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Early access to a legal assistance within criminal proceedings in european jurisdictions: “England & Wales as a case study”*

Acesso antecipado a assistência jurídica em processos penais em jurisdições europeias: “Inglaterra e País de Gales como estudo de caso”

Bassim Jameel Almusawi**

Abstract

The main purpose of this article is to evaluate the existing law and practice regarding the right of a suspect of access to a legal assistance in England & Wales. The study analyses this conferred right by taking a procedural approach to assess whether the English criminal justice system is in line with European human rights guarantees in criminal proceedings, particularly the European Convention on Human Rights, to which the United Kingdom is a state party. The current study focuses on the right of access to a legal assistance, and doctrinal legal research was adopted in the conduct of this research, and both primary and secondary data sources were assessed. The paper critically analyses the relevant legal rules, case law as well as looking at other European jurisdictions and intentional human rights norm, with special reference to the jurisprudence of European Court of Human Rights (ECtHR) so that the right of access to a legal assistance in criminal justice system in England & Wales can be critically analysed. The key findings unearthed by the current study are that even with the many welcome identified guarantees that have been made to respect the present right of a suspect in England & Wales, however, it remains clear that the English criminal justice system is still under considerable shortage, which need further suggested reforms to be made. The study found certain weaknesses between the law and working practice. The present study concludes that further reform is required in order to ensure implementing the rule of law during every day working practice.

Keywords: legal assistance; fair trial; European Jurisprudences; England & Wales; criminal proceedings.

Resumo

O principal objetivo deste artigo é avaliar a legislação e a prática existentes relativamente ao direito de um suspeito de acesso a assistência jurídica em Inglaterra e no País de Gales. o estudo analisa este direito conferido adotando uma abordagem processual para avaliar se o sistema de justiça criminal inglês está em conformidade com as garantias europeias de direitos humanos em processos penais, particularmente a Convenção Europeia dos Direitos Humanos, da qual o Reino Unido é Estado Parte. o presente estudo enfoca o direito de acesso a assistência jurídica, e na condução de-

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** PhD in law from United Kingdom / Bangor university. rank/ Head of school of law in wasit university.
Email: balmusawi@uowasit.edu.iq

sta pesquisa foi adotada pesquisa jurídica doutrinária, e foram avaliadas fontes de dados primárias e secundárias. O artigo analisa criticamente as regras jurídicas relevantes, a jurisprudência, bem como analisa outras jurisdições europeias e normas intencionais de direitos humanos, com especial referência à jurisprudência do Tribunal Europeu dos Direitos Humanos (TEDH), a fim de abordar o direito no sistema de justiça criminal em Inglaterra e País de Gales podem ser analisados criticamente. As principais conclusões do presente estudo são que, mesmo com as muitas garantias bem-vindas identificadas que foram dadas para respeitar o direito de um suspeito a ter assistência jurídica em Inglaterra e no País de Gales, permanece claro que o sistema de justiça criminal inglês é ainda sob considerável escassez, que precisa de mais reformas sugeridas. O estudo encontrou certas fragilidades entre a lei e a prática de trabalho. O presente estudo conclui que são necessárias mais reformas para garantir a implementação do Estado de direito durante a prática de trabalho quotidiana.

palavras chave: assistência legal; julgamento justo; Jurisprudências Europeias; Inglaterra e País de Gales; procedimentos criminais.

1 Introduction

In Europe, it is self-evident that safeguarding personal liberty is one of the most significant human rights. In this context, the right to an effective defence in criminal proceedings is indispensable for the purpose of protecting the right to a fair trial, which is unanimously recognized by all European States. This paper examines a suspect's right to legal assistance in criminal proceedings during the arrest, investigation and detention stages in the selected criminal legal system that is in England and Wales. In this regard, it may well for the purposes of human rights studies, the English criminal legal system be a good representation of modern legal systems across Europe & likely around the world.

The research is based upon assumption that the English criminal legal system vis-a-vis with European norm satisfies the essential elements of the protection of a suspect's human rights within legislative provisions in perfectly and intelligibly structure. Whereas it is self-evident that some criminal justice systems remain ine-

ffective in securing or protecting the human rights of suspects.

In recent time, ensuring minimum rights during arrest and detention has become the most critical issue. The European Convention on Human Rights and Fundamental Freedoms, expressly affirms the right of a access to legal assistance in article 6 of the convention. The criminal justice system in England and Wales then has effectively incorporated in the European Convention on Human Rights. In other words, the European Convention on Human Rights is deemed as part of English law as long as its provisions are automatically applied under the English Human Rights Act 1998. In light of this, it is claimed that English law has effective experience in implementing human rights protection since the Human Rights Act came into force in 2000.¹ Hence, the European Convention on Human Rights is deemed as part of English law as long as its provisions are automatically applied under the English Human Rights Act 1998 which supports the mentioned claim that English law has effective experience in implementing human rights protection since the Act came into force in 2000.² The experience of the English criminal justice system then would be an ideal yardstick to address any systemic deficiency in due process & human rights standards in Europe.

In England and Wales, following the promulgating of the Police and Criminal Evidence Act 1984 (PACE) & its Codes of Practice, there was a major overhaul of English's criminal procedure law. One of the major innovations of the (PACE) & its amendments is the reform of legal rules relating to the right of a suspect to have legal advice which was reliant on inherited case law. In present time, a person facing criminal proceedings in detention at a police station or elsewhere has a clear and firmly statutory right to consult a solicitor in private and free of charge at initial stages of proceedings & thereafter.³ Provisions of legal Codes of Practice

¹ SADIQ, Khan. Home Secretary: 'Scrap Human Rights Act'. *Yahoo News*, 2 Oct. 2011. Available in: <https://uk.news.yahoo.com/home-secretary-scrap-human-rights-act-083212525.html?guccounter=1>. Access on: 2 Oct. 2022.

