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TITLE: Article: Rights of an Arrested Person to Counsel: Is It Not A Case of Too Little Too Late?

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TEXT: Right to Personal Liberty Save in Accordance With Law

Article 5 of the Malaysian Federal Constitution provides that no person shall be deprived of his personal liberty *save in accordance with law* (my emphasis). Accordingly, any person who believes that he has been unlawfully deprived of his liberty may resort to a writ of *habeas corpus ad subjiciendum*, commonly known as a writ of *habeas corpus* for securing his immediate release from unlawful or unjustifiable detention. n1 In *Yap Hock Seng @ Ah Seng v Ministry of Home Affairs*, n2 it was held that habeas corpus is a high prerogative writ of summary character for enforcing the cherished civil right of personal liberty and entitles the detainee to a prejudicial determination ie it is legally valid in the sense that it is pursuant to a valid statutory authority. Habeas corpus is, however, not an appropriate remedy to an accused denied of his constitutional right to seek counsel under Article 5(3). Such a person must seek other available remedies since the legality of the detention is not in issue. n3 In *Morgan a/l Perumal v Ketua Inspektor Hussein bin Abdul Majid & Ors*, n4 Justice Abdul Malik Ishak also held that the manner and conditions of detention the detainee alleged he was subjected to are not matters within the scope of cases where habeas corpus would normally issue. Thus, *habeas corpus* is inapplicable in situations where the detention is in itself lawful.

The importance of a person's personal liberty is also given monetary recognition under the now archaic provisions of ss 438 or 175 of the Criminal Procedure Code (hereinafter referred to as the 'CPC'). Section 438 of the CPC states that any person who causes a police officer to arrest another person, and if it appears to the Magistrate that there was no sufficient ground for causing the arrest, the Magistrate may then award such compensation not exceeding a sum of twenty five Ringgit to be paid to the person so arrested for his loss of time, and any expenses incurred by him in the matter as the Magistrate shall think fit. Such compensation shall not, however, operate as a bar to an action by him or her for general and specific damages for false imprisonment, assault and battery, against such a person arising from the unlawful arrest and detention. n5

Police Investigation

Section 3(3) of the Police Act 1967 provides that the job specifications of the Police are to maintain law and order, the preservation of the peace and security of Malaysia, the prevention and detection of crime, the apprehension and prosecution of offenders, and the collection of security intelligence. n6 Thus, in preventing and detecting crime, and in the prosecution of an offender, the police are given power to arrest (with or without warrant) and for the purpose of investigation may detain such a person. n7 Whether there is or not a First Information Report is beside the point as the first information report is not a condition precedent to the setting in motion of a criminal investigation. n8 This holds true for police officers as far as policing and enforcement in general is concerned, and the police knowing of a design to commit any seizable offence may arrest without orders from a Magistrate and without a warrant the person so designing if it appears to such officer that the commission of the offence cannot otherwise be prevented. n9 Moreover, arrest and investigation are not the same, though they are interrelated. Police investigation normally commences when the police have information whether receive through their own wits or intelligence (credible information) or reasonable suspicion. Investigation is also prompted if there is a First Information Report (reasonable complaint) made to them. In non-seizable cases, s 108 of the CPC clearly stipulates that an order to investigate from the Public Prosecutor is first needed to enable the police to exercise their special powers in relation to police investigations such as recording statements from witnesses under s 112 of the CPC. In seizable cases, ss 109 and 110 of the CPC state that the Police whose rank is at least a sergeant are not required to obtain an order to investigate from the Public Prosecutor and may exercise their special powers relating to police investigations. However, the police must forthwith report those cases to the Public Prosecutor unless the offence is of the type the Public Prosecutor has directed need not be reported to him. A police officer whose rank is not less than a sergeant or the Officer in Charge of the Police Station may proceed with the investigation but if they deputed the task to a lower ranking subordinate police officer, such subordinate officer shall withhold from resorting to the special powers of investigation provided under ss 111 (summoning witnesses), 112 (interviewing witnesses), 116 (search of premises) and 117 (further detention of suspect). These are pro-active powers the Police have to ensure they can get hold of the evidence.

Rights To Counsel Upon Arrest

The Police normally arrest a person acting on information, or reasonable complaint or where there exist reasonable suspicion that such person is concerned in the commission of any seizable (arrestable) offence. n10 The Police are prudently reluctant to allow Counsel to see the arrested suspect under their lawful custody pending their investigation of the crime in question by the suspect. The suspect detained cannot be allowed a Counsel for to do so would be imprudent, and would frustrate or interfere with their investigation. The rationale for the Police to do that is not too difficult to fathom for they fear that to allow Counsel would likely to lead to interference with evidence, harm to persons, alerting suspects or hindering the recovery of property. There is the possible danger that the Counsel may be the intermediary to the suspect towards the very disposal or removal of the evidence. It may also provide the suspect with the opportunities to forewarn his accomplice to take steps to avoid arrest, or to dispose the evidence. n11 For the same reason, it is easy to understand why in England, even though a suspect has the right to inform someone about his arrest, such phone call cannot be made by him personally but a police officer who will do the informing on his behalf. In England, the right to Counsel, though it cannot be denied, may be delayed for up to 36 hours for arrestable (seizable) cases.

The paramount right of the Police to conduct investigation and to get hold of the evidence against a suspect was recognised by the Federal Court even though the suspect right to Counsel is also enshrined under the same Article 5 of the Federal Constitution? In *Ooi Ah Phua v Officer-in-Charge of Criminal Investigation, Kedah/Perlis*, n12 Suffian LP said as follows:

... that the right of an arrested person to consult his lawyer begins from the moment of arrest, but I (*my emphasis*) am of the opinion that the right cannot be exercised immediately after arrest. A balance has to 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 as important as the interest of arrested persons and it is well known that criminal elements are deterred most of all by certainty of detection, arrest, and punishment.

