

The Police and Criminal Evidence Act 1984: balancing civil liberties and public security

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Abstract

Police work is a balancing act. Its main purpose is to prevent and investigate offences, i.e. infringements of a person's civil liberties. Simultaneously, the investigative powers needed for this, such as stop and search, arrest, and detention, will interfere with other people's civil liberties. To achieve this balance, laws are needed that provide the police with all the powers necessary to work efficiently and at the same time keep the infringement of civil liberties to a minimum. The Police and Criminal Evidence Act 1984 (PACE) was passed to deal with this basic dilemma (Ozin et al. 2006). This essay aims to assess to what extent PACE manages to guarantee the interests of suspect, police, and victim during the pre-trial stages, for the use of investigative powers (stop and search, arrest, detention and questioning). It will be shown that PACE is an integral part of the criminal justice system for the police, the suspect and the victim. However, severe issues concerning the regulation of police powers still have to be addressed, especially in the light of recent political and social trends. The question of whether the victim's interests are satisfied by PACE is also discussed.

Keywords: Police and Criminal Evidence Act 1984, Civil Liberties, Regulating Police Powers, Human Rights, Criminal Justice System.

Laws, such as PACE, that establish and regulate police powers are fundamental for the legal system in a democratic state. The police perform important functions within the community, such as the prevention and investigation of crime. These tasks require a close co-operation between the police and the general public. Therefore, a good, trustful relationship between police and citizens is essential. Before 1984, laws governing police powers were fragmentary and insufficient, leading to misconduct of the police and miscarriages of justice: one example was the case of the Birmingham Six, where manipulation of evidence led to the false conviction and imprisonment of the suspects (Zander 2005). These incidents put a strain on that relationship. PACE was therefore welcomed as an improvement by both the police and law professionals, suggesting that both groups considered the powers and regulations to be sufficient. Still, PACE was heavily criticised by the left wing and human rights activists (Zander 2005) who considered the powers granted to the police to be unnecessarily extensive. In their opinion, PACE did not prevent the infringement of civil liberties, but legitimized it.

Some even compared the new legal provisions to the dictatorship portrayed in George Orwell's novel *1984* (Baxter & Koffman 1985).

This attitude towards PACE seems surprising, considering that a major part of the European Convention on Human Rights (ECHR) is dedicated to defining circumstances in which it is acceptable to infringe civil liberties within the needs of the criminal justice system in a democracy (ECHR art 5 s. 1; art 8 s. 1). The fact that a law aiming to protect civil liberties provides definitions of situations where interference with them must be possible also implies that regulation of these situations is vital for a functioning legal system. PACE, as the law aiming to provide these regulations, is therefore compatible with the ECHR (Starmer et al. 2001). However, these regulation mechanisms are arguably the most heavily criticised aspect of PACE: if the suspect's rights established in PACE are not protected sufficiently, the law will inevitably be unbalanced in favour of the police. Appropriate regulation mechanisms should therefore be clear enough to provide guidelines applicable in daily police work and strict enough to prevent police misconduct.

The regulation of police powers is complex. Police work requires both clear guidelines and flexibility: the police must be able to react promptly if confronted with a possible offence, but they will also need rules guaranteeing that evidence obtained is admissible in court (Bailey et al. 2001). A good example is stop and search, as described in PACE pt. I: a constable may stop and search anyone in a public place if he reasonably suspects that the person is in possession of stolen or other illicit property (PACE pt I, 1 [9]), making this power quite extensive. However, since it constitutes only a marginal infringement of civil liberties (right to liberty ECHR art 5), basic safeguards seem adequate. These include the requirement to inform the person stopped of the reasons for the search and record keeping but only if it is 'reasonably practicable' (PACE pt I, ss. 3 [1]; pt II, 3 [2] [6]). PACE code A 2.2 provides a list of unacceptable grounds for a search (race, sex, religion etc.). This provides the constable with the aforementioned flexibility, which is undoubtedly legitimate as a requirement of police work. However, it might also facilitate abuse of the power. Evidence suggests that stop and search is used notably more often against young black males than against other ethnic groups, which could heighten the distrust of this group towards the police (Bowling & Phillips 2007). Ethnic minorities may therefore be irritated because recording the ethnicity of a person stopped is no longer obligatory, weakening the only safeguard against racial discrimination (*The Observer* 2012). Possibly to amend this, a reminder of protected characteristics (ethnicity, age, sex/gender, religion etc.) is now given at the beginning of each code of practice (Zander 2011a). However, while the effort is laudable, lack of sanctions for breaches of the provision make the effectiveness of such

measures questionable. The need for much more extensive reform on this aspect of PACE is drastically demonstrated by the current inquiry into the murder of Stephen Lawrence. Here, the police allegedly hindered the investigation for racist reasons (Dodd 2012). Racial discrimination constitutes a violation of the suspect's human rights (ECHR art. 14). Furthermore, the effectiveness of stop and search has been doubted: only 11% of stops results in further legal action (Bowling & Phillips 2007). This is particularly relevant, because any infringement of civil liberties is only acceptable if it is absolutely necessary for an investigation.

