UNREPRESENTED ACCUSED PERSONS IN THE LOWER COURTS

by

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PERAKUAN KEIZINAN

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"Open your mouth for the dumb, for the rights of all who are left desolate.

Open your mouth, judge righteously, maintain the rights of the poor and needy."

Proverbs 31:8,9
(R.S.V.)

TABLE OF CONTENTS

LIST OF TABLES

LIST OF CASES

CHAPTER I

INTRODUCTION

The elaborate substantive, evidentiary and procedural provisions in the area of criminal justice, i.e., the law of crimes and the administration of criminal justice, are the result of the balance achieved by the interaction of the forces tending to the protection of society and those tending to the safeguarding of individual liberty. The resolution of these competing interests ultimately depends on what weight and importance is attached to either and this is determined by the general notions of fairness and justice and the existing circumstances of the country. It is naturally ideal to strike an even balance between such rights and interests and....."to devise a system or systems which will work fairly from a practical point of view according to the conditions of the country in which each particular system operates and the state of development of its people".[1] "Each country protects the interest of the accused to the extent to which it thinks it safe to do so. Each country has the minimum criminal law it thinks it can afford".[2]

If one travels the entire length of the criminal justice process, beginning with the prescriptive function of defining what acts are

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[1] H.H. Marshall, "Former British Commonwealth Dependencies" in The Accused by J.A. Coutts, London Stevens & Sons (1966), p 169.

[2] J.A. Coutts, The Accused, London Stevens & Sons (1966), p 3.

criminal to the very last stage, namely the punishment of a person proven by the law to have committed a crime, one sees where and how the balance has been struck. Thus it is the general rule of law that a guilty mind is an essential element of a crime. If the law be otherwise, then a person who inflicts a wound in accident or in self-defence would be punished for that act of wounding alone. Nevertheless there are certain recognised acts which are so manifestly dangerous and prejudicial to the interests of order and security of society that it is deemed that such acts are in themselves criminal; hence the exception to the general principle of criminal liability representing the way in which the conflicting interests are accomodated.

Again, in the guilt-determining process, a large mass of rules restricts the questions that may be asked so as not to prejudice the fair trial of the accused without at the same time making it more difficult to bring a criminal to book. The real aim behind these rules "must be to achieve a balance between the protection of the accused individual (epitomised by Bentham when he said, 'it is better that ten guilty men should be allowed to go free than that one innocent man should be convicted') and the protection of society by due conviction of criminals".[3]

The fact remains however that these rules, designed to ensure that the accused obtains a fair trial, are generally beyond the grasp and utility of the accused who does not have the benefit of legal

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[3] J.D. McClean & J.C. Wood, Criminal Justice and the Treatment of Offenders, London Sweet & Maxwell (1969), p 39. Brackets added.

representation. "If a defence is to be properly prepared and adequately presented, it is virtually necessary to employ legal advisers.....the need for legal assistance exists at all stages of a criminal charge".[4] Indeed it has become trite to say that it is the rare accused who can have the necessary skill and confidence to present his case skilfully or even adequately.

There are many reasons why an accused is not represented by counsel. Poverty as well as ignorance of one's right to counsel and of circumstances calling for legal advice are the more probable ones. If in the guilt-determining process, poverty or ignorance results in limitations on the ability of the accused to conduct his case satisfactorily, he would then have been robbed of the safeguards and protection offered to him by the law and be denied the prospects of a fair trial. Neither poverty nor ignorance is relevant in the determination of guilt and if it interferes at all, it has become a relevant factor in the process.

Furthermore in an accusatorial or adversary system of trial as opposed to an inquisitorial system as in Germany and other continental countries, there is a presumption of equal contest between the two contending parties. This is clearly fictional where the unrepresented accused is pitted against a superior opponent, usually a trained prosecuting officer supported by the entire state apparatus.

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[4] R.M. Jackson, The Machinery of Justice in England, Fifth Edition, Cambridge University Press, (1967), p 149.

Finally, every person subjected to the processes of criminal justice should be treated equally. A situation where the unrepresented accused is disadvantaged at the trial and unable to avail himself of the safeguards and protection of the law means that he does not enjoy the same equality of consideration as the accused who is represented. This is indisputably contrary to our concept of equal justice.

Thus non-representation, if it adversely affects the accused in the conduct of his case, renders illusory the basic principles and presuppositions underlying our system of criminal justice. The system then offers justice for that class of society that is able to avail itself of legal services, the rich, the educated and the assertive. Is our system of criminal justice then credible or is it intrinsically unjust insofar as the unrepresented accused is concerned? This is a weighty question, the answer to which lies in whether non-representation does render the accused less or at all able to rely upon the rules of criminal justice and to be a meaningful participant in its processes. It is therefore imperative that the impact of non-representation on the accused at the various stages of the trial be systematically and scientifically investigated. This then is the justification and aim of the study.

Scope of the Study - A Preview of the Paper

The paper begins with a look into the role played by the lower courts - the Magistrate's and Sessions, in the administration of criminal justice in our country. The study proper begins with a statistical survey of representation levels in the Kuala Lumpur lower

courts which is the main area of inquiry. Representation levels, firstly by reference to the stages of the trial, then by reference to various types of offences, are computed. For the purposes of comparison with the K.L. sample which represents a city area, samples from two other sets of courts, the Kluang and Mersing lower courts, are also taken as representative of a town and semi-urban area respectively. Findings and observations will then be made thereof.

The next three chapters consist of an inquiry into the impact of non-representation on the accused. Chapter IV deals with non-representation and pleas; Chapter V with non-representation and results in the proceedings pursuant to a plea of not guilty and Chapter VI with non-representation and sentences. In each of these chapters the hypothesis that non-representation has an adverse impact on the response the accused makes and the results made against him is tested. Associations or correlationships between the factum of non-representation and results and responses adverse to the accused are made. From these it was possible to draw certain conclusions which tend to show the negative impact of non-representation. As further supportive of the basic hypothesis and as explanatory of the conclusions drawn from the associations, the author looks beyond the statistics to the actual factual circumstances obtaining at the various stages of the trial. Thus information was obtained by observation in court proceedings, interviews and a study of court records.

It may be argued that there are sufficient statutory and inbuilt safeguards in our criminal justice system designed to ensure the fair

nd equal operation of the processes of criminal justice for the nrepresented accused. The author looks at some of these safeguards nd evaluates their effectiveness in Chapter VII.

The preceding chapters seek to establish that a high level of on-representation and its adverse consequences raises serious questions or our system of criminal justice. Chapter VII goes on to attempt to race the possible factors responsible for the low representation levels n our lower courts.

The concluding chapter rounds up the study with a brief summary f the findings made and the conclusions made therefrom. The mplications of such conclusions are then discussed.

ources of Data

The main bulk of the study was carried out in the Kuala Lumpur lagistrate's and Sessions Courts with a more limited study in the ersing and Kluang courts. It was necessary for a meaningful and omprehensive study of various aspects of the non-representation uestion to collect data from three primary sources, viz., court ecords of cases, interviews with accused persons and observation in ourt. Some general comments on these sources are made below but the pecific purpose of utilising these sources and the particular methods y which each set of data is analysed and classified will be explained r become apparent in the subsequent chapters.

Court Records: This was the main source of the data collected. They consist of the records of all the cases registered in the months of August to December 1973 in the Kuala Lumpur courts and

the Kluang Magistrate's court only and all cases registered in 1973 for the Kluang Sessions and the Mersing courts. A more recent sample was not taken as they would not give as much detail as would be desired due to the chronic backlog problem in our lower courts.[5] It was however also necessary to take a larger sample of cases of the Kuala Lumpur courts where specific questions were considered and there were insufficient cases for the purposes of the inquiry.

Observation: The author, over a period of about three weeks, made random observations of plea and post-plea proceedings in the various courts.

Interviews: Permission to interview accused persons who were remanded in the court lock-ups was not obtainable and the author had to resort to conducting the interviews while the accused persons were in court "waiting-room" while the court was in the session or just before it began. This was highly unsatisfactory as interviews could not be conducted in privacy and in an orderly and unhurried manner. Permission from the police personnel having custody over the accused persons was also not always forthcoming. Nevertheless the author managed to interview 33 accused persons and the information gathered was extremely useful in filling in the gaps left unanswered by the two previous sources of information.

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[5] Most of the cases registered in 1975 were undisposed as were many of those registered in 1974 where the accused claimed trial. The August-December 1973 sample which was taken had up to 37.5% of the cases still pending at the time the study was made.

The Empirical Method

In view of the fact that thus far legal research and studies in our country have been largely normative and that this study is essentially an attempt at approaching a legal question from a behavioral perspective, it is desirable that something be said of the empirical method. Nagel succintly states that "with regard to methodology, a behavioral orientation tends to emphasize the quantitative testing of generalizations about the relations between various legal phenomena and other phenomena".[6] The steps followed in this study are basically the same as those suggested by Nagel, which includes choosing the hypotheses to test; deciding the research design; compiling the data accordingly; drawing conclusions therefrom and offering explanations for one's findings.

The hypotheses tested include both the one-variable and two-variables type. The one-variable hypotheses tested here include, inter alia, that most of the cases in the lower courts in our country are unrepresented. Here the factum of representation is the one single variable. The two-variable hypotheses, which is the type in which most of the hypotheses tested here falls into, consist of postulating relationship between an independent variable and the dependent variable. In considering the impact of representation on findings in hearings for instance, the hypotheses would be that non-representation generally leads to the adverse finding of guilty. Here representation is the independent variable while the finding the dependent variable. In considering representation levels by reference to category of offences

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[6] Stuart S. Nagel, The Legal Process from a Behavioral Perspective, The Dorsey Press, 1969, p vii.

n the other hand, the hypothesis is that the more serious an offence s the more likely is the accused to be represented. Here the offences ssume the nature of the independent variable while the representation actor becomes the dependent variable.

Planning the research design raises problems peculiar to the ypotheses sought to be tested. How this is done will be seen when each ypotheses is tested. Generally however it involves determining the ample of entities on which to test the hypotheses and the method of easuring the variables and deciding what analysis of the data will be sed to test the validity of the hypotheses. The data collected consists ostly of two-variable phenomena and are usually presented in four-fold ables or some modification of it. To determine relationship or otherwise etween the variables studied, simple correlation analysis, by the use of ercentages, is made.

"The testing of empirical generalizations is not complete until a ested or untested explanation is offered for why the relationship found xists or why the relation hypothesized but not found does not exist."[7] Most of the explanations offered here would be untested but based on random observations made of court proceedings and from interviews with accused persons. This is due to limitations of time and resources. Wherever it is possible, however, the explanation is tested.

Finally something has to be said of the use of empirical methods to derive generalisations. As in most social science studies, not every

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[7] Ibid., p 21

factor potentially affecting the relationship between variables can be considered and eliminated so as to enable definitive conclusions or pronouncements. Hence, one can usually only say that where a factor is present another is "likely" to be present too; or that, "generally" or "it appears that" when X occurs Y also follows. That at any rate is what generalisations of social phenomena is all about or purports to achieve.

CHAPTER II

ROLE OF THE LOWER COURTS

The paper is a study of the nature, extent and impact of non-epresentation on the administration of criminal justice in the lower ourts. These courts deal with virtually all the criminal cases that ome before our courts in the exercise of their criminal jurisdiction, ence their being chosen as the area of the inquiry.

As a preliminary to the study then, we will first consider the ole of the lower courts in the trial of persons charged with having ommitted offences. It is in this aspect of the lower courts' functions hat grave consequences on the individual may follow. He may be deprived f his personal liberty when he is imprisoned or be made to suffer some ecuniary damage when he is fined. Adverse results on a citizen's eputation and his livelihood may also accompany a conviction and entence. The lower courts, being responsible for the conduct of the ulk of criminal trials which usually end with some form of detriment nflicted upon the accused, have thus a very vital and important role o play in the administration of criminal justice. If there be any iverse impact by virtue of non-representation it will be at this level f our courts hierarchy that the effects are most evident and its onsequences most serious.

The role of the lower courts in the criminal justice process can

: seen from two perspectives firstly, by looking into its jurisdiction
ıd powers in the trial of the accused persons and secondly, by
ɔnsidering the extent to which this jurisdiction and powers are
ɛercised in the criminal workload of our courts.

ɛiminal Jurisdiction and Powers

There are 106 lower courts in our country consisting of Magistrate's
ıd Sessions Courts. The criminal jurisdiction and powers of these courts
ɛe well set out in the Subordinate Courts Act, 1948. The provisions
ɛe outlined briefly below.

