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ARTICLE :

RIGHTS OF ACCUSED PERSONS — ARE SAFEGUARDS BEING REDUCED?[1]

by

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One of the hallmarks of a free society is the ability of citizens to go about their businesses without the need to explain to anyone in authority what they are doing and without fear that they may be subject to arbitrary challenge or arrest[2]. Personal freedom is of great importance and covers the right to privacy, freedom to enjoy property, freedom of speech and even freedom from disclosure of personal secrets.

A person's physical freedom is even more important. "To interfere bodily with a person strikes at the heart of their individuality[3]". Therefore when the state authorizes the police to arrest, search, question and detain a person, such authority must be clearly stipulated in a statute, be exercised on the clearest grounds and only when it is absolutely necessary.

It is the rights accorded to a person between the time he is arrested up to the point a decision is made as to his guilt or innocence that we are concerned with in this paper.

Rights and freedom from arbitrary power

The extent to which we provide safeguards to protect these rights indicates our society's level of maturity and freedom. It has often been said that an important measure of society's civilization is the extent to which human rights are respected and protected within the context of criminal proceedings[4].

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1 This paper was presented at the 12th Malaysian Law Conference held in Kuala Lumpur from 10th - 12th December 2003.

2 Richard Stone *Civil Liberties and Human Rights* 3rd Ed. (2000) London, Blackstone Press Ltd. at p 38.

3 Richard Stone *Civil Liberties and Human Rights* 3rd Ed. (2000) London, Blackstone Press Ltd. at p 3.

4 P.N. Bhagwati at the Kumarappa-Lecture delivered at the TATA Institute of Social Sciences, Bombay, on 23rd February, 1985. Also found in Noorjahan Baya, *Human Rights and Criminal Justice Administration of India* (2000) New Delhi, Upal Publishing House at p 11.

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Malayan Law Journal Articles

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One of the hallmarks of a free society is the ability of citizens to go about their businesses without the need to explain to anyone in authority what they are doing and without fear that they may be subject to arbitrary challenge or arrest[2]. Personal freedom is of great importance and covers the right to privacy, freedom to enjoy property, freedom of speech and even freedom from disclosure of personal secrets.

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RIGHTS AND FREEDOM FROM ARBITRARY POWER

The extent to which we provide safeguards to protect these rights indicates our society's level of maturity and freedom. It has often been said that an important measure of society's civilization is the extent to which human rights are respected and protected within the context of criminal proceedings[4].

On the other side of the coin are the rights of society protected by the government who must do so within the laws promulgated by a democratically elected legislature (Parliament).[5]

It must be appreciated that the rights which are most often identified as individual - such as the rights of persons accused of crimes - are in fact also rights of society. They are not designed to free the individual from society's norms; rather, they exist to promote a responsible liberty, to allow each and every person freedom from arbitrary power. In the areas of free expression, the Constitution carves out a space where dissenting voices may be freely heard, both for the benefit of the individual as well as for the society. Rights of any kind are the society's protection against the unwarranted interference in daily life by an all-powerful government. Rights liberate both the society and the individual6

In discussing the individual's personal freedom in the context of criminal procedure, Lord Denning said,

"It must be matched with social security, by which I mean, peace and good order of the community in which we live. The freedom of a just man is worth little to him if he can be preyed upon by the murderer or the thief. Every society

must have means to protect itself from marauders. It must have powers to arrest, to search and imprison those who break its laws. So long as those powers are properly exercised, they are safeguards of freedom. But powers may be abused, and if those powers are abused, there is no tyranny like them."[7]

The balance is achieved basically by two means - legislation and judicial decisions, the latter playing a more effective role in this regard. Overemphasis on the protection of the interest of the state in prevention of crimes against individual rights or vice versa is bound to have an adverse impact.

The main player in keeping this fine balance is the Judiciary. In the words of the former Chief Justice of India, P.N Bhagwati, in his paper on Human Rights in the Criminal Justice System,

"The task in a democracy governed by the rule of law is entrusted to the judiciary and it is the judiciary which has to find a dividing line so as to harmonise the two interests without over emphasising one to the detriment of the other." [8]

The former Lord President Tun Salleh Abas in Lim Kit Siang v Dato' Seri Dr Mahathir Mohamad[9] stated,

"The Courts are the final arbiter between the individual and the state and between individuals inter se, and in performing their constitutional role, they must of necessity and strictly in accordance with the Constitution and the law be the ultimate bulwark against unconstitutional legislations or excesses in administrative action."

To do this, the judiciary must always keep in mind the most important and general principle stated by John Stuart Mills in his Essay on Liberty that, "The only purpose for which power can be rightfully exercised over any member of civilised community against his will, is to prevent harm to others."

FUNDAMENTAL AND BASIC RIGHTS

There are certain minimal rights accorded to a person found guilty of a crime[10]. There are even more specific rights for persons merely accused of an offence. These rights have received recognition by member states of the United Nations including Malaysia, in the Universal Declaration of Human Rights 1948 (UDHR) and to some extent, incorporated in our Federal Constitution (FC).

To further enhance the protection of these rights the National Human Rights Commission was established through the Human Rights Commission Act 1999, which stipulates that "regard shall be had to the Universal Declaration of Human Rights...[11]".

Pursuant to the UDHR,

Article 3: Everyone has the right to life, liberty and security of person.

Article 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 9: No one shall be subject to arbitrary arrest, detention or exile.

Article 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in determination of his rights and obligations and of any criminal charge against him.

Article 11:Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in public trial at which he has had all the guarantees necessary for his defence.

The FC provides under Article 5 that,

No person shall be deprived of his life or personal liberty, save in accordance with law" and also that "Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be

defended by a legal practitioner of his choice."

There are many rights that can be discussed, and are available at different stages of criminal proceedings - pretrial, during trial and post trial. However due to constraints of time and space this paper is limited to only the first two stages and confined to 4 specific rights,

1. the Right to be Presumed Innocent

2. the Right to be Informed of the Grounds of Arrest

3. the Right to Counsel

4. the Right to Silence.

This paper will discuss the origins of these rights, the current law in Malaysia and other jurisdictions with similar Constitutional rights, the rationale and importance of these rights and safeguards, the reduction of these rights and safeguards by legislation and judicial decisions and the consequences.

1.THE RIGHT TO BE PRESUMED INNOCENT

Malaysia follows the common law of England as administered on the 7th day of April 1956[12]. We have also adopted the British adversarial system and laws as well as its parliamentary system of government.

Clauses 39 and 40 of the Magna Carta, signed in 1215 in Runnymede, states

Clause 39: No free man shall be taken or imprisoned, or disused, or outlawed, or exiled or in any way destroyed, nor will we go upon him, nor will we send upon him, except by lawful judgment of his peer.

Clause 40: To no one will we sell, deny or delay right or justice.

From this (the right of all men to be free except by lawful judgment of his peers), evolved the fundamental rule in criminal law that the accused is presumed innocent until proven guilty.

In 1935 Viscount Sankey LC in Woolmington v The Director of Public Prosecution[13] restated the common law as follows:

"...at the end of the evidence it is not for the prisoner to establish his innocence, but for the prosecution to establish his guilt...Throughout the web of the English criminal law one golden thread is always to be seen, it is the duty of the prosecution to prove the prisoners guilt...No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

In Arulpragasan a/l Sandaraju v PP[14] our Federal Court applied Woolmington and held that ,

"Thus it is wrong... to whittle down the cardinal principle of our criminal law on the presumption of innocence of the accused throughout the whole trial..."[15]

Whittling down of the right to be presumed innocent

i. Legislation

In Malaysia, we now have laws that do away with even the right to a fair trial, leaving alone the presumption of

innocence. One such example is the Internal Security Act 1960.[16]

The Act provides for deprivation of a person's liberty by administrative order and not trial. Such laws are adapted from war time legislation employed in the United Kingdom. Section 8 of the ISA is similar to section 18B of the Defence of the Realm Act 1939 in the United Kingdom.

