THE CONTINUING SAGA ON THE RIGHT TO COUNSEL UNDER ARTICLE 5(3) OF THE MALAYSIAN CONSTITUTION

The Malaysian judiciary has finally made its first few authoritative pronouncements[1] on the nature and scope of the right to counsel of an arrested person as guaranteed by the second limb of Article 5(3) of the Malaysian Constitution. The major problem concerning this right has arisen out of the obscurity inherent in the Federal Constitution itself. Article 5(3) provides:

> "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."

The time-element has been expressly provided only in the first limb referring to the right to be informed of grounds of arrest. Exigencies of each particular case have been stated to be relevant in any application of this first right and the concept of reasonableness has been appropriately introduced to cater for contingent complexities.[2] In contra-distinction the constitution-framers chose to leave out any indication whatsoever as to time from the second limb. And if one were also to concede to one learned view that the entire right provided by Article 5(3) seems "to prohibit impediment rather than to compel anyone to take positive steps,"[3] the right to counsel would take on an even more limited perspective. The recent pronouncements by the Malaysian judiciary should therefore satisfy, if not resolve, previous disagreements over the actual meaning of this constitutional right. No longer need reliance be placed on external guidelines from India or England for there are now two new Malaysian judgments from the High Court followed by a Federal Court decision for

[1] *Ooi Ah Phua* v. *The Officer in Charge Criminal Investigations, Kedah/Perlis,* [1975] 1 M.L.J. 93; *Public Prosecutor* v. *Mah Chuen Lim & Ors.* [1975] 1 M.L.J. 95. Note that the Federal Court has already upheld the High Court decision in the first case and given judicial notice and approval to the second. See *Ooi Ah Phua* v. *The Officer-in-charge, Criminal Investigations, Kedah/Perlis,* Federal Court Civil Appeal No. 14 of 1975.

[2] In *Aminah* v. *Superintendent of Prison, Pengkalan Chepa,* [1968] 1 M.L.J. 92, at p. 93 Wan Suleiman J. stated "... the words 'as soon as may be' ...mean as nearly as is reasonable in the circumstances of the case."

[3] Sheridan, L.A. and H.E. Groves, "*The Constitution of Malaysia*" p. 36.

convenient reference. The question henceforth facing parties with keen interest in this facet of civil liberties would therefore be whether Hashim Yeop Sani J., Syed Othman J. and the Federal Court judges[4] have truly cleared all doubts on this matter or whether they have merely entered the picture as new participants with varying individual opinions. Does the saga therefore continue regardless?[5]

It first came to pass that the Singapore Chief Justice, Wee Chong Jin, in the case of *Lee Mau Seng v. Minister of Home Affairs, Singapore*[6] started the ball rolling when he expressed an *obiter dictum* on the subject – an arrested person is "beyond a shadow of doubt entitled to this constitutional right granted to him by the authority who has custody of him after his arrest."[7] Syed Agil Barakbah J. had occasion in the case of *Ramli bin Salleh v. Inspector Yahya bin Hashim*[8] to make a ruling on the question of the right to counsel. Notwithstanding that the subject matter of the motion for a writ of *habeas corpus* had ceased to exist as a result of the applicant's release by the police one day before the motion was to be heard, the learned judge courageously chose to lay down certain guidelines on the application of the right. However, his Lordship's ruling then had only persuasive *obiter* value as subsequently the full bench of the Federal Court unanimously refused to give an opinion on the question referred to it under s. 8 of the Courts of Judicature Act, 1964 on the ground that Syed Agil Barakbah J. was *functus officio* when he made the ruling.[9] Nonetheless it is useful to take a brief look at the points laid down by the learned judge before making any further comparison with the latest cases:[10]

(1) The right to counsel envisaged in Article 5(3) begins right from the day of arrest even though police investigation has not yet been completed.

(2) The right should be subject to certain legitimate restrictions which necessarily arise in the course of police investigations, the main object being to ensure a proper and speedy trial in a court of law.

(3) Such restrictions may relate to time and convenience of both the

[4] In the *Ooi Ah Phua* and *Mah Chuen Lim* cases respectively, *op. cit.* n.1.