² SADIQ, Khan. Home Secretary: 'Scrap Human Rights Act'. *Yahoo News*, 2 Oct. 2011. Available in: <https://uk.news.yahoo.com/home-secretary-scrap-human-rights-act-083212525.html?guccounter=1>. Access on: 2 Oct. 2022.

³ THE POLICE and Criminal Evidence Act 1984 (PACE) s58(1) states that "A person arrested and held in custody in a police station or other premises shall be entitled, if he so request, to consult a solicitor privately at any time". PACE s59 (as amended by legal

state that persons facing criminal proceedings should be notified & information must be sufficiently given about their right of independent legal advice. Such advice should be available free of charge whether a suspect is taken to a police station under arrest or having attended voluntarily.⁴ Notifying access to this advice should be immediately taken place at the outset of proceedings before beginning or re-commencement of any interview at the police station or other authorised place of detention,⁵ before a review of detention is conducted,⁶ after a suspect has been charged or informed that he may be prosecuted, if the police wish to bring to his attention any statement or the content of an interview, or where they wish to re-interview,⁷ before being asked to provide an intimate Sample,⁸ and before an identification parade, or group or video identification occurs.⁹ These new provisions, thusly, introduces a significant improvement on the earlier rules as it now provides specific protection for the right of a suspect to have a legal assistance.

One of the key arguments of the paper is that, one may well expect that there is a high degree of compliance between legal rules and practice relating to the right of legal assistance, which applies to criminal proceedings in England & Wales with the protection of the right under international human rights norm. In the latter context, it is questionable whether the expected European standard under the convention of early access to a legal assistance within criminal proceedings is properly set out in England & Wales. The paper will argue that a clear legal rules relating to the right of early access to legal assistance have been made in several forms in many European jurisdictions, particularly in the English legal system. However, in the view of the present author, a further reform is required for enhancing the effectiveness of legal Assistance in criminal proceedings. In light of the aforesaid, the present paper endeavours to examine whether the criminal justice system in England & Wales efficiently secures required protection and respecting to the right of access to a legal assistance by officials at all circumstances during

process of arrest and detention. It founded & pointed some a weakness. These shortages are relative to the absence of some rules that could properly regulate police conduct, in danger of bringing the right into disrepute. Such weakness which has not been addressed by the (PACE) undermined the effectiveness of this right in criminal proceedings.

This right is of the most important due process since it takes notable role in spreading of a human rights culture, enforcing rule of law and avoiding miscarriage of justice. In forthcoming pages relevant jurisdictions, legal rules, case law, and intentional human rights norm, would be critically analysed with special reference to the jurisprudence of European Court of Human Rights (ECtHR). In some its aspects, the present paper aims to fill an important gap in our understanding regarding any possible legal reforms that could be made for achieving an ideal system in respecting a suspect's rights of access to legal assistance. The paper to achieve its aims adopts rigorous doctrinal legal research to evaluate the existing law and practice regarding the right of a suspect of early access to a legal assistance in England & Wales. The research critically analyses the relevant legal rules. The publications of scholars that are relevant to the early access to a legal assistance have been also evaluated. In addition to the textual analysis to the relevant legal rules there are many cases in English legal system & other European jurisdictions, are looked at with special reference to the jurisprudence of European Court of Human Rights (ECtHR), so that the right of access to a legal assistance in criminal justice system in England & Wales can be critically analysed.

2 Justifications of access to a legal assistance at the initial investigation stage (significance & rational)

A suspect has right of access to a legal assistance in a criminal procedure. The question requires to be best considered in this regard is when should an individual have access to a lawyer?

In this respect, it can be submitted that the right to legal assistance in criminal proceedings, is considered one of the fundamental procedural rights of a person accused of a criminal offense, particularly in heinous

Aid Act 1988) provides that this consultation will be provided freely, enabling duty solicitor schemes to be established.

⁴ CODES of Practice (Code C paras 3.1 and 3.5)

⁵ (Code C para 11.2)

⁶ (Code C para 15.3)

⁷ (Code C paras 16.4 and 16.5)

⁸ (Code D para 5.2)

⁹ (Code D para 2.15)

offences. It is no surprise, then, that the most significant protection for due process introduced for the first time by the (PACE) is the right of access to legal advice from outset of proceedings.¹⁰ A suspect in detention can be undergone long & complex criminal procedure and hence it can be said that the basic right of the detainee is to access to a lawyer in order to be one of his most important safeguards and a fundamental protection against police abuse.¹¹

In the view of present author, the right of access to a legal advice is more arguent during the pre-trial stages, at the beginning of a criminal procedure. This right achieves for a suspect several important goals particularly in serious cases: it is a guarantee of a fair trial. In addition it is deemed a guarantee of a suspects' other rights such as right of communication with outside & presence of kin or a friend face to face. Access to a legal assistance is helpful for a suspect to be notified and known his further rights or any evidences against his case to prepare his defence.

Also, early access to a legal assistance may adequately protect the right to silence, particularly, it is under the Criminal Justice and Public Order Act 1994, as will be discussed in further details later, no adverse inferences can be drawn from remaining silence whenever a suspect is denied access to legal advice during investigation stage.

Early access to legal aid may also adequately protect the right to silence, particularly since under the Criminal Justice and Public Order Act 1994, as will be discussed in more detail later, no adverse inferences can be drawn from maintaining silence if the suspect is prevented from obtaining legal advice during the investigation phase. Moreover, a person facing criminal proceedings is in very much confusion so at this stage the legal advice prevents a suspect from making an unreliable confession, particularly there is, a strong possibility that evidence attained during the initial investigation stage is likely will be relied on in the later stage of proceedings at the trial.¹²

¹⁰ FENWICK, Helen. *Civil liberties and human rights*. 4th ed. Routledge: Cavendish Publish, 2007. p. 1208; ANDREW, Sanders; RICHARD, Young. *Criminal justice*. 2nd ed. London: Butterworths, 2000. p. 216.