An important point to note is that the records of our Parliamentary debates in 1960 show that this legislation was enacted for the sole purpose of fighting the threat of communist insurgency and intended as a temporary measure until the threat was removed[17].

It was never meant to be used on the general public for any sort of crime. It does not reduce safeguards, it completely removes them. It is worthy to note that there have been a few decisions recently on the requirement of an objective test as opposed to a subjective one by the detaining authorities under this statute[18]. However discussion of the same is not within the ambit of this paper.

There are also other legislations that incorporate presumptions against an accused person thereby reversing the burden of proof[19]. There is not much that can be said or done here except that this right to be presumed innocent, which is the substratum of the criminal justice system, is being whittled down.

ii. Police

The police have often used the power to arrest, pursuant to section 28 and the power of detention, under section 117 of the Criminal Procedure Code (CPC) as a means of punishment[20]. In its extreme form, an accused is remanded indefinitely, by way of what is now commonly known as "chain smoking orders", where an accused person is arrested in one district and detained for 14 days (though it is pursuant to a Magistrate's order), then rearrested in another district and detained for another 14 days and this goes on as long as the police wish to keep the accused in custody. The writer knows of several instances where this had happened and personally had conduct of a case where a habeas corpus application was filed as the arrested persons were detained for a few months. As soon as the date was fixed for hearing of the habeas corpus application, the arrested persons were released on bail and 2 of them were charged. The High Court did not proceed with the application as it had become academic.

These types of abuses continue to this day, making a mockery of the safeguards afforded by the Constitution and the CPC.

The Magistrate is not informed that this arrested person has been kept in detention for long periods of time of more than 14 days. She only concerns herself with the investigation before her and not investigations that had been done in the various other police stations.

Abdul Wahab Patail J has taken a different view and has held that,

"To restrict the application of s117 detentions to only 15 days to dispose of all matters relating to any report made before arrest ignores the fact that the alleged offence may be committed and reported in different police districts and police stations, and as a result falls under the jurisdiction of not only different police stations but different police districts and investigation officers in the ordinary performance of their duties are properly independent[21]".

With due respect, the writer disagrees for the following reasons:

1. The Constitution is the Supreme law of the land. Article 5 is framed to ensure that no person is deprived of his life or personal liberty, save in accordance with law. Article 5 (4) provides that a person shall not be detained beyond 24 hours without the Magistrate's authority. Parliament has clearly stipulated in s117 of the CPC that the Magistrate can only authorize the detention of an accused for a period not exceeding 15 days in the whole. It does not specify how many Magistrates or how many police officers or how many remand orders can be made but it does specify that 'not

exceeding 15 days in the whole'. It is clear from a plain reading of the Constitution that the intention of the legislature is to limit the detention of the accused to no more than 15 days at any one time. Any other interpretation will render illusory the protection provided for under the Constitution and the CPC.

2. Even in the case of a multiple offender, there is no need for the accused to be remanded and be sitting in the police station while the police investigate. He can be released on police bail and be required to come back to the police station at any time for whatever reason the police may need him. As pointed out by Harun J, in PP v Tan Kim San[22], the police must first investigate and then arrest, not the other way round.

3. Today the police are equipped with computers and extensive forensic ability. They are in touch with each other throughout the country. They should be more efficient in law enforcement and it should not be at the expense of fundamental right to personal liberty.

4. Our whole criminal jurisprudence is based on the presumption of innocence. In Khoon Chye Hin v Public Prosecutor[23] Thompson CJ quotes Holroyd J[24]

"It is a maxim in English law that it is better that ten guilty men should escape than that one innocent man should suffer".

Thomson CJ went on to hold that,

"In other words it is but another way, perhaps a vivid way, of enunciating the presumption of innocence".

How then can one justify the detention of a person presumed innocent for a continuous period of remand for periods beyond 15 days on the basis of a variety of reports in different districts against the same accused? The presumption of innocence has very little meaning in this context. [25]

The learned Abdul Wahab Patail J has taken the view[26] that the proper way to avoid abuse is by the courts applying s117 strictly and exercising its discretion to remand under s117 not solely by the demands of convenience of the investigative and prosecution authorities, but rather by balancing such needs against the fact that any remand order is a restriction of a fundamental liberty against a person who has not been convicted of an offence. Unfortunately this is precisely where the system fails. Even when there is only the power to decide on remanding an accused person for 14 days leave alone 'chain smoking orders', the Magistrates are too young and inexperienced, merely complying with the request of the police, like a rubber stamping exercise.The High Court is normally too taxed to entertain an application for revision in time.

5. Where does one draw the line? 15 days each for different states or for different districts or for different police stations or different divisions like special branch, commercial crime or criminal investigations or different units or different investigating officers in the same police station or different reports even if it is under the same investigating officer? As a result a person can be detained for long periods of time almost indefinitely in our country on this basis without accountability.

The 'police' means the whole police force for the purposes of the Constitution and the CPC. Every police personnel is an agent of the whole Force. The principal through its agent is only allowed, pursuant to s117 of the CPC, a remand order/detention of the accused of a maximum period of 15 days, 14 of which must be by way of a Magistrate's order. Each agent cannot have 15 days based on their various investigations all over the country. The whole basis of prohibiting the police from detaining a person beyond 24 hours and a Magistrate from remanding a person beyond 14 days should not be thwarted by procedural gymnastics.

6. There are other specific legislation that allow for long periods of remand and detention.[27] These statutes can be resorted to if the threat to society is so great. It is not in the interest of society and it was never the intention of legislature to give the power to police and Magistrates to remand a person for more than 15 days under the general

provision of s117 of the CPC.

Criminal justice, if administered in this way gives little meaning or effect to the fundamental principle of law that a man is presumed innocent until proven guilty.

2. THE RIGHT TO BE INFORMED OF THE GROUNDS OF ARREST

This is a common law right clearly stated in Christie v Leachinsky,[28] where the House of Lords held that,

"It is a condition of a lawful arrest that the party arrested should know on what charge or on suspicion of what crime he is arrested."

In Abdul Rahman v Tan Jo Koh[29] our Federal Court applied the law as stated in Christie v Leachinsky and held that,

"In Christie v Leachinsky, it was held that a person arrested on suspicion of committing an offence, is entitled to know forthwith the reason for his arrest and that if the reason was withheld, the arrest and detention would amount to false imprisonment, until the time he was told the reason. It would follow therefore from this proposition that a person arrested without being told the reason is entitled to resist the arrest and any force used to overcome the resistance would amount to assault"[30].

So important is this right that the law permits a person to resist arrest with force, and any force used against him to overcome the same is an offence.

The significance and importance of this right ensures that it be clearly enshrined in the Constitution[31].

The law requires that the accused be informed of the grounds of his arrest but in practice, it is difficult, if not impossible, for an accused to prove that he was denied this right. In most cases he would be unrepresented at the time and it would be his uncorroborated word against that of the police officer whose word will be corroborated by other officers[32].

To justify an arrest, the police must have reasonable suspicion that a crime has been committed by the person. Therefore the arrest cannot bejustified by something discovered after the arrest or for any other reason. That basis of arrest must be made known to the accused.

The law is clearly laid down in Christie v Leachinsky[33] by the House of Lords as follows

"an arrest without warrant can be justified only if it is an arrest on a charge made known to the person arrested"

Generally our courts are more concerned about whether the evidence before it points to the guilt or innocence of the accused, rather than about the legality of the arrest. As a result, the police continue to flaunt this basic right as it has no real consequence to them[34]as set out in the following discussion.