[5] The writer's intention in presenting this discussion is not to create any impression whatsoever of seemingly entering as another "participant" with the apparent purpose of swelling the ranks of any one "side" on the issue. The reason for this paper is only to fulfil a desire that the utmost clarification can be accorded to the exact scope of this important individual right.

[6] [1971] 2 M.L.J. 137.

[7] *Ibid*, at p. 140.

[8] [1973] 1 M.L.J. 54.

[9] Federal Court Special Case No. 1 of 1972.

[10] *Op. Cit.*, n. 8 at p. 56.

police and the person seeking the interview and should not be subject to any abuse by either party.

(4) Interviews should be held out of the hearing, though within sight, of the police.

The problem has given rise to frequent disagreements between counsel and the police. Views have been expressed seemingly supporting both sides, with constant guidance being sought from the Indian Constitution[11] as well as Indian and English judicial pronouncements. Two notable published views to date are those of the learned Solicitor-General, Malaysia, Tan Sri Mohamed Salleh bin Abas[12] and a Malaysian legal practitioner, Karpal Singh.[13] It is useful at this juncture to summarise the views of both writers. The learned Solicitor-General's contentions can be said to favour the powers of the police to carry out the necessary criminal investigations, seen by him as an extension of "the greater right of the community to have peace and tranquillity in the society. . . [which] therefore must be given priority to the right of individual persons."[14] In his opinion the position is that[15]:

(1) A lawyer cannot dictate the time of his visits.

(2) The police must not unreasonably obstruct the detainee's right to see his lawyer.

(3) The police should as far as possible meet the desires of the detainee and his lawyer for a visit.

(4) The police may refuse a visit when the time is inconvenient or when it is likely to hamper police investigations.

(5) In particular, the police may refuse a visit:

(i) while the detainee is undergoing interrogation;

(ii) before the detainee has given an explanation of the facts against him;

(iii) if there is reason to believe that the lawyer may encourage the detainee to refuse to answer lawful questions or to answer untruthfully; or

[11] Constant reference has been made to the corresponding provision in the Indian Constitution relating to the right to counsel, i.e. Article 22(1) which states: "No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice."

[12] Tan Sri Mohamed Salleh bin Abas, *Right of An Arrested Person To Consult Counsel* [1972] M.L.J. lxiii.

[13] Karpal Singh, *When Does The Right of An Arrested Person To Consult Counsel Under Article 5(3) Of The Federal Constitution Begin?* [1973] M.L.J. xxi

[14] *Op. Cit.*, n. 12 at p. lxiv.

[15] *Ibid*, at p. lxv.

(iv) if the detainee is about to make or is making a voluntary confession to a magistrate.

(6) In order to be fair the police should exercise a reasonable discretion, must not unduly delay visits by lawyers, and should take statements as early as possible from the arrested person.

(7) The police must be ready to justify their conduct before the courts which ultimately decide the question of reasonableness.

(8) Police discretion in this matter should not be exercised by young and inexperienced officers.

The above suggested guidelines are supported by arguments which can be summarised thus:[16]

- the individual right to counsel must be weighed together with "the greater right of the community to have peace and tranquillity in the society ... which eventually empowers the police to carry out the necessary criminal investigations in order to bring to justice people who have committed criminal offences."
- the words "shall be allowed" referring to the right to counsel have a concessionary, as opposed to a mandatory, overtone, especially when compared with the more positive term "shall not be denied" in Article 22(1)[17] of the Indian Constitution.
- this difference in phraseology, and thus in value, is further reinforced by the fact that the Malaysian right is embodied in the third clause of Article 5 in contrast to the Indian first clause of Article 22 – this logically means that the Malaysian right can be relegated so as to be "subservient" to the power of the police to carry out and complete the investigations.
- since the object of detention under s. 117[18] of the Criminal Procedure Code is to enable the police to complete their investigation it follows that the right of consultation should not prejudice such investigation and therefore the police should be entitled to refuse lawyers' visits which hinder investigations

[16] *Ibid.*, at p. lxiv.