A first class Magistrate may try all offences for which the
aximum sentence of imprisonment does not exceed five years or which
ɛe punishable with fine only. He may also try certain sentences under
he Penal Code which carry maximum sentences of more than five years
nd which are punishable with whipping as well. He may pass any sentence
ot exceeding two years imprisonment, a fine of five thousand dollars,
ıipping or a sentence combining any of these. A proviso however empowers
ıe Magistrate to inflict punishment in excess of the maximum sentence
ithin his competence, i.e., up to the maximum authorised by the offence
ɛeating sections of the statute in circumstances which call for it.
second class Magistrate may however only try offences which are
ınishable with a maximum term of imprisonment for twelve months or
ıich is punishable with fine only. He may only pass sentence not
ɛceeding three months imprisonment, a fine of two hundred and fifty
ɔllars or a combination of the above.[8]

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[8] Subordinate Court Act, secs. 85, 87, 88, 89.

The Sessions Court President is empowered to try all offences for hich the maximum sentence does not exceed ten years imprisonment, ffences punishable with fine only and certain offences exceeding these imits. It may pass sentence not exceeding five years, a fine of ten housand dollars, whipping of up to twelve strokes or a sentence ombining any of these. Notwithstanding these provisions, the President ay try any other offence not punishable by death on the application of he Public Prosecutor and with the consent of the accused. This is sually done, especially in armed robbery cases under Sec. 392 of the enal Code and other similar offences. As for the powers of a Magistrate, here is a similar proviso whereby the President's power of sentencing s extended.[9]

Sessions Court's Presidents conferred with special powers under ec 63(3) may try offences for which the maximum term of imprisonment oes not exceed fourteen years imprisonment as well as other offences hich may carry a maximum sentence of life imprisonment. In addition o the general jurisdiction to try and powers to sentence conferred by he Subordinate Courts Act, various statutes confer powers far beyond hese limits for certain kinds of offences, e.g., offences under the angerous Drugs Ordinance and the Corrosive and Explosive and other ffensive Weapons Act (this is also specifically recognised by the roviso to Sec. 64(1) of the Act).

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[9] Ibid., secs. 63, 64.

Criminal Workload of the Lower Courts

The extent to which this wide jurisdiction of the lower courts has been exercised is seen in Tables I and II below.[10]

Table I

Criminal Cases and Charges - 1973

(West Malaysia)

	Cases Heard and Disposed	Charges Involved
High Court	88 (0.09%)	104 (0.08%)
Sessions Court	3049 (3.03%)	3718 (2.96%)
Magistrate's Court	97,346 (96.88%)	121,868 (96.96%)
Total	100,483 (100%)	125,690 (100%)

Table II

Persons Involved and Convicted

	Involved	Convicted
High Court	104 (0.09%)	55 (0.07%)
Sessions Court	3718 (3.23%)	2616 (3.17%)
Magistrate's Court	111,431 (96.68%)	79,724 (96.76%)
Total	115,243 (100%)	82,395 (100%)

[10] These statistics are compiled from records kept at the High Court Registry, Kuala Lumpur.

From Table I above, it is seen that almost 99.9% of the criminal orkload in West Malaysia in 1973 was disposed off by the lower courts. able II shows the impact of the lower courts on the individual. 15,243 persons were charged with criminal offences of one form or other. f these 99.9% again were brought before the lower courts. Of the 79,724 ho were convicted, 99.9% of them were in the lower courts.

CHAPTER III

REPRESENTATION LEVELS

We next look at the level of representation in the deliberations
: the lower courts with the accused persons brought before them. In
iis chapter the representation levels in the various stages of the
:ial, i.e., the plea, the 'hearing'[11] and the sentence stage will be
:amined. Next the representation levels in the various offences in the
mple chosen are compared. A comparative study between the Kuala Lumpur
mple representing a city area and the Kluang and Mersing Courts,
ypifying a town and a semi-urban area respectively is also undertaken
> assess whether the location of the court has any bearing on
epresentation levels.

ne Sample

The basic sample chosen consisted of all cases registered in the
iala Lumpur Magistrate's and Sessions Courts in August to December,
973. All kinds of cases are tried before these courts. Most of the
:cused charged for minor statutory offences such as gambling and minor
)ad traffic cases are almost always unrepresented. To avoid arriving
: an unduly inflated level of non-representation, all juvenile, summons
id minor arrest cases were excluded from this basic sample. Thus offences

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[11] 'Hearing' refers to the proceedings pursuant to a plea of not
iilty. Each such plea is always accompanied by the prospect of a hearing
iere the guilt or otherwise of the accused is determined. A hearing
)es not always occur however, as where an offence is compounded and the
:cused acquitted.

ıder the Minor Offences Ordinance, the Common Gaming Houses Ordinance, ıe Road Traffic Ordinance (except for cases under S34A(1)), the National egistration Act and other statutes where minor offences are created were ɔt considered. The rest of the cases,[12] viz., all cases under the Penal ɔde, and all other offences usually tried in the Sessions Court, viz., ıe offences under the Dangerous Drugs Ordinance, the Arms Act, the ɔrrossive and Explosive Substances and other Offensive Weapons Ordinance, ıe Excise Act, the Customs Act, the Prevention of Corruption Act and 34A(1) of the Road Traffic Ordinance thus make up the sample[13] for the tudy of representation levels.

The sample of cases for the Kluang and Mersing courts was similarly aken. The basic sample for the Kluang Sessions Court only and the ersing courts however consisted of all cases registered therein in the ıole of 1973 so as to have a sufficiently large number of cases for easonable statistical comparison.

omputing the Representation Variable

Some preliminary difficulties in computing has to be dealt with. ı accused may be faced with more than one charge or he may be involved ı more than one case. Conversely, there may be more than one accused ı a case. An accused may be defended in one case but not in another,

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[12] K.L. Mag. Ct. Cases A.C. 3391-3596/73 and K.L. Ses. Ct. Cases .S.A. 1149-1265 and 2143-2224/73.

[13] This is also the sample, unless otherwise stated, upon which ıe subsequent inquiry into the impact of non-representation is made. : is hereinafter referred to as the Kuala Lumpur sample.

d where there is more than one accused jointly charged, some of them ly may be represented. What then do we take cognizance of-charges, ses or accused persons?

The problem was resolved by taking only accused persons into nsideration. Computation of representation levels for it to mean ything and to be of any use must be of the level of representation ong persons brought before the court. It was clearly fallacious to nsider either charges or cases as there is then the real danger of plication and hence unrealistic figures. Thus where X was charged four separate cases[14] for using forged documents as genuine, and he s unrepresented, only one case was considered and the figure for represented accused was recorded as one only. Where, however, in one se,[15] six persons were jointly charged with theft and four of them re represented, the figures for represented and unrepresented accused rsons were recorded as four and two respectively. Where an accused s charged for different offences, in one case, for extortion and tempted extortion,[16] only the more serious offence was taken. Finally ere was a peculiar case where the accused was charged for theft in o separate cases[17] and he was represented in only one of them. Here e result less favourable to the hypotheses that a large number of ses in the sample is taken and the accused is recorded as being represented.

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[14] K.L. Mag. Ct. Cases A.C. 3586-3589/73.

[15] K.L. Mag. Ct. Cases A.C. 3585/73.

[16] K.L. Mag. Ct. Cases A.C. 3462, 3463/73.

[17] K.L. Mag. Ct. Cases A.C. 3442, 3443/73.

presentation Levels - Stage of the Trial

We first look at the level of representation among accused persons each stage of the trial - the plea, the 'hearing' and the sentence.

The Plea: When an accused is brought before the court he is asked whether he is guilty of the offence charged or claims to be tried.[18] An accused may change his plea at any time before a finding of guilt and sentence. As he may make several pleas, the fact of his representation or otherwise at this plea stage is looked for at his final or operative plea, this being the plea of any consequence. This is, where the accused pleads guilty, the plea before a finding of guilty, conviction and sentence. Where he claims trial, this is the plea prior to the commencement of the 'hearing'.

Table III

Representation Level at the Plea

	Represented		Unrepresented		Total
Magistrate's Court	106	32.6%	219	67.4%	325
Sessions Court	79	33.6%	156	66.4%	235
Lower Courts Total	185	33.0%	375	67.0%	560

The table above shows that as high as 67.0% of the accused persons in the sample taken from the Kuala Lumpur lower courts, which consists only of the more serious arrest[19] cases and excludes

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[18] Section 173(a), Criminal Procedure Code (F.M.S. Cap 6).

[19] This is also known as "warrant" cases. It is defined in the P.C. as "an offence punishable with death or imprisonment for a term ceeding six months".

all summons and juvenile cases, made pleas without the benefit of legal representation. Contrary to popular belief, the level of representation in the Sessions Court which tries more serious cases is almost as low as that in the Magistrate's Court. It is in fact higher by an insignificant 1%. If this picture of representation level is representative of other areas it is definitely an undesirable and a disturbing one if it can be established that it leads to an adverse impact on the unrepresented accused.

Of the three stages of the trial, only the plea involves all the accused; the 'hearing' being encountered only where an accused claims trial and the sentence where he is found guilty and convicted. Usually representation or otherwise at the operative plea continues into the subsequent 'hearing' and sentence stages. Thus, if one wishes to look for a general representation level among all the accused, representation at the plea stage would be the most useful indication. This general representation level is employed subsequently when the author compares representation levels in various offences and in various areas.

The 'Hearing': The next stage to be considered is the proceedings pursuant to a plea of not guilty which has been collectively termed as 'hearing'. In the Kuala Lumpur sample, a total of 230 accused persons claimed to be tried. The table below shows the level of representation in this stage.

Table IV

Representation Level at the 'Hearing'

	Represented		Unrepresented		Total
Magistrate's Court	86	65.2%	46	34.8%	132
Sessions Court	65	66.3%	33	33.7%	98
Lower Courts Total	151	65.7%	79	34.3%	230

The table shows that the representation level improves in the post - not guilty plea stage, most of which proceedings consists of an actual hearing and all of which begins with the prospect of one. 65.7% of the accused persons were represented. It appears thus that an accused facing a hearing - an extremely protracted and complicated process, or the future prospect of one, is less prepared to proceed on his own. 34.3% of the accused persons were nevertheless unrepresented at this stage of the trial which requires a sound knowledge of the rules of criminal law, evidence and procedure. Again there is no appreciable difference in representation levels between the Sessions and Magistrate's Court.

The Sentence: "If the Court finds the accused guilty or if a plea of guilty has been recorded and accepted the Court shall pass sentence according to law".[20] In practice, following a finding of guilt an accused may either be discharged or convicted. He may be discharged either unconditionally, after a caution or an admonition, or on being bound over. If he is convicted, he may be sentenced

[20] Section 173 (m) (2) Criminal Procedure Code (F.M.S. Cap 6).

to a fine or imprisonment and sometimes whipping as well or a combination of these. He may also be bound over or placed under police supervision.

There were 387 findings of guilt from the cases disposed off in the Kuala Lumpur sample. 12 of the accused persons were discharged unconditionally, i.e., upon being cautioned or admonished. The table below shows the representation level among the rest who were subjected to various forms of sentence.

Table V

Representation Level at the Sentence

	Represented		Unrepresented		Total
Magistrate's Court	30	14.2%	181	85.8%	211
Sessions Court	35	21.5%	128	78.5%	162
Lower Courts Total	65	17.4%	309	82.6%	374

The table above shows that of the cases disposed off which ended in an actual sentence being passed on the accused, 82.6% of them were subjected to binding over, fine and jail and other forms of sentence without the benefit of legal representation.

presentation Levels - Type of Offence

We next look at and compare representation levels by reference to pe of offences. For this purpose representation at the plea stage which most representative of general representation level is taken.

The problem arose here as to the manner in which various offences

re to be categorised. It was thought that three factors were to be nsidered in categorising offences for comparing representation levels. ese were: seriousness of the offence; type of offenders usually sociated with the offence and the nature of the offence itself, in rticular, the elements of the offence which affects the ability of e accused to defend himself. Ideally this would entail a breakdown the sample into the distinct offences in the Penal Code or other levant statutes. This however led to most of the figures obtained ing so numerically small as to render them virtually useless for lid statistical comparison. It was thus necessary to adopt a dual assification method involving a general classification in one as in ble VI, together with a more specific breakdown of a category of operty offences only as in Table VII. In the latter, the property fences only were taken for reasons given in the findings below.[21] ese were also the only offences with 18 or more accused persons.