3. THE RIGHT TO COUNSEL

This right is also enshrined in our Constitution ensuring that a person arrested has the right to consult and be defended by a legal practitioner of his choice.[35]

This right in the writer's view is the most important right to an accused person and also to the proper administration of criminal justice because it ensures that the law enforcement bodies and personnel accord the accused with the safeguards and rights afforded to him under the law[36]

The law presently governing the interpretation of this right in Malaysia has been stated by the late Suffian LP in Ooi Ah Phua v Officer in Charge of Criminal Investigations, Kedah/Perli[37]. After quoting Syed Barakbah J in Ramli Bin Salleh

v Inspector Yahya bin Husin[38] Suffian LP stated,

"With respect I agree that the right of an arrested person to consult his lawyer begins from the moment of arrest, but I am of the opinion that that right cannot be exercised immediately after arrest."

The opinion expressed by Suffian LP, which is now considered law in our country cannot stand the test of logic, reason or even the normal rules of interpretation.

A right which is acknowledged to 'exist' but cannot be exercised is no right at all. It makes nonsense of this important safeguard and right.[39]

The basis of Suffian LP's opinion is found in the following two paragraphs in his judgment:

"A balance must be struck between the right of the arrested person to consult his lawyer on the one hand and on the other the duty of the police to protect the public from wrongdoers by apprehending them and collecting whatever evidence exists against them. The interest of justice is more important as (sic) the interest of an arrested person and it is well-known that criminal elements are most of all deterred by the certainty of detection, arrest and punishment."

"In view of the above I am of the opinion that it was unreasonable of Mr. Karpal Singh to expect to be allowed to interview Ooi on Monday, December 30, 1974 and that as in this case there has been a day light robbery committed in the heart of the state capital involving the use of a pistol and the loss of $14,000/- to $15,000/- not to mention the loss of one life and that as many young men are prepared to go to any length in the pursuit of instant wealth, armed robberies are therefore quite common, it was quite reasonable of the police to give facilities to Mr Karpal Singh to interview Ooi for the first time only on January 5, 1975."

The police were able to legally deny the accused his constitutional right for 6 days, according to Suffian LP.

What does the type of the crime, where it was committed, that young men are prepared to go to any length in the pursuit of wealth, that armed robberies are common, the subject matter and amount of the stolen goods or even proposition that criminal elements are most deterred by the certainty of detection, arrest and punishment have to do with the constitutional right to counsel guaranteed under the Constitution?

The actual effect of Suffian LP's opinion is that the right does not exist. It is really at the discretion of the police to grant an accused the privilege (and no longer the right) of consulting his lawyer if the police feel that it would be convenient to them and if they think that it does not interfere with their investigations. This is clearly the opinion held and practice as set out in a paper presented by the Deputy Chief of Criminal Investigations, Kuala Lumpur recently[40].

"It is relevant to note here that whilst it is clear that an arrested person has the right, the Constitution does not say the time when and the manner in which this right is required by law to be granted. Neither does the Constitution give an arrested person the right to dictate the time at which he will see his lawyer, nor does it operate to compel the police to allow the lawyer's visit at an inconvenient time or when to permit such a visit would interfere with the interest of justice. In the absence of any specific direction as to the time of consultation with a lawyer this right must be construed in accordance with general rules, that the arrested person may consult a lawyer at a reasonable time. Undoubtedly it is hard to say exactly what is a reasonable time, in the circumstances. The object of detaining the arrested person under s 117 of the CPC is to enable the police to complete their investigations. Police investigation does not merely consist of taking statements from the arrested person, but also arranging for identification parades, and checking the accuracy of the statement already made; all this being done in order to ascertain and arrive at the truth. If the grant of rights of consultation before the completion of the investigation is considered by the police to be prejudicial to the completion of their investigation, it is submitted that the police are entitled to refuse visits by counsel."

How does allowing an accused person the right to be advised of his legal rights provided by the Constitution and Parliament through legislation prevent the police from apprehending wrongdoers or completing their investigation?

Take for example the right to silence under the common law and statute[41]. An accused person may not be well versed with this right, and the law ensures that the accused has been given this right in the interest of justice, and not the other way around.

The only person the accused has a constitutional right to consult is an Advocate and Solicitor of the High Court of Malaya, who must be a practitioner, meaning an authorized person, holding a valid practicing certificate pursuant to Legal Profession Act 1956. He is an officer of the Court. He has a very important role to play in the interest of justice.

Arthur Goldberg J in Escobedo v Illinois (1964)[42], dealing with an accused person's right to consult counsel, held

"No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system".

If Suffian LP is right in his interpretation of the constitutional right of an accused person, what becomes of the right of an accused person to be represented by Counsel in remand proceedings?

The right of an accused person to be represented by counsel is clearly stated in Saul Hamid v Public Prosecuto'[43]

The Constitution expressly removes from the police the discretion or authority to detain an accused person beyond 24 hours and specifically empowers a judicial officer with this authority. KC Vohrah J, one of our more highly regarded and respected Judges held in Re The Detention of R Sivarasa & Ors [44].

"It will be noted that ss 28 and 117 have been inserted into the CPC for a good reason, so that detention by the police of a person beyond 24 hours after arrest is not as a result of an executive act but as a result of a judicial decision in consonance with Article 5(4) of the Federal Constitution".

This safeguard in the constitution has little or no effect if an accused person cannot address the Court and state why his liberty should not be further denied[45].

How is an accused person or his counsel going to make proper representation to the judicial officer, for such a judicial officer to apply her mind and consider all the relevant considerations both legal and factual before taking away that most important right to a citizen, his liberty?

The words of the late Harun J ring loud and clear

"There is no consolation in the fact that he eventually be shown to be innocent of the charge. The damage has been done"[46].

The right to be heard would be of little consequence if it does not encompass the right to be heard by counsel[47]. The laymen in society are not familiar with the science of law. To make this hearing fair and meaningful, the accused must be able to exercise the right to consult and be defended by a legal practitioner of his choice at this hearing. How is he to consult if he has no access to Counsel within the first 24 hours of detention?

Even if we assume, which is highly unlikely, that a counsel would impede police investigations, the answer to this objection is found in the article written by Edgar Joseph Jr on the Rights of the Accused[48] quoting the editor of the New Law Journal,

"If Lord Widgery had in mind the objection most invariably taken by the police, that a suspect's solicitor would simply impede police enquiries, then we would, with respect, suggest that His Lordship should initiate a conference between the police authorities and the Law Society to secure from the latter proper assurances for the former that any solicitor who abuses his position and impedes the police in the proper conduct of their duties would be appropriately dealt with. The interest of suspects cannot, however, be left forever on the long finger, while others fail to establish the modus

vinendi".

In this country the writer knows of no instance in which a counsel has been charged and convicted of the offence of impeding police investigations, neither is the writer aware of any complaint lodged with the Bar Council against a counsel with regard to same.

However it is well known that many persons have suffered abuse in police custody. Police personnel have been charged and convicted for causing death and injury to an accused person in police custody. What about the many instances where citizens suffer without anyone's knowledge?

To highlight the seriousness of the problem the writer refers to those few instances that have been reported in the press.

On 13th April 1993 the New Straits Times (NST) reported - Police said teenaged fisherman Manaf Mat died while in custody of prison authorities and not under police custody. Manaf died in Alor Star General Hospital on 8th February 1993, nine days after he was arrested for alleged drug possession.

On 13th May 1994 NST reported - Police detainee found dead in cell. A 45 year old detainee was found dead inside Klang police station lock up. Lim defaulted supervision after serving sentence for dadah offences in 1990.

On 15th May 1995, NST reported - An air-conditioner mechanic detained by police under the Emergency Ordinance 1969 to facilitate investigations into a financial institution break in March died under detention.

On 19th May 1995, NST reported - City Police Chief, Datuk Ismail Che Rus has denied that the death of a 40-year old air-conditioner mechanic while in police custody was due to internal bleeding.

