufficient justification for not mentioning facts relevant to the case. The question that courts and juries consider, in fact, is not why a solicitor advised the client to make no comments, but why the suspect

[57] For the reasons for advising clients not to make comments, see Cape, E, Police Station advice: Defence Strategies after Condron, October 1997, Legal Action Magazine. P: 19.

[58] Jackson, *Supra* note 1. P: 160.

[59] [1997] 1 Cr App R 185. In this case the appellant argued that because of the fact they had been silent on their solicitor's advice, they were not expected to answer the police questions. Therefore, the question to draw adverse inferences from their silent should not have been put to the jury. See also, *Murray v UK* (1996) 22 EHRR 29, *Averill v UK* 92001) 31 EHRR 36; [2000] Crim LR 682, and *Beckles v UK* (2001) 31 EHRR 1; [2002] Crim LR 917.

[60] In spite of the fact that juries were satisfied with the plausibility of the defendants' explanation of their silent during police interrogation, the judge had drawn the jury's attention to such explanation and left it open to them to draw adverse inferences. The court held that the judge should have made it clear for the jury that they could only draw an adverse inferences "if satisfied that the defendants' silence at the police interview could only 'sensibly be attributed to their having no answer to the charge or none that would stand up to cross-examination'. For more about this case see: Jackson, *Supra* note 1. P: 151.

[61] [2003] EWCA Crim 1; (2005) 1 Cr App R 1; [2003] Crim LR 405.

[62] See Howell, ibid., para.24; *R v Knight* [2004] 1 Cr.App.R. 117 and *R v Turner* [2004] 1 All E.R. 1025.

[63] [1997] Crim LR 449

[64] In the case of Condron v UK (2000) 31 EHRR 1; [2000] Crim LR 679, it was held that the defendant will need to state the reasons for the advice of remaining silent, giving evidence of this nature, however, means that he will be deemed to have waived privilege. For more details see: England study, P: 51.

[65] [2004] EWCA Crim 784; [2005] 1 WLR 1804; (2005) 1 Cr App R 22.

[66] [2005] 149 S.J. 301, C.A. (judgment 3 March 2005)

accepted the advice.[67] In *Hoare and Pierce*[68] the defence argued that inferences should only be drawn if defendants have not acted genuinely in following legal advice. The prosecution, however, claimed that the issue to be considered is whether the defendants have acted reasonably. The Lord Justice believed that it is one thing to have the right to silence during an interview, and it is another thing why you use this right.[69] The question for the court was not whether the defendant had acted genuinely on relaying on his solicitor advice, but whether in the circumstances existing at the time, it is reasonable to expect the accused to have mentioned the relevant facts. The jury and court are required not to concentrate on the proceedings in court, but on the police interviews and the circumstances surrounding the investigation stage.[70] Solicitors are now advised to prepare a written statement during consultations in order to protect their clients from police questioning. After a client or his solicitor read this statement the defendant can subsequently make no comments, and no adverse inferences should be drawn at trial.[71] The case of *R v McGarry*[72] indicated that the written statement is a satisfactory way to inform the police of the facts that defendants rely on at trial, as long as the statement does include these facts.[73] The court, in *R v Ali*,[74] held that if the written statement that had been handed to the police does not include the relevant facts, then inferences could be drawn. Also, it is important to be noticed here that although a written statement may prevent inferences to be drawn under s.34(1)(a),[75] it cannot do so under s.34(1)(b).[76] In the case of *R v Dervish*,[77] inferences were drawn under s.34(1)(b), because the police disclosed some evidence that had not been taken into account in the statement that the defendant handed to the police. The court held that the defendant could have made at the time of charge.