[17] *Op. Cit.*, n. 11.

[18] This provision regulates police procedure where investigation cannot be completed within twenty-four hours:

"117(1) Whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of twenty-four hours ... and there are grounds for believing that the accusation or information is well-founded the police officer making the investigation shall ... produce the accused before [a] Magistrate.

(2) The Magistrate before whom an accused person is produced ... may, whether he has or has not jurisdiction to try the case, from time to time authorise the detention of the accused in such custody as such Magistrate thinks fit for a term not exceeding fifteen days in the whole..."

– refusal of visits would not do the arrested person any harm if the law was observed since at the remand stage the lawyer could only advise him to tell the truth, except in cases where he might wish to consult a lawyer with a view to opposing remand or seeking bail.

The learned Solicitor-General's views have met with strong reactions from Karpal Singh, who considers the right to counsel as an unqualified right which "commences immediately after [the detainee's] arrest"[19] and renders the investigative powers of the police subject to it by virtue of its supreme constitutional status. He takes great pains in his criticisms and relies on numerous Indian cases to rebut the grounds supporting the learned Solicitor–General's contentions. Karpal Singh's assertions run thus:[20]

– notwithstanding the difference in phraseology, Articles 5(3) and 22(1) are both similar mandatory requirements of law on individual rights.
– Article 5[21] should be read as a whole with clause (3), just like clause (4), being regarded as a procedural requirement of similar significance to the entire right embodied in the whole provision.
– an "irresistible implication" of Article 5(3) is that an arrested person is entitled to the right to counsel the moment he is arrested so that he may defend himself against such arrest and not merely when he is charged in court.
– the police should not in any way delay or obstruct the right of an arrested person to consult counsel or prevent counsel's presence at the scene of a crime to help in police investigations, at an identification parade to protect the detainee's rights, or when a confession is being made to render legal advice.
– the arrested person should be entitled to the use of the telephone to contact his lawyer or relatives or friends who could engage counsel to represent him.
– counsel's presence at custodial interrogation by the police would ensure that there is no undue harassment or any use of questionable methods to produce forced statements.
– lawyers form part of a noble profession whom police should not fear if their investigations are above board and do not resort to unfair methods.

[19] *Op. Cit.*, n. 13 at p. xxiv.

[20] *Ibid*, pp. xxiii-xxiv.

[21] This provision in the Federal Constitution contains guarantees on liberty of the person embodied in five clauses, with procedural safeguards to be found in clauses (2), providing for complaints to the High Court against unlawful detention, (3) on the right to be informed of grounds of arrest and legal representation and (4) on the necessity of obtaining within twenty-four hours a magistrate's authority for detention of an arrested person.

– therefore, the denial of an immediate right to counsel renders detention unlawful and entitles the institution of *habeas corpus* proceedings under Article 5(2) of the Constitution.

The foregoing makes it obvious that the nature and scope of Article 5(3) has been far from crystal clear and has only led to the postulation of theories and interpretations equally supportable through resort to Indian cases amidst the numerous diverging judicial opinions emanating from that quarter. Views to support police investigative functions seem as credible as those which seek to reassert the sanctity of individual liberties regardless of all else. The concept of reasonableness has been mercilessly exploited in noble attempts to protect the administration of justice on the one hand and zealously to guard individual freedom on the other. Logic abounds in all corners, statutory interpretation of all shades run rampant, whilst the poor constitution – framers, though not wholly blameless for this ensuing melee, have indirectly been castigated for their imprecision (or rather should they instead be commended for the resultant beauty and value of flexibility?).