In *Ooi Ah Phua v Officer-in-Charge, Criminal Investigation, Kedah/Perlis*, the lawyer was only able to see his client on 4 January 1975 after his client's arrest on 26 December 1974. The police had prior to that managed to 'dodge' the suspect's lawyer from getting to his client on the ground that the requested time was not suitable. The suspect's lawyer was left 'in the cold' when he tried in vain to see his client despite that the police had told him that he could possibly see his client on 2nd January 1975. In another Federal Court decision of *Hashim Bin Saud v Yahya bin Hashim & Anor* n13 Raja Azlan Shah FJ (as he then was) having referred to the above quoted passage in the judgment of Suffian LP in *Ooi Ah Phua* with approval, added:

We (*my emphasis*) therefore did not agree with the proposition of law propounded by the learned judge that the right to counsel could only be exercised after the completion of the period of police investigation under s 117 CPC. That is too narrow a proposition. In our view it is at the police station that the real trial begins and a court which limits the concept of fairness to the period of police investigation is completed recognises only the form of criminal justiciable process and ignores its substance.

A little further down his Lordship added a bit more:

The onus of proving to the satisfaction of the court that giving effect to the right to counsel would impede police investigation or the administration of justice falls on the police.

In *Saul Hamid bin Pakir Mohamad v Inspector Abdul Fatah bin Abdul Rahman*, n14 Zaleha Zahari J said that the constitution does not prescribe the time within which an arrested person shall be allowed to consult counsel. The learned Judge considered the case of *Saul Hamid v PP* and concluded that in that case, Edgar Joseph Junior (as he then was) only held that an accused has the right to be represented by Counsel in an application for remand before a judicial officer under s 117 of the Criminal Procedure Code. Further, the Judge also acknowledges that the right of an arrested person is settled law as decided in *Ooi Ah Phua*. Thus, Zaleha Zahari J rightly so decided that she is bound to follow the law as set by the Federal Court in *Ooi Ah Phua* where the arrested person access to Counsel can be denied ('delay' is a better word) on the ground that investigations were still in progress. The denial of access during the period an arrested person is under remand does not amount to an infringement of the right of access to Counsel conferred by the Constitution. In *Saul Hamid v PP*, n15 Edgar Joseph Junior J (as he then was) also said that the right of the arrested person to be represented by a legal practitioner may be refused if the Police can adduced evidence sufficient to convince a legal mind that there are substantial grounds to support their objection in that to allow the suspect with a counsel would result in undue interference with the course of investigation. This onus cannot be discharged by the simple unsworn ipse dixit of the Police Officer. The Judge further said that accordingly, the police should upon request co-operate by keeping relatives of the arrested person or his Counsel informed of the dates, times and the name of the Magistrate from whom remand is going to be sought so as to enable counsel to appear before the Magistrate and apply to be heard being consistent with s 255 of the Criminal Procedure Code. In *Ooi Ah Phua*, the apex court referred and agreed with Syed Othman J in the case of *PP v Mah Chuen Lim and others* at p 96, that the Federal Constitution does not prescribe the time within which the arrested person shall be allowed to consult Counsel. Section 38 of the Interpretation and General Clauses Act 1948 generally states that where no time is prescribed, it shall then be done with all convenient speed and as often as the prescribed occasion arises. That however depends on the circumstances of each particular case. The Federal Court in this case was of the opinion that the police had acted reasonably all the while because of the seriousness of the offence involved, namely robbery in daylight using a firearm committed in the heart of the state capital involving the loss of money in the sum of $14,000 to $15,000, and the death of a person. Moreover, the request by the Counsel to the police to interview the accused was made during the period the accused was under detention under s 117 of the Criminal Procedure Code. The right of an arrested person to seek counsel cannot therefore be exercised to the detriment of investigation. n16

It is clear from the above decided cases that the right of an arrested person to Counsel, though begins from the time of arrest, it must somehow be subjected to an overriding right of the Police to do their job as prescribed by the Police Act 1967 or public interest may suffer. The right of an arrested person to seek counsel cannot therefore be exercised to the detriment of investigation. Article 5(3) of Constitution, it is submitted, is therefore subsidiary to Article 5(1). However, the onus is on the police to establish to the satisfaction of the Court that giving effect to the right to Counsel would impede police investigation or the administration of justice. This right to have access to Counsel need not be after the investigation by the Police has completed. It is also clear that in an application for police remand, the arrested person generally has the right to be represented by a legal practitioner unless the Police can discharge the onus of satisfying the Magistrate that to allow him to exercise that right would result in undue interference with the course of investigations: This onus cannot be discharged by the simple unsworn *ipse dixit*of the Police Officer.

The issue of contention still existing about right to Counsel is what are the matters that will impede police investigation or the administration of justice is still not clear enough from the decided cases. Would the police be justified if they can say that the incriminating evidence and or the accomplice are still on the loose and allowing Counsel may hamper efforts by the police to get hold of the evidence or the accomplice which are the paramount matters? There is of course foreseeable danger if access to Counsel is given to the accused, as the Counsel may be the intermediary between the detained suspect and his accomplices and it may lead to the removal or the obliteration of the evidence and thus frustrate Police investigation. Sometimes, in seizable cases, the arrest of the suspect should be kept concealed even form the suspect immediate members of the family so as to not to jeorpardise intelligence gathering and as not to alert other related suspects still at large. Thus the Police, it is submitted, are justified to withhold the suspect's Counsel from getting access to his client if to allow Counsel would likely lead to interference with evidence (its disposal or removal), harm to persons, alerting suspects or hindering the recovery of property, or there is the possible danger that the Counsel may be the intermediary to the suspect towards the very disposal or removal of the evidence. It may also provide the suspect with the opportunities to forewarn his accomplice to take steps to avoid arrest, or to dispose the evidence. It is submitted that a decision by the Public Prosecutor to charge the accused pursuant to the report by the Police under s 120 of the Criminal Procedure Code is one such justification that the police are done with the investigations. This justification, however, would have been rather too late' since the Counsel wishes to see his clients the moment his client has been arrested and not after the investigation is completed. Going by *Hashim Bin Saud* case, in seizable cases, it is suggested that the appropriate person to determine whether allowing the suspect with counsel would jeopardize police investigation or the interest of justice must necessarily be certified by the District Chief Investigating Police Officer and a written statement from him that to allow Counsel to suspect would likely lead to interference with evidence (its disposal or removal), harm to persons, alerting suspects or hindering the recovery of property, or there is the possible danger that the Counsel may be the intermediary to the suspect towards the very disposal or removal of the evidence should suffice as justification. Mere refusal or oral refusal cannot therefore be entertained, and more so if it comes from the subordinate police officers.