Table VI

Representation Level - Type Of Offence

	Represented		Unrepresented		Total
Penal Code Cases Magistrate's Court	109	33.2%	219	66.8%	328
Penal Code Cases Sessions Court	23	25.8%	66	74.2%	89
Dangerous Drugs Ordinance Cases	40	39.2%	62	60.8%	102

[21] See footnote 22 below.

Table VI

Representation Level - Type Of Offence

	Represented		Unrepresented		Total
Arms Act, C.E.S.O.W.O.*	5	29.4%	12	70.6%	17
Prevention of Corruption Act	4	57.1%	3	42.9%	7
Customs Act	3	75.1%	1	25.0%	4
Excise Act	2	22.2%	7	77.8%	9
Road Traffic Ordinance Sec 34A(1)	2	66.7%	1	33.3%	3

* Corrossive and Explosive Substances and other Offensive Weapons Ordinance.

Table VII

Representation Level - Seriousness Of Offence

Offence	Maximum Sentence	Represented		Unrepresented		Total
Housebreaking	2 years and fine	3	16.7%	15	83.3%	18
Theft, receiving stolen property	3 years, fine or whipping or any two of such punishments*	56	25.1%	167	74.9%	223
Housebreaking to the commission of theft	10 years and fine	14	42.4%	19	57.6%	33

* Whipping may not be imposed for receiving.

From Table VI we find that despite the fact that the Penal Code
ses tried in the Sessions Court involve much more serious offences and
nsequently heavier punishments than similar cases tried in the
gistrate's Court, the former display a lower level of representation.

ough offences under the Arms Act and its sister act, the Corrosive and plosive Substances and other Offensive Weapons Ordinance carry the ssibility of very heavy sentences, representation in these cases is so low, i.e., 29.4% only. A comparison of the offences in Table VII, usebreaking, theft and receiving (these two being taken together as e latter is usually charged in the alternative to the former) and usebreaking to the commission of theft;[22] which shows a gradation of e offences in terms of seriousness of the penalty, however, reveals definite corelationship between the seriousness of the offence and presentation levels.

It appears thus from the above that other things being equal, an cused is more likely to be represented if he is charged for a more rious offence than if he was for a less serious one.[23] This inference y however be subject to some doubt by the findings made from Table VI ich show lower representation levels in the more serious Penal Code ses tried in the Sessions Court compared with such Magistrate's Court ses. A possible explanation for this is that accessibility to counsel

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[22] These are property offences similar in that they are distinct om other property offences like Extortion and robbery where the cused confronts the victim and which it is beli ved arouses police ejudice against the accused.

[23] 'Less serious' is used here and is not to be taken to mean inor'. The minor - all summons and some warrant, offences/were /which cluded from the sample are mostly unrepresented.

It was felt that this was a safe inference to draw, the impact police prejudice, an irrelevant variable, having been negatived by lecting the offences in Table VII only.

pends to some extent at least, on the magnanimity of the police who
e more prone to be sympathetic to an accused charged for housebreaking
theft than to one charged for an offence which is more dangerous[24] to
e public (and the police) like robbery or armed robbery, which make up
st of the cases Penal Code tried in the Sessions Court.

There is greater representation in drugs cases as compared to the
nal Code cases tried in the Sessions Court. This could be due to the
ct that drug offences are not only serious in terms of penalty but
so that almost all of these cases are what may be termed as 'possession'
ses, i.e., of drugs or drug taking implements which are high-conviction
ses. Offenders in this category of cases are also usually 'mixed' in
at they come from both low and high income levels groups of society.

The next sets of findings and observations are suspect as there
a possibility of bias due to the low number of cases in each of the
tegories. It is believed though that if a larger number of cases in
ch of these categories is taken, similar sets of data would be found.

Compare first the figures for cases under the Customs Act and the
cise Act. Both involve possession, of uncustomed goods in the former
d of unlicensed liquor in the latter, contrary to statutory regulations.
stoms cases however show a higher representation level than Excise
ses, 75.0% as compared with 22.2%. Two possible reasons for this
stinct difference could be postulated. Firstly, defendants in the

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[24] For the same reason that theft, etc. is distinguished from
ortion, etc., in footnote 22 above.

cise cases generally consist of persons from the lower income group arged with possession of illicit samsu or toddy. In the customs cases ey are believed to be members of the mercantile or business sector, ing charged with the possession of uncustomed commercial goods. condly, the latter usually involve substantial amounts of money and nsequently the penalty also, whereas in the former the amounts of quor is usually small and hence the penalty too.

presentation Levels - Locality Of The Courts

Finally we consider representation levels in various areas of onomic growth. For this purpose the areas from which the samples re taken were Kuala Lumpur, Kluang and Mersing, typifying a city, an ban and a semi-urban area respectively. The table below shows the presentation level in the various areas.

Table VIII

Representation Level - Locality of Court

	Represented		Unrepresented		Total
Kuala Lumpur	185	33.0%	375	67.0%	560
Kluang	12	14.8%	69	85.2%	81
Mersing	21	35.0%	39	65.0%	60

From Table VIII above we find a high level of non-representation all three areas, city, urban and semi-urban. The most attractive planation for such poor levels of representation in all three areas the indigency of the accused. Poverty and other factors which may

xplain low representation levels are examined more fully in Chapter VIII elow.[25] What the author hopes to do here, is to examine the rather urious difference between the Kluang courts and the Kuala Lumpur and lersing courts.

Mersing, the semi-urban area has a slightly better representation evel than Kuala Lumpur, the city area. Both, however, has a representatio evel very significantly higher than Kluang, the town area. Thus while n all areas an accused is likely to be unrepresented, this is particularly ore so in Kluang. Is there some plausible explanation for this?

A possible explanation could lie in the basic economic theory of upply and demand. "The price of legal services has been bid up ubstantially as a result of the increased demand by government and pper-income groups. The legal profession tends to gravitate towards he more lucrative work - in a developing society, the rapidly growing commercial work - with a resultant decrease in legal services available or purchase at the lower margin".[26] "Development" means increased ransactions, not only in commerce and industry but between one individual nd another and between citizen and state. Correspondingly, an increased lemand is generated by this sector, and being more renumerative, it raws away the supply of legal services from the less lucrative criminal ractice side. Increased demand may however result in an injection of xcess supply of legal services available for the commercial-civil legal

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[25] See p 80

[26] Barry Metzger, Legal Aid and World Poverty, Praeyer Publishers, 1974, p 9.

rvices market. The need to survive in the competition inevitably ads to a flow of legal services back to the less rewarding criminal actice which may result in better representation levels among accused rsons. This could be the explanation why Kuala Lumpur has a much tter representation level than Kluang.

Kluang, the town area, on the other hand is a growth centre with creased demand by the commercial-civil sector. There was however no flux of young hopefuls as was probably what happened in Kuala Lumpur. e resultant decrease at the lower margin that Metzger talks about sults, and this is reflected among other things in the significantly wer representation levels among the accused persons in the area.

Mersing was and is essentially an agriculture and fishing community thout much growth in terms of its transactions - commercial, industrial, tizen-government or inter-resident. There is correspondingly no crease in the demand for commercial-civil legal services, hence the tter representation level among the accused persons there. This would obably be eroded away were there to be increased transactions with growth in Kluang.

The hypotheses above focuses attention on one factor only, the llure of the supply of legal services to keep up with the increased mand generated by increased transactions. This may satisfactorily plain why there is a markedly lower level of representation in the uang sample as compared with the other two samples. Inadequate supply

legal services alone however does not explain why there is low
resentation levels, 35.0% and below, in all three samples. Thus
le Kuala Lumpur probably has ample legal services for those accused
sons who could do with them, its representation level is still as
as 35.0%.

CHAPTER IV

NON-REPRESENTATION AND PLEAS

In this and the next two chapters it is intended to investigate e impact of non-representation on the unrepresented accused and the ministration of criminal justice. Here we test the general hypotheses at proceedings against an unrepresented accused are more likely to oduce an adverse result and that this may be due to the disadvantage suffers vis-a-vis an accused who is represented.

We first consider non-representation and pleas. More specifically consider whether, and if so how, non-representation may cause an represented accused to make the adverse plea of guilty. The question ether the adverse plea may be the unfavourable plea is also considered.

eas of the Accused Persons

As a starting point and as the basis for the inquiry we begin with study of the plea patterns of the accused in the Kuala Lumpur sample. is is seen in Table IX below.

Table IX

Representation and Pleas

		Pleaded Guilty		Claimed Trial		Total
Magistrate's Court	Rep	23	21.7%	83	78.3%	106
	Unrep	173	79.0%	46	21.0%	219
Sessions Court	Rep	16	20.3%	63	79.7%	79
	Unrep	120	76.9%	36	23.1%	156
Lower Courts Total	Rep	39	21.1%	146	78.9%	185
	Unrep	293	78.1%	82	21.9%	375

• Note: Pleas taken are final or operative pleas.[27]

n-representation and Guilty Pleas

From the table above there is a clear association between the fact non-representation and the fact of pleading guilty. Of all the cases both courts, 78.1% of those unrepresented pleaded guilty compared th only 21.1% of those who were represented. Thus it appears that represented accused persons are more likely to plead guilty than those o are represented. The converse, that represented accused/ are more /per kely to claim trial, naturally follows. This inference, it is submitted uld be drawn because there is a logical basis for relationship in the variation between the two variables. The making of a plea depends on owledge of the law and its application to the facts which in turn is pendent on the availability or otherwise of legal advice by counsel, e., representation. In short it is not just spurious correlation for

[27] See page 12.

is neither nonsensical nor without meaning.[28]

Does it mean however that because an unrepresented accused is more kely to plead guilty he is necessarily disadvantaged, prejudiced or herwise adversely affected? This question can be approached from two gles, firstly, by reference to the implications of a plea of guilty the rights of the accused and secondly by considering the possibility an unrepresented accused making an unwarranted plea of guilty where a ea of not guilty may have been was the more appropriate plea.

e Adverse Plea

A plea of guilty is usually followed by a finding of guilt and nviction by the court, i.e., without the accused's guilt being proved yond all reasonable doubt. The plea of guilty duly accepted and recorded thus a waiver by the accused of his right to require the prosecution "establish the fact (of the accused's guilt) to a moral certainty, a rtainty that convinces the understanding and satisfies the reason"[29] a hearing. In terms of his rights as an accused therefore, it is the verse plea in that he gives up his right to insist on proof of his guilt the prosecution, the court here relying on his plea of guilty to base finding of guilt and conviction. Viewed from this angle therefore e generalisation that may be drawn from the association would be that unrepresented accused is more likely to make a plea whereby he loses right to have his guilt determined in a hearing, and thus, in this

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[28] See Simpson & Kafka, Basic Statistics, Oxford & IBH Publishing . (1965) p 348.

[29] Alison Russel, The Magistrate, London Butterworth & Co. iblishers) Ltd., 1947 p 58.

se the more adverse plea.

There are several possible explanations why the unrepresented used is more likely to make the adverse plea. Basically these ate to two factors, firstly, the inadequacy of knowledge of the law secondly, the influence of legally irrelevant considerations both which may operate to produce the plea of guilty made by an unrepresented used.

It would seem reasonable and logical enough that the average used's knowledge as to what constitutes the offence of which he is rged together with the range of general and special defences that be raised to exculpate him is easily far short of the legally ined criminal lawyer. This inadequacy could lead to the failure on part of the unrepresented accused to appreciate circumstances which the lawyer should be met with a plea of not guilty. This may be ustrated by a classic case of an unrepresented defendant making a a without sufficient knowledge of his rights under the criminal law. P.P. v X,[30] A was charged with voluntarily causing grievous hurt to an offence punishable under Sec. 325 of the Penal Code. X pleaded lty to the charge and admitted the facts of th case which were read by the prosecuting officer. The court then went on to record a ding of guilt and conviction. An unexceptional case, except that facts which it must be remembered were given by the prosecution closed that D in the midst of an argument with X, following the

[30]The actual names of the accused persons where cases such as se are quoted as well as their case numbers are not given for ious reasons of anonymity.

ner's assault on X's mother, had bent down to pick up a brick and was
ut to attack him when X picked up a six foot long stick and hit him
the forehead. The incident took place in a construction site and X
ged a report following it. To the legally trained mind the facts
ve disclose at least one possible defence, i.e., self-defence under
tions 97 and 98 of the Penal Code.[31] Unfortunately he was unadvised
unknowledgeable as to the law of the crime of which he was charged
he made a plea of guilty which to any reasonable lawyer would be
which was unwarranted in the circumstances .