However, just like a godsend, the Malaysian judiciary was presented with the opportunities (in one of which incidentally Karpal Singh played a prime role) to make its pronouncements on the subject. The first opportunity presented itself to Hashim Yeop A. Sani J. in the High Court at Ipoh though ironically it would have instead accrued to Syed Agil Barakbah J. if the latter had not departed on a pilgrimage to Mecca.[22] In this first substantive Malaysian case on the right to counsel, *Ooi Ah Phua* v. *The Officer In Charge Criminal Investigations, Kedah/Perlis*[23], an application for the issue of a writ of *habeas corpus* was made by the father of Ooi Chooi Toh who had been arrested for abetment in an alleged armed robbery and then remanded at the Alor Star prison for ten days under s. 117 of the Criminal Procedure Code before being charged. The applicant contended that there had been a breach of Article 5(3) of the Constitution when his son's counsel was denied access to him by the police on two occasions within a period of seven days after the arrest. The second proposed visit had been arranged and promised by the police after the lawyer's initial failure to gain access. The respondent's justification for counsel's inability to consult his client was that during the first occasion investigation was still in progress whilst the second refusal by the police resulted from the fact that interrogation was still continuing at that time. Upon completion of investigations the detainee was then allowed to consult counsel. Based on the facts of the case so far as could be positively

[22] Poetic injustice for the latter?

[23] *Op. Cit.* n. 1.

ascertained the learned judge held that the application was to be refused since there was no evidence that the respondent had actually denied the detainee the exercise of his rights under Article 5(3). The police were justified in refusing visits by counsel while investigations were still in progress.

The learned judge refused to accept defence counsel's urgings that a comparison be drawn with the corresponding right under the United States Constitution. This is rightly so, not only for his Lordship's reason that almost all rights under the U.S. Constitution are in absolute terms whereas ours are mostly qualified, but furthermore, it is submitted, because of the widely differing constitutional legal history and development, underlying philosophy and prevailing moral attitudes. Admirable as they may be, current American interpretation and application of civil liberties place heavy reliance on doctrines and principles which are not easily acceptable here and indeed have not gained much local juristic recognition. Consequently, constant resort to American legal trends might not prove useful and could even further complicate hitherto undeveloped areas of Malaysian law on the subject.

Judicial recognition was also accorded in the instant case to the oft-repeated premise that the right in Article 5(3) is not a constitutional innovation, but merely a continuation of existing pre-*Merdeka*[24] laws enshrined in s. 255 of the Criminal Procedure Code (FMS Cap. 6) and s. 250 of the Criminal Procedure Code (SS Cap. 21) with the new form of a constitutional guarantee. Approval [25] was then given to Wee Chong Jin, C.J.'s concept of reasonableness as stated in *Lee Mau Seng's*[26] case. In addition, Justice Syed Agil Barakbah's "guidelines" in *Ramli Salleb's* case were also referred to, though only with respect to the right being given within a reasonable time after arrest and not as regards the learned judge's more positive assertions.[27]

On the functional operation of the right, Hashim Yeop A. Sani J. accepted part of Karpal Singh's views, that the right is not meant to be given only when the arrested person is charged in a criminal court but "well before that so as to enable him to prepare his defence."[28] Yet, this was quickly qualified by the holding that it need not necessarily be given simultaneously with the right to be informed of grounds of arrest, i.e. that the right to counsel is certainly not one that must be given immediately upon arrest as contended by Karpal Singh and Syed Agil Barakbah J. Hashim Yeop A. Sani J. seems to be echoing the words of Tan Sri Salleh

[24] Independence of the Federation of Malaya, attained on 31st August 1957.

[25] *Op. Cit.* n. 1, at p. 94.

[26] *Op. Cit.* n. 6.

[27] *Op. Cit.* n. 1, at p. 94.

[28] *Ibid.*

Abas when his Lordship further pronounced that the right "should be reconciled"[29] with the duty of the police to investigate into an offence, with the qualification "so that a proper investigation, and *consequently an expeditious trial*, can be made possible."[30] Lest this escapes the proper scrutiny and due emphasis it should so richly deserve, it is submitted that this proviso is not without significance in clarifying the true import of the advantage allowed to the police over the individual. This should mean, it is further submitted, that the police advantage in its turn should be qualified and curtailed by:

(i) the necessity of a speedy and expeditious trial, and not mere administrative convenience, being the essential consequence thereof
(ii) the exercise of discretion in good faith by the authorities to enable the proper utilisation of the right in Article 5(3) and the necessary preparations for a full, free and fair defence in court, and
(iii) the absence of any clear and deliberate attempt to obstruct or hinder the person arrested from getting the benefit of counsel to prepare his defence.