On 11th October 1995, NST reported - Attorney-General, Datuk Mokhtar Abdullah ordered a judicial inquiry following dissatisfaction with police failure to identify the person or persons responsible for the death of an air-conditioner mechanic in a police lock-up.

On 21st November 1995, NST reported - A police officer told the Magistrate's Court that the suspect identified as detainee No. 37/95 was found dead, naked and in half kneeling position at the Police Remand Centre, DSP Paul Keong, who is PRC commandant said.

On 22nd November 1995, NST reported - A detainee was in the interrogation room for over 96 hours at the police remand centre before he died several days later.

On 23rd November 1995, NST reported - A detainee at the Police Remand Centre complained of being assaulted at an interrogation room where he had been kept for four days. The complaint by detainee Lee Quat Leong was made to L/Cpl Khalid Ahmad who told the Court that Lee however, did not tell him who had assaulted him.

On 24th November 1995, NST reported - A teacher Daniel Hasni Mustaffa, who is Lee's friend and former neighbour said, Chief Inspector Ng Koh Siew denied the deceased was assaulted while in detention.

On 25th November 1995, NST reported - Mechanic Lee Quat Leong who died while being detained at the Police remand centre had succumbed to subconscious bleeding caused by violent blows on many parts of his body, a forensic pathologist told the Magistrate's Court.

On 29th November 1995, NST reported - Eleven policemen including the City Deputy Head of Criminal Investigations were criminally involved in the death of mechanic Lee Quat Leong at the Police remand centre.

On 18th January 1996, NST reported - A detainee collapsed in the lock-up of the District Police Headquarters and died on the way to the Tengku Ampuan Rahimah Hospital in Klang.

On 4th July 1997, NST reported - A 25 year old man who was detained for suspected car and motorcycle thefts was found dead in a toilet at the Cheras Police Headquarters.

On 21st December 1997, the New Sunday Times reported - Perak Police Chief Deputy Commissioner, Mariman Mohd Taib said the Police were awaiting post-mortem and chemist reports pertaining to the death of Othman Mohd Hashim in a Police lock-up in Parit. Othman who was detained for alleged theft was found hanged with a towel in a lock-up.

On 2nd September 1997, NST reported - A second-hand car dealer R. Shanmugam who was found dead at the Kampong Tawas Police Station lock-up, was in police lock-up for 66 days. The death certificate issued by the Hospital authorities stated he died of hanging.

On 10th February 1998, NST reported - Selangor Police offered to record statements from seven Indonesian workers who claimed to have watched their colleague being assaulted by two plainclothes detectives. As a result the victim died in police custody at the Seri Kembangan Police Station.

On 4th March 1998, NST reported - Police said that the cause of death of the 36 year old labourer while in police custody at the Bentong District Police Headquarters was liver failure. However, the victim's wife claimed that there were a few bruises on her husband's body and hands and legs.

On 15th April 1999, The Sun reported - Police are investigating the death of a 20 year old drug suspect at the Nilam Puri Police Station, 2 hours after his arrest. Police were about to take him to the Kota Bahru Police Headquarters when they found him dead in the lock-up.

On 17th March 2000, NST reported - The Bar Council today called for an inquest into the death of a man while in police custody 4 months ago. Francis Nathan, 21, who was held for questioning in connection with dadah related offences died at the Kuala Lumpur Hospital on October 26th last year.

On 11th April 2000, NST reported that a Form Three student had filed a suit against the police and government claiming that he was tortured while he was held under remand in Kulim. He arrived at the High Court with his leg in a cast. He claimed that the police forced him to stand tip-toe with arms outstretched, placed thumb-tacks under the soles of his feet before kicking him, slapping him and slamming his head against the wall and beating him with a length of cable. His claim also included denial of food, being given only breakfast during the first three days he was held in the police lock-up.[49]

On 29th April 2000, The Sun reported - A 22 year old assistant driving instructor who drowned in the Malacca river 4 years ago after escaping was handcuffed, a Sessions Court was told today.

On 20th May 2000, The Star reported - A widow who is suing the police and the Government claimed that her 31 year old husband was taken from her house by policemen in August last year and brought back "as a corpse" eight days later.

On 20th May 2000 Berita Harian reported - A woman whose husband died while in police custody at Rawang Police Station last year, filed a summons against the Royal Malaysian Police Force and the Government of Malaysia for damages amounting to RM682400 (Pada 20 Mei 2000 Berita Harian melaporkan seorang isteri yang suaminya mati ketika dalam tahanan polis di Balai Polis Rawang tahun lalu, mengemukakan saman menuntut gantirugi sebanyak RM682,400.00 daripada Polis Diraja Malaysia (PDRM) dan Kerajaan Malaysia)

On 13th June 2001, Harian Metro reported - A detainee was killed from injuries to the head, ribs and other parts of the body as a result of being assaulted by other detainees in the Setapak Police Station lockup - (Pada 13 Jun 2001 Harian Metro melaporkan seorang tahanan terbunuh apabila cedera di kepala, rusuk dan beberapa bahagian lain akibat dipukul sekumpulan tahanan lain di lokap di Balai Polis Setapak, di sini).

On 26th January 2002, NST reported - A man has sued the Officer in charge of the Police Station in Parit, Perak and

two others for negligence involving the death of his son in the police lock-up a day after his arrest on Dec 16, 1997.

On June 2002 The STAR reported - A man yesterday lodged a police report over the death of his younger brother while in police custody.[50]

On 8th August 2003, the Sessions Court convicted a police constable of raping a Filipino woman and an Indonesian woman who were detained in lock-up.[51]

On 1st December 2003, Malaysia Kini reported that a police report had been lodged by the family of G Veerasamy, a 52-year-old security guard who died while he was held in a police lock-up[52]. Veerasamy's son Suresh said his father was arrested on Nov 24 by the Pandan Indah police for unknown reasons and remanded until Dec 1 this year. Suresh, 30, said his father was perfectly healthy when he last saw him at the Pandan Indah police station on the day of his arrest. However, Suresh said he was informed on Friday that his father had died while he was in the police lock-up. 'I met my father at the Pandan Indah police station on Nov 24 at about 9pm and he was really healthy and fine. Yesterday, an ASP Seah called me at about 4:30pm asking me to go to the police station on an urgent matter. Upon my enquiry, he said that my father had died in police custody,' he said in the report. On identifying Veerasamy's body at the Kuala Lumpur Hospital (HKL), Suresh said he saw suspicious injury marks on his father's face. "I saw cuts on his nose and a Professor Dr Sharom (from the hospital) explained to me that my father had died of stomach pains. The professor threatened not to release the body when I questioned him further about my father's death," he said.

How is the interest of justice preserved by reducing the constitutional safeguards of the right to counsel? How can the decision for further remand be properly made without proper representations and hearings?[53] Raja Azlan Shah J as he then was, was right when His Lordship stated,

"It is at the police station that the real trial begins and a Court which limits the concept of fairness until the police investigations are completed, recognizes only the form of the criminal process and ignores its substance". [54]

There is an expectation of society that the government and their law enforcement functionaries deal with criminals in an efficient and effective way and bring to justice to those involved in crime. But the cure cannot be worse than the disease itself.[55]

These safeguards provided in the Constitution and the CPC, are the only protection a citizen accused of a crime has. If these safeguards are not effectively enforced, then as Lord Denning said, "there is no tyranny like them"[56].

A crime is a crime in any part of the world. India has a similar problem. In the words of Professor S.P. Srivastava of Lucknow University '[57]

"The main culprits of human rights abuses are police, prisons and the State... Police in our context has a long history of law-breaking. Its record of little regard of human rights is not a thing of the past; it is flourishing now as ever before. Our police has (sic) perfected a torture technology of a horrible and horrendous kind. It consists of several ingenious ways of torture and tyranny, all in the name of crime prevention and control. In the arrogance of authority the policemen often become the worst violators of law. In the garb of combating criminality, the police takes (sic) law into their own hands and systematically violates the basic rights of individuals and groups of people belonging to weaker sections - those who are unresourced and underpriviledged."