The explanation offered above is one that could be tested. The
ts of the above case could be read out to an equal number of unadvised
sons from a representative sample of the class or classes of people
nally associated with such a crime as this, as well as to lawyers.
percentage of unadvised persons indicating their wish to plead
lty should be markedly higher than that from amongst the lawyers.
er sets of facts and circumstances from actual cases could of course
used too to illustrate the failure to appreciate the essential
redients of the offence charged.

Inadequacy of understanding as to the nature of the crime charged
in itself capable of leading to a guilty or not guilty plea. It

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[31] There were some disturbing features in this case. X was
ginally charged with committing culpable homicide not amounting to
der in the Magistrate's Court. He claimed trial and was to be
resented at the preliminary inquiry. Unknown to X's counsel, the
secuting officer had asked the court to discharge the accused not
unting to an acquittal and brought him to the present (Sessions
rt) where he pleaded guilty to the present charge. The author is
ormed that X's counsel would definitely have advised him to claim
al to the new charge had he been present when X pleaded guilty.

ld be asked then why this factor may not operate to create a reverse
nd from that observed in the plea pattern of unrepresented accused so
t he is more likely to claim trial. This however is not quite likely,
one considers the position an accused is placed in when he is charged.
s brings us to the question of the extraneous influences to which the
used is subject to and which may induce him to enter a guilty plea
ecially if he is unrepresented.

The first of such legally irrelevant considerations may be termed
psychological barrier that an accused who is not represented faces
n he weighs in his mind whether to plead guilty or to claim trial.
will be seen later a very high proportion (47.4%) of the unrepresented
endants who initially pleaded not guilty, subsequently changed their
as to guilty. This suggests that the unrepresented accused is aware
the handicaps he faces in a trial unaided and would prefer to plead
lty rather than go through the hearing 'contest' where he is often
a great disadvantage in the handling of the guilt-determining
cesses.

Other psychological and physical stimuli which are equally
elevant include the desire of the accused to get the case over with
soon as possible and the wish to avoid adverse publicity by a long
al. In his interviews with accused persons[32] the author also
ained evidence that some of them pleaded guilty because of an
orneous belief that the offence he is being charged with is only a

[32] See pg. 7

or one and that there was no point in contesting the case when they ld get away with a lenient sentence. It was also found that an accused son who claims trial and is unable to furnish bail could be tempted plead guilty so as to be released from police custody. Such influences real for the unrepresented accused; to what extent they actually induce lty pleas is left to be answered however by further and more searching iry. Where the accused is represented the impact of these stimuli ld clearly be less, thus also it follows the guilty pleas.

The last of the legally irrelevant influences which may induce unrepresented accused to plead guilty may be simply termed "police ssure". In his interviews the author found that out of 26 accuseds were asked whether they were subjected to some form of physical ssure or threats of it to plead guilty, only 4 answered in the ative, i.e., 84.6% of them said they were. Again the extent to which n pressure may lead to guilty pleas is yet to be determined. It ld be said that such stimuli would operate as well on accused who represented as on those unrepresented. This could be so except t its influence would clearly be weaker once an accused is properly ised.

To round up the explanation therefore, it may be said that the bility of the unrepresented accused to recognise situations which the lawyer would justify a plea of not guilty coupled with the impact irrelevant influences that produce a "plead guilty" state of mind in unrepresented accused could be the reason why there is such a high

l of adverse guilty pleas among unrepresented accuseds.

Unfavourable Plea

It could be argued however that the adverse plea of guilty where accused is actually guilty is in fact the favourable plea and thus unrepresented accused who as is seen above is more likely to plead ty is in no way prejudiced. This argument is based on the fact in such a case the accused is not put to greater expenses, time money by a long and protracted hearing only to be found guilty ay. The plea of guilty would at any rate be taken as a mitigating umstance when the court passes sentence. The contention is valid ourse, but only if the accused person is in the position to make ntelligent and sound plea independent of any extraneous and legally levant influences. As seen earlier where the accused is legally esented he would be fully advised as to the soundness or otherwise plea and the impact of irrelevant influences would be minimised. e should then plead guilty he may then at least be said to have the more favourable plea. Where the accused is unrepresented ver could he be said to be in the position to make this sound, lligent and independent plea? On any reasonable hypotheses the er to the question would have to be in the negative.

The same factors which were tendered to explain why there is such gh incidence of adverse pleas amongst unrepresented accused are vant in considering the possibility of prejudice wrought upon the sed who is unrepresented by a plea of guilty. Thus there is the

danger of the unrepresented accused being insufficiently equipped knowledge of the various facets of the offence charged to make plea of guilty which in the circumstances may be considered the urable plea. P.P. v X was an obvious example of the fair and just ation of the administration of criminal justice being adversely cted to the prejudice of the unrepresented accused. Then there is ourse the danger of an unrepresented accused being motivated to d guilty not because he is actually guilty, or even because he eves himself to be so, but because of the operation of one or more he irrelevant influences referred to earlier.

representation and Change of Pleas

An interesting aspect of proceedings in the plea stage is the ict of representation or continued non-representation on the ging or maintaining of original pleas. Here, unlike the earlier ly on non-representation and the making of final or operative pleas, take into consideration both initial and final pleas.[33] Against each these is juxtaposed the variable representation. The table below ws an analysis of the plea history of the sample taken from the la Lumpur courts.

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[33] Intermediate pleas are thus excluded. Where there is only one a followed by the sentence, where the accused pleads guilty or the cing, where he claims trial, this is both the initial and final a.

Table X

Initial and Final Pleas and Representation

		Magistrate's Court	Sessions Court	Total
Represented throughout:	CTx CTx	21	18	39
	PGx PGx	4	2	6
	CTx PGx	4	4	8
	PGx CTx	0	1	1
Unrepresented throughout:	CTo CTo	41	33	74
	PGo PGo	135	99	234
	CTo PGo	37	21	58
	PGo CTo	5	3	8
Represented subsequently:	CTo CTx	54	39	93
	PGo PGx	6	2	8
	CTo PGx	9	8	17
	PGo CTx	8	5	13
Unrepresented subsequently:	CTx CTo	0	0	0
	PGx PGo	0	0	0
	CTx PGo	1	0	1
	PGx CTo	0	0	0

Key to interpretation: CT stands for Claims Trial.
PG stands for Pleads Guilty.
x stands for represented.
o stands for unrepresented.

For the purposes of the present analysis figures for the ıgistrate's Court only are used. A similar analysis for the Sessions ɔurt figures should yield similar results.

There were 141 original pleas of not guilty made by unrepresented ccuseds. 63 of them were subsequently represented out of which only or 16.7% changed their pleas to guilty. 78 of them continued to be ırepresented out of which 37 or 47.4% of them changed their pleas to ıilty. It would appear thus that an unrepresented accused who pleaded

ot guilty is more likely to continue to do so with subsequent representat
ntinued non-representation works the opposite effect to encourage the
ccused to change his plea to that of guilty.

Let us now take the other category of unrepresented accused persons-
hose who pleaded guilty. There were 154 original pleas of not guilty
ade by unrepresented accuseds. 14 of them were subsequently represented,
f which 8 or 57.1% of them changed their pleas to not guilty. 140 of
hem continued to be unrepresented of which only 5 or 3.6% changed their
leas to not guilty. It appears from this that subsequent representation
s more likely to encourage the accused to change his plea to not guilty
hilst continued non-representation is more likely to result in the
ccused maintaining his plea of guilty.

Thus from the above findings there is a clear association between
aintaining of not guilty pleas and changing of pleas from guilty to
ot guilty and subsequent representation on the one hand, and between
aintaining of guilty pleas and changing of pleas from not guilty to
uilty and continued non-representation on the other. The generalisation
hat may be drawn would thus be that subsequent representation is more
ikely to result in a not guilty plea, either as a result of the
aintaining of the original not-guilty plea or the change of a plea of
uilty to one of not guilty. The logical converse also holds. Continued
on-representation is more likely to result in the adverse guilty plea
ither as a result of the maintaining of the original guilty plea or as
result of a change of the original plea from not guilty to guilty.
his is consistent with and supportive of the inference drawn earlier

that the unrepresented accused is more likely to make the adverse operative or final plea.

Conclusions

We may conclude from the foregoing that an unrepresented accused is more likely to make the adverse plea of guilty. This could be due to inadequate knowledge of the elements of the offence charged as well as the possible defences thereof. The operation of the legally irrelevant influences that may operate upon the mind of the unrepresented accused cannot also be dismissed. The impact of both these factors would of course be minimised, if not negatived, with proper legal advice.

The adverse plea may of course not necessarily be the unfavourable plea. The same reasons offered in explaining why the unrepresented accused is more likely to make an adverse plea may however, be advanced to say that the guilty plea may also be the unfavourable plea. Inadequate knowledge and the operation of the legally irrelevant factors may possibly render the unrepresented accused incapable of making a guilty plea which in the circumstances of the case may be said to be favourable to him.

When a study of the plea history of the sample was made it was found that subsequent representation does indeed have an impact on the making of final pleas as does continued non-representation. The finding is that representation is likely to induce a change of plea to that of not guilty and to encourage the maintaining of a plea of not guilty. The

reverse trend is observed for continued non-representation. An insight into the background to the plea-making thus confirms the conclusion that non-representation is more likely to lead to a plea of guilty.

CHAPTER V

NON-REPRESENTATION AND FINDINGS

In this chapter the author investigates the impact of non-representation on the proceedings subsequent to a plea of not guilty. A plea of not guilty is always accompanied by the prospect of a hearing where the guilt or otherwise of the accused is determined. A hearing may not always occur however, as where the Public Prosecutor withdraws the charges or does not wish to proceed further with the case. When this happens the accused is discharged, such discharge not amounting to an acquittal unless the court so directs. Some offences may also be compounded, in which case the accused is acquitted. The court may also on the application of the accused order a discharge not amounting to an acquittal in circumstances where it would not be fair on the accused to have a charge hanging over him.

Results Where the Accused Persons Claimed Trial

In the Kuala Lumpur sample of cases there were 132 accused persons in the Magistrate's and 99 in the Sessions court who claimed trial. The table below shows the results of the proceedings at the time the study was made.

Table XI

Results where the Accused Claimed Trial

	Magistrate's Court	Sessions Court
Stuck Off	1	1
Withdrawn	6	12
D.N.A.A.*	10	11
Compounded	4	0
Acquitted	15	20
Convicted	27	41
Part-heard	6	3
Unheard	63	10

* Discharged not amounting to an acquittal by the court.

Table XI above shows us the various ways in which cases where the accused claims trial may be disposed off. It is now intended to study whether non-representation may have an adverse impact on the results in the post - not guilty plea proceedings.

The Results in Completed Hearings

We begin by considering how the accused persons who claimed trial and actually went through a hearing fared. As in the previous chapters, a statistical breakdown of the results at this stage is made. For comparison, a study of another sample of cases chosen in the same manner as the main Kuala Lumpur sample was made. The basic sample here consisted of all cases registered in January to July, 1973 in the Kuala Lumpur Magistrate's Court and disposed off after September 1973. Table XII

below shows the number and rate of convictions and acquittals for represented and unrepresented accused persons from the two samples.

Table XII

Representation and Findings

			Acquitted		Convicted		Total
Magistrate's Court	Jan.-July	Rep	16	59.3%	11	40.7%	27
		Unrep	4	14.3%	24	85.7%	28
	Aug.-Dec.	Rep	13	59.1%	9	40.9%	22
		Unrep	2	10.0%	18	90.0%	20
Sessions Court	Aug.-Dec.	Rep	15	38.5%	24	61.5%	39
		Unrep	5	22.7%	17	77.3%	22

Non-representation and Convictions

From the table above we find that in the Magistrate's Court there is a very distinct association between non-representation and convictions. The August to December sample shows a conviction rate of as high as 90.0% among the unrepresented accused persons compared with 40.9% of those represented. This phenomenon is also seen in the January to July sample which shows 85.7% of those unrepresented convicted compared with 40.7% of those represented. Thus it appears that the unrepresented accused in the Magistrate's court is much more likely to be convicted in a hearing than one who is represented. Zander in a similar study,[24] where he found a conviction rate of 62% for unrepresented defendants compared with 57% for those represented felt justified in concluding that "these

[24] Michael Zander, "Unrepresented Defendants in the Criminal Courts", 1969 Criminal Law Review (London, Sweet and Maxwell), p 632.

figures show a slight indication that representation may improve the prospects of an acquittal".[25]

The association between non-representation and convictions though apparent in the Sessions Court is not as striking. 77.3% of those unrepresented were convicted compared with 61.5% of those represented. The reason for this weaker association becomes clear when the conviction rates are worked out by reference to various categories of offences. The breakdown of the cases heard in the sample is seen in Table XII below.