The deduction to be made from this judgment then is that the onus lies upon the defence to adduce satisfactory proof of denial of the right in Article 5(3) without the above qualifications. At the same time, it is submitted, the police should also be responsible for submitting sufficient evidence of the necessity of continued investigations so as to facilitate a speedy and expeditious trial. This is quite implicit from his Lordship's reasoning as based on the facts of the instant case where the respondent had sworn affidavits to explain why visits had been denied on two occasions. This clear onus also should thus lie on the detaining authority to counterbalance the disadvantage imposed upon the arrested person as a result of his right under Article 5(3) being rendered subservient to police functions. In the absence of such express necessity on the part of the police it can be imputed that the right to counsel must quickly[31] follow as a matter of course.

[29] *Ibid.*

[30] *Op. Cit.* n. 1, at p. 94, emphasis added.

[31] It is not necessary to delve into a semantic exposition of the word "quickly" as suggested here even though immediacy seems to be the crux of the disagreement between counsel and the police. But for purposes of clarification in the context it is submitted that this word is synonymous with "immediately after arrest" only so long as the police cannot reasonably explain any other necessity for delay except in relation to a proper investigation and a consequent expeditious trial. This sole necessity is objective and can only be finally adjudged by the courts. Note that "mere administrative convenience" has already been rejected (by the writer through necessary implication) as an insufficient ground.

Whilst still on the question of status of this right *vis-a-vis* police functions it is also pertinent to mention at this point that his Lordship did not seem to reiterate Tan Sri Salleh Abas' contention that the legal standing of Article 5(3) is diminished by the 'negative' overtone of the words "shall be allowed". The learned judge readily agreed that this provision "embodies a rule which should be regarded as vital and fundamental for safeguarding personal liberty under rule of law."[32] Whilst happily welcoming this judicial confirmation, it can be added here that this is certainly not constitutional heresy and that it does not detract from accepted constitutional legal philosophy to place provisions from the constitutional document at the peak of the legal hierarchy, with qualifications being made as concessions to ordinary laws and the necessary implementation of administrative functions. A complete reversal of such positions would only place our constitutional law in an unhappy state of affairs, render Article 4(1)[33] of the Federal Constitution redundant and uncomfortably impale Malaysian constitutional lawyers on the painful horns of an unwarranted dilemma.[34]

It might be considered unfortunate that this judgment has not filled the constitutional lacuna relating to time in the individual's favour, possibly for fear of upsetting the flexibility presumably intended by the constitution-framers. Of course, according to a well-known canon of construction it is not for the judiciary to expressly provide what the legislature has omitted lest there be accusations of usurpation of legislative powers. However, where a lacuna presents problems in constitutional workability and offers opportunities for administrative abuse to the extent of endangering individual rights, the judiciary, as guardians of such rights, ought not to hesitate stepping in with substantive guidelines. Nonetheless, some guidance can now be extracted temporarily to quell academic and practitioners' rumblings. The detaining authorities no longer hold complete sway over this individual liberty – more consistent and reasoned control has to be exercised, always subject to judicial review. This deterring factor vested in the judicial body could indeed result in a more satisfactory and amicable relationship between counsel and the police.

In the second case, the High Court judgment of Syed Othman J. in *P.P. v. Mah Chuen Lim & Ors.*[35] stemmed from applications by counsel for the

[32] *Op. Cit.* n. 1, at p. 94.

[33] This provision is a constitutional assertion of its own legal supremacy: "This Constitution is the supreme law of the Federation . . .".

[34] With acknowledgements and apologies to the late S.A. de Smith, *Constitutional Lawyers In Revolutionary Situations* [1968] 7 Western Ontario Law Review 93, at p. 105.