A scrutiny of the practice of the Police in England is, therefore, warranted since under section 5 of the Criminal Procedure Code, whenever there is a *lacuna* on a matter, the law relating to criminal procedure for the time being in force in England shall be applied so far as the same shall not conflict or be consistent with the CPC and can be made auxiliary thereto. Though, the CPC was intended to be an exhaustive pronouncement of the criminal procedure, the law relating to criminal procedure for the time being in force in England shall be applicable should there be any *lacunae* in the Code and or in any other laws in Malaysia. n17 Further, even though the law of Malaysia has to be taken from the CPC and not from cases on the common law principles, where the Code is embodying common law principles, decisions of the Courts of England and of other Commonwealth countries in which the common law has been expounded, can be helpful in the understanding and application of the Code. n18 Thus, where the Criminal Procedure Code and any other written laws are silent or fail to be explicit, both the Common Law, the Police and Criminal Evidence Act including the Codes of Practice are applicable. A selective scan of the Police and Criminal Evidence Act is, therefore, crucial here. It is also incidentally important to discuss the length of detention an arrested person may be lawfully kept in custody as it will have a direct bearing on when exactly access to Counsel is to be allowed.

Police Detention

Article 5(4) of the Federal Constitution subsequently provides that a person who is arrested and not released on bail (police bail), he shall without unreasonable delay, and in any case within twenty-for hours (excluding the time of any necessary journey) be produced before a Magistrate, and shall not be further detained in custody without the Magistrate's authority. Section 28 of the Criminal Procedure Code then states that a person who was arrested by a police officer without a warrant shall without unnecessary delay be produced before a Magistrate Court.

His custody under the police shall not be unnecessarily or unreasonably prolonged given all circumstances of the case, and shall not at the most exceed 24 hours (exclusive of the time necessary for the journey to the court from the place of arrest) without an authorization from a Magistrate under s 117 of the Criminal Procedure Code. n19 An application under s 117 is one situation where *the prescribed occasion arises*for the accused to seek counsel unless the police can satisfy the Magistrate that to do so would be interfering with police investigations. n20

What is obvious is that time starts to run the moment an arrest takes place. According to s 54(b) of the Interpretation Act 1967, if the last day of the period is a weekly holiday or a public holiday (both being an excluded day), the period shall include the next following day which is not an excluded day. Section 54(c) of the Act also provides that where any act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next following day which is not an excluded day. On the basis of the Interpretation Act, a person who is arrested at 9.00 am on Saturday, it would have been done or taken in due time if he is produced before the magistrate on Monday and preferably during the first half of the office hours. The Interpretation Act defined 'weekly holiday' as Sunday, or in a State where Friday is observed as the weekly holiday, then it is Friday. Saturday is not deemed as a 'weekly holiday' as far as the Interpretation Act is concerned, but earlier on, the first and third Saturday in every month could be construed as a 'public holiday' as far the Federal government civil servants are concerned since the Federal government civil servants do not work on those days. Now, administrators of government civil servants work on 5 days week basis. The Interpretation Act defined 'public Holiday' as a public holiday established by law in Malaysia, or *any part of Malaysia (author's emphasis)*. n21 It does not matter whether it is a State law or Federal law. n22 It is reckoned then that time should not be computed in determining the 24-hour period on these Saturdays. In *Ooi Ah Phua v Officer-in-Charge of Criminal Investigation, Kedah/Perlis* n23, the accused was arrested at Kubang Pasu, Kedah, on Thursday, the 26th of December 1974 at 11.30 am for an armed robbery, and then produced before the Magistrate on Saturday, the 28th of December which was not an excluded day: Thursday was a half day and Friday being the State's weekly holiday for Kedah. The Magistrate then authorised his detention for a week until the 3rd of January 1975 as provided by s 117 of the Criminal Procedure Code (FMS Cap 6). It is apparent that in this case the computation of 24 hours did not include the excluded day (weekly holiday). The Federal Court referred with approval the case of *PP v Mah Chuen Lim & Ors* , by Syed Othman J that by virtue of the Eleventh Schedule of the Federal Constitution, s 38 of the Interpretation and General Clauses Ordinance 1948 of the Interpretation and General Clauses Ordinance applies to the Constitution.

The logical interpretation or view would seem to be 24 hours from the time of arrest save the time that is required for the journey to the court. This is because the Subordinate Courts Act 1948 provides that Magistrates includes ex-officio Magistrates, hence any Assistant Registrar, District Officer or Assistant District Officer, may grant the authorisation. It is preferable that a remand application after office hours could be agreed upon so that it could be done at an appointed place (official premises) and time, not at their private residence for reasons that are quite obvious. What a police officer needs to do is the moment the accused has been arrested, and if police bail is not given, and it is contemplated that investigations cannot be completed within the actual 24 hours, then all the necessary efforts must be taken to take the suspect to a Magistrates Court or before any Magistrate during the available office hours. This view is consistent and transparent otherwise with the five-day a week working period and public holiday, 24 hours could be a matter of days. Moreover, both Article 5(4) of the Federal Constitution and s 28 of the Criminal Procedure Code emphasise that the detention of the arrested person should without unreasonable delay be authorised by a Magistrate (excluding the time necessary for the journey), and in any event, must be within 24 hours. Therefore, if a person is

arrested on Friday at noon, the police are required to get an authorisation for the suspect's detention from a Magistrate by 4.30 pm the same day before the Magistrate goes home, and if it is not possible to do it by then, provided the delay is necessary (or if the person is arrested after office hour), an authorisation from any Magistrate whether officio or ex-officio whoever is available during office hours. This is to pre-empt any likelihood that the detention would exceed twenty-four hours without an authorisation from a Magistrate, hence illegal. Recently, the implementation of a 24-hour Magistrate for remand purposes is therefore a commendable move provided that the 24-hour period is defined as 24 hours save the time of the journey needed to go the Magistrate. The idea of having a 24-hour Magistrate court for remand purposes definitely lends support to this view that the computation of 24 hours is inclusive of the excluded days save the time of the journey to the magistrate court for remand application.