It is not only the police who are responsible for these atrocities but also the courts and the legislature because whenever power is given absolutely to any individual over another, it corrupts absolutely[58]. Therefore in any jurisdiction, there must be proper safeguards, checks and balances that will ensure that individuals placed in the custody of another for the interest of society, will not suffer the abuse and corruption that absolute power brings.

Other jurisdictions recognize this and have enshrined similar safeguards and rights in their Constitution.

The 6th Amendment to the Constitution of the United States reads as follows

"In all criminal trials, the accused shall enjoy the right to a speedy and public trial...and to have assistance of counsel for his defence."

In Powell v Alabama (1932) Oliver J held

"The right to be heard would be in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be out on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both skill and knowledge adequately to prepare his defence, even though he may have a perfect one. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that is true of men of intelligence how much more true is it of the ignorant and illiterate or those of feeble intellect."[59]

This decision established the rule that in capital cases, effective assistance of counsel is constitutionally required.

In Gideon v Wainwright[60] the Supreme Court, under the leadership of Earl Warren CJ, held that there could never be a truly fair trial and the requirements of due process could never be met, unless the defendant, no matter what his financial resources, could have the services of an attorney. The Supreme Court extended this basic right to all persons charged with a felony. A few years later the Supreme Court, under the Warren Burger CJ, extended this safeguard to misdemeanor charges that could lead to a jail sentence.

Today in the United States, every accused person has the right to counsel upon arrest unless he waives that right.[61] If those rights are infringed the whole case against the accused is thrown out and there is good reason for this.

"Although there have been critics of the exclusionary rule - Justice Cardozo once famously said that because of the rule "the criminal is to go free because the constable blundered" - there is also general agreement that it is the only means to enforce the requirement of the Fourth Amendment. It makes sure that the state, with all the power behind it, plays by the rules. And if it doesn't, then it cannot use evidence illegally gained in prosecuting a person, even if that person is in fact guilty. While it may seem extreme to some, it serves a higher good - ensuring proper behavior of the police." [62]

The point is the same in our context - how does one enforce the safeguards and his Constitutional right to Counsel or to be informed of his grounds of arrest upon arrest as well as the right to remain silent. How do our Courts ensure these safeguards, checks and balances are followed?

Suffian LP in Ooi Ah Phua said that

"It is possible for a person to be lawfully detained and yet unlawfully denied communication with his lawyer."

In deciding that unlawful denial of the right to counsel under Article 5(3) does not necessarily render the detention unlawful, and further holding that a habeas corpus application on this ground will not succeed,[63]what avenue then is left to the accused person to immediately remedy the denial of this constitutional safeguard and right? It reduces these constitutional safeguards to pious platitudes with no legal effect, leaving the road to tyranny open.

Visu Sinnadurai J in Public Prosecutor v Basri bin Salihin[64] quoted Lord Griffiths in Lam Chi Ming & ors v R[65] and stated,

"Their Lordships are of the view that the more recent English cases establish that the rejection of an improperly obtained confession is not dependent on its unreliability but also...upon the importance that attaches in a civilized society to proper behavior by police towards those in their custody."

The point is clearly made by Warren CJ in Miranda v Arizona[66]

"It is not admissible to do a great right by doing a little wrong...It is not sufficient to do justice by obtaining a proper result by irregular or improper means."

In India this right is enshrined in Article 22 of the Indian Constitution which reads,

"No person who is arrested shall be detained in custody without being informed, as soon as may be of the grounds of such arrest nor shall he be denied the right to consult, and to be defended by a legal practitioner of his choice"

In Sudha Sindhu Dey v Emperor [67]Cunlifee J stated

"But it seems to me that unless in certain offences persons are directed by the government to be tried by drumhead Court martial, it is of paramount importance that advocates should have access to their clients and should obtain all support they are entitled to look for in seeking such (sic) success. The more serious the offence the greater the need of the advocate's help and more especially where persons are charged with taking part in what I may term a 'group crime'[68]

Countries enshrine this safeguard in their constitution because of its degree of importance. The Courts are the 'ultimate bulwark' and protector of individual rights and freedoms. What more if these rights are specifically enshrined in our Constitution.

4.THE RIGHT TO SILENCE

The right to silence encompasses the two fundamental principles in the criminal justice system - the privilege against self incrimination and the presumption of innocence[69].

There are a number of theories as to how the right evolved in the common law of England. Wigmore's theory is that the right to silence gained acceptance in the early 17th century in response to forced interrogation and arbitrary power of the courts like the "Star Chamber" and Ecclesiastical courts. Methods used by these courts included torture, mutilations, forfeiture and imprisonment. These courts were the source of censorship by the monarch of any political works or any unorthodox religious ideas until their abolition in 1641.

It was in these circumstances that the right to silence emerged to protect the accused, as one of the most significant features of these courts was that interrogation constituted a fishing expedition. Instead of being confronted with a particular charge by a complainant, the accused was compelled to speak on oath before being charged in the hope that he would come forth with an incriminating statement. The principle that no man should be compelled to give evidence against himself, emerged as a protection against such courts and improper procedures, and was eventually extended to and adopted by the Common Law courts, which had established their supremacy by 1660.

MacNair's view was that Wigmore had put the cart before the horse. MacNair states that this right originated from Roman Canon Law, applying first to allegations of crime in civil proceedings before being extended to the accused in criminal trials. This came about through Roman Canon Law tradition and religious objections to compulsory testimony.

The Criminal Law Revision Law Committee (UK) in their Eleventh Report stated that the right to silence in Common Law did not fully emerge until the early 19th Century, when courts attempted to offset the disadvantage to the accused caused by the prohibition against the defendant's testimony[70], poor quality of juries, magistrates and legal representation and the haste in which cases were concluded. There was judicial recognition that a balance had to be struck between the power of the State and the rights of individuals.

Whatever theory one may be inclined to believe, it appears that the right to silence is an essential safeguard against state power and ensures a fair trial in the context of an adversarial system.[71]

In Malaysia, this safeguard exists and is stated clearly under section 113 of the CPC. The law requires under section

113(1) a (ii), that the police must administer a caution in the following words or words to the like effect:

"It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence".

Therefore the law now is, if there is no inducement, threat or promise[72] and the caution has been administered in the prescribed form, the statement made by an accused person is admissible.

Let me digress for a moment to state that the late Tan Sri Harun Hashim did not think it feasible that the police should be allowed to record cautioned statements. The learned former Supreme Court Judge felt that it would be better for a magistrate to record any statement freely given to avoid abuse or accusations of abuse by the police[73].

However Sharma J in the case of Public Prosecutor v Law Say Seck & ors[74] had this to say, when the law authorized only magistrates to record confessions which can be used as evidence:'[75]

"It may be that there is no justification for me to say that the police investigating agency in our country has not yet acquired a reputation of being proof against the temptation of attempting to secure confessions by questionable methods. I might say that such means and methods are capable of being used and it is the duty of the magistrate to see that they devote their attention to all the safeguards provided to ensuring that the confessions they record are truly voluntary."

Clearly, even when magistrates were taking confessions of an accused person while they were in police custody, the court recognized the danger of attempting to secure confessions by questionable methods. This is the very reason why the right to counsel upon arrest is essential. It has the advantage of also ensuring that when the accused gives evidence it is truly voluntary, free from inducement, threat or promise.

It is worthy of note that the US Supreme Court held in Miranda v Arizona[76] that

"...the modern practice of in-custody interrogation is psychologically, rather physically, oriented. As we have stated before, since Chambers v Florida 309 US 227, this court has recognized that coercion can be mental as well as physical and that the blood of the accused is not the only hallmark of unconstitutional inquisition."