Table XIII

Breakdown of Cases Heard and their Results

		Acquitted		Convicted		Total
Penal Code Cases (Mag. Ct. only)	Rep	13	59.1%	9	40.9%	22
	Unrep	2	10.0%	18	90.0%	20
Penal Code Cases (Ses. Ct. only)	Rep	7	63.6%	4	36.4%	11
	Unrep	4	40.0%	6	60.0%	10
Dangerous Drugs Ordinance Cases	Rep	8	34.8%	15	65.2%	23
	Unrep	1	9.1%	10	90.9%	11
Customs Act	Rep	0		1		1
	Unrep	0		0		0
Excise Act	Rep	0		0		0
	Unrep	0		0		0
Arms Act, C.E.S.O.W.O.	Rep	0		1		1
	Unrep	0		1		1
Prevention of Corruption Act	Rep	0		2		2
	Unrep	0		0		0
S34A(1) Road Traffic Ord.	Rep	0		1		1
	Unrep	0		0		0

[25] Ibid., p. 639

It is clear even from a cursory look at the table that over half the cases heard in the Sessions Court dealt with offences under the Dangerous Drugs Ordinance. As was seen earlier these are mostly "possession" cases and from the table above are also what may be termed high-conviction cases. Of the 34 accused persons charged for drugs offences, 23 of them or 69.7% were represented of which 15 of them representing 65.2% of those represented were convicted. This high number of represented accused persons who were convicted on drugs charges has thus gone into inflating the conviction rate for represented accused persons in the Sessions Court taken together. This explains the significantly weaker association between representation and acquittals in this court and conversely, between non-representation and convictions.

The striking correlation between convictions and non-representation which was apparent in the Magistrate's Court samples reemerges when each category of cases tried in the Sessions Court are considered in turn. Thus 60.0% of the unrepresented accused persons charged for Penal Code Offences were convicted compared with 36.4% of those represented. Again 90.9% of those unrepresented charged under the Dangerous Drugs Ordinance ended with convictions compared with 65.2% of those represented. Hence, here too, as in the Magistrate's Court, a similar generalization that the unrepresented accused is much more likely to be convicted in a hearing may be drawn.

Our system of adversary trial involves a contest of some sort between the prosecution and the accused. It would seem reasonable and

logical to say that the former should have sufficient evidence of the accused's guilt before it proceeds with the case, for otherwise it would not have preferred the charges. In a survey of 40 cases involving 41 accused persons (where cross-examination of prosecution witnesses would be less vigorous and minimal), it was found that the prosecution succeeded in establishing a prima facie case against 38 or 93% of them. Only 3 or 7% of them were acquitted without their defence being called, the prosecution having failed to establish a prima facie case against them.[26] Assuming then that in none of these 41 cases was there any cross-examination at all, the result would then have been either still the same or that the prosecution would have been able to establish a prima facie case against more, if not all of the accused persons. The survey thus shows quite convincingly that the prosecution is usually able to adduce sufficient evidence which if not rebutted by cross-examination would establish a prima facie case against almost all the accused persons. Representation or otherwise is not relevant to whether or not the prosecution has the ability to produce this quantum of evidence; so the finding would be equally applicable to cases where the accused is represented as well.

The significance of the above conclusion is that as regards each accused, whether represented or not, he comes before the court with the prosecution in the position to establish a prima facie case against him. Whether the prosecution succeeds or fails then depends on whether the

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[26] See Table XIV below.

accused, or his counsel, if he is represented, is able to rebut this prosecution evidence by raising a reasonable doubt in the mind of the Magistrate or President. This may be done either by cross-examination during the prosecution case or at the defence, if the court should so call for it. The statistics show quite unequivocally that the unrepresented accused is much less likely to succeed in doing so and more likely to be convicted.

There are many reasons that may explain the correlation between non-representation and convictions; some may easily be tested, while others may be more difficult to verify. Basically however these reasons may be traced to the relative inability of the unrepresented accused to operate meaningfully through the maze of rules and principles that governs the hearing. If there be any stage of the trial that calls for greater knowledge, understanding and application of legal principles it is probably at this hearing stage. Application of substantive criminal law, evidence and procedure requires not only knowledge of these areas of the law, but skill and confidence as well. This is something obviously beyond the average accused who is unrepresented. The accused who is represented on the other hand will at least have his case adequately and skilfully presented by his counsel. Every rule in the book that is intended to safeguard his interests and to ensure that justice may be done would be mobilised in his defence. Is it possible to test this explanation or some aspect of it?

Performance of the Unrepresented Accused in Hearing

Each accused comes before the court with a wholly different set

of circumstances which is said to constitute the offence for which he is being charged. It is quite impossible to measure objectively and definitively his ability to utilize the rules of criminal justice unless these background facts are known. Nevertheless this may be reflected in whether he did participate in the various stages of the hearing. This, besides showing whether he was able, and the extent he was so able, to operate within the procedures of the hearing also gives us an indication of whether he was able to participate meaningfully in the process. An accused who is silent or unvocal in the hearing either has nothing to say or is unable to say what he wishes to say. Both are equally consistent with his being inadequately equipped with the necessary knowledge, skill and confidence to be a meaningful participant in the guilt-determining process of the hearing.

A survey of cases where the accused had claimed trial and had his guilt or otherwise determined in a hearing was carried out. The sample consisted of all cases[27] registered in the Kuala Lumpur Magistrate's Court in 1973 and disposed of as at 30th March 1975. The results showing the extent of the participation of the accused persons in each of the hearing are tabulated in Table XIV below.

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[27] Again, all summons, juvenile and minor arrest cases are excluded, leaving only the cases under the Penal Code to be considered.

Table XIV

Participation of the Unrepresented Accused Persons at Hearings

	Yes		No		Total
Cross-examination	31	66%	10	24%	41
Submission-after prosecution case	0	0%	41	100%	41
(Defence called)	38	93%	3	7%	41
Accused gives evidence	33	87%	5	13%	38
Accused calls other witnesses	6	16%	32	84%	38
Submission-after defence evidence	0	0%	38	100%	38
(Found guilty)	37	98%	1	2%	38

Cross-examination: 10 of the accused persons or 24% of them failed to cross-examine any of the prosecution witnesses. In an adversary trial, cross-examination is an important weapon in the armoury of the defence. In general it is aimed at rebutting the prosecution evidence by raising a reasonable doubt in the mind of the Magistrate as to its truth or reliability. In view of the observation that the prosecution is usually equipped with sufficient evidence to establish a prima facie case against each accused, these 10 accused persons are very likely to be called upon to enter their defence. 9 out of the 10 were in fact so called upon, the Magistrate holding that the prosecution had established a prima facie case against them.

Unrepresented accused persons do not cross-examine for the possible reason that they are not aware as to why they should do so. Even for those who are, they may not have sufficient knowledge of the ingredients of the offence to know what questions they should ask. The lack of confidence may also be an explanatory reason.

31 or 66% of them conducted some form of cross-examination of at least one prosecution witness. At this stage of the hearing, the prosecution normally asks questions to bring out facts to establish the ingredients of the offence charged. Facts are not too difficult for the accused to comprehend and to query or dispute. The facts with the law however make up the offence, and cross-examination without knowledge of the elements of the offence may not be very useful. Cross-examination without skill or confidence may also fail to discredit an untruthful witness or unreliable testimony. This form of cross-examination appears however to be all that most of the unrepresented accused persons (as observed in hearings by the author) appear to be capable of. That 66% of the accused persons went through the formal motions of cross-examination does not therefore say much for his being able to cross-examine effectively or meaningfully. It is significant that of the 31 who cross-examined one or more prosecution witnesses, all but two or 94% of them were called upon to enter their defence, i.e., cross-examination by unrepresented accused persons failed to a large extent to negative the prosecution evidence which is

usually sufficient to establish a prima facie case against an accused person.

Submission after prosecution case: Not one accused made a submission at the end of the case for the prosecution, a clear indication of the absence of knowledge of the substantive law of the offence charged and of the rules of evidence and procedure. Such knowledge is absolutely essential if the defence is to submit that the prosecution had failed to establish a prima facie case against the accused, i.e., that on the facts as adduced by the prosecution the ingredients of the charge are not proved beyond reasonable doubt. In sharp contrast with unrepresented cases, we find that in represented cases it is natural for the defence counsel to submit with his legal arguments that there is no offence disclosed by the evidence.

Accused giving evidence on his own behalf: When the court finds that a prima facie case has been made out against the accused it shall explain the three alternatives open to him, i.e., to remain silent, to make an unsworn statement from the dock or to give evidence on oath. 38 of the accused were called upon to make their defence. 34 of them or 84% chose to give evidence on oath, one made a statement from the dock and the other 5 or 13% of them remained silent. Since these 5 have asserted their innocence by claiming trial, the logical explanation why they chose not to give evidence on their own behalf to negative the prima facie evidence of guilt could be either their ignorance as to what they

should say or the lack of confidence to say it.

As for cross-examination, it does not take much legal ability to stand up and say something, which 85% of them did. What is said however is important, and it is possible that inadequacy of legal knowledge and skill may affect the accused exercising his right with advantage. At any rate, even if he manages to say something beneficial to his defence, it will not be his evidence against that of the prosecution witnesses which will largely be undiscredited or unrebutted in view of the fact that this has either not been cross-examined or ineffectively cross-examined.

Accused calling other defence witnesses: After the accused gives his own evidence he may call other witnesses for the defence. Independent third party evidence is extremely important if the accused wishes to negative the prosecution evidence. Only 6 or 16% of the accused persons called upon to enter their defence called an any witness. That as many as 32, representing 84% of them did not do so is a strong indication that many accused persons may not even be aware of this right early enough to be of any help to them. The Magistrate, it is observed, only asks the accused whether he has any witness to call during the course of the defence and after the accused has himself given his own evidence.

With 83% of the accused persons not having any independent evidence to back up the defence and bearing in mind that cross-

examination of prosecution witnesses was nil or minimal, and in the latter case largely ineffective, it appears unlikely that many of them may be able to rebut the prosecution. This of course is borne out by the statistics. 37 or 98% of the 38 accused persons who were called upon to enter their defence were found guilty. Only 1 of them or 3% succeeded in rebutting the prima facie case established against him.

Submission after defence case: As for submission at the close of the case for the prosecution, here too we find that not one accused made any submission at the end of their defence. The same observations may also be made.

No participation at all: They were 5 accused persons who did not participate in any of the five stages of the hearing. This represented 13% of the sample of unrepresented accused persons. Having asserted and maintained their plea of not guilty, one finds it difficult to attribute this total non-participation to any reason other than inadequate legal knowledge and skill and the lack of confidence of the unrepresented accused.

Conclusions: Thus from the foregoing, one finds a disturbing state of affairs insofar as the performance of the unrepresented accused at hearings is concerned. It appears that there is a clear disadvantage suffered by the unrepresented accused. This is reflected in the non or minimal participation in the various stages of the hearing. 13% of them took no part at all in the

proceedings. The possible explanation for this is inadequate knowledge, skill and confidence.

The level of participation appears to correlate with the complexity of the stages of the hearing. Thus 87% of the accused persons gave evidence on their own behalf, 66% conducted some form of cross-examination of at least one prosecution witness, only 16% called third party witnesses for the defence, and none of them made a submission at the close of either the prosecution or the defence case. This again is indicative of the unrepresented accused being handicapped by inadequate legal skills which render him capable only of handling the less complicated stages of the hearing. Observations show that even where the accused is more assertive and participates in the proceedings, the inadequacies he suffers may render this quite meaningless.

Non-representation and Other Adverse Results

Where after a plea of not guilty the prospect of a trial does materialize at all, some other results may be arrived at. Generally, the accused may be given a discharge not amounting to an acquittal or he may be acquitted and discharged. The result depends on why the hearing never materialized, for e.g., because the offence was compounded, or because on the application of the accused the court ordered a discharge not amounting to an acquittal. A question that may be fruitfully investigated is whether representation may have an impact on the proceedings leading to these other results. It is not

intended to make a thorough study of this question. The figures for the proceedings leading to the results and the percentage they make up of the cases disposed of are tabulated below and tentative conclusions and explanations made therefrom. This, it is hoped, will be the subject of more sophisticated inquiry and statistical testing.