The current position of computing the period of 24 hours is that it could be a matter of several days, and is definitely 'worrying' to some legal academicians. n24 Be that as it may, the view, however 'absurd' it may be, is the correct view since an excluded day (weekly holiday and public holiday) shall not be reckoned in the computation of time and can be done the next day following an excluded day. On the basis of the Interpretation Act, the arrested person if taken to a Magistrate on the day following *a weekly (Sunday) or public holiday* (an excluded day) it shall be construed as being done or *taken in due time (authors' emphasis)*. Moreover, the move to have a 24-hour Magistrate is only a recent one and is not widely implemented throughout the country, and only a Standing Order, n25 and it has no legal effect but merely disciplinary actions against the members of the Judiciary or the police force: There is still no legal obligation to produce the arrested suspect before the 24-hour Magistrate. The practice has all the while been that excluded days are never reckoned when computing 24 hours. n26 What is even more disturbing about the argument that 24 hours is the actual 24 hours since there are also ex-officio Magistrates who could authorise detention failed to see that an order under s 117 of the CPC is a judicial act (see the discussions below), and this role, it is submitted, is best done only by appointed Magistrate rather than ex-officio (amateur) Magistrates. The amendment to the Interpretation Act 1967 with the insertion of s 17A may now lend support that s 28 of the CPC has to be 24 hour. Still, it is suggested that the Interpretation Act be amended so that for the computation of time for the purpose of s 28 of the Criminal Procedure Code, 24 hours should be construed as 24 hours save the time necessary for the journey from the place of arrest to the Magistrate's Court. Otherwise, 24 hours can have an undesirable effect.

Authorising the Detention beyond 24 hours

In *Maja Anak Kus v PP*, n27, Justice Tan Chiaw Thong said that whenever a person is arrested without warrant, the police in the absence of a special order of a Magistrate, are not authorised to detain the person arrested in custody beyond 24 hours. If the police are unable to complete the investigation within that period, and the offence concerned is a bailable offence, the person arrested must be given bail, if he is prepared to furnish bail. In *Maja Anak Kus v PP*, the appellant argued that he should have been allowed bail considering that the offence he committed is a bailable offence. The High Court held that the right to bail is subject to the power of the Magistrates to make an order under s 117 CPC for further detention for purposes of police investigations. Thus, the Magistrate before whom the person arrested is brought, may, if deemed appropriate, authorise detention for *a term not exceeding 15 days in the whole (my emphasis)*.

In the Privy Council case of *Shaaban & Ors v Chong Fook Kam & Anor*, n28 Lord Devlin held that under s 28 of the CPC, the suspect must be brought before a Magistrate within 24 hours of his arrest. If investigation cannot be completed within that period, and there are grounds for believing that the accusation or information is well founded, under s 117 of CPC, a Magistrate may order that the accused be detained further for a period not exceeding 15 days detention in the whole. n29 The detention of an accused person for a period longer than 24 hours requires authorisation from a Magistrate, or the detention would be illegal. n30 The Magistrate has to record his or her reasons for extending the order for remand as required under the explicit provisions of s 117(iii) of CPC.

In *PDRM v Keong Mei Cheng Audrey*, n31 the Court of Appeal held that the Magistrate needs to know that there are grounds for believing that the accusation or information against the arrested person is well founded to justify the extension of the detention for more than 24 hours under s 117 of CPC from that allowed under s 28 of CPC. The Magistrate should not at this stage be concerned with whether the arrest was lawful or not. Without the police providing

the grounds, the detention cannot be lawful. KC Vohrah J in *Re the Detention of R Sivarasa and Ors*, n32 having referred to the case of *Keong Mei Cheung Audrey*, concluded that the failure to furnish the Magistrate with a copy of the investigation diary as required under s 119 was fatal to the application, because it prevented the Magistrate from making a judicial inquiry whether to order or not further remand under s 117. In R Sivarasa, three sheets of typewritten paper purported as the investigation diary were produced. The Magistrate allowed the application by the police to detain the accused for 10 days for investigation. On revision, it was discovered that the Magistrate gave no reasons for being satisfied with the application. Furthermore, the three sheets of paper produced by the police were not copies of entries in the diary, which was a mandatory requirement hence the order was invalid because it had no foundation. No remand order should have been made.

Syed Agil Barakbah J in *Ramli bin Salleh v Inspector Yahya bin Hashim* n33 states that the discretion to order remand for the prisoner should be exercised sparingly because it requires the Magistrate to record his grounds for making the order. Section 117 of CPC contemplates more than one application for the remand order and the maximum period as a whole is fifteen days. The Magistrate should not allow the full period as a matter of course but should weigh the seriousness of the offence and determine whether a shorter period would suffice to enable the police to complete investigation. In *Hashim bin Saud v Yahya bin Hashim & Anor*, n34 Harun J states that the purpose of further detention under s 117 of CPC is to enable the police to complete investigation. The detention itself is subject to judicial control requiring the Magistrate to scrutinise the essentiality of prolonging the detention and must record his reasons, if he prolongs it. In coming to such a decision, the police must supply the Magistrate with a copy of the investigation diary, containing all the particulars as required under s 119, namely to inform the Magistrate of the progress of the investigation up to the time of the application and not what they think the Magistrate need only to know. An order by a Magistrate authorising the detention of an arrested person beyond the period of 24 hours made under s 117 is a judicial act and cannot found a claim for damages against the Magistrate. n35

The Chief Justice Practice Direction Notes No 3/2003 simply requires the Magistrate in an application for further detention under s 117 of the CPC to ask the suspect whether he has been given the opportunity to inform Counsel or to get a Counsel. The Police may object to such request, and if that is the case, the Police bear the burden why Counsel should not be allowed. Since remand application is done in chamber, any lawyer would be ignorant of such an application, hence such a prescribed occasion for the accused to seek counsel is subtly transgressed. Section 255 of the CPC only provides that the accused prosecuted in court has the right to be defended by a lawyer. That did not sound good to an arrested person who is yet to be charged. Even if Counsel were allowed to be present during an application for remand, the right would not extend to the giving of advice to the client (arrested person), rather contesting as to the actual days needed to remand the arrested person. It only serves to check on the Magistrate from 'so easily' succumbing to the request of the police for remand, no more and no less. Since, it is the police who is doing the investigation, the Magistrate would not be in a good position to determine with precision the number of days the police actually require for the investigation into the offence. Like it or not, the Magistrate has to succumb to the request of the police unless their evidence is inherently incredible. Here, it is urged that all applications for a remand have to be done in writing indicating the rationale for the investigations that have been done, required to be done, and that which could be done but was left undone. The police should also indicate why they require the detention period, and what they intend to do in each of the given day. Magistrates, especially those who freshly graduated from law schools have yet to familiarise themselves with the diary of investigation or for that matter, how investigations are done. Where the application for remand lacks the necessary explanation, the application should be refused even though the magistrates are furnished with the investigation diary. It is best if magistrates are appointed among those who have some working experience as Deputy Public Prosecutor. After all, magistrates are expected to monitor the officers of the court during the proceedings, and somehow having mastered evidence and criminal procedure. Being a magistrate is no small deal.