¹¹ MARTEN, Hannibal; LISA, Mountford. *The law of criminal and civil evidence: principles and practice*. Harlow: Pearson Education Limited, 2002. p. 214.

¹² MARASINGHE, Charika. The right to legal assistance in inter-

It can be submitted that an access to legal assistance can be deemed as the first and most significant step towards providing a right balance between police power & suspect's human rights whilst in police custody. Consequently, for the proper investigation of offences, waiver of the right to a legal assistance should not be a common practice neither at outset of proceedings nor during questioning. The presence of a lawyer prevents the risk of oppressive interrogation. Lawyers can be seen as an obvious means of equalising the inequality between police power and a person facing criminal proceedings. It has been rightly stated that the fact that a detained person who committed a criminal offense may not understand the provisions of the criminal law and criminal procedural legislation, which puts a suspect and the criminal justice authorities in an admittedly unequal position.¹³

Hence, attaining a balance of power between a professional police force, who are highly trained in techniques and operating on home ground (that is police station), and the private individual who is under fear and stress & in unfamiliar and threatening circumstances. Such a balance of power can only be equalised by allowing the detainee to obtain professional legal advice.¹⁴

Most importantly, the right to a legal advice is most salient immediately after arrest more than during his trial, because at this stage as has already been mentioned that a suspect may not know exactly the accusation against him. The suspect is under grate emotional tension so he is in grave danger to make irreparably confession.¹⁵ It is obvious that, the right to legal assistance minimizes, at this stage of proceedings, the emotional strain on the suspect whom police may force to endure undue pressure during the criminal proceedings. In this regard Faundeza is certainly correct in saying that "if legal assistance were immediately available after arrest or

national law, with special reference to the ICCPR, the ECHR and the ACHR. *Asian Year Book of International Law*, v. 5, p. 15-44, 1995.

¹³ ZAVHORODNII, Vitalii A. *et al.* Application of Article 5 of the ECHR to the detention of a person who has committed a criminal offense. *Revista de Direito Internacional*, Brasília, v. 19, n. 1, p. 336-353, 2022.

¹⁴ MICHAEL, Zander. *Cases and material on the english legal system*. 10th ed. Cambridge: Cambridge University Press, 2007. p. 175; Regina v Samuel [1988] QB 615.

¹⁵ ALMUSAWI, Bassim. Legal response to protection of right to communicate & appropriate adults during process of arrest or detention. *Revista de Direito Internacional*, Brasília, v.19, n. 2, p. 314-324. 2022.

before a person were interrogated by the police it would be less likely that he would become the victim of improper interrogation or third degree methods".¹⁶ Skinns also added that it is "difficult for legal advisers to judge a suspect's state of mind and their physical condition, if they do not attend the police station. Yet understanding a suspect's physical and mental state may be the only way a legal adviser can take a fully adversarial stance on matters of legal significance, such as whether a suspect is fit for interview".¹⁷ Summarizing all of the above, it is necessary to emphasize that Summing up all the above, it is necessary to emphasize that the presence of legal assistance may well ensure the validity of the proceedings and hence the neutrality of the investigation along with the protection of the suspect from arbitrary power of the police during arrest and detention can only be properly ensured after receiving legal assistance.

3 Requesting legal assistance

In most European legal systems & in England and Wales too, provisions of law make it compulsory for the authorities to notify a person under an arrest or detention, prior to interrogation, that he has the right to access to a legal assistance. Accordingly, if a suspect is brought to the police station either under arrest by police or voluntarily comes and then arrested there, he must be informed of the right to access to free legal assistance both orally and in a written form.¹⁸ The custody officer must record every step of this request in the custody record then a solicitor must be contacted as soon as practical.¹⁹

The detainee, who has had a solicitor, should be allowed to specify that solicitor is to give advice.²⁰ If the detainee does not have a solicitor, he must be told of the availability of a duty solicitor scheme and be shown a list of the duty solicitors. If the duty solicitor who is available is unacceptable to the suspect, they can request two further selections of solicitors. Further attempts

may be permitted by the custody officer relying on his discretion. In this regard it seems to be more appropriate, if the suspect can be entitled to select as his legal advisor somebody in whom he has confidence because legal assistance of suspect's choice is deemed an essential right not only in the interest of the suspect, but also in the fair of criminal justice system.

It is no surprise, then, that, if a suspect is allowed to select a solicitor on his choice the relationship between citizen and justice provided by the State would be full of trust. After a solicitor has been chosen, the custody officer must act without delay to secure the advice by making contact with him.

A solicitor having been arrived at a police station must be, first of all, efficiently informed about the nature of the accusation and general evidence against his client, in addition of hearing the tapes of any interviews. It should be noted that, the suspect must be informed of the solicitor's arrival even if he is being interviewed at that time.²¹

Let us now turn to highlight the rate of requesting legal advice in police station. In this regard, research studies which achieved via different periods have shown variety proportions from requesting advice and a number of studies have demonstrated a rising in the rate of suspects making a requests for legal advice. It can be claimed that these increased rate of suspects making a requests for legal advice may belong to the provisions of Codes of Practice. Codes of Practice seek to ensure suspects entering custody understanding that legal assistance is available to them independent and free of charge.²² According to these Codes, having requested is made any detainee has statutory right to access to legal advice.²³ Consequently, this contributed to getting higher in request and advice rates.²⁴

Studies show that the proportion of requesting advice by detainees under detention is reached about 60

¹⁶ FAUNDEZA, Hector. *International protection of human rights in criminal procedure*. 1980. Doctoral (Phil thesis) - King's College London, London, 1980. p. 201.

¹⁷ SKINNS, Layla. The right to legal advice in the police station: past, present and future. *Criminal Law Review*, v. 19, n. 1, p. 19-36, 2011.