Table XV

Cases Disposed Of Other Than In A Hearing

	Rep.		Unrep.		Rep.		Unrep.	
Cases Compounded (Acquitted)	3	8%	1	4%	0	0%	0	0%
Discharged N.A.A.	8	22%	2	8%	9	16%	2	6%
Charges Withdrawn (D.N.A.A.)	3	8%	3	11%	8	14%	4	12%
Cases Heard	12	62%	20	77%	29	70%	27	82%
Total Number Disposed Of	36	100%	26	100%	56	100%	33	100%

We find from Table XV above that 8% of all represented accused persons had their cases disposed of by the device of compounding of offences. This compares with 4% of those accused persons who were unrepresented. It would appear that the unrepresented accused would be less likely to have his offence compounded and thus to be spared a hearing. The possible explanation for this is that this device of compounding of offences is less known to the unrepresented accused and hence less relied upon.

Note however that the percentage represents the proportion of all cases disposed of, and not of compoundable cases brought before the

court and disposed of. The basis for a more reliable conclusion should be based on the latter.

We also find that taking all the cases disposed of, a higher percentage of represented accused persons were discharged not amounting to an acquittal compared with those not represented. A similar inference and explanation as that made earlier for the compounding of offences may thus be made. Unrepresented accused persons are less likely to have themselves discharged not amounting to an acquittal for the possible reason that they may not be aware, or are less aware, that they may make an application to the court for such an order in certain circumstances, for e.g., unnecessary delays or unjustified postponements.

The last manner in which cases may be disposed of is where the prosecution withdraws charges against the accused. This may be before the hearing commences or even during the course of the hearing. There is not appreciable difference in the percentages of cases disposed of by the prosecution withdrawing charges for represented and unrepresented accused persons.

Conclusions:

It appears that in hearings, where the guilt of an accused is determined, the unrepresented accused is much more likely to be convicted than the accused who is represented. As it may be said that the prosecution is usually in the position to establish a prima facie case against each accused the most logical explanation for this phenomenon is that of the poor performance of the unrepresented accused at the

hearing. This could only stem from the accused being inadequately equipped with the knowledge of substantive criminal law and the rules of evidence and procedure and the necessary skill and confidence to utilise them well or at all. Poor performance is borne out by the survey of 41 unrepresented accused persons which showed minimum or non-participation in the various stages of the hearing. Observations also reveal that where there is evidence of better participation by unrepresented accused persons, inadequate legal knowledge of the elements of the offence and other areas of the law and the lack of skill possibly rendered this less effective and meaningful than it would otherwise have been.

It may also be that representation may be helpful in obtaining other results favourable to the accused where the cases are disposed of in ways other than in a hearing. This could be due to unrepresented accused persons being less aware of devices such as compounding of offences and the possibility of making an application to the court for a discharge because of unnecessary or unreasonable delays or postponements.

CHAPTER VI

NON-REPRESENTATION AND SENTENCES

We now consider the impact of non-representation in the final stage of the trial, i.e., the sentence. Again we test the basic hypotheses that the unrepresented accused is at a disadvantage or adversely affected in some way or other. The specific hypotheses that is sought to be tested here would be that the unrepresented accused is less able to handle the proceedings prior to the sentence being passed on him to his advantage and this results in the sentence against him being more likely to be heavier than for the accused who has counsel speaking for him at the mitigation plea. As in the previous two chapters the study begins with an attempt to draw an association between non-representation and the adverse result - here being a heavier sentence.

Sampling Difficulties

In testing the existence of correlation between these two phenomena, difficulties not confronted in the previous analyses had to be solved.

Measuring the Sentence Variable: Having decided on the entities to sample - the factum of representation as the independent variable, and the factum of sentences as the dependent variable, the next step is to determine how these variables are to be measured. The former presents no problems, the factum of representation or otherwise is taken as was done previously. The

problem here lies with the dependent variable, i.e., the sentence factor. Unlike pleas and findings, where there are only two possibilities, a plea, or a finding, of either guilty or not guilty, here we find that the variable, sentence consisting of a wide range of possibilities. The fines or terms of imprisonment, and whipping besides the other form of custodial and suspended sentences vary in terms of their severity. A term of one year may be considered as a severe sentence for one offence but for another it may be light. Thus merely tabulating all the sentences by reference to the gradations of the sentences and drawing a correlation between the heavier sentences and non-representation gives no indication that the unrepresented accused may be more likely to get a heavier sentence than the represented accused. The way to overcome this difficulty is probably to have a sort of a scoring system by which it may be possible to classify a sentence as light or heavy by reference to the maximum sentence a court is empowered by law to inflict.

The Irrelevant Variables: All our problems are not solved, however, for we still have to consider the real possibility of irrelevant variables accounting for the differences in the sentences if this is indeed found. First and foremost of these is the fact that a variety of cases involving different offences for which different sentences are usually meted out are tried in the lower courts. To merely categorise the sentences into various degrees of seriousness and juxtapose against these the percentages

of accused persons represented and those not represented without considering the nature of the offence may result in a spurious correlation as this association may arise because most of the cases where the heavy sentences were passed were serious ones, and if there happened also to be represented, it is not justifiable to suggest that the represented accused is more likely to get a heavier sentence for it is clear that here the difference was due to the nature of the offence.

Similarly, other variables which may go towards affecting a reliable correlation analysis consist of the fact that each case, and each accused has a different set of circumstances and antecedents which are relevant in the court's making up its mind as to the sentence to be passed but which are irrelevant for the present analysis. A robbery of ten dollars will be viewed much more seriously than one of a thousand dollars. In the same way too, an accused who is in his youth is usually treated more leniently than one who is an adult. These factors would either go to mitigate the offence or put the accused in a worse light and may be responsible for observed association between non-representation and heavier sentences rather than the two variables in which we are interested in at the moment.

Finally there is the possibility that there may be differences in the attitudes of the sentencing Magistrate or President towards certain kinds of sentences or towards certain kinds of accused per persons. This may again constitute an irrelevant variable which

may be the real reason why there are differences in sentences for accused persons represented and those not represented, thus compounding the possibility of spurious correlation.

The problem then is one of the danger of irrelevant variables affecting the results of the analysis. To measure association one must be able to simplify situations by minimising the effect of irrelevant variables, that is variables other than those in which [one is] interested at the moment. This [one does] either by setting up an experimental situation, or by selecting events from life in such a way as to minimise the effect of the irrelevant variables".[38] It is proposed here to adopt the latter approach which Walker terms 'scientific selection'.[39]

The Sample: The irrelevant variables which might interfere with the drawing of logical and meaningful correlation have already been dealt with in some detail. It is now left to exclude them so that the sample taken has almost similar facts and circumstances prior to the passing of sentence. The cases were chosen thus: all cases of theft under Sec. 380 of the Penal Code, where the value of the property was below M$100, the accused had pleaded guilty and is below twenty one years of age and a first offender tried by the same Magistrate. Another sample was taken whereby the antecedents of the cases are the same as those above with the

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[38] Nigel Walker, Crimes, Courts and Figures; an introduction to criminal Statistics, Penguin Books Ltd., 1971, p 76. (Words in square brackets added).

[39] Ibid., p 77.

exception that the offender is now over twenty one. The samples were taken from all the cases registered between September 1974 and April 1975.

Non-Representation and the Heavier Sentence

An analysis of the sentences meted out in the cases in the two samples was made. Table XVI below shows the numbers and percentage of accused persons - represented and unrepresented, bound over (the lighter sentence) and fined and jailed (the heavier sentence).

Table XVI

Non-representation and Sentences

		Bound Over		Fined & Jailed		Total
Offenders under 21	Rep	1	100%	0	0.00%	1
	Unrep	11	100%	0	0.00%	11
Offenders over 21	Rep	1	100%	0	0.00%	1
	Unrep	0	0.00%	13	100%	13

It appears from the above that insofar as the first sample consisting of youthful offenders goes, there is no difference between sentences for unrepresented and represented accused persons. The sentencing policy of the Magistrate appears to be to give all youthful offenders a chance where the antecedents of the nature laid out above are present.

Where first offenders over the age of twenty one are considered however the situation appears to be different. All thirteen unrepresented accused persons failed to get the court to bind them over. The only accused who was represented was however bound over. The inference may

drawn that an unrepresented accused has less chance of getting off
th a binding over order than one who is represented. This it is
mitted is justified considering the fact that out of as many as
irteen of the unrepresented accused/, not one of them was bound over. /pers
though there was only one case where the accused was represented,
y subsequent case where such accused may be sentenced to imprisonment
d fine will decrease the percentage of represented accused persons
nd over without however bringing it to as low as 0%, which is the
rcentage of unrepresented accused persons failing to obtain a binding
er order.

There was not sufficient time to carry out similar studies with
ariation of the antecedents of the cases. It is believed that such
dies if so carried out would yield results supportive of the inference
ch may be drawn from the foregoing - that non-representation is
ely to lead to the accused getting a more severe sentence, or in
er words, that representation improves the chances of an accused
son found guilty of getting off with a lighter sentence.

The generalisation drawn may be explained by the inability of the
epresented accused to recognise and draw upon the circumstances that
mitigate the offence he had committed. In general, the sentencing
istrate is usually sympathetic and quite well disposed to hear the
sed out in his mitigation. In the sample taken for accused persons
twenty one, the circumstances of the cases were almost on all
s. The mitigating factors therefrom were available to all the
sed persons;what was left was merely for the accused to draw upon

them and present them to the court. What frequently happens however is that beyond saying things that are already known to the Magistrate the accused says nothing much more. Indeed it has been observed that all that the unrepresented accused says in mitigation is that he is a first offender, he is married with children and that he pleads for leniency and to be given another chance. Some even say nothing in mitigation. There is thus, unlike the mitigation plea of a counsel a failure to present the exceptional and extenuating circumstances of the case that may draw the sympathy of the Magistrate.

That there is no difference between the represented and unrepresented accused persons in those cases where the defendant was below twenty one may be attributable not only to the possibility of the Magistrate having a general sentencing policy as regards youthful offenders with the antecedents considered. One important factor that has to be considered, which is present in this sample but not in the latter sample, is the fact that it has become a salutary habit on the part of the lower courts to request for a probation report on youthful offenders by the Probation Officer of a district or area. Most of these probation reports delve into the background of the offender as well as present the mitigating factors on behalf of the accused. This speaks much more confidently and definitely more eloquently than the unrepresented accused, and could be also explanatory of why there is no difference observable between the accused persons represented and those not represented.

Conclusions

If the findings made from the sample of theft cases above is representative of other offences, it may then be concluded that representation may improve the chances of an accused being given less heavy sentence. The unrepresented accused is thus more likely to be given a heavier sentence than one who is represented by counsel in comparable circumstances. This is possibly attributable to the inability of the unrepresented accused to make an effective and meaningful plea in mitigation. Failure to draw upon the less obvious but equally important mitigating factors could be the source of this inability as could be the lack of confidence and skill.

CHAPTER VII

PROCEDURAL SAFEGUARDS

In general the rules of criminal procedure as provided for in our adjudicating system are applicable to all accused persons, represented and unrepresented alike. Recognising the disadvantage suffered by the unrepresented accused, however, legislature has provided statutory provisions which are intended to safeguard the interests of the unrepresented accused. Similarly, certain rules of practice may be expected to be complied with by the court when hearing an unrepresented accused so as to ensure fairness to him and that justice may be done. This chapter then looks at what some of these statutory and inbuilt safeguards are, their due compliance or otherwise and their effectiveness in mitigating the disadvantage of non-representation.

Charge Read, Explained and Understood

Section 173(a) and (b) of the Criminal Procedure Code (c.p.c.) is a general section on summary trials intended to apply to all accused persons. It is one of the devices of criminal procedure which if strenuously adhered to in its form and in its spirit will go a long way to place the unrepresented accused in a more equal position in the criminal justice process. It is also one of the sections where the appellate courts have held, quite consistently should be rigorously applied, more so where the accused is not represented. It is thus an

ample where the courts', the appellate courts at any rate, practice
f procedure is applied differentially in aid of the unrepresented
ccused.

See 173 (a) provides that when the accused appears before the
ourt, a charge containing the particulars of the offence of which he
s accused shall be read and explained to him and he shall be asked to
lead to the charge. See 173 (b) provides that if the accused pleads
ilty, he may be convicted thereon, provided that before a plea of
ilty is recorded the court shall ascertain that he understands the
ature and consequences of his plea and intends to admit, without
alification, the offence alleged against him.