The officer who normally decides whether Counsel may be allowed is the investigating police officer. Among the reasons for allowing counsel to see the arrested person being that the person arrested 'has been very cooperative'. It is also suggested that the lawyer should be polite and firm to the police, be smartly dressed to command more respect from the Investigation officer, and not to be confrontational when making a request to the police to see his client. n36

What is clear is that the Police require time to get hold of evidence and to preempt its deliberate destruction or removal. This, it is submitted, has to be the very basis why detention is necessary, and when Magistrate authorises further detention, it cannot be but for this very purpose, and a *primae facie* justification to deny the suspect Counsel. The refusal to allow the suspect with Counsel at the investigation stage, therefore, is in accordance with law. It must be noted that a person is normally arrested on suspicion, credible information or reasonable complaint where proof is lacking. Therefore, to ask the police to show proof of the suspect's guilt is premature but they should be able to show that they are actually investigating the suspect diligently and expediently as possible, and why in the interest of justice the arrest of the suspect must be kept secret and if already known, why he needs to be kept aloof from everybody including the Counsel.

The Human Rights Commission of Malaysia (Suhakam), in its 2001 annual report, chided the police for failing to strictly adhere to existing regulations on the treatment of detainees and prisoners. This includes respecting the detainees' right upon arrest, remand proceedings, detention conditions, and access for family visits and abuse of police powers. On the requirement for suspects to be produced before a Magistrate within 24 hours of arrest, Suhakam said the time-frame must be interpreted strictly because 'the liberty of an individual is at stake'. As such, persons arrested should be produced within 24 hours regardless of whether the end of the period falls on a holiday. Suhakam feels that having a duty Magistrate would enable applications for remand to be considered at any time. The human rights watchdog also recommended that family members and lawyers be given access to visit detainees. According to Suhakam, the police said that they could not allow suspects to see their family members and legal counsel until after investigations have been completed due to the possibility of them giving instruction to dispose evidence. However, the Commission said that all such visits are within sight and hearing of police officers. In addition, the Federal Court decisions allowing the police the right to decide when an arrested person can consult counsel should be reviewed so that the constitutional right can be exercised immediately upon arrest.

Right to Counsel as practised in the United Kingdom (UK)

Most police's powers of arrest, interviewing and charging a suspect are contained in the Police and Criminal Evidence Act 1984 (PACE), and the Codes of Practice created there under. While PACE provides the overall framework in general, the Codes provide the details. There are five Codes of Practice, and all the Codes contained 'notes for guidance'. Though, they are not provisions of the Code, the notes of guidance serve to guide police officers and others about their application and interpretation.

The one relevant to this discussion is the Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers. n37 The first stage is when an arrested person is taken to the police station and is then placed under a custody officer. The custody officer is not involved in the investigation. The custody officer has several duties, one of which is to inform the suspect of his or her rights to consult a solicitor, to have someone informed, and to examine the Codes of Practice. The custody officer also maintains a custody record of the suspect's detention including matters such as times of meals, interviews, the caution, if given and the charge. Being not involved in the investigation, the custody officer is believed to be more objective when assessing whether the suspect should be released or detained, or whether there is sufficient evidence to charge the suspect. At the second stage, a review officer must make periodic reviews of the detention, if the custody officer authorises detention, and if the suspect has not yet been charged. The review officer must at least be of the rank of an Inspector, and is not directly involved in the investigation. The first review must be held within six hours of the original decision to detain. At the third stage, a second review must thereafter be held at no more than nine-hourly intervals. The fourth stage is when the maximum of 24 hours (1 day) after the suspect's arrival at the designated police station has expired. n38 He or she must then be released or charged, unless the following conditions are satisfied;

(a) the continued detention is authorised by an officer of at least the rank of Superintendent; and

(b) the suspect is under arrest in connection with a serious arrestable offence;

n39 and

(c) the authorising officer has reasonable grounds for believing that the suspect's continued detention is necessary to: (i) secure or preserve evidence relating to the offence, or (ii) obtain such evidence by questioning the suspect; and

(d) the authorising officer has reasonable grounds for believing that the investigation is being conducted diligently and expeditiously.

The fifth stage is when the maximum of 36 hours (1 days) has lapsed; the suspect must be released or charged unless a Magistrates' Court issued a warrant of further detention. A court may authorise the suspect's detention for 36 hours (1 days) if: (a) the court comprises of at least two magistrates; and (b) the application for the warrant is made on oath and supported by a written information which is also supplied to the suspect; (c) and the suspect is present in court; and (d) the suspect is detained in connection with a serious arrestable offence; and (e) the court is satisfied of the matters in (c) and (d) of the fourth stage. The sixth stage is when the maximum of 72 hours (3 days from the time of arrival at the designated police station) has lapsed where the court may then authorise further detention if all the conditions of the fifth stage are satisfied. This further detention is for a maximum of 36 hours (1 days) and in any event, the court may not authorise detention for a period of more than 96 hours. The seven stage is after 96 hours (4 days), the suspect must be charged and/or released. n40

The caution must be administered on the person arrested or if before an arrest, suspicion has been cast, before any questions about the offence are put for the purpose of obtaining evidence, which may be given to a court in a trial. The evidence may still be admissible if it is impracticable to administer the caution by reason of the suspect's behavior at the time. Caution need not be administered where the questions are in the nature of an inquiry, such as to establish identities or ownership, not quite connected to any suspicion for a crime or that there are no 'grounds to suspect'. Upon arrest, the suspect must not be interviewed until he or she is at the police station, unless any delay would likely to lead to interference with evidence, harm to persons, alerting suspects or hindering the recovery of property. Any communications that goes beyond a mere request for information in which the suspect is in effect being questioned of his or her involvement in the offence would be construed as an interview. The weight of the evidence, if not its admissibility is then affected during the trial. The caution should be re-administered after any material break in questioning. n41 Section 34 of the Criminal Justice and Public Order Act 1994 provides that the caution shall be in the following terms:

You do not have to say anything. But it may harm your defence if you do not mention, when question, something which you later rely on in court. Anything you do say may be given in evidence.