¹⁸ (Cod C paras 3.1,3.2 and 6.1)

¹⁹ (Cod C, Note 6B)

²⁰ (PACE s58(2) and (4))

²¹ STONE, Richard. *Civil liberties and human rights*. 4th ed. Oxford: Oxford University Press, 2010. p. 115.

²² (Cod C, Note 6B) states "When a detainee asks for free legal advice, the Defence Solicitor Call Centre (DSCC) must be informed of the request".

²³ BUCKE, Tom; BROWN, David. *In police custody: police power and suspect rights under the revised PACE codes of practice*. United Kingdom: Home Office, Research and Statistics Directorate, 1997. p. 19.

²⁴ SKINNS, Layla. I'm a detainee: get me out of here. *British Journal of Criminology*, v. 19, 2009.

per cent which 80% got consult with a solicitor among them.²⁵ Such progress in per cent of asking legal advice is in opposite with previous much less per cent which indicated in last studies. The reasons behind this high request may belong to growth of encouraging a suspect to have due rights while facing criminal proceedings, which is legal advice is one of the most significant amongst them especially in serious crimes.²⁶ The police interested with consenting to outcome of investigation by encouragement of suspects to use their rights in legal advice to secure admissible confession at police station.²⁷ It may be well to indicate that conditions of detention which surround of detainees at custody are another important factor that may rise requests of legal advice. As the Layla rightly mentions that the environment of police custody has reflected highly in requested consultations. One of the vital role that could affect requesting legal advice by a suspect is the conduct of police. Such fact may unsurprisingly illustrate why in privatized custody the detainees are more likely to request advice than those who are detained in public custody. This is because the privatized custody is as she pointed out that bigger, less busy, brighter, and there is an adequate amount of staff to take a note of their requests.²⁸

As already mentioned, about 20% of detainees who request legal advice did not get it so the question can be asked that what factors such default line & weakness? The notable factor is that the solicitor perhaps slow motivation to attend police station. This may belong to finance reasons, as instance the budget which puts in legal aid is not encouragement. The growing number of detainees also is not matched with the number of solicitors who could respond to these requests and thus solicitors whom police my request to attend police station some time is not ready to present nor be available in due time.

²⁵ SKINNS, Layla. The right to legal advice in the police station: past, present and future. *Criminal Law Review*, v. 19, n. 1, p. 19-36, 2011; PLEASANCE, Pascoe; NIGEL, Balmer; KEMP, Vicay. The justice lottery? Police station advice 25 years on from PACE. *Criminal Law Review*, London, v. 1, p. 3-18, Jan. 2011.

²⁶ BOTTOMLEY, Keith *et al.* The detention of suspects in police custody: the impact of the police and criminal evidence act 1984. *The British Journal of Criminology, Brit. J. Crim.*, v. 31, n. 4, p. 347-364, Dec. 1991.

²⁷ SKINNS, Layla. I'm a detainee: get me out of here. *British Journal of Criminology*, v. 19, 2009.

²⁸ SKINNS, Layla. I'm a detainee: get me out of here. *British Journal of Criminology*, v. 19, 2009.

As a result of dealing with many detainees at same times a suspect who requests advice may not always obtain it via a duty solicitor.²⁹ As description for one of such situations, the following comment in such context can be mentioned as example that "there's just one duty solicitor ... they're trying to split between ten people. Initially, they just come and see you ,sit down with you for two minutes, tell you exactly what's happening and then they cut out ... if a solicitor's been out all day, and then they cut out... if a solicitor's been out all day, and then all of a sudden he's the only duty solicitor there, like, for example, in a bust police station... they're there all day, and all up to 12, 1 o'clock in the morning they're still going to be there, 3 o'clock in the morning, so realistically there's no time for them to get out, and every time they see someone they're just hoping that's the last person they have to see".³⁰

Despite the police are compiled with securing legal advice to a suspect without delay,³¹ the officers at police station sometimes are behind failure to obtain advice for example when they ignore the telephone calls whose subject connections with suspect's advice whether it has received from duty solicitor or his own lawyer.³²

It can be assumed on the basis of the aforesaid that these rates of requesting legal advice are less than expected. However, let us bear in mind that despite of approximately less than half of all detainees during arrest or detention did not request legal advice, receiving legal advice still play a massive role in jurisdiction of England & Wales such as its impact on reliability of confession and right of silence during police interrogations. For instance, in *Cadder v Her Majesty's Advocate*,³³ it has been stated that whenever a legal advice having been asked by a suspect unanswered any confession during interview would be considered illicit. What follow is that the court could exclude such a confession. Thus, it is un surprised that rates of requesting advice as the studies suggest that have been risen steadily recently.³⁴

²⁹ SKINNS, Layla. I'm a detainee: get me out of here. *British Journal of Criminology*, v. 19, 2009.

³⁰ SKINNS, Layla. The right to legal advice in the police station: past, present and future. *Criminal Law Review*, v. 19, n. 1, p. 19-36, 2011.

³¹ PACE Code C Para 6.5.

³² PLEASANCE, Pascoe; NIGEL, Balmer; KEMP, Vicay. The justice lottery? Police station advice 25 years on from PACE. *Criminal Law Review*, London, v. 1, p. 3-18, Jan. 2011.

³³ *Cadder v Her Majesty's Advocate* [2010] UKSC 43.

³⁴ PLEASANCE, Pascoe; NIGEL, Balmer; KEMP, Vicay. The justice lottery? Police station advice 25 years on from PACE. *Criminal*

4 Refusing & delaying access to a legal assistance

It is agreed that the right to have legal assistance is one of the most significant rights to a suspect in criminal procedures. Nevertheless, many suspects may select waiving this right that is one of the most importance right belongs to them. In addition, under justified reasons, access to a legal assistance can be delayed by authorities. Refusing such a safeguard raises the question of whether or not the suspect has the choice to waiving his such right. The question raised in this connection is why a suspect refuses legal advice and what the reasons are behind this refusal?