Another issue is the seemingly imprecise wording in PACE, for example the term 'reasonable suspicion'. The test set out for 'reasonable grounds' in relation to arrest without warrant in *Castorina v Chief Constable of Surrey* [1988] is generally cited: reasonable suspicion must be based on both objective (intelligence) and subjective (impression of the constable) information simultaneously. The value of the objective information can only be determined by a jury during a subsequent trial. Hence, a legal definition for reasonable suspicion does exist. However, the applicability in practical police work may be questionable. In *Howarth v Metropolitan Police Commissioner* [2011] the judge found that information given to a constable by his superior (which could be regarded as intelligence), does not justify a stop and search unless it is corroborated by information gathered by the constable himself. This emphasizes how much responsibility is placed on the constable, which may be problematic especially for inexperienced policemen. Furthermore, objective information regarded as sufficient for reasonable suspicion by the constable in question might not be accepted by a jury. This lack of clear, easily understandable rules may heighten the distrust between police and community who might not have the legal background needed to understand the rules mentioned.

Similar issues arise for the power to arrest without a warrant (PACE pt II s. 24). However, because a detailed list of reasons for an arrest is provided (PACE pt II, s. 24 [5]), regulation seems more effective in this case.

Arresting persons who attend voluntarily at a police station, for example for an interview, is more problematic. Persons volunteering information to the police should not have to fear an arrest unless new information warranting such action becomes apparent. However, abuse of the power has occurred: in *Richardson v Chief Constable of West Midlands* [2011], a teacher attending at a police station for an interview was arrested because the constable felt he might leave during the interview.

This was found to constitute an abuse of the power under PACE. Changes to PACE Code G (arrest) aim to regulate this power more effectively by specifying acceptable grounds (Zander 2011b).

Interpretation of language is not the only issue raised in relation to regulation and control mechanisms within PACE. Further objections have been raised in relation to the power to detain and question a suspect at a police station as provided for by PACE pt IV, which is both a fundamental investigative power and a severe infringement of civil liberties (Mylonaki & Burton 2010). It therefore requires very strict regulation.

Safeguards for detention and questioning include: the right to legal advice, the right of silence (included in the caution, PACE Code C 3.2), the right to inform someone of the arrest and review of the detention in regular intervals. The treatment of persons in police detention is governed by PACE Code C.

Like most powers in PACE, detention and questioning are regulated by internal and external control mechanisms. The position of the custody officer is the internal control mechanism (self-regulation of the police). He authorizes detention and has to ensure that the detainee's rights are respected (PACE pt IV, ss. 36-40). The possibility to exclude unlawfully obtained evidence and confessions during a subsequent trial (PACE s. 76), constitutes the external control. Both control mechanisms are controversial.

While Zander (2005) believes that internal control may be the most effective way to regulate police powers, Sanders & Young (1995) and Mylonaki & Burton (2010) disagree. They found that the custody officer rarely questions the reasons for an arrest or refuses to authorize detention – less than 1% of cases according to Mylonaki & Burton (2010, 67). The reason for this could be that a refusal would undermine the authority and diminish the effectiveness of detention as a display of power as which it is often abused (Sanders & Young 1995). The free legal advice is frequently turned down because detainees are either inadequately informed (Mylonaki & Burton 2010) or because they want to escape the pressure of detention as fast as possible (Sanders & Young 1995).

Both articles also criticize that the exclusion of confessions is the only external control. They believe that investigative needs may be given priority before the protection of the detainee's rights, a view that is supported by the decision in *R v Walsh* [1989] where access to legal advice was delayed. The judge found that a breach of the codes of practice must only result in exclusion of confessions if the

breach was committed in 'bad faith', i.e. without being justified by the investigation. The right of silence, which originates from the protection against self-incrimination also appears to have lost importance since it was restricted by the Criminal Justice and Public Order Act 1994 (Jackson 1994). Since similar issues have been raised by Sanders & Young and Mylonaki & Burton (albeit 15 years apart), a trend towards dilution of safeguards can be perceived.