The caution provided for under our law, incorporating the right to silence, is taken from the case of Miranda v Arizona (1966)[77]. According to Warren CJ, a person under arrest had to be informed in clear and unequivocal terms of the constitutional right to remain silent, and that anything said at that point could be used against him later in court. In addition, the officers had to tell the suspect of the right to counsel and that if he or she had no money to hire a lawyer, the state would provide one. If the police investigation continued without a lawyer present, the Chief Justice warned, "a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and the right to counsel."

The Miranda decision unleashed a storm of criticism of the Court for its alleged coddling of criminals, but within a short time the basic soundness of Miranda became clear. The more progressive police departments in the United States lost no time in announcing that they had been following similar practices for years, and that doing so had not undermined their effectiveness in investigating or solving crimes. Felons who wanted to confess did so anyway; in other cases, the lack of a confession merely required more efficient police work to find and convict the guilty party. As to charges that the decision encouraged crime, Attorney General Ramsey Clark explained that "court rules do not cause crime".[78]

UK has whittled down the right to silence against the recommendation of the Royal Commission on Criminal Justice:

"The majority of the members of the RCCJ recommended that the position as regards the right of silence, and the inferences to be drawn from silence, should remain unchanged (Report, chapter 4, para. 22). Nevertheless on 6 October

1993, the then Home Secretary Michael Howard announced at the Conservative Party Conference that he intended to remove the 'so-called right to silence'.

The right was in the end modified by s. 34 of the Criminal Justice and Public Order Act 1994. This provides that a court may draw 'such inferences ... as appear proper'."[79]

In R v Condron[80] the accused remained silent on the advice of his solicitor. The trial judge directed the jury that they could draw an adverse inference from the defendants' silence if they thought it proper to do so. The accused were convicted and on appeal the Court of Appeal confirmed the conviction. The matter was appealed and went up to the European Court of Justice in Condron v United Kingdom (May 2000, unreported). The ECJ found that the Condrons had been denied a fair trial as they felt that the judge's direction had not properly reflected the balance between the right to silence and the drawing of an adverse inference.

In Saunders v UK[81] the ECJ cited Funke v France[82], and confirmed

"Although not mentioned in Article 6 of the Convention, the right to silence and the right not to incriminate oneself, are generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6."

The Court held further [83] that

"The public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during trial proceedings."

The Judges find it difficult to know when an adverse inference should be drawn based on the amendment. How can one expect an accused or even his solicitor to know when to speak and when not to?

As stated by the then Secretary of the Criminal Law Committee of the Law Society of England, Roger Ede, curtailing the right to silence in certain circumstances would be forcing the accused to play Russian roulette. He will not know which questions to answer and which not to[84].

The law, especially criminal law, must be certain in its application and the rights and safeguards must be clear and unambiguous in order for it to be effectively exercised by an accused person. Members of society must know exactly what questions they must answer and what they need not with utmost certainty as their life and liberty depend on it.

In commenting on the effect of similar provisions in Northern Ireland, a report in "Justice" summarized the position as follows:

"Restrictions on criminal suspects' right to silence for the last six years in Northern Ireland are unsafe and inefficient according to a research report by "Justice". The report states that the order is used to put pressure on suspects to speak and this has an unfair impact on the vulnerable as well as those who may have reasons for not speaking, such as being suspicious of the police, wishing to protect family members or fearing intimidation. Ulster solicitors commenting to researchers broadly came down against the right to silence restrictions. 'The police are using the order to frighten the daylights out of people', said one."[85]

In Malaysia, there has also been a slight shift by the legislature to whittling down the right to silence under specific legislations.[86]

There are many arguments advanced for abolishing the right to silence. Three, which the writer believes are most persuasive, relate to the pre-trial stage.

The first argument is that the right to silence evolved as a protection against courts like the Star Chamber and methods used by them to extract evidence or confessions which became the basis of conviction. Today, it is said that torture and compulsion no longer exist; therefore the right to silence no longer serves its purpose and can be abolished[87] The reality

is very different from this theoretical view.

The second argument is that of "ambush defences". These are defences which take the prosecution by surprise during trial, allowing insufficient time for the preparation of the prosecution's case and consequently, when argued, leads to wrongful acquittals. It is argued that consent to rape, belief that the goods were not stolen and self defence in a robbery are all "ambush defences". An alibi defence may be an ambush defence but statute has already dealt with this problem in that there is now a requirement for the accused to give the prosecution sufficient notice if an alibi defence is to be relied on. Consent in a rape case and belief that the goods were not stolen, self defence in a robbery cannot be termed "ambush defences" as these are the very ingredients of the offence that the prosecution must prove. How then can they be taken by surprise when these defences are raised?

The third argument is the actual basis for this move by the authorities to change the status quo. There has been a change of view or thinking by some quarters from what used to be the view and thinking of our predecessors. Simply put, it is in line with Bentham's view, when he said, "Innocence claims the right to speak as guilt invokes the privilege of silence". Lord Denning echoed this when he said, "Silence is the refuge of the guilty". This view is based on the premise that there can be no other reason why a person remains silent, other than guilt.

The writer does not agree with the view that accused persons who choose to remain silent, do so only because they are guilty. They may be other reasons for his silence, for example,

His lawyer advised him to

He may be emotional and not in a proper frame of mind to speak

He may be afraid that if he speaks he may incriminate himself in relation to an offence that he did not commit

He may not know the answers to the questions asked and is unable to explain away otherwise suspicious circumstances

He may have done something morally wrong and dose not want that to come to light

He may be protecting others

He may not want to be stigmatized as an informer

He may remain silent during a formal interview because his earlier explanations were not accepted by the police or dismissed as ridiculous at the scene or in the patrol car

There are many more reasons but the above examples are sufficient to show that an accused person may remain silent for reasons other than guilt.

But it is not "why" the accused remains silent that enshrines the right in our criminal justice system, it is to protect the accused from the abuse and the arbitrary exercise of power by the state. "It makes sure that the State with all the power behind it plays by the rules."[88]

The right is not absolute in the sense that persons may not refuse to be fingerprinted, to have their blood samples taken, voice recordings made or other physical evidence taken or even submit to an intoxication test even though all this may incriminate the accused during trial.

CONCLUSION

In 2002 the then Chief Justice of Malaysia, Tun Dzaiddin, stated the position clearly,[89]

"In my personal view, the current criminal procedures as we know them, when set against the backdrop of real life

situations now appear to be wanting".

The learned Chief Justice went on say that,

"In fact, there should be a bundle of protections, such as against unreasonable search and seizure, arbitrary detention and right to counsel upon detention."

It is clear that the Head of the Judiciary found that the pendulum has swung too much in favour of protecting society and there is a serious imbalance with regard to the rights of an individual person.

The learned Chief Justice called for a re-evaluation and a revisit of these issues.

The Human Rights Commission of Malaysia has also called for reform of the law in the context of our criminal proceedings. [90]

The Judiciary - and the Constitution - can do very little should a person commit a crime. Their concern, and the concern of society, is that when the police apprehend a suspect, that man or woman is not harmed or sent to jail or condemned to die without a fair trial according to law. The prevention of crime is the responsibility of the legislative and executive branches, which make the laws and retain the ultimate responsibility for enforcement. But they must do so within the parameters drawn by the Constitution incorporating all the safeguards, checks and balances. History has shown how the courts could be perverted by an overbearing ruler[91] and how the criminal law could be used to persecute political opponents. [92]

Adherence to the doctrine of separation of powers and the due recognition and protection of fundamental liberties with safeguards enshrined in the Constitution go a long way to reducing such abuses. It ensures a proper check and balance between the awesome power of the State against the individual, and that no arbitrary power would be exercised by any person over another. In this context, even the power to prosecute should be exercised by an independent body, accountable only to Parliament.