The question of waiving a legal assistance has been the subject of controversy among scholars. There are scholars who hold that a suspect in criminal cases has the right to the assistance of legal advice which should be provided either the defendants demand it or not owing to assistance of counsel is often a requisite to the very existence of a fair trial. Betz, has presented this point in the following terms: "there is case authority for the proposition that to allow self-representation would result in an unfair trial".³⁵ Also, Sir K. Younger may be right when he pointed out that "there are many people, precisely those who perhaps need lawyers most, who often say they don't want them, but they too should be provided with legal advice, whether they want it or not".³⁶ Conversely, the opposite view has been considered that a suspect person has the right to conducting his defence in person without restore to legal advice.³⁷

In light of the foregoing said it would be possible submitted that a suspect has choice to have legal advice but such level of protection to right of legal advice can be succeed further to add that a suspect in criminal

cases must be provided with legal advice regardless on his option either in unusual situations or in serious crimes. It is found in old opinion to some scholars in this regard that "in the absence of unusual circumstances, a suspect in a criminal case who is mentally competent has the right to conduct his defence in person, without the assistance of legal advice".³⁸

The (PACE) adopted such above mentioned provisions which stipulated that, whenever the question of waiving rights arises whether a suspect asked legal advice or not they should be provided with it at least through phone or through any other advanced devices of communication such as cameras or online which thereby suspect is managed to contacting with adviser face to face from distance. Moreover, in a case wherever the suspect is mentally competent or is not reached eighteen years old or illiterate and does not have knowledge in law, he should be provided with legal advice face to face with adviser. It seems to be more important to deal with juveniles in more arrangements within criminal procedure by that during interview with the suspect who is a juvenile the legal advice or legal assistance must mandatorily be available to him beside appropriate adults.³⁹

Let us now turn to reasons for refusing legal advice by suspects despite the fact of significance of that advice to them. Firstly, many suspects do not seek legal advice because they see their case as hopeless so they believe that nothing can help them at all. legal advice is sometimes refused by suspects for fear of delaying their departure from the police station because it may take a long time to be available.⁴⁰ In the view of legal rules, those detectives & police officers in daily life who adhere & do not violate the law should encourage suspects to seek legal advice without worrying about delays, by responding quickly and easily to the request in a timely manner and also informing the suspect of the benefit of using legal advice without alluding it needs long time to fulfill their request. In this regard, Skinns mentioned this critical issue under this terms "let's get it over

Law Review, London, v. 1, p. 3-18, Jan. 2011.

³⁵ James states that: "Where is the constitutional right to self-representation and why is the California Supreme Court saying all those terrible things about it?" JAMES, Betz. Where is the constitutional right to self-representation and why is the California Supreme Court saying all those terrible things about it? *Western Law Review*, v. 10, n. 1, 1973; FAUNDEZA, Hector. *International protection of human rights in criminal procedure*. 1980. Doctoral (Phil thesis) - King's College London, London, 1980. p. 213.

³⁶ Mentioned by FAUNDEZA, Hector. *International protection of human rights in criminal procedure*. 1980. Doctoral (Phil thesis) - King's College London, London, 1980. p. 211.

³⁷ THE ROYAL Commission on Criminal Procedure in England and Wales. 1981. Available in: <https://archiveshub.jisc.ac.uk/data/gb97-rccp>. Access on: 13 Feb. 2023.

³⁸ MIKE, Riddle. The right to defend. *Tex Teach Law Review*, v. 3, p. 89-90. 1971. p. 213.

³⁹ ALMUSAWI, Bassim. Legal response to protection of right to communicate & appropriate adults during process of arrest or detention. *Revista de Direito Internacional*, Brasília, v.19, n. 2, p. 314-324. 2022.

⁴⁰ SKINNS, Layla. The right to legal advice in the police station: past, present and future. *Criminal Law Review*, v. 19, n. 1, p. 19-36. 2011.

with” and then conveys following example from practical life for police at one of police station when a suspect was brought to Sunnyside police station. Having been asked whether the suspect would have legal advice he questions whether it would need long time then officer answer that it would take longer so he declined and said “I want to get out of here as soon as possible”.⁴¹ Furthermore, Skinns showed that there is connection between request legal advice and seriousness of offence because a suspect in less serious offence less potential to request consulting.⁴²

In the view of some that what happens at the police station is not important, so they decide to see a lawyer in court, as guilt or innocence is determined there rather than at the police station. Some suspects have general distrust of lawyers because of past experience or unwillingness and unavailability of solicitors to attend police stations. In line with this perspective, prior experiences play notable role when the suspect feels that he would not need legal assistance because he now enough through previous experiences at police station.⁴³ Others who have clearly broken the law seek the sympathy of the jury as Philo said that “others who have clearly broken the law seek acquittal by arguing that they were following a moral code which should be given greater weight by a jury than the written law of that jurisdiction. In order to present this argument in its best light, the defendants will seek to represent themselves without aid of counsel who they contend damper the sincerity they project to the jury”.⁴⁴

According to the code of practice as seen earlier and moreover, no attempt may be made to dissuade a suspect from obtaining legal advice;⁴⁵ the custody officer shall ask the detained person whether he would like to obtain legal advice.⁴⁶ Whether or not advice is the origi-

nally requested, the police are supposed to remind the suspect to his right of advice and also, he is not mandatory asked why he refused it.⁴⁷ The suspect shall be asked to sign the custody record to confirm his final decision about regarding such legal advice.⁴⁸ The custody officer is responsible for ensuring that confirming any decision the person signs in the correct place.⁴⁹

On many occasions, as shown by previous studies, the notable reason why suspects refuse to exercise legal advice in daily practice is due to police discouragement regarding the use of this right. In practice the fact is that police with or without obstructing suspects from requesting legal advice during proceedings, they keen to interrogate the suspect without a lawyer whom from point of view of police seen as a major hindrance for achieving their tasks. It is common believe that confessions are more likely to be produced whenever a suspect is alone at interrogation without attendance of a lawyer.⁵⁰