The Codes provide that any interview at a police station should take place in an adequately lit, heated and ventilated interview room. The interviewing officer must introduce himself or herself and any officers that are present. The suspect must not be required to stand during the interview, and should be given breaks at recognised meal times. In addition, there should be short breaks for refreshment every two hours. In any event, the suspect is entitled to one main and two light meals in any period of 24 hours. The suspect should be allowed a continuous period of eight hours' sleep without interruption, normally at night.

Section 58(1) of the PACE provides that the suspect if he has been arrested and is being held in custody, is entitled upon request, to consult privately with a solicitor at any time. The custody police officer has to inform the suspect of this right on his or her arrival at the police station, and it must be recorded whether or not a request was made to that effect. The suspect's request must be complied with as soon as possible. Though the suspect has the right to consult a solicitor, the right does not extend to having the solicitor present during the interview. However, paragraph 6.8 of the Code of Practice for the Identification of Persons by Police Officers provides that if the solicitor is available at the time the interview begins, or is in progress, the suspect must be allowed to have his solicitor present while he is interviewed.

The right of the suspect to consult a solicitor may not be denied, but may be delayed for up to 36 hours after the suspect's arrival at the police station. The suspect must be told why access to solicitor has been delayed, and that reason must be entered on the custody record. It may be delayed if:

(a) the suspect is detained in connection with a serious arrestable (seizable) offence; and

(b) the delay is authorised by an officer of at least the rank of a superintendent; and

(c) the authorising officer has reasonable grounds for believing that immediate consultation will lead to:

(i) interference or harm to evidence connected with a serious arrestable offence or interference with or physical injury to other persons; or

(ii) the alerting of other persons suspected of having committed the offence but not yet arrested for it; or

(iii) the hindrance of the recovery of any property obtained as a result of such an offence.

The admissibility of the evidence may be affected due to wrongful denial of access to a solicitor. Section 56(1) of the PACE entitles the suspect the right to inform a friend or relative, or some other person who is known to him or her or who is likely to take an interest in his or her welfare, told of the arrest. The suspect has no right to make personal contact, it being the duty of the police to pass on the information. The request must be complied with as soon as is practicable.

Re-evaluating the Right to Counsel

It is not uncommon for students and lecturers of law, members of the legal profession and the judiciary to utter the words such as 'justice must not only be done, but must be manifestly seen to be done', n42 or 'justice delayed is justice denied'. In other words, it is contrary to accepted judicial practice that justice is only seemed to be done. Moreover, an accused is presumed innocent until the prosecution could prove the case against him beyond all reasonable doubt, or the case against him is not proven: It is not for the accused to prove his innocence. n43

An accused detained pending investigations, often than not, encounters shrewd and crafty interrogating police officers and they are far more eloquent compared to the accused. Without someone to assist him or her of his or her rights, the accused fate is somehow doomed. Though the police should be not be allowed to have their investigation frustrated, at the same time, it is pertinent to see that the arrested suspect knows his rights and someone who should be concern of his fate should be made known. Although the Criminal Procedure Code seems silent of these rights, it does not mean that they are not there. Section 5 of the CPC provides that these rights practice as applied in England is applicable in the event the Code is silent on the matter. These rights must therefore be given to the suspect before he is being questioned or during the questioning by the authorised Police officer. A compromise can be reached by allowing the suspect's Counsel in the presence of the police officer so that Counsel does not engage beyond advising the suspect of his rights as an accused and about the possible offence the suspect may be charged, the conviction and sentencing. Such a compromise will erase from the police their worry or fear that immediate consultation given to the suspect with his Counsel in private will lead to:

(i) interference or harm to evidence connected with a serious arrestable offence or interference with or physical injury to other persons; or

(ii) the alerting of other persons suspected of having committed the offence but not yet arrested for it; or

(iii) the hindrance of the recovery of any property obtained as a result of such an offence.

Right to Silence

The right to silence is based on the maxim nemo tenatur seipsum that no person 'shall be compelled to accuse himself.' In the face of questioning by persons in authority, an arrested person kept aloof from his peers is definitely under an immense pressure to answer and accordingly will think that there is an obligation to answer. The person arrested may fear that if he does not answer, his silence will be taken to mean that he has no innocent response to offer and that, therefore, it amounts to an assent to what the questions imply: He runs the risk of increasing the suspicion against himself. On the other hand, the arrested person may fear that from their reluctance to give an innocent account, if he has one, it will raise suspicion that he knows it will not withstand detailed scrutiny and that this is because it is false and that he does not have an innocent account which is true. Section 113 of the CPC simply indicates the right of the accused to remain silent but does not, it is submitted, prohibit the Police from continuing to question the suspect so long as his rest and recreation time are observed. Further, it is important for the accused to actually know the actual connotations of s 113 of the Code. Someone has to inform him that he commits no offence by not answering to the questions by the Police and the law protects him by making evidence obtained through unfair means inadmissible in the Court. Further, he should know that the police have no authority to beat him up. Also he needs to know that he is presumed innocent and the Prosecution instead bears such a burden to prove his guilt beyond any reasonable doubt. The best person to inform him of these must be someone whom he trusts and naturally an advocate and solicitor rather than Police officer. To ensure that the arrested suspect knows these rights, Counsel should be provided to the suspect or be beside him before or during the questioning. The advice made to the suspect cannot, however, be made in private but in the presence (within sight and hearing) of a Police officer to make sure that Counsel does not act as intermediary to the removal or disposal of the evidence. Apart from these, the arrested suspect should be kept aloof to enable Police investigations and the gathering of evidence.

It is also high time that the right to remain silent should not be unqualified if Counsel is available in the questioning and if the accused has a defence, it should be disclosed or the credibility of the defence will dilute if disclosed later at the trial. n44 The risk the suspect takes is, however, a calculated one which he is free to take at his own peril. The reason the police sometimes resort to 'beating up' the arrested suspect is because a suspect is too unfavourably protected, as far as the police are concerned. Innocent suspect should provide explanations for the facts alleged against him as soon as practicable. n45 This is to enable suspects to exonerate themselves or to direct attention towards the guilty person (or both), and to provide the police with a fair and reasonable opportunity of investigating the suspect's account. By refusing to answer questions, the arrested suspect is depriving police of their investigative opportunities presented by interview may be indicative to the issue of tacit acceptance in that an unexplained delay in furnishing an assertion or explanation consistent with innocence may reinforce the inference that the original silence indicated tacit acceptance of the truth of the allegation. n46 Thus, the caution given to an arrested suspect should include this statement:

You do not have to say anything. But it may harm your defence if you do not mention, when question, something which you later rely on in court. Anything you do say may be given in evidence.