These provisions have been judicially considered in several
ases where the accused appealed to the High Court on the grounds that
is plea of guilty was bad for non-compliance with the same. The
asic effect of these subsection of Section 173 as interpreted by the
arious judges have remained consistent throughout. For an understanding
f what the contents of these provisions are let us consider some of
hese cases.

In Cheng Ah Sang v P.P.,[40] it was held that "A magistrate should
atisfy himself by questioning accused that he does really understand
he charge and admits each ingredient that goes to make it up, before
e records a plea of guilty by the accused and should record that the

[40] [1948] M.L.J. 82

ccused understands the charge before entering his plea of guilty".

Then in Koh Mui Kiow v R,[41] Brown, J. said "where the charge ontains one or more ingredients, and where the accused is not epresented by counsel it is desirable that each ingredient and each uestion involved should be explained by the Magistrate himself, hrough the interpreter to the accused, and that the accused replies hould be recorded. If, after recording them, the Magistrate is in ny doubt whether the plea is an unequivocal plea of guilty, a plea f not guilty should be entered and the evidence should be called. his is particularly important in a case which is sufficiently serious o warrant a sentence of imprisonment". The judge here held that "the ecord leaves me in considerable doubt whether the appellant fully nderstood the charge and I reverse the finding and sentence and order er to be retried by another Magistrate".

Again in Yeo Sun Huat v P.P.,[42] Ismail Khan, J. held that "In a ase serious enough to call for severe penalties, as in this case and here the accused is unrepresented, every ingredient and question should e explained to the accused by the Magistrate and his replies recorded, nd a plea of guilty should not be recorded if there is any doubt hether the plea was an unequivocal plea of guilty".

More recently, in the case of P.P. V Chamras Tasaso, Hashim Sani,

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41 [1952] M.L.J. 214

42 [1961] M.L.J. 328

J. said "Any accused person is not to be taken to admit an offence unless he pleads guilty to it in considerable terms with appreciation of the essential elements of the offence. This rule should be more scrupulously observed in the case of an undefended accused or a person probably not versed in the language".[43]

The decisions may be summarised as follows: As regards the accused who pleads guilty, especially one who is unrepresented, it is the duty of the Magistrate to ensure that the accused understands fully the charge and admits each ingredient that goes to make it up. He is to explain each ingredient and question of the charge and to record the replies of the accused so that he may be clear in his mind that the plea is an unequivocal plea of guilty. Failure to comply with these requirements renders a conviction liable to be set a side under Sec. 422 of the C.P.C. if there was a failure of justice caused by such omission.

What, however, is the practice of the lower courts in respect of these two provisions? From the cases in all three areas where representation levels were computed, the author notes that in not one case where the accused was unrepresented and he had pleaded guilty was there any evidence of the Magistrate or President explaining each ingredient and question for the benefit of the accused and the latter's replies to it. All that was recored in each of these cases were the abbreviations C.R.E.U., P.G. meaning "Charge read, explained and understood,

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[43] Straits Times, Thursday March 27, 1975, now reported in [1975] 2 M.L.J. 44

pleads guilty". From the records therefore it appears that the expectation of the High Court that the Magistrate or President actively aids the accused who is unrepresented by explaining each ingredient in the charge to the accused and hearing him out in his replies is never fulfilled.

The above is confirmed by the observations in the courts of plea proceedings. The only compliance with Sec. 173 (a) appears to consist of the court interpreter reading out the charge to the accused or interpreting it to him where he does not understand the language of the court, and his being asked to plead to the charge. The Magistrate is passive throughout taking no part in the proceedings except to record in the charge sheet the misleading abbreviations "C.R.E.U." (followed usually by "P.G."). A more appropriate set of abbreviations would seem to be "C.R." only or "C.R.I." meaning charge read and interpreted. One is thus justified in wondering in how many of these cases an appeal court would have echoed the words of Brown, J. when he averred that he was doubtful that the accused fully understood the charge.

The objects of Sec. 173(a) and (b) are sometimes achieved obliquely, though unintentionally, by the practice of the courts in requiring the prosecuting officer to state the brief facts of the offence committed after the accused makes his plea of guilty. The Magistrate or President then asks the accused persons whether they admit these facts as stated, which they usually do (see below). These facts are more often than not a mere amplification of the charge with more details of the circumstances of the offence charged; the legal jargon found in the charge is usually

imported and so is the possibility of the accused failing to understand the ingredients and questions involved in the charge. Apart from being informed of more facts therefore, the accused is usually in no position to better understand the charge against him.

Some accused persons nevertheless do dispute the brief facts as adduced especially so where the facts presented are not couched in difficult legal terms or where the terms of the offence are easily understood even to the average accused. Here the Magistrate or the President then directs the accused that if he does not admit that particular fact as well he will be taken to have pleaded not guilty. The accused may then admit that fact as well following which the Magistrate or the President accepts the plea of guilty and proceeds to find him guilty.

Thus where some material fact is disputed at this stage, the accused is given the benefit of some explanation of that aspect of the offence which he disputed. Of the cases surveyed for the representation levels however it was found that out of the 295 unrepresented accused/ who pleaded guilty when charged initially, /pers only 7 of them disputed some fact in the brief facts stated by the prosecution and were recorded as having claimed trial. Thus the benefit of such explanation, limited though it is, rarely ever happens. It appears therefore that it takes a bold accused to disagree on one or more of the brief facts stated by the prosecution. This among other thing could be because the facts are only stated after the accused has been asked to plead and has done so. It is possible that

the unrepresented accused may be unaware that his guilty plea may be revoked in the event that he disputes a material fact as the Magistrate never explains this to the accused when he asks the accused whether he admits them. The accused thus may see no point in disputing the facts. Even if the accused is aware that his plea of guilty is revocable, and even if he wishes to dispute some facts, the operation of the extraneous factors inducing in the accused a "plead-guilty" frame of mind may discourage him from doing so.

Aiding the Unrepresented Accused at the Hearing

Section 257 (i) of the C.P.C. is a special section applicable to the unrepresented accused only. It provides that when the court calls for the defence it shall, if the accused is not represented by an advocate, "inform him of his right to give evidence on his own behalf, and if he elects to give evidence on his own behalf shall call his attention to the principal points in the evidence for the prosecution which tell against him in order that he may have an opportunity of explaining them".

The object and content of Sec. 257 (i) is clear from a reading of the section. Recognising the disadvantage faced by the unrepresented accused at this rather complicated stage of the trial, the C.P.C. specifically requires the presiding Magistrate to actively aid the former so that a fair hearing may be ensured. The Magistrate is enjoined firstly, to inform the accused of his right to give evidence on his own behalf, and secondly, if the accused should chose to do so, to call his attention to the principal points in the prosecution

vidence that tell against him, i.e., the main points in the prima facie vidence established against him.

Let us again consider the practice of the lower courts as regards ompliance with Sec. 257 (i). In the survey of 41 accused persons nvolving six different Magistrates, 38 of them were called upon to nter their defence. The record shows that one of the Magistrates ailed to inform the accused of his right to give evidence on his own ehalf. 33 of those called to enter their defence elected to give vidence on their own behalf. None of these 33 accused persons were iven the benefit of an explanation by the Magistrate of the principal oints in the prosecution evidence that told against them. Insofar as his stage of the hearing is concerned, the only record found took the following form or some modification of it: "I find that the prosecution has produced prima facie evidence against the accused, and I now call for the defence, DW 1.....". The record of the defence evidence then follows.

There has been apparently only one case where the effect of non-compliance of Sec. 257 (i) has been considered. In Shaari v P.P.,[44] it was held that "although the learned Magistrate had failed to explain the main points of the evidence against the appellant, he (the appellant) was able in his defence to give an intelligent reply; therefore having regard to what had taken place subsequent to that the accused had not been prejudiced in his defence, failure to comply had not occassioned

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[44] [1963] M.L.J. 22

any prejudice or a reasonable probability of prejudice but was an ommission curable under Sec. 422 of the Code". It appears therefore that if the ommission causes a prejudice or a reasonable probability of it to the accused in his defence this would be a failure of justice as contemplated in Sec. 422 and the proceedings may be set aside.

Was there a failure of justice in the trial of the 33 accused persons who were not informed of the main points of the prosecution evidence against them? Shaari's case appear to suggest that if the accused is unable to make an "intelligent reply" in his evidence, this may be circumstances that may render the proceedings a nullity for occassioning prejudice or a reasonable probaility of prejudice to the accused in his defence. It is submitted that insofar as an intelligent and complete reply, which is necessary if the accused is not to be prejudiced in his defence, depends upon the accused being fully aware of all the substantial points in the prima facie case proved against him, and that as these were never brought to his notice, there could be a reasonable probability of prejudice brought upon the accused in his defence. An accused may be able to make an intelligent reply to one or more of the points in the prosecution case established against him, but it is just probable that the unrepresented accused, being generally unknowledgeable as to the substantive and evidentiary principles of the criminal law was unable to identify and reply to the other equally important and relevant points in the evidence adduced against him.

Rules of Fairness

Under the heading "Magistrate to assist accused" Russel says "It

is of little use to furnish the accused with all the rights and privileges of a full defence and a fair trial, unless he is made aware of the existence of these safeguards: this is especially so when the accused is illiterate. The magistrate should take great care, therefore, to enlighten him on all matters relating to his defence in the ways referred to herein. It should also be made clear to the accused that the magistrate before whom he appears is not there merely to convict and punish him, but is still quite unaware whether he is guilty or innocent, and during the hearing will be at least as anxious to help him as to listen to the case for the prosecution".[45]

It is unfortunate that this exhortation to the Magistrate to assist the accused, especially important if he is unrepresented, is by and large never heeded. As for the previous statutory safeguards, this rule of fairness requires some active participation on the part of the presiding Magistrate. Again neither records nor observation in court proceeding bear this out. The role of the Magistrate appears to be confined to asking questions incidental to the conduct of the case, for e.g., whether the accused wishes to cross-examine, or to clarify some statement made by the accused. Nowhere was any Magistrate seen to expressly inform the accused, apart from telling him the three alternatives open to him after he is called to enter his defence, what he may do (in the conduct of his defence) or how he may do it.

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[45] Alison Russel, The Magistrate, London Butterworth and Co. (Publishers) Ltd., 1947 p.11

Conclusions

With rare exception therefore,[46] despite statutory directions to actively aid the unrepresented accused, the role of the Magistrate appears to be that of a passive, disinterested referee keeping the score in the verbal contest between the parties. This is alright and something necessary where both parties are on equal terms, i.e., if the accused is represented. It is however a perverse practice of the principle of the impartiality of the presiding Magistrate in an adversary trial when such a practice is adhered to where the accused is unrepresented by counsel.

[46] There was only one Magistrate, not from the sample taken but in 1970, who had the following record in his charge sheet "Prima facie case on both charges made out. Defendant to enter into his defence on both charges. Procedure for the defence explained. Defendant is told of the case he has to meet. Defendant elects to give evidence on oath".

CHAPTER VIII

CAUSES OF LOW REPRESENTATION LEVELS

Thus far we have established that there is a low level of representation in criminal cases in the lower courts. We have also seen strong indications that this is likely to lead to some adverse or negative impact on the accused and to prejudice his interests. It is now intended to trace some of the possible factors responsible for low representation levels.

Generally, an accused may be unrepresented either because of some personal attributes of his, for example poverty or ignorance, or due to some factor extraneous to him which render him incapable of engaging counsel even if he wishes to. The latter may take the form of inaccessibility to counsel or the non-cooperation of the police.

Poverty

Poverty is clearly one probable reason for the low representation levels. The price of legal services, being what they are, must be rather prohibitive to the man in the lower income group, thus rendering him less able to engage counsel. Thus one of the most common answers in reply to the question why the accused did not ask for counsel were "I can't afford it" and "I don't have any money". A survey of thirty six accused persons charged with various offences in the Kuala Lumpur courts was carried out. All of them had incomes ranging from $0 to $250

with the exception of three of them who had $390. Eighteen of these accused persons were daily paid, as contract labourers, lorry attendants or as carpenters and blacksmiths. Of the thirty six only three of them or 8.3% of them were represented.

It will also be recalled that in the sample of cases from which representation levels were computed, there is an indication that offences associated with people in the lower income groups like theft tend to be less represented than offences associated with people from various income-level groups like possession of drugs. It appears therefore that among the lower income group representation would be low. The adverse and prejudicial impact of non-representation would also therefore be worst felt here.