[35] *Op. Cit.* n. 1.

three accused persons for orders under s. 9[36] of the Criminal Procedure Code, firstly for them to be sent for medical observation following allegations of police brutality, and secondly for access to them. Besides rejecting the applicability of s. 9, Syed Othman J. also examined the grounds submitted in the applications. Technical defects relating to the first application for medical observation meant that it was easily dismissed. It is the second application, for access to the three accused persons, which is more pertinent to the present discussion and on which the substantial part of the judgment was delivered. Doubts had been cast as to whether counsel had been positively engaged prior to the trial to appear for the three accused. As such he was held not to be "the legal practitioner of [their] choice" and did not form the object of the accuseds' right under Article 5(3). The fact that counsel had been instructed by the accuseds' relatives to see them after their arrest was held to be insufficient proof of rightful representation.

In explaining Article 5(3) the learned judge painstakingly stressed, in a rather over-simplified fashion, an interpretation which seemed to him to be an obvious understanding of the provision, presumably for fear that wrong interpretations might otherwise ensue. He presented his view on the nature and scope of Article 5(3) by emphasising that the right therein belongs to the arrested person and not the legal practitioner – "The constitutional right of an arrested person to counsel cannot be equated with the right of counsel, *if any*, to an arrested person."[37] Whilst it can be conceded that the right in Article 5(3) is constitutionally granted principally to an arrested person it should also be noted that counsel does not play an insignificant role in its usage. It is feared that the learned judge is unnecessarily entangling the meaning of the right to counsel in knots as a result of his simple remark. Even though the right belongs to the arrested person he is not the only party therein involved who is required to take positive steps to assert this guarantee. His right is meaningless without the active participation and freedom of counsel for it is difficult to imagine much liberty being made available to an incarcerated person to demand that someone from outside be sent to him at any desired moment and be at his beck and call. He is quite helpless to do as he pleases, so that the

[36] This provision embodies the criminal jurisdiction of magistrates.

[37] *Op. Cit.* n. 1 at p. 95. Emphasis added. This phrase unhappily seems to cast doubts on the existence of any rights at all entitling counsel to see an arrested person. If it only refers to a lawyer who has not been chosen by the arrested person to represent him, it is certainly acceptable since the former is not involved whatsoever in the granting and usage of the right. If it refers generally to all lawyers who potentially will be representing arrested persons, it is far from satisfactory and would further restrict the right of consultation.

utmost reliance has to be placed by him upon his lawyer. The lawyer is entrusted to do all that he considers best for the client who has engaged him and as such he is also indirectly entitled to certain freedoms. The corollary of the right of an arrested person to consult counsel should, through sheer necessity, logic and practicality, be counsel's ability to have access to him so that consultation can in fact take place.

As regards the question as to when an arrested person is entitled to his right under Article 5(3), Syed Othman J. chose not to lay down any hard and fast rules. He did not believe it to be desirable to do so, preferring the circumstances of each particular case to dictate the requirements.[38] Presumably, the police would still retain much discretion in the matter, but, bearing in mind Hashim Yeop A. Sani J.'s words[39] in the *Ooi Ah Phua* case, the courts would remain final arbiters as to reasonableness.

Syed Othman J. attempted to point out that some guidance is actually available from s. 38 of the Interpretation and General Clauses Ordinance, 1948, as inserted in the Eleventh Schedule of the Federal Constitution, which provides:

> "When no time is prescribed or allowed within which anything shall be done, such thing shall be done with all convenient speed and as often as the prescribed occasion arises."

"Convenient speed" of course does not admit of a helpful definition either so we have been taken back to square one. And when the learned judge quoted from *Stroud's Judicial Dictionary* on the meaning of this term as applicable to the reasonable time for the sale of property by trustees for sale it is unfortunate indeed that in that particular chosen example "with all convenient speed" is said not to render an immediate sale imperative. Are we then to take this analogy to imply that Syed Othman J.'s view is that the right in Article 5(3) similarly should not be interpreted to accrue immediately? This is not stated positively either by his Lordship, who could easily have stated otherwise if he were so inclined and thus endorsed Syed Agil Barakbah J.'s belief as to immediacy in *Ramli Salleh's*[40] case.