Sometimes the police obtain confessions from suspects through informal interviews before the solicitor’s arrival or between interrogations so they exploit the suspect to delay access to get advice until they obtain the confession from him particularly when the suspects are hesitant or silent where faced with the question of legal advice. Therefore, as a consequence by the time solicitor arrives at the station the solicitor would have nothing to do. As Dixon et al, has pointed out: “solicitors frequently complain that on arrival at the station they are often ‘informed by officer that the suspect has changed his mind, agreed to talk to them, and confessed’”.⁵¹

Sometimes the police do not call the solicitor at all, which is unclearly unlawful. Therefore, many suspects do not learn the details about their rights to legal advice because the police ploy to dissuade suspect from seeking advice.⁵²

⁴¹ SKINNS, Layla. The right to legal advice in the police station: past, present and future. *Criminal Law Review*, v. 19, n. 1, p. 19-36, 2011.

⁴² SKINNS, Layla. The right to legal advice in the police station: past, present and future. *Criminal Law Review*, v. 19, n. 1, p. 19-36, 2011.

⁴³ SKINNS, Layla. The right to legal advice in the police station: past, present and future. *Criminal Law Review*, v. 19, n. 1, p. 19-36, 2011.

⁴⁴ PHILO, Steven E. Self-representation in criminal trials. *Wake Forest Law Review*, v. 9, p. 272-273, 1972. In FAUNDEZA, Hector. *International protection of human rights in criminal procedure*. 1980. Doctoral (Phil thesis) - King’s College London, London, 1980. p. 212.

⁴⁵ PACE Code C, para 6.4.

⁴⁶ PACE Code C, paras 6.1. 6.3.

⁴⁷ PACE Code C, para 6.5. Note 6k.

⁴⁸ PACE Code C, para 3.5(a)(i), (b).

⁴⁹ PACE Code C, para 11.2.

⁵⁰ BEDRI, Eryilmaz. *Arrest and detention powers in english and turkish law and practice in the light of the European Convention on Human Rights*. Leiden: Martinus Nijhoff Publishers, 2000. p.190.

⁵¹ DAVID, Dixon *et al*. Safeguarding the rights of suspects in police custody. *Policing and Society*, v. 1, n. 2, p. 115-140, 1991; ANDREW, Sanders; RICHARD, Young. *Criminal justice*. 2nd ed. London: Butterworths, 2000. p. 228.

⁵² MICHAEL, Zander. *The police and criminal evidence act 1984*. 5th ed. Mytholmroyd: Sweet & Maxwell, 2005. p. 180.

Therefore, there are scholars who suggest that if the police really want to help a suspect even a suspect who refuses legal advice should then be given the opportunity of speaking to a duty solicitor on the telephone without delay in order to discuss the question of legal advice and the suspect would have nothing to lose.⁵³

Under those circumstances as a result there are variations in the reasons stand behind the suspect's decline of requesting legal advice owing to different factors which is most notable one that the kind of way the police custody is communicate with suspects about their right to legal advice. Therefore, if invalid reason has been used to obstruct suspect's right of advice this maybe give grounds at trail for excluding any evidence subsequently obtained by police.

In England & Wales in spite of the fact that the right of access to a legal assistance is compulsory one under the provisions of the (PACE), an investigator under exceptional situations or in certain circumstances has authority to delay it under justified reasons.⁵⁴ This means that if the investigator decides to delay access to a legal assistance he should mention these justified reasons and then a suspect may exercise this right at any time later. In the same vein, even where convincing causes may exceptionally justify the delaying of access to a legal assistance, such a delay should not extend more than reasonable period.

5 Quality of a legal assistance

Access to legal assistance is considered a significant right for a suspect but that does not mean end the matter, because if the solicitor's advice given to the suspect is subsequently criticised by the court during trial, the question here arises whether or not the performance of the counsel has an effect on the outcome of the case against the suspect at trial.

In spite of the adequate of legal assistance is taken vital role in determination to suspect destiny many studies indicate that as result of its inadequate, advice can be insufficient to be acceptable. In some cases,

fairness has been compromised whenever legal advisers are largely passive and non-interventionist in police interrogations. It has been reported that "the self-perceived role of many is to act purely as witness to the proceedings".⁵⁵ another criticism reported that the presence of legal advisers should have notable impact during criminal proceedings particularly on police practice & preventing malpractice against the suspect while facing police power.⁵⁶ As a result, evidence from police interviews had been later excluded by criminal courts in a number of cases under section 78 of the Police and Criminal Evidence Act 1984 on the grounds that they had compromised of fairness.⁵⁷

Under different circumstances, it seemed certain that, the quality of the solicitor's advice should be improved through training of advisers and improvement of skills. The importance of practical experience within the training programmers needs to be emphasised in order to, as the Hodgson has pointed out that "in order to advise the client effectively, the lawyer herself must first have a clear understanding of the issues involved and the consequences of adopting various courses of action".⁵⁸

It may be well for the solicitor to state in the interview the advice that has been given to make clear what occurs at pre-trial stage in the police station in order to protect himself against likely criticism of the court at a later stage of the trial in case the court finds that the given legal advice was inadequate & adversely impacted the position of the suspect because it did not meet appropriate professional standard.

⁵³ DAVID, Dixon *et al.* Safeguarding the rights of suspects in police custody. *Policing and Society*, v. 1, n. 2, p. 115-140, 1991.

⁵⁶ HODGSON, Jacqueline; BRIDGES, Lee. Improving custodial legal advice. *Criminal Law Review*, p. 101-113, 1995; SKINNS, Layla. The right to legal advice in the police station: past, present and future. *Criminal Law Review*, v. 19, n. 1, p. 19-36, 2011; MICHAEL, Zander. *The police and criminal evidence act 1984*. 5th ed. Mytholmroyd: Sweet & Maxwell, 2005. p. 232.