Ignorance

Ignorance of one's right to counsel and of the necessity of employing the services of one is another possible reason for low representation levels. The first facet of ignorance consists of the accused not being aware of his constitutional right to consult a lawyer as well as of his right to insist to see a lawyer while in police custody. Thus some of the accused persons, who were remanded and produced before the court, when interviewed indicated that they never asked to consult a lawyer because "I did not know I could ask for one".

Ignorance may also lead an accused to be unable to identify circumstances which call for legal advice. Thus three accused persons who were charged with unlawful assembly and rioting in reply to the

ame question above replies that "it was a small matter" and expressed he opinion that the Magistrate will let them off leniently. This was owever a serious offence which carried a maximum sentence of two years mprisonment. The fact that there is a higher level of representation n hearings than at the plea also appear to indicate that accused ersons view the plea and sentence as less difficult to handle and so o not require legal representation. These however involve difficulties hich, though less apparent than at the hearing, materially affect the ccused's ability to conduct the proceedings meaningfully unaided, specially where it involves technical points of law.

The root cause of ignorance can usually be traced to poverty. etzger succintly states this relationship when he said "among the poor, ow education levels and ineffective communication of legal norms ontribute to a failure to recognize situations where legal services re required or advantageous. Even where such a need or advantage is erceived, it is not tied to effective purchasing power".[47]

Attitudes

The low regard for, and expectation of respect for personal liberty in our society particularly among the lower income groups which are associated with most of the offences triable in the lower courts may also be explanatory of low representation levels. The prevailing attitude towards criminal charges and the possibility of conviction appear to be that these, though they are all arrest cases,

[47] Metzger, op. cit. n.26 p.9

are not so serious in terms of their actual physical or pecuniary consequences as to warrant enlisting the aid of counsel. Thus it is only where the consequences are grave that legal representation would be needed. This occurs for instance when the sentence may be long terms of imprisonment. There is some evidence for this in the study of the three broadly "similar" offences which differ materially only in their maximum sentences. Accused persons charged with house-breaking to the commission of theft which has the highest maximum sentence were more heavily represented than those charged for simple housebreaking or theft; the representation level being 42.4% compared with 25.1% and 16.7%. It is thus only in the more for very serious cases that an accused or his family or friends may try to overcome other restraints, for e.g., the inability to pay for legal services, to seek legal advice. In this respect it is believed that most criminal cases in the High Court which usually involve maximum sentences of imprisonment for life or the death penalty, are represented.

Accessibility and Police Cooperation

After an accused is arrested and before he is charged in court he may be released on police bail. Once he is produced and charged in court he may also be allowed bail pending the next stage of the proceedings against him. These two intervals are vital for the accused insofar as his obtaining the services of counsel or otherwise is concerned. If the accused is released on bail, he is of course free to move around and engage the services of one if he so wishes. What however of the accused who is remanded either because he is unable to

ish bail or because bail is refused him?

For the accused who is remanded in police custody, there can only hree possible ways he may get access to counsel, by himself, through friends or relatives or through the police. All three possible means nds on the cooperation of the police. Interviews with 33 accused ons were conducted to gauge the extent accused persons remanded in tody were able to make contact with people outside and the cooperation he police in this. It was found that both were minimal. This is lected in some of the answers to questions on various aspects of ssibility to friends, relatives and counsel and the availability he cooperation of the police. Some of these are given below:

"I was refused permission to ring up my father"

"I wanted to contact my brother, they said no"

"I wanted my father to get a lawyer, but they refused me permission to ring up"

"I asked (for a lawyer), but they did not allow me"

"I asked the police to contact my parents, they refused"

"I asked the police to contact my family, up to now they have not come"

" I slipped out a note to my father through a car-washer"

"My father came to check, found me here"

"I got a lawyer when I went out on bail"

"My friends who are out on bail will get me a lawyer"

"I would like to contact a lawyer but I have no chance to do so"

"They allowed me to write"

"I wrote to my father, up to now I have no news"

"None of my friends or relatives came to see me"

"No one knows I am here"

It appears therefore that once in police custody, an accused is virtually cut off from friends, relatives and others who may be able to help him engage council. He is also quite unable to reach one if he tries to do so himself. It is only in the event that someone comes up to the police station to check on his whereabouts that some contact is established. The more resourceful accused may try some devious means, as did the accused who slipped out a note through the car-washer. The only form of communication that the accused is allowed to use appears to be by letters only. Sympathy and cooperation for the accused who requests to communicate with someone outside, or to get the police to do this for them, is also almost nil. This is also reflected in some of the cynical replies of accused persons when, in response to the question whether they asked to contact a lawyer, some of them answered, "There where can get".

Inaccessibility and police non-cooperation are thus possible factors for the low representation levels, particularly among accused persons who are remanded in custody throughout the proceedings against them. Statistically it may be shown that there is some truth in the suggestion that the accused who is remanded in custody is not in too favourable position to secure representation. There were 56 represented accused persons in the Jan-July sample of cases which were disposed off

er September 15 of the same year. Only 8 of them or 14% of them e recorded as being represented the first time they appeared before court. The other 48 of them or 84% became represented only after y were released on bail.

The above may be true also for accused persons who are released bail after they are formally charged. Many of these accused persons e remanded for various periods up to two weeks under sec.117 of the iminal Procedure Code where there is no question of bail. At the end this period he is produced before the court, formally charged and ked to plead. It is then that the question of bail comes up, when, usually happens, his case postponed. Thus if he is released on il it is only after he has made his plea usually, of guilty. The tatistics show that the unrepresented accused who has pleaded guilty extremely unlikely to engage counsel subsequently. From the main ala Lumpur sample (Magistrate's Court) there were 154 unrepresented cused persons who initially pleaded guilty; only 14 of them or 9.1% them subsequently sought counsel. It seems that accused persons who ve pleaded guilty are not very likely to seek legal advice subsequently. is is possibly because they do not see the point in engaging legal rvices now that they had pleaded guilty. It could also be that some them have no idea that their plea is not final and may be revoked d so just resign themselves to the fact that they have pleaded guilty.

pply of Legal Services

Low levels of representation in criminal cases in the lower courts uld also be because of the low supply of legal services in this area

of our legal system. Most of the crimes discussed in this paper are associated with the lower-income group and thus representing accused persons is less rewarding financially. Lawyers generally thus opt for the more lucrative fields as in civil litigation and the commercial sector; and this despite heavy and stiff competition there.

Legal Aid

Finally, the inadequacy of our legal aid system is surely accountable for low representation levels and their adverse impact in these cases. The Legal Aid Bureau in so far as its criminal jurisdiction is concerned is only empowered to represent an accused who has pleaded guilty and who wishes to make a plea in mitigation.[48] Even this limited jurisdiction is rarely exercised.[49] The impact of an inadequate legal aid scheme for criminal cases is borne out by a comparison of statistics between our Sessions Courts and those of the Assizes and Quarter Session in several courts in the London area, where there is a comprehensive scheme of legal aid. Zander found a representation level of 94% in the latter courts.[50] This compares with the 33.6% in our Sessions Court in Kuala Lumpur. Of those represented in the London courts 87% of them were financed by legal aid. None of the cases in the Kuala Lumpur courts were so financed.

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[48] Second Schedule to Legal Aid Act, 1971.

[49] The Legal Aid Bureau represented 5 such accused persons in 1973, only 1 in 1974 and 4 this year-as at July, 1975.

[50] Zander, op.cit. n.24, p,637

Conclusions

The relationship between poverty and non-representation appears to be quite clear. It is usually the indigent accused who is less able to recognize situations calling for legal services and even where he is in the position to do so, the price of legal services is usually beyond his means. It is also among the poor that negative attitudes towards personal liberty may be traced as is evidenced from their being less concerned about the consequences that may befall them in the event that they were convicted for the less serious offences.

Inaccessibility and police non-cooperation when the accused is remanded may also contribute to low representation levels. Remand in police custody could, however, prove to be a greater barrier to the indigent accused than to one who is a man of means. Thus the accused who is unable to furnish bail may probably never have access to the people who may aid him in obtaining legal advice or services. Again even where the accused is released on bail after a plea has been taken (if he is unrepresented, it is usually the guilty plea), the unknowledgeable accused may leave the court fallaciously believing that this plea is final and irrevocable. Thus even though he may be a free man, he is not persuaded to make efforts to engage counsel or even to contemplate seeking legal advice, he being of the impression that having pleaded guilty, it is not necessary to employ counsel.

CHAPTER IX

CONCLUSION

We saw that there was a depressingly low general level of representation in each of the three areas studied. In the main Kuala Lumpur sample it was as low as 33%. This is also the representation level at the plea stage. Thus as many as 67% of the accused persons were unrepresented and without the benefit of legal advice at this crucial stage of a criminal trial which determines whether his guilt shall be determined at a hearing or by his admission of guilt. There was a representation level of 65.7% in 'hearings'. This however gives no reason for comfort in view of the fact that among the accused persons only 40.7% claimed trial, most of them being those represented at the plea. The remaining 34.3% went through or may go through the complex process of the hearing unaided by counsel. As high as 82.6% of the accused persons who were found guilty and sentenced to some form of punishment were not represented and had no one to speak for them at the mitigation plea.

The study also shows quite conclusively that non-representation is more likely to lead to results adverse to the accused and that this may logically be explained by the accused's general inadequacy of knowledge of the rules of criminal justice and his inability to operate within them. Thus the unrepresented accused is more likely to plead guilty, which may be the unfavourable plea in the circumstances; to be

found guilty; and to be given a heavier sentence. He is also less likely to be acquitted or discharged in the special circumstances where such an order may be obtained.

That an unrepresented accused is more likely to be adversely affected in the various proceedings against him because of the disadvanta he suffers vis-a-vis an accused who is able to avail himself of legal services raises serious jurisprudential questions regarding the credibili of the character and operation of our criminal justice system.

In the first place there is the possibility of injustice being wrought upon the unrepresented accused. As seen earlier the rules of our criminal justice system are the results of a delicate balance achieved by the conflict of the interests of the state and those of the individual citizen. Notions of justice and fairness decide where the equilibrium may be arrived at. Where the accused is unable to rely upon these rules of criminal justice, the principles of justice and fairness underlying the same do not come into play. The interests of justice are thereby not furthered or even preserved by such a consequence. This may be alleviate to some extent if the presiding Magistrate actively tries to mitigate the disadvantage suffered by the unrepresented accused. An almost consistent magisterial practice of detachment from the proceedings before the court however appears to be the rule.

This brings us naturally to the next point, that of our system of adversary trial. The evolution of our complex criminal justice processes has as its background the adversary system as opposed to the inquisitoria type. This presupposes that the opposing parties are sufficiently

equipped with the necessary knowledge and skills to engage in equal contest. Equal contest is clearly fictional in an unrepresented trial, the accused is to say the least not on equal terms with the legally trained prosecution officer. He is in fact faced with a double handicap in that while he is unable to rely upon the rules of criminal justice that are designed to protect him, he is confronted by a prosecuting officer who wields them against him.

Flowing from the above there is thus no equality in the application of the law between an unrepresented accused and someone who is in the position to avail himself of legal services. The ramifications of this can be seen in the limited legal knowledge from which an unrepresented accused may draw upon to make the sound and favourable plea compared with the accused who is fully advised on all points of the ingredients of the offence for which he is charged together with the defences he may rely upon. There is unequal consideration in the guilt-determining proce of the hearing where the accused is unrepresented brought about by his inability to participate fully and meaningfully in it. Similarly, there is unequal consideration of the circumstances of the offender and the offence committed before sentence is passed where the unrepresented accus is unable to make a meaningful and effective plea in mitigation.

In tracing the causative factors for low representation levels, one finds that remand in custody and police non-cooperation may be possible factors. More basic than these, however, appear to be poverty, and its sisters, ignorance and the negative regard for freedom and personal liberty. It is the poor, who are also the less educated and

knowledgeable as well as the less assertive of their rights who appear to be less likely to avail themselves of legal services; and hence also to suffer the adverse consequences of non-representation.

A comprehensive system of legal aid, at least, for those offences considered in this study, is thus evidently a crying need. The alternative, but at best, a temporary measure in correcting the disadvantage suffered by the unrepresented accused, would be for the presiding Magistrate to discard the practice of total detachment from the proceedings going on before him and to actively aid the unrepresented accused; this at any rate, being precisely what they are enjoined to do by the C.P.C. The implicit presumption of equal contest, religiously followed but perversely applied here, can only render into a nonsensity our system adversary trial and reduce into a mere performance and a farce the trial of the unrepresented accused.

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