IV. THE IMPACT OF SILENCE PROVISIONS ON POLICE DISCLOSURE

What and when facts should be mentioned is a decision that has become difficult for solicitors to make, since it depends on many important elements. One is the police disclosure. Evidence studies and researches have shown that one of the most important causes for advising suspects to make no comments is the fact that the police do not have to disclose everything about the case, which is supported by the court. Sanders and Young (2006) state that in seeking to secure the police disclosure, solicitors advise their clients to remain silent until discloser is secure.[78] Solicitors have to consider what facts are likely to be relevant at trial [79] before advising their clients whether or not to mention them to the police.[80] Researches have shown that silence provisions were causing solicitors to ask for police disclosure more often.[81] Solicitors and legal advisors argue that suspects are not reasonably expected to mention a relevant fact without sufficient information had been disclosed.[82] In fact, legal advice depends on the nature of the case and this depends on how much information a solicitor has

[67] Cape, *Supra* note 57. P: 20.
[68] [2004] EWCA Crim 784; [2005] 1 WLR 1804; (2005) 1 Cr App R 22.
[69] *Hoare and Pierce* [2005] 1 WLR 1804; (2005) 1 Cr App R 22.
[70] *Betts and Hall* [2001] EWCA Crim 224. The circumstances that should be considered by the court and jury before drawing inferences are related to suspects themselves, such as their intelligence or their health state. See Leng, *Supra* note 53. P: 253. Also, to see the reasonableness as a condition in drawing adverse inferences under s.34, see Cape, *Supra* note 57. P: 18.
[71] England Study (2000: 28). See, also, Cape, *Supra* note 37. P: 15.
[72] [1999] 1 WLR 1500; [1998] 3 All ER 805; [1999] 1 Gr App R 377
[73] More and clear information about handing in a statement in order to prevent inferences to be drawn see Cape, *Supra* note 57. P: 19.
[74] [2001] EWCA Crim 863.
[75] s. 34(1)(a) states 'at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings.'
[76] s. 34(1)(a) states 'on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact.'
[77] In the case of *R v Dervish* [2001] EWCA Crim 2789; [2002] Cr App R 6, inferences were drawn under s.34(1)(b). As the police disclosed some evidence that had not been taken into account in the statement that the defendant handed to the police.
[78] Sanders, A, and Young, R, *Criminal Justice*, third edition, 2007, Oxford University Press. P: 231.
[79] After the silence provisions came into force legal advisors have become more aware about police disclosure, since advising their clients to make no comments now may led to conviction.
[80] For more details see Cape, *Supra* note 2. P: 189.
[81] England study (2000: 23).
[82] Solicitors were more tending to advice their clients to remain silent in the absence of sufficient information about the case. England study (2000: 23).

about the case against his client.[83] However, it was made clear by courts that the police could reasonably refuse to disclose information.[84] In other words, advising suspects to make no comments on the ground that disclosure was not secure may not prevent inferences from being drawn.[85] In the case of *R v Argent*[86] it was argued by the defence that because the police had not fully disclosed evidence against the suspect his solicitor advised him to remain silent[87] and therefore no adverse inferences should be drawn from the suspect's silence.[88] The court held that, according to the CJPOA, whether legal advice to make no comments made silence reasonable depended on what passed between lawyer and suspect. Also, police disclosure was applicable only if this was necessary in order for the suspect's silence to be observed as unreasonable.[89] This case indicated that insufficiency of police disclosure cannot be an automatic basis for excluding evidence and this is to be considered by the jury.[90] The silence provisions, however, have also had a positive impact on police disclosure. England and Northern Ireland studies have shown that the police were disclosing more information than before.[91] It was found that in order to make drawing adverse inferences by judges and jury to be more likely, the police were disclosing their case more willingly. In fact, police disclosure is a complicated issue itself, since the police should think before they disclose anything about what should be disclosed and at what time. For example, Sanders and Young (2006) state that maybe if police disclose a part of their case, by such disclosure they will mislead a suspect. Therefore no adverse inferences should be drawn from such suspect silence.[92]