Here the right to remain silent still remains, only that it is no longer free of risk. That his defence is less likely to be believed should the arrested suspect fails to mention any defence that he proposed to rely upon at the defence stage goes to weight not to their admissibility. The bottom line is that he will be informed that it is unlawful to subject someone to tribulation, either by blows, threats or the like. n47 An inducement need not be made directly. In *Mohamed Yusof bin Haji Ahmad v PP*, n48 Syed Agil Barakbah observed that threat or inducement could be made by indirect means eg from mannerism of speech or conduct of the person in authority, and the court is satisfied from the facts and surrounding circumstances that its effect in the mind of the accused is that he has to make a statement whether he likes it or not. In the circumstances the caution that is administered loses its efficacy and the whole purpose and intention of the provision is thereby defeated. In other words, the inducement, threat or promise must have 'caused' the person to make the statement. n49 Moreover, an accused is entitled to know that he is presumed innocent until he has been proven guilty beyond all reasonable doubt. n50 The burden is on the prosecution to satisfy the judge beyond reasonable

doubt that the statement in question has been made voluntarily, and not for the accused to show involuntariness. n51

At the end of the detention period, the arrested suspect must either be released or be charged. In the latter, if bail is not given, Counsel can then be given unrestricted freedom and privacy to give consultation to and to take statements from his client under remand because the danger of interference or harm to evidence connected with a serious arrestable offence or interference with or physical injury to other persons; or the alerting of other persons suspected of having committed the offence but not yet arrested for it; or the hindrance of the recovery of any property obtained as a result of such an offence no longer arise. Moreover, because he has been charged, it is important that his lawyer should be allowed to see him in private. n52

Conclusion

Access to legal advice undeniably ensures that an arrested person is informed of, and benefit from, the procedural rights to which he or she is entitled. Involvement of lawyers in the investigation process would greatly increase the care and attention given by the police that an arrested person, whether guilty or not, are entitled to exercise his or her rights. n53 During suspect's period of detention, no legal Counsel is possible under the pretext that to allow counsel would frustrate investigation and gathering of intelligence. Technically, the person arrested has no right to inform someone or even a lawyer of his whereabouts, and the police are not under any legal duty to entertain such a request. In the UK, the protection afforded even to a suspect who has yet to be arrested is therefore proactive. A suspect who has been arrested cannot generally be questioned, as any interview in relation to his or her involvement to the offence has to be done in the police station. Before any interview takes place, the suspect has to be cautioned that he has the right to remain silent, and he has the right to request for counsel. Such request cannot be denied, though it may be delayed for up to 36 hours at the most, and only in serious arrestable (seizable) cases. There must be tangible basis for doing so. The delay in fulfilling such request must be conveyed to the accused and the reason for doing so has to be recorded. Though, an accused has no right to have a counsel in his or her presence during interviews (questioning), rather only to seek solicitor's advice, if the solicitor is available then and there at the beginning of the interview or is in progress, in such case, the presence of the solicitor to be with his client is allowed. Definitely, there is crystal clear mechanism during detention to make sure that the suspect is afforded all facilities and opportunity in exercising his or her rights.

Going by the Federal Court case, how then is the right to Counsel to be exercised? Small latitude seems to have been given to allow an arrested person to seek counsel 'where the prescribe occasion arises', and that it is the police that have to prove that seeking counsel impedes their investigations. However, who then decides that? Where and how are the procedures or the mechanism applied?

In Malaysia the right to Counsel is not merely a substantive right, rather, it is a constitutional right. However, as in the case of Malaysia, the steps taken to protect the rights of an arrested person is rather too little too late. An arrested person still retain his right to seek counsel but not until the police are done with him or her. It is high time that there should be a change in attitude to such an approach. Such a right, especially to seek Counsel should not be easily transgressed, rather protected and be afforded all the facilities to give effect to it but without jeopardising police investigations. In balancing the two competing rights, there must of course be proper mechanism provided not simply formula whose application can be quite arbitrary.

The right of suspect to seek Counsel intertwines with his or her right to remain silence until proper legal advice has been obtained, and if possible, the arrested person shall not be interrogated without his or her Counsel's presence. The arrested person's right to remain silent when being questioned must be scrupulously honoured and will definitely be lost if Counsel is denied. Accordingly, the right to seek Counsel as soon as may be must also inseparably relate to the right of the arrested person to inform someone who shall take an interest into his detention. In the light of modern developments, the right to seek counsel should be allowed within 36 hours after an arrest, if not within 24 hours. Access to Counsel would ensure that the questioning is done fairly. The arrested person is thus able to consult his or her counsel to each and every question that is posed to him or her, and whether to answer or to remain silent partly or to all of them. A judge is expected to 'embody justice' ensuring that the right to due process is respected and upheld, and an arrested

person must be treated fairly. The police must act in ways that strengthen their 'legitimacy' in the eyes of the public. By allowing the suspect to see his Counsel as soon as possible will prevent the police from ever manipulating, deceiving, or taking advantage of the suspect's vulnerability. 'The right to seek Counsel as soon as may be' must therefore be read to mean before an arrested person is interviewed: Otherwise, the right counts to nothing. Given the doctrine of binding precedents, it is now expedient that the Federal Court itself and or the legislature who have to take the bold step to rectify the matter in line with the modern perspective of criminal justice. Allowing Counsel to the arrested suspect during the interview would circumvent the fear that allowing Counsel would lead to interference with evidence, harm to persons, alerting suspects or hindering the recovery of property.

Given the right to Counsel, it is now timely and only fair that an arrested suspect should be made aware that he should provide explanations for the facts alleged against him as soon as practicable. This is to enable the suspects to exonerate themselves or to direct attention towards the guilty (or both), and to provide the police with a fair and reasonable opportunity of investigating the suspect's account. By refusing to answer questions, the arrested suspect is depriving police of their investigative opportunities presented by interview may be indicative to the issue of tacit acceptance in that an unexplained delay in furnishing an assertion or explanation consistent with innocence may reinforce the inference that the original silence indicated tacit acceptance of the truth of the allegation.