Professor Wu Ming Aun[93], in making recommendations for the delivery of a more efficient and transparent system of justice suggested, that in light of the already onerous duties on the office of the Attorney General, the first law officer whose constitutional duty[94] is to provide advice to the YDPA and the Government, a separate but independent office of Director of Public Prosecutions should be established.[95]

The entire criminal justice system rests on the assumption that a person accused of a crime is considered innocent until proven guilty beyond the reasonable doubt. In a democratic society, no person should have to prove that he or she is innocent when accused of a crime. Rather, the burden is on the state to prove guilt and to do so convincingly. In the final analysis, the law is and should be as stated by Holroyd J [96]

"... it is better that ten guilty men should escape that that one innocent man should suffer."

Will some criminals escape justice because they have hidden their tracks well and the police cannot make a case? Yes, and that is one of the prices we have to pay for a system that insists on fair trials in accordance to our Constitution and law. An occasional criminal may go free, but the goal is to ensure that no innocent person is wrongfully punished. The system is not perfect but its ideals do indeed govern. Fair trial in accordance to law in a democracy must be more than a mere phrase if the rights of the people are to be protected.[97]

We should strive to ensure that these rights and safeguards are realized not just in form but also in substance.[98]

1 This paper was presented at the 12th Malaysian Law Conference held in Kuala Lumpur from 10th - 12th December 2003.

2 Richard Stone Civil Liberties and Human Rights 3rd Ed. (2000) London, Blackstone Press Ltd. at p 38.

3 Richard Stone Civil Liberties and Human Rights 3rd Ed. (2000) London, Blackstone Press Ltd. at p 3.

4 P.N. Bhagwati at the Kumarappa-Lecture delivered at the TATA Institute of Social Sciences, Bombay, on 23rd February, 1985. Also found in Noorjahan Baya, Human Rights and Criminal Justice Administration of India (2000) New Delhi, Upal Publishing House at p 11.

5 "It must always be remembered that the freedom to which we aspire is freedom to govern ourselves under a system in which parliamentary institutions shall be exclusively representative of the people's will" - Tunku Abdul Rahman in moving the second reading of the Federal Constitution Bill on 15 August 1957 - Malaysian Constitutional Documents (2nd Ed) Vol. 1 at p iv. Also see Cyrus V Das Governments & Crisis Powers (1996) Kuala Lumpur, The Malaysian Current Law Journal Sdn Bhd at p 69.

6 See US Department of State Rights of the People: Individual Freedom and the Bill of Rights Chapter 8: Rights of the Accused at p 11, The US Department of State - International Information Programs - http://usinfo.state.gov/products/pubs/rightsof/accused.htm.

7 The Rt Hon Lord Denning, The Due Process of Law (1980) London, Butterworths, at p 101.

8 Kumarappa-Lecture delivered at the TATA Institute of Social Sciences, Bombay, on 23 February 1985. Also found in Noorjahan Baya, Human Rights and Criminal Justice Administration of India (2000) New Delhi, Upal Publishing House at p 11, 12.

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10 Like the prohibition against torture or cruel and degrading treatment. UDHR Article 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

11 Section 4(4) of the Human Rights Commission Act 1999

12 Section 3(1) of Civil Law Act 1956.

13 [1935] AC 462 at 481.

14 [1997] 1 MLJ 1 at 24.

15 Justice Mohd Azmi at page 24 of the judgment. It has been recently applied in PP v Chia Leong Foo [2000] 6 MLJ 705 at 730.

16 Other legislation include the Emergency (Public Order and Prevention of Crime) Ordinance 1969 , the Dangerous Drugs (Special Prevention Measures) Act 1985, Restricted Residence Act 1933, Public Order Preservation Act 1958 and many others.

17 Deputy Prime Minister Tun Abdul Razak moved the bill in Parliament.

18 Mohamad Ezam bin Mohd Noor v Ketua Polis Negara [2002] 4 MLJ 449. See also "Human Rights Advocacy in Court", Raja Aziz Addruse, Paper presented at a conference organized by SUHAKAM on "Human Rights and the Administration of the Law" on 9-10 September 2003

19 Under the Dangerous Drugs Act 1952 which carries the death penalty, the presumption is that you are trafficking if you are found in possession of a certain amount of drugs. No longer is the accused presumed innocent, here he is presumed guilty of trafficking until he is able to rebut that presumption. Some feel that this is a justified shift due to the type of crime and the consequences involved.

20 Senator Valli Muthusamy once addressed Parliament on this section describing it as a "money making section for the police". There is much abuse here and Criminal practitioners at the Bar complain that often times their clients have been asked to pay monies to the police to avoid continued remand.

21 Dasthigeer b Mohamed Ismail v Kerajaan Malaysia & Anor [1999] MLJU 121.

22 [1980] 2 MLJ.

23 [1961] 27 MLJ 105 at 108.

24 Sarah v Hobson 1 Lewin 261.

25 PP v Tan Kim San [1980] 2 MLJ 98. Though here the learned Judge, Harun J (as he then was) rebuked the police for charging first and then investigating, the same stigma attaches to a person arrested and remanded for a long period of time. "It must always be remembered that

when a person is arrested and remanded for a long period of time, a social stigma immediately attaches to him, his friends desert him, his business and work is affected, his right to livelihood jeopardized, his creditors close on him, he is mentally tormented and put to the expense of engaging a lawyer. It is no consolation that he may turn out to be totally innocent after the police have completed their investigations".

26 Dasthigeer b Mohamed Ismail v Kerajaan Malaysia & Anor [1999] MLJU 121.

27 Internal Security Act 1960.

28 [1947] AC 573.

29 [1968] 1 MLJ 205.

30 [1968] 1 MLJ 205 at 207.

31 Article 5(3) of the Federal Constitution.

32 "The Rights of the Accused" Edgar Joseph Jr [1976] MLJ ii.

33 [1947] AC 573

34 Unlike United States where they follow the 'poison tree' principle the whole case will be thrown out. Also worthy of note is that even though the police normally make a report called an 'arresting report', that report narrates who accompanied the arresting officer and who was arrested but often does not state exactly the grounds of arrest or what offence the person is being arrested for.

35 Article 5(3) of the Federal Constitution.

36 If a lawyer is present when a person is arrested the police more often than not, make a genuine effort to follow the law and observe all the rights and protection afforded to the accused by the law.

37 [1975] 2 MLJ 198.

38 [1973] 1 MLJ 54.

39 It may be restricted by the express provisions of the constitution which is not the case here.

40 "Arrest", Superintendent Ramli b Mat Arshad, paper presented at the Conference organized by Suhakam on 'Human Rights and the Administration of the Law' 9-10 September 2003, Kuala Lumpur

41 Section 113 Criminal Procedure Code.

42 US Department of State Rights of the People: Individual Freedom and the Bill of Rights Chapter 8: Rights of the Accused at p 4, The US Department of State - International Information Programs - http://usinfo.state.gov/products/pubs/rightsof/accused.htm.

43 [1987] 2 MLJ 736.

44 [1996] 3 MLJ 611.

45 Suhakam Law Reform Report: Rights of Remand Prisoners December 2001 at page 7 states 'The hearing, in Kuala Lumpur, is conducted in the Magistrates Chambers and not in open Court. The arrested person is locked in a cell at a distance from the Magistrate and is unable to communicate either with the Magistrate or his counsel, if he has one. The arrested person in not in the same room as the Magistrate and cannot hear what is going on between the Police officer and Magistrate. The arrested person is not given an opportunity to challenge the information put before the Magistrate' Another safeguard being substantially reduced is not completely lost.

46 [1980] 2 MLJ 98.

47 For detailed explanation refer to "Police Powers and Remand Proceedings" Jerald Gomez [2003] 2 MLJ cxxix.

48 [1976] MLJ ii at iv.

49 http://www.nstpi.com.my/11 April, 2000.