V. THE IMPACT OF SILENCE PROVISIONS ON THE PROSECUTION'S DECISION

Some strongly argued that the police and prosecution may gain a significant advantage from comments made by suspects due to the new silence provisions. For example, in the England Study,[93] the impact of such provisions has been considered in accordance with two clear facts. First, the decrease in the number of suspects who made no comments while interviewed by the police: this had made it easier to decide whether to proceed with a prosecution, since more information is offered. However, the change in the number of suspects who have made confessions in the face of police questioning has been limited. For example, in a study in England[94] before the silence provisions came into force there were only 55 per cent of suspects who made confessions. This has not changed after such provisions came into force.[95] This has caused some to argue that such provisions do not seem to yet have a significant effect.[96] Second, although inferences from silence alone cannot prove guilt,[97] remaining silent may significantly play a role in establishing the prosecution's case. If the court determines that a suspect has a case to answer, making no comments while interviewed may be treated as evidence against him.[98] In the same study, however, because of the fact that other kinds of evidence are needed in order to have a successful prosecution, some CPS respondents considered that the silence provisions still play a limited role in

[83] One of the most important challenges that face legal advisors and solicitors after silence provisions is that obtaining sufficient information from the police about cases. After CJPO they cannot advice their clients to remain silent unless they have sufficient reasons to do so.
[84] See R v Roble [1997] Crim LR 449.
[85] Jackson, *Supra* note 1. P: 160.
[86] [1997] 2 Cr App Rep 27.
[87] In this case the main issues were whether adverse inferences may be drawn from suspect's silence based on legal advice under s34.
[88] In the case of R v Argent the suspect while interviewed made no comments and at trial he relayed on facts such as he was not drunk and no one else had danced with his wife. However, in the second interview the judge believed that the suspect was reasonably expected to mention the information that he relayed on at trial in the face of police questioning. Such interview was admitted since it was preceded by an identification parade with a positive identification. Therefore such argument was rejected by the court of appeal.
[89] R v Argent [1997] 2 Cr App Rep 27.
[90] See Easton, S, *Legal Advice, Common Sense and the Right to Silence*, 1998, 2 the International Journal of Evidence and Proof. PP: 109-122. P: 110.
[91] Northern Ireland Study. 123, England Study, 70.
[92] England study (2000: 22). Sanders and young, *Supra* note 78. P: 231. See, for example, Imran and Hussain [1997] Crim LR 754.
[93] England study (2000: 43).
[94] Ibid. PP: 59-60.
[95] Phillips and Brown, *Supra* note 49. P: 58.
[96] As Jackson (2001) did. Jackson, *Supra* note 1. P: 163.
[97] The CJPOA 1994, section 38 (3).
[98] Ibid, sections 34 (2) (c), 36 (2) (c) and 37 (2) (c).

the decision to prosecute. They stated that reliance on silence evidence made the prosecution case look weak because there must be enough evidence otherwise the chance for the case to succeed at court will be limited. [99] Some argue that in some ways these provisions have a negative impact on the police, as some officers consider that with the new provisions all they get is a 'pack of lies'. [100] This, however, can benefit the police since they will still be provided with information to investigate and even if suspects lie, what they say during investigation may be used against them at trial.[101] Furthermore, the England Study has emphasized that using silence evidence at trial may hinder the prosecution's case instead of helping it.[102] This resulted from the fact that some barristers, judges, and juries did not like the implications of the provisions.[103] Moreover, Jackson (2001) argued that the silence provisions have had a limited impact on supporting the prosecution's case since adverse inferences that may drawn could be used to 'fill any large deficit' in the prosecution's case.[104] In addition, evidence researches and cases have not shown that there has been a change in the percentage of suspects charged or convicted, which can be related to the use of the silence provisions.[105] Also, as mentioned above, that there has been no change in the rate of suspects who made confessions while interviewed. However, this is not to say that prosecutors do not find such provisions useful to be used at trial.[106] The England study considered that although using suspect's silence in prosecuting cases was not thought to be appropriate or desirable,[107] most of CPS respondents were happy to use it in the magistrates' courts.[108] Nevertheless, it was clearly considered that using such provisions at trial may be perceived as unfair by juries.[109] Thus there were cases where prosecutors would make a decision not to deploy the provisions of silence.[110] The study concluded, however, that barristers generally used the provisions if they believed that there was an advantage for the prosecution's case in using them.[111] In spite of the fact that silence provisions have become a live issue, judges have not directed the jury very often concerning this issue.[112] Crown courts judges are divided into two groups of thoughts: [113] judges who support the silence provisions and like to use them; and judges who are aware to use such provisions.[114] Within the second group of judges do, in some cases, direct juries to draw inferences, but the juries still do not often do so. One important reason for this as Jackson states was the difficulty in the way that the judge directs the jury to draw adverse inferences.[115] In fact, judges themselves find directing juries a very difficult task, there are a

[99] England study (2000: 43-44).