The increase in violent crime and the threat of international terrorism have been suggested as reasons behind recent amendments to the pre-trial stage provisions in PACE and other police powers (Samuels 2007). These contemporary issues make the question of how much an individual's rights should be infringed to guarantee public safety more pressing. The changes made to the powers to stop and search, arrest without warrant and detention by terrorism legislation imply that public safety is considered to be of higher value: all these powers have been extended. A person suspected of terrorism can be kept in detention for up to 28 days without charge, cursory stop and searches without the need for reasonable suspicion can be authorized and arrest without warrant is no longer limited to indictable offences (Samuels 2007).

Further evidence for the tougher approach on crime includes the retention of DNA profiles even after acquittal under PACE s. 64, which was found *in R v Chief Constable of Yorkshire Police, ex p. Marper* [2004] not to conflict with the right to private life (ECHR art 8): the benefit for the community from a large DNA database would outweigh infringement of individuals' rights. However, Sir Alec Jeffreys, the inventor of forensic DNA profiling is quoted as questioning the said benefit: he argues that keeping innocents on the database is an unjustifiable stigmatization and that the current standard of forensic DNA profiling increases the risk of miscarriages of justice (*The Guardian* 2009). This view was subsequently shared by the European Court of Human Rights, which decided in 2009 that the indefinite, indiscriminate and effectively unregulated retention of biometric data constitutes a violation of the right to private life (ECHR art. 8) that cannot be justified with investigative needs (*S v United Kingdom, Marper v United Kingdom* [2009]). In response to the issues raised in this case, the Protection of Freedoms Act 2012 was passed. It imposes clear time-frames for data retention and clearly distinguishes between acquitted and convicted individuals. While the new law is a promising attempt at making the necessary revisions to PACE, and as such welcomed by the legal community (Jackson 2012), only its application over a longer period of time will show its effectiveness and possible flaws.

Until now, only the interests and rights of the police and the suspect have been discussed. This is because the victim is not mentioned directly in PACE, an act specifically set out to regulate the investigation and the treatment of the suspect. It may seem as if this is an indicator that the criminal justice system is unbalanced in favour of the suspect. However, PACE does aim to provide rules enabling an effective investigation leading to the arrest and conviction of the offender, which surely is in the interest of the victim. But this means that the shortcomings of PACE described in this essay do concern the victim as they may increase the likelihood for miscarriages of justice.

The role of the victim during the investigation (the pre-trial stages) must also be considered: he/she will be involved as a witness. PACE contains regulations for the questioning of suspects, but not for the treatment of possibly traumatized witnesses. These would be important, especially for victims of sexual or domestic violence. Here, the victims often seem to be prosecuted instead of protected: if they withdraw the allegations they may face prosecution for perverting the course of justice. This practice is certainly not helpful in securing convictions, because it may deter victims from reporting offences (Edwards 2012). However, this shortcoming of the legal process is outside the scope of PACE, but indicative of an imbalance of the criminal justice system itself, which is centred on the suspect/defendant.

Recently there have been efforts to correct this. Most approaches are based on the false assumption that reducing the suspect's rights will automatically help the victim. Motivation for this approach could be political, again reflecting the idea of being 'tough on crime'. All measures focus on the treatment of the offender/suspect, not the victim. Legal provisions for the fair treatment (protection while testifying, being informed about the progress of the investigation) and adequate support of victims might be more effective (Jackson 2003).

It seems safe to conclude that at present PACE has not managed to strike the right balance between the suspect, the police and the victim. While the investigative powers of the police are extensive enough to be effective, the same cannot be said for the rights of the suspect. The safeguards themselves would be sufficient, but ineffective control mechanisms and lack of sanctions for non-compliance, combined with a general political trend towards reducing the suspect's rights, defies their initial purpose, which is not just to protect the civil liberties of the suspect, but also to guarantee an unbiased, fair investigation leading to the apprehension and conviction of the real offender. This is the main thing PACE can achieve for the victim; any other improvements for the victim are outside the scope of PACE. Efforts to correct some of these shortcomings are evident,

indicating the growing political and public awareness of the issues discussed. Their effectiveness can only be judged over a longer period of time. Because the regulation of police powers is such an integral part of the criminal justice system, criticism should be taken seriously and incorporated when reviewing and amending PACE.

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Further reading

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