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FOOTNOTES:

n1 See ss 23, 28, 117 & 365 of the Criminal Procedure Code (referred simply as the CPC).

n2 .

n3 *Ooi Ah Phua v Officer-in-charge of Criminal Investigation, Kedah/Perlis* (FC).

n4 .

n5 Read *Kuan Kwai Choi v AK Zaidi bin Pg Metali* ; See also another archaic s 175 of the Code.

n6 See also s 20(3) of the Police Act 1967.

n7 See ss 23, 28, 103, 105, 107 to 120 of the CPC.

n8 See *PP v Foong Chee Cheong* ; *PP v Dato Seri Anwar bin Ibrahim* .

n9 See ss 104 & 105 of the CPC.

n10 See ss 23, and 103-105 of the CPC.

n11 See Suhakam (Malaysian Human Rights Commission) Annual Report 2001, at p 20.

n12 (FC), at p 200.

n13 .

n14 at pp 821-822

n15 at pp 739-740.

n16 at p 199; See Article 5(3) of the Federal Constitution.

n17 Section 5 of the CPC; *Dato Seri Anwar bin Ibrahim v PP* - Court of Appeal (Kuala Lumpur).

n18 *Shaaban & Ors v Chong Fook Kam & Anor* -Lord Devlin, Privy Council: The case of *Bank of England v Vagliano Brothers* [1891] AC 107 was referred and applied.

n19 The Code is a general legislation that specifically governs criminal proceedings for offences under the Penal Code, and other statutes in general. Should there be a specific procedures provided by a specific Statutes such as the Internal Security Act 1960, or the Dangerous Drugs Act 1952, the specific procedures provided shall take precedence over the procedures in the Code: See Suriyadi J in *PP v Chua Chor Kian*, who cited with approval the Federal Court decision in *PP v Chew Siew Luan* , where Raja Azlan Shah CJ (Malaya) as he then was held that the Dangerous Drugs Act 1952 is a specific legislation, and the Code being a general legislation must ex necessitate yield to the specific provisions of section 41B of the Dangerous Drugs Act 1952 relating to bail. The judge is not allowed to grant bail under those circumstances, hence unbailable as opposed to non-bailable.

n20 *Saul Hamid v PP* - Edgar Joseph Junior J as he then was; See also the Chief Justice Practice Direction No 3/2003.

n21 Section 3 & 66 of the Interpretation Acts 1948 and 1967 (Act 388).

n22 See also s 160(2) of the Federal Constitution.

n23 (FC).

n24 See Mimi Kamariah Majid, *Criminal Procedure in Malaysia*(3rd Ed) 1999, University Malaya Press, University Malaya, Kuala Lumpur, Malaysia at pp 68-70, and Francis Ng Aik Guan, *Criminal Procedure*, Malayan Law Journal Sdn Bhd: 2000, Kuala Lumpur, Malaysia, pp 47-49. Both authors held the view that applying the Interpretation Act 1948 to compute the 24 hours period definitely leads to 'absurdity'. Read also the Human Rights Commission of Malaysia (Suhakam), 2001 annual report on this matter.

n25 See the Chief Justice Practice Direction Number 3/2003.

n26 See Suhakam (Malaysian Human Rights Commission) Annual Report 2001, at pp 20-21.

n27 , at p 312; see Article 5(4) of the Federal Constitution; for right to a bail in bailable offence, see *R v Lim Kwan Seng , and Mohd Jalil bin Abdulla*h .

n28 *Saul Hamid v PP* , 740-Edgar Joseph Junior J, High Court (as he then was).

n29 ; see also *Saul Hamid Bin Pakir Mohamad v Inspector Abdul Fatah bin Abdul Rahman* -High Court.

n30 See *Hashim Bin Saud v Yahya Bin Hashim & Anor* (FC), & *Ooi Ah Phua v Officer-in-Charge of Criminal Investigation, Kedah/Perlis* (FC).

n31 .

n32 .

n33 *Ramli bin Salleh* ; see also the Chief Justice Practice Direction No 3/2003.

n34 .

n35 *Chong Fook Kam & Anor v Shaaban & Ors* - Suffian LP.

n36 Read the paper by Teo Say Seng, 'Arrest and Remand Procedures' Head of the Prosecution Unit, Johore Bahru, in a Seminar *The Practical Approach to Criminal Procedure*held at Dewan Tunku Hussein Onn, Putra World Trade Centre, Kuala Lumpur on the 15th and 16th of October 2002, jointly organised by Lexis-Nexis Butterworths, and the Judicial and Legal Service Officers' Association.

n37 See ss 30-36 of the PACE.

n38 An arresting police officer shall bring the suspects to a designated police station [s 35(1) of PACE] suitable for the detention of arrested persons, if it is anticipated that the detention will exceed six hours: Section 30(2), (3) - PACE. An arresting police officer is nevertheless, still, obliged to take the suspect immediately to a police station, designated or not unless it is reasonable to carry out other investigations: Section 30(1), (10) - PACE.

n39 Seizable in the case of Malaysia's Criminal Procedure Code. Therefore, there could be no more detention after 24 hours from the time of arrest for non-seizable cases.

n40 These time limits have no application to the UK's Terrorism Act 2000.

n41 *R v Oni* [1992] Crim LR 183, CA. See paragraph 10-11 of the Code.

n42 See *R v Sussex Justices, ex p McCarthy* .

n43 See s 173(f), (m) of CPC.

n44 See s 45(3) Anti Corruption Act 1997.

n45 See s 402A of CPC where notice to be given of defence of alibi.

n46 See s 9 (facts to support an inference suggested by the fact in issue), s 11 (making the fact in issue probable), and s 114(g) (adverse presumptions) of Evidence Act 1950.

n47 See s 113 of the Code, and s 24 of the Evidence Act 1952.

n48 .

n49 *Aziz bin Muhamad Din v PP* .

n50 See ss 173(m), 182A and 175 of the Code.

n51 *DPP v Ling Lin* [1975] 3 All ER 175; *Tan Too Kia v PP* (FC); *Hasibullah bin Mohd Ghazali v PP* (SC).

n52 Rule 101(2) of the Prisons Regulations 2000; s 255 CPC.

n53 See AAA Zuckerman, '*Trial by Unfair Means: The Report of the Working Group on the Right of Silence*', [1989] Crim LR 855.