[100] As one respondent stated 'Because of the fact that under these provisions suspects believe that to answer the questions put to them is better than making no comments, 'they always find you a story no matter how cock-and-bull it is. In fact they probably lie a little better now, instead of saying 'no comment.' From: Zander, M, Cases and Materials on the English legal system. 9th edition, 2003, LexisNexis. P: 160.

[101] Zander (2003) states "this at least provided the police with something to investigate and if these accounts could be proven false then this evidence strengthened the case against the suspect and was seen as much more valuable than the drawing of adverse inferences in court." Ibid.

[102] England Study (2000: 44).

[103] As one CPS respondents stated 'their [the judges'] [to use the provisions] was: 'if you have to rely on that your case is ropey in any event and so why are you here?'. I think that some counsel take the same sort of attitude towards the inferences.' England study (2000: 44).

[104] Jackson, *Supra* note 1. P: 162. Also, case. England Study. 44.

[105] England study (2000: 65).

[106] Both England and Northern Ireland studies have shown that the use of the silence provisions in the Crown courts was varied. Both studies emphasized that prosecutors adopt different approaches in using such provisions. Northern Ireland study, P: 78, England study, P: 48.

[107] In the cases they felt that it was appropriate to be used they highlighted the fact that talk of inferences could put defendants under pressure not only the value of adverse inferences that maybe drawn against defendant. Ibid. P: 45.

[108] Most of prosecutors in England study expressed that they would use them where appropriate, they believed it in any way will play a role at trial. England study, (2000: 46).

[109] Northern Ireland study, P: 78, England study, P: 48.

[110] The study classified the reasons for such decision into three groups: 'tactical', 'presentational', and 'personal'. For more details about what those kinds of reasons mean see: England study, (2000: 48).

[111] Ibid. P: 49.

[112]For example, juries were directed to draw adverse inferences only in 43.3 per cent of the cases in which art. 4 arose as a live issue and 37.5 per cent of the cases in which art. 3 arose as a live issue in Northern Ireland study. P: 78.

[113] England study, 60.

[114] Ibid. P: 60.

[115] One barrister stated: I mean, you can plug on all day, 'well, he can explain this, he could explain that, why hasn't he done this, why hasn't he done that'. At the end of the day juries aren't impressed by that sort of

number of Appealed cases considered that judges' directions were inadequate.[116] Moreover, juries may, some times, do not know what kind of inferences should be drawn. For example, in stead of drawing inferences of fact they draw inferences of guilt.[117]

VI. CONCLUSION

In spite of the fact that the silence provisions have had a significant impact on the pre-trial stage, the complexity of drawing inferences at trial has been considered as a balance to that significance.[118] Evidence researches have not recognized any change in charge and conviction rates even if defendants are more likely to testify.[119] Moreover, judges do not direct juries very often to draw inferences and juries even if they are directed they appear very careful in dealing with such provisions.[120]

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argument. If it's that obvious they'll have thought of it themselves. If it's not that obvious, there's no point in really telling them that here's something exra that we can throw into the pot." Northern Ireland study, Page: 81

[116] See for example *R v Beckles* [2004] EWCA Crim 2766; [2005] 1 Cr App R 23; *R v Bresa* [2005] EWCA Crim 1414.

[117] England Study, 63.

[118] Jackson, *Supra* note 1. P: 172.

[119] England Study.

[120] Ibid.

[24] *Averill v UK* 92001) 31 EHRR 36; [2000] Crim LR 682; [2000] BHRC 430
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