⁵⁷ PARIS, Abdullahi and Miller (1993) 97 Cr.App.R. 99; GLAVES [1993] Crim.L.R.685. Mankdo and Mustak Manchester Crown Court, No T97/0718. Judgment: 11, 1997; FISHER and Lovell Leeds Crown Court, No. 2000/1040, judgment dated December 18, 2000.

⁵⁸ HODGSON, Jacqueline; HODGSON, Jacqueline; CULLO, Nicholas; NAYLOR, Bronwyn. Legal aid and access to legal representation: redefining the right to a fair trial. *Melbourne university law review*, v. 40, p. 207-236, Sept. 2016. At this point since April 2001, only solicitors who have a contract with the Legal Services Commission (LSC) can undertake legally aid work.

⁵³ The Royal Commission on Criminal Justice, RCCJ- (1993) p. 36.; FIELD, Stewart; THOMAS, Philip. Justice and efficiency? the Royal Commission on Criminal Justice. *Journal of Law and Society*, v. 21, n. 1, p. 1-19. Mar. 1994.

⁵⁴ The PACE, s.58.

As a result, it can be argued that there are a number of judicial reviews which can be considered incorrect because according to these reviews the jury is entitled to draw an adverse inference from the refusing to answer questions even if the suspect followed the wrong advice of his solicitor, especially when the result is that the prosecution has obtained evidence that they may not have otherwise obtained, whether in the form of admissions, lies or silence.⁵⁹ Conversely, following creation of a statutory right to legal advice for suspects at the police station, it is rightly held that courts should exclude any evidence obtained as a result of incompetence legal advice that have been given at the police station.⁶⁰

By virtue of statutory right of legal assistance, attention has been given to the connections between legal advice and acceptability of evidence during trial. It seemed right that a poor quality of legal advice that may take place during police station at pre-trial stage has effect in the outcome of criminal cases, particularly regarding unacceptability of evidence during trial.⁶¹

6 European Standard

The right of access to a legal assistance is considered as fundamental safeguard for a suspect against ill-treatment during criminal proceedings. International European standard is taken place through rules that interpreted by decisions, comments, and reports issued from European human rights bodies such as the European Court of Human Rights & the European Committee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CPT).

It is self-evident that the protecting due process during criminal proceedings as other human rights is not a purely internal competence of states.⁶² Accordingly, European Committee on the Prevention of Torture and

other Cruel, Inhuman or Degrading Treatment or Punishment (CPT) has mentioned that a legal assistance has a crucial role for ensuring a fair trial in plenty of cases. CPT has indicted a specific significance to tangible safeguards for a person under an arrest or detention in police station rights: the right to communicate with a third party (family member, a friend), translator or interpreter, the right of access to a legal assistance, and the right to have a medical auspices & examination.⁶³

The European Convention of Human Rights, underlines that "Any accused has the right to defend himself or to be assisted by a lawyer assigned by him and, if he does not have any means to reward the lawyer, he must be guaranteed with a legal assistance freely by a lawyer primarily assigned, mainly when this is required by the interests of justice".⁶⁴ Regarding case law, it can be submitted that the Right of early access to a legal assistance while in police detention has been expressly adopted by the judicial practice of European Court of Human Rights in several cases.⁶⁵ The ECtHR points out that in case, when a person is arrested, one of the fundamental his rights is the right to have a defense counsel during interrogations and meet with him under conditions that ensure the confidentiality of communication. According to jurisprudence of the European court of human rights, the European convention on human rights in article 6 of the convention, maintains the right of access to a legal assistance from early stage of proceeding during arrest & detention. In this regard the court held that "even if the primary purpose of Article 6, as far as criminal proceedings are concerned, is to ensure a fair trial by a "tribunal" competent to determine "any criminal charge", it does not follow that the Article has no application to pre-trial proceedings. Thus, Article 6 - especially paragraph 3 - may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions".⁶⁶

⁵⁹ CAPE, E. Incompetent police station advice and the exclusion of evidence. *Criminal Law Review*, London, p. 471-484, Jun. 2002.

⁶⁰ CAPE, E. Incompetent police station advice and the exclusion of evidence. *Criminal Law Review*, London, p. 471-484, Jun. 2002.

⁶¹ SKINNS, Layla. The right to legal advice in the police station: past, present and future. *Criminal Law Review*, v. 19, n. 1, p. 19-36, 2011.

⁶² ABLAMSKYI, Serhii; MUZYCHUK, Oleksandr; D'ORIO, Eugenio; ROMANIUK, Vitalii. Taking biological samples from a person for examination in criminal proceedings: correlation between obtaining evidence and observing human rights. *Revista de Direito Internacional, Brasília*, v. 20, n. 1, p. 194-212, 2023.

⁶³ COUNCIL OF EUROPE. *The European Committee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CPT)*. CPT Standards Document. Available in: <http://www.cpt.coe.int/en/documents/eng-standards.pdf>. Access on: 17 Apr. 2023.

⁶⁴ ECHR, article 6/3; see

⁶⁵ MARASINGHE, Charika. The right to legal assistance in international law, with special reference to the ICCPR, the ECHR and the ACHR. *Asian Year Book of International Law*, v. 5, p. 15-44, 1995.

⁶⁶ *Salduz v Turkey* App no 36391/02 (ECtHR, 27 November 2008), (2009) 49 EHRR 19 paras 50-63; *Plonka v Poland* App no 20310/02 (ECtHR, 31 March 2009) para 35; *Shabelnik v Ukraine* App no 16404/03 (ECtHR, 19 February 2009) paras 52, 53; SKINNS, Layla.