50 It has been suggested that most of the abuse during remand is as a result of police officers trying to secure a confession from the accused

rather that trying to secure evidence by way of scientific methods of investigation with patience, tenacity and professional expertise without resorting to short cut methods, which the law does not permit.

51 http://www.mmail.com.my/8August2003. See also http://www.aliran.com/monthly/10 July 2003, Stephanie Bastian, "An Embarrassment For The State: Act now to wipe out custodial violence."

52 http://www.malaysiakini.com/news/2003113000113158.php.

53 Recommendation and proposals for reforms to correct the imbalance is highlighted in "Police Powers and Remand Proceedings", Jerald Gomez [2003] 2 MLJ cxxix at cliv.

54 Hamid bin Saud v Yahya bin Hashim & Anor [1977] 2 MLJ 116 at 118.

55 Supreme Court of India in DK Basu v State of Bengal AIR (1997) SCC 6100.

56 The Rt. Hon. Lord Denning The Due Process of Law (1980) London, Butterworths at p 101

57 "Human Rights and Administration of Criminal Justice in India" Prof S.P. Srivastava in Human Rights and Criminal Justice Administration in India Prod (Dr) Noorjahan Bava (ed) (2000) Delhi, Upal Publishing House p.134 at p. 141.

58 Lord Acton, in a letter to Bishop Mandell Creighton, 3rd April 1887 in Creighton L., Life and Letters of Mandell Creighton (1904) Vol 1 Chap 11.

59 Rights of the People: Individual Freedom and the Bill of Rights Chapter 8: Rights of the Accused pg 4. Published by The US Department of State; International Information Programs - http://usinfo.state.gov/products/pubs/rightsof/accused.htm.

60 Rights of the People: Individual Freedom and the Bill of Rights Chapter 8: Rights of the Accused pg 4. Published by The US Department of State; International Information Programs - http://usinfo.state.gov/products/pubs/rightsof/accused.htm.

61 Miranda v Arizona 384 US 436 (1966) USSC

62 Rights of the People: Individual Freedom and the Bill of Rights Chapter 8: Rights of the Accused pg 4. Published by The US Department of State; International Information Programs - http://usinfo.state.gov/products/pubs/rightsof/accused.htm.

63 Rights of the Accused commentary by Wan Arfah Hamzah [1976] MLJ xviii. She adds that the infringement of this Constitutional right based on this decision will not even entitle the accused to succeed in a habeas corpus application.

64 [1994] 2 MLJ 476.

65 [1991] 3 AER 172.

66 384 US 436 (1966) USSC.

67 [1935] AIR Cal. 101.

68 His Lordship went on to hold that the communications between solicitor and client are privileged and police cannot be within earshot of the parties so as to hear what is being discussed.

69 Richard Stone Civil Liberties and Human Rights (2000) 3rd ed, London, Blackstone Press Ltd p 96.

70 See Justin Fleming Barbarism to Verdict - A History of the Common Law (1994) Sydney, Angus & Robertson, Chapter 3.

71 "The Right to Silence in the United Kingdom and Malaysia", Jerald Gomez, The Commonwealth Lawyer June 1995 pg 71 at 74.

72 section 113 (1)a (i) CPC.

73 He expressed his view at a Bar Council Seminar this year on Police Powers and Remand Proceedings where he, Makinuddin J and the writer were members of the panel.

74 [1971] 1 MLJ 199.

75 section 115 CPC prior to the s 113 amendment which came into force on 10.1.1976.

76 384 US 436 (1966) USSC.

77 384 US 436 (1966) USSC.

78 Rights of the People: Individual Freedom and the Bill of Rights Chapter 8: Rights of the Accused pg 11. Published by The US Department of State - International Information Programs - http://usinfo.state.gov/products/pubs/rightsof/accused.htm.

79 Richard Stone Civil Liberties & Human Rights, (2000) 3rd ed., London, Blackstone Press at p 97. Note : The Malimath Committee on reforms of the Criminal Justice System in India has also recommended moving away from the absolute right to silence. See however the article by K.G. Kannabiran criticizing the recommendations - "Safeguard the rights of the accused" - http://www.pucl.org/Topics/Law/2003/malimath.htm.

80 (1997) 1 WLR 827.

81 (1997) 23 EHRR 313.

82 (1993) EHRR 297.

83 at p 340

84 "The Right to Silence in the United Kingdom and Malaysia" Jerald Gomez, The Commonwealth Lawyer, June 1995 page 71 at p 73.

85 "The Right to Silence in the United Kingdom and Malaysia" Jerald Gomez, The Commonwealth Lawyer, June 1995 page 71 at 73.

86 section 45(3) of the Anti Corruption Act 1997, section 134(2) Securities Commission Act 1993 - see "Fair Trial Procedures", Ng Aik Guan, paper presented at a conference on 'Human Rights and the Administration of the Law' organized by Suhakam on 9-10 September 2003 Kuala Lumpur. There is less difficulty in accepting it at the trial stage, in a courtroom atmosphere, in full public view and after legal advice.

87 In fact when the then Chief Justice of England, Lord Taylor, was asked, "What was the preponderance of judicial reasoning and jurisprudence that warranted the abolition of the right to silence?" he answered that it was safer now for the accused as the whole interview was tape recorded. See "The Right to Silence in the United Kingdom and Malaysia" Jerald Gomez, The Commonwealth Lawyer June 1995 p 71 at p 75.

88 See US Department of State Rights of the People: Individual Freedom and the Bill of Rights Chapter 8: Rights of the Accused at p 11, The US Department of State - International Information Programs - http://usinfo.state.gov/products/pubs/rightsof/accused.htm

89 Keynote Address by the Rt Hon Tun Mohamed Dzaiddin Hj Abdullah, Chief Justice Malaysia, at the opening of the seminar entitled 'A Practical Approach to Criminal Procedure' on Tuesday, 15 October 2002 at Dewan Tun Hussein Onn, Putra World Trade Centre, Kuala Lumpur. [2002] 4 MLJ at i -lxiv.

90 The Human Rights Commission of Malaysia (Suhakam) decided that this should be one of the priority areas to be studied for the year 2000 and came out with a report entitled 'SUHAKAM Law Reform Report: Rights of Remand Prisoners December 2001'. The report raises several shortcomings in the present remand proceedings and has recommended changes to be made.

91 See US Department of State Rights of the People: Individual Freedom and the Bill of Rights Chapter 8: Rights of the Accused at p 11, The US Department of State - International Information Programs - http://usinfo.state.gov/products/pubs/rightsof/accused.htm.

92 From Socrates to Sir Thomas More it continues - see Thomas C Brickhouse and Nicholas D Smith Socrates on Trial (1989), Princeton, New Jersey, Princeton University Press, and William Roper Life of Sir Thomas More (1963) London, Everyman.

93 "Human Rights and Law Enforcement" Professor Wu Min Aun - paper presented at a conference on 'Human Rights and the Administration of the Law' organized by Suhakam on 9-10 September 2003 Kuala Lumpur.

94 Article 145 (1) and (2) of the Federal Constitution.

95 Sarah v Hobson 1 Lewin 261. Also cited in Khoo Chye Hin v PP [1961] 2 MLJ 105 at 108.

96 Sarah v Hobson 1 Lewin 261. Also cited in Khoo Chye Hin v PP [1961] 2 MLJ 105 at 108.

97 See US Department of State Rights of the People: Individual Freedom and the Bill of Rights Chapter 8: Rights of the Accused at p 11, The US Department of State - International Information Programs - http://usinfo.state.gov/products/pubs/rightsof/accused.htm.

98 "These precious rights were fixed in our Constitution only after centuries of persecution and struggle. And in the words of Chief Justice Marshall, they were secured 'for ages to come and ...designed to approach immortality as nearly as human institutions can approach it.'"Warren CJ in Miranda v Arizona 384 US 436 (1966) USSC citing Marshall CJ in Cohens v Virginia 6 Wheat 264, 387 (1821).