The Malaysian Federal Court has already heard the appeal against the judgment of Hashim Yeop A. Sani J. in the *Ooi Ah Phua* case and made its final pronouncements on 2nd June, 1975. The Lord President, Malaysia, Tan Sri Mohamed Suffian, with the concurrence of the Chief Justice, Borneo, and Wan Suleiman, F.J., upheld the High Court decision and stated that "the right of an arrested person to consult his lawyer begins from the moment of arrest, but ... that right cannot be exercised immediately after arrest."[41] Thus, the judicial position on the subject has

[38] *Ibid*, at p. 96.

[39] *Op. Cit.*, n. 31.

[40] *Op. Cit.* n. 10.

[41] *Op. Cit.* n. 1, p. 5.

clearly been re-asserted in order to strike a balance between the individual right of an arrested person as constitutionally guaranteed by Article 5(3) and "the duty of the police to protect the public from wrong-doers by apprehending them and collecting whatever evidence exists against them".[42] To further close the chapter and, doubtless, to terminate further *habeas corpus* proceedings based on denial of the right under Article 5(3), Tan Sri Mohd. Suffian L.P. concluded his judgment with the firm statement of law that "it is possible for a person to be lawfully detained and yet unlawfully denied communication with his lawyer." In other words, unlawful denial of the right under Article 5(3) does not necessarily render detention unlawful and thereby entitle immediate release through *habeas corpus* proceedings. Remedies against such unlawful denial cannot be procured by way of *habeas corpus* but are available by other means. The Lord President has here chosen to follow the step taken by Wee Chong Jin, C.J. in the *Lee Mau Seng*[43] case where *habeas corpus* was not awarded to the applicant who had been detained under the Internal Security Act but denied his constitutional right of legal consultation. Wee Chong Jin C.J. had adhered strictly in that case to "the principle that the courts will not order the release of a person in *habeas corpus* proceedings unless it can be shown that his detention is illegal or unlawful. . ."[44] In invoking a similar principle the Malaysian Federal Court has succeeded in suppressing complaints of denial of the right to counsel *via* the device of *habeas corpus* but has at the same time failed to supply the much sought for guidelines *a la* Syed Agil Barakbah J. The constitutional lacuna has not been closed because the court preferred to devote its attention to the specific question of lawful detention and refused to consider the wider question of when an arrested person acquires the right to counsel. In that event then, this case cannot truly be considered as very authoritative on the subject-matter of the present discussion, which is still left very much open to debate and argument.

The foregoing examination and evaluation of the two recent High Court pronouncements and the Federal Court's decision answers in the affirmative the question initially posed as to the continuing saga on the right to counsel. Disagreement between counsel and the police has not been settled satisfactorily either. Contrary to expectations, clear guidelines such as those which Syed Agil Barakbah J. had so inopportunely introduced have not been presented by his learned brethren. Instead, general statements about the sanctity of fundamental rights have been expressed

[42] *Ibid.*

[43] *Op. Cit.* n. 6.

[44] *Ibid.*, at p. 141.

without the accompaniment of substantive declarations of firm limits to safeguard arrested persons from administrative abuse. Fears and suspicion have not been erased from the hearts and minds of the legal profession and the public whom they serve as to the possibility of high-handedness and resort to unfair methods by detaining authorities upon whom no satisfactory practical curbs have been judicially imposed. The institution of civil proceedings seems to be the only remedy available to the individual.

The legal position to date on the right to counsel seems far from sufficient to most champions of human rights, regardless of the courts' constant reminders that almost all our fundamental liberties as guaranteed by the constitution are necessarily qualified. In the case of the right to counsel the qualification is not one imposed either by constitutional stipulation or primary legislation but the exploitation of a constitutional lacuna to facilitate the smooth running of administrative functions. No law abiding citizen can truly deny the importance to the community of crime control and consequent public tranquillity, especially in view of crime increases lately. Yet it is sad that other modern devices have not been deemed to be more effective and of prime importance without resorting to this most recent erosion of the constitutional protection of individual rights. This trend is most unencouraging to the development and improvement of the quality of the Malaysian Constitutional legal system.

*Azmi bin Abdul Khalid.

*Lecturer, Faculty of Law, University of Malaya.