The court In its jurisprudence describes the role of access to a legal assistance as watch dog in modern criminal justice systems by which a vulnerable persons facing criminal investigations can be protected against every human rights violations as torture and other cruel, inhuman or degrading treatment.⁶⁷ It has held that exercising right of access to a legal assistance from outset of proceedings performances a major role in guaranteeing other defence rights for a person under interrogation in order these guarantees and all his rights to be effectively implemented in the practice.⁶⁸

The European Court of Human Rights in many cases made it clear that authorities must agree to persons during criminal proceedings to have a legal assistance from the first interrogation by the police. Moreover, it is recognized in some verdicts that the court goes further than that by not only giving a person facing criminal proceedings right to legal assistance but also the right to being notified of the right of accesses to a legal assistance.⁶⁹ In line with such norm, in most European legal systems & in England and Wales too provisions of law make it compulsory for the authorities to notify a person under an arrest or detention, prior to interrogation, that he has the right to access to a legal assistance.

In spite of the fact that the right of access to a legal assistance is compulsory one under the norm of international law of human rights, according the jurisprudence of ECtHR authorities under exceptional situations or in certain circumstances can delay it under justified reasons.⁷⁰ it is argent for states to enact legal rules that defines such certain circumstances. These described rules are regarded as binding and observed in

practice. In this regards, given legal assistance should be in practical way not illusory & effectively given to a suspect. the ECtHR has clearly held that that the authority is necessary to interfere in event a legal assistance has not effectively provided for the person facing criminal proceedings.⁷¹

7 Conclusion

The present paper has reminded us that from the outset, the right of a suspect to have legal assistance is of the most significant human rights during all stage of criminal proceedings. In response, the English law requires everyone detained in relation to criminal offences is legally entitled to receive a legal assistance even at state expense. Yet, in respect of all matters within exercising this right the question has been already attempted to be answered throughout the present paper is that whether the practice of police during dealing with the right of a suspect to have legal assistance meets the eligibility criteria set out in the law & European norm of human rights. The present paper, in the wider sense described above, indicates a number of circumstances in which there were the lack of access to a legal assistance were very common. In spite of the fact that the right of access to a legal assistance is always required in criminal proceedings, wider factors influencing the exercise this right and unsurprised then that lack of access to legal assistance at pre-trial processes significantly prejudice on the outcome of proceedings in a number of cases at the trial stage.

This means that apart from counter-terrorism acts, the English law rules are complimented by international institutions at many occasions. As example the European Committee of Preventing Torture (CPT) in one of the occasions has summarised the rules of the Police and Criminal Evidence Act (PACE) and its Codes of Practice (COP) which have had the approval of international institution due to the suspect rights in police detention have been protected by them into impressive level.⁷²

I'm a detainee: get me out of here. *British Journal of Criminology*, v. 19, 2009.

⁶⁷ CAPE, E. *Improving pretrial justice: the roles of lawyers and paralegals*. New York: Open Society Foundations, 2012. p. 14.

⁶⁸ SALDUZ v Turkey App no 36391/02 (ECtHR, 27 November 2008); MURRAY v the United Kingdom App no 18731/91 (ECtHR, 8 February 1996) para 59.

⁶⁹ SALDUZ v. Turkey (App no 36391/02) (27 November 2008) para 16; SHABELNIK v Ukraine, ECtHR, Judgment of 17 February 2009, at para.57; ZAICHENKO v Russia, ECtHR. Judgment: 28 Jun. 2010.

⁷⁰ SHISHKIN v. Russia (Application no. 18280/04) 7 July 2011, papa 140; SALDUZ v. Turkey (App no 36391/02) (27 November 2008) para 54-55; PANOVIIS v. Cyprus (App no 4268/04) (11 December 2008) para 66 and 70-73; COUNCIL OF EUROPE. *The European Committee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CPT)*. CPT Standards Document. Available in: <http://www.cpt.coe.int/en/documents/eng-standards.pdf>. Access on: 17 Apr. 2023.

⁷¹ ARTICO v. Italy (App no 6694/74) (1980) Series A no 37; Kamasinsk (App no 9/1988/153/207) (1989) 168. CAPE, E. *et al. Effective criminal defence in Europe*. Antwerp: Intersentia, 2010. p. 16.

⁷² COUNCIL OF EUROPE. *Report of CPT, UK, First Report to the United Kingdom Government, date of visit from 29 July 1990 to 10 August 1990, reference CPT/Inf (91) 15*. 26 Nov. 1991. Available in: <http://www.cpt.coe.int/en/documents/eng-standards.pdf>.

Accordingly, having taken into account avoiding any rules may contradict with a suspect's human rights, English law as modern law will be ideal yardstick to any reform can be achieved regarding the right of a suspect to access legal advice. However, it may well to conclude that in spite of the fact that there is an adequate protection of suspect's human rights in England and Wales which is deserved to be sufficient yard stick to measuring and developing any the lack of rules covering access of a legal instance there is another reform should be made.

The reform should be made in law & practice. The right of access to a legal assistance should not only be clearly stated & legally enforceable but also a suspect should be received professional legal advice during detention in police station at outset of proceedings. Courts also during trial stage are under duty to abstain from drawn adverse inference from a suspect silence that has been submitted before police during pre-trial questioning stage unless the courts make sure that the suspect in reality has been already conferred a proper legal advice. This of course is a reasonable because in accordance with European norm of fair trial, it should be given effect to the right of legal assistance which is already provided in legislative as articulated in the (PACE) alongside with the fact that in criminal proceedings as already has been seen a suspect should be conferred professional assistance to satisfy the fair trial requirement. Finally, the paper drew attention about some adequate steps that need to be taken to provide effective access to legal advice. Failure to do so will mean that the state fails to respect human rights and the due process system.

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www.cpt.coe.int/documents/gbr/1991-15-inf-eng.htm. Access on: 13 Mar. 2023. Similar view has been held by other scholars for instance see BIRTLES, Alexander. *The standards developed by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*. 2000. Doctoral (Phil thesis) - University of Nottingham, Nottingham, 2000. p. 74.

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