THE POSITION OF THE UNREPRESENTED ACCUSED IN THE SUBORDINATE COURTS IN MALAYSIA

BY

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PREFACE

A. Synopsis

This is a formulative or exploratory study which examines the relative position of the represented and the unrepresented accused persons before the subordinate courts in Malaysia. The aim of this study is primarily to ascertain whether the unrepresented accused is disadvantaged when compared with his represented counterpart and, if so, to what extent. The premise on which this study proceeds is that if reasons extraneous to the guilt - determining process affect the proper outcome of a case, then a proper functioning of the rule of law in the criminal area is in question. The State is then obliged to correct this, and at the very least minimise the impact of these factors, if the adversary trial system is to be preserved. Many countries, no less Malaysia, accept that an unrepresented accused is disadvantaged and have instituted schemes to provide counsel to an indigent accused. Financial limitations, however, have resulted in schemes of a limited nature. In Malaysia legal aid in the criminal area is confined to the provision of counsel to advance mitigation pleas on behalf of an accused person after he has been found guilty. This study then also traces the impact of counsel at every stage of the

trial process viz., plea, trial and sentence, to ascertain whether scarce resources are being rationally applied.

The choice of the subordinate courts as the focus of this study is justified on three grounds, namely, first, the bulk of the criminal cases are heard by these courts, and especially the Magistrates Courts, secondly, the subordinate court cases, in particular those from the Magistrates Courts affect a far greater number of people and thirdly, the greatest number of convictions are recorded in the subordinate courts, and in particular the Magistrates Courts. Further, although the High Court hears the most serious cases, the subordinate courts, nonetheless, also try cases with potentially serious consequences.

Data in respect of four Magistrates Courts and three Sessions Courts over a two year period (1972 - 1973) were collected and analysed primarily from court records, supplemented by interviews of accused persons and observations in the courts. The main study was in respect of all criminal cases registered between January to July 1973 at the Magistrate's Court, Kuala Lumpur (Total sample: 309). To obtain a representative result the courts chosen were located

in urban, semi-urban and semi-rural areas. The study examines, first, the level of representation at each stage of the trial process namely, plea, trial and sentence, and relates the representation both to the seriousness of the offence (in terms of the penalty imposable), and the nature of the charge. An assessment is also made as to whether the location of the court affects representation level. Some tenative reasons for the high level of unrepresentation recorded are proferred. Legal representation in relation to the plea recorded is also examined. Data are also analysed to ascertain whether the retention of counsel results in a change of pleas, especially from guilty to not guilty. The relationship between representation and findings in cases where the accused persons plead not guilty and proceed to trial of their case is also traced. The study also examines the impact of representation on final stage of the trial process, namely the imposition of the sentence. Some of the variables which affect outcome are identified and are controlled to make more reliable inferences possible. A special evaluation is made of the role of counsel for mitigation purposes. The actual position of the accused person in court is also examined. The lay-out of the court, court procedures and mannerisms are evaluated to ascertain whether they create problems for the unrepresented accused in

articulating his case. Finally the study describes the various legal aid systems which have evolved to provide counsel to an indigent accused. The relative merits of these models are traced and the main features of a model delivery system are attempted. A brief account of novel funding sources for this model delivery system is also presented.

Where appropriate results of similar studies carried out elsewhere, for example, Australia, U.S.A., and England are set out for comparative purposes. Recourse is also made to reports of committees in these countries looking into the question of the provision of legal services to indigent accused persons.

B. Acknowledgement

I wish to express my gratitude to my supervisor, Professor Nik Abdul Rashid, for his valuable comments and his assistance.

I also wish to thank the Law Faculty for the use of the unpublished project papers; the Legal Aid Bureau for access to their files, the High Court Registry for access to their files and finally to the Courts from which data were collected for giving me access to charge sheets and related documents.

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CHAPTER I

INTRODUCTION

A. The General Problem

In principle all persons who stand accused of a criminal offence have an equal chance of proving their innocence, aided or otherwise. The Malaysian Law is replete with elaborate procedural and evidentiary provisions safeguarding the interests of the accused and which are designed to ensure a fair result. But it is trite knowledge emanating from simple observations that it requires a trained and skilled person to understand and utilise efficiently these safeguards. This much has been recognised by jurists since a very long time ago. Writing in 1882, Sir James Stephen had said:

> "When the prisoner is undefended his position becomes often pitiable, even if he has a good case. An ignorant, uneducated man has the greatest difficulty in collecting his ideas and seeing the hearing of the facts alleged. He is utterly unaccustomed to sustain the attention of systematic thought, and it often appears, as if the proceedings on a trial which to an experienced person appear plain and simple, must pass before

> the eyes and mind of the prisoner like a dam which he cannot grasp."[1]

The pathetic plight of the unaided accused has also received judicial recognition. In Powell v. Alabama[2], Justice Sutherland of the United States Supreme Court said:

> "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of the counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he has a perfect one. He requires the guiding hand of counsel at every stage of the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."[3]

This view has been publicly aired by one member of the Malaysian Judiciary, albeit extra-judicially, in these terms:

> "...Even the enlightened and educated members of our society have little or no skill in the science of the law - what more of the poor, the illiterate and

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[1] Stephen James, A History of Criminal Law of England, 1882, 1, p. 442.

[2] 287 U.S. 45 (1932).

[3] Ibid., p. 77.

> men of feeble intellect. The complex procedures of our Court with all its technical refinements may pose serious obstructions to the poor unrepresented laymen from successfully obtaining justice."[4]

It is important to realise that it is the State in pursuance of its duties, which initiates the criminal process against its citizens and that this process may end with the imposition of serious disabilities on the persons proceeded against. It is therefore obligatory on the Government to ensure that all extraneous factors which unduly impede the attainment of a just and proper result are eliminated or their impact minimised. It is not only the interests of the accused which needs protection; wider and more important interests are at stake. Our system of trial is adversary. The innocence of the accused is presumed. The State accuses, and is backed up by the whole infrastructure of the justice department, which includes experienced investigators and experienced prosecutors. It is for the accused to challenge effectively the State's case against him. The Judge in this accusatorial trial system merely presides at the trial, listening to both

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[4] Datuk Wan Yahya bin Pawan Teh, in a speech on his elevation to the Bench on 8th January 1978. Reported in (1978) 1 M.L.J. cxvii.

sides and intervening only to clarify points that are obscure. He finally gives his decision on the basis of the case presented by both sides. It is clear therefore that the adversary trial system assumes an equal contest between the participants, and the proper performance of both the prosecutory and defence functions. If there are limitations on the ability of one contestant to marshal his evidence, dissect his opponent's evidence and advance the necessary supportive arguments then the implicit assumptions of the adversary system are fictional and the system itself inherently unjust. The proper functioning of the rule of law in the criminal area is then at stake.[5]

The problem is exacerbated when it is poverty which prevents the accused from engaging counsel to help him conduct his case. It is for these reasons that legal assistance to accused persons has become an integral component of most legal systems throughout the world.

But the existing legal aid schemes are not all uniform. Some countries have elaborate schemes

[5] See generally on this, "Report of the Attorney-General's Committee on Poverty and Administration of Criminal Justice USA", 1963, cited in Hall and Kamisar, Modern Criminal Procedure, Minnesota U.S.A., West Publishing Co., 1966, p. 265.

designed to assist the accused from the moment he is arrested whilst in others, for example Malaysia, counsel is introduced to advance pleas of mitigation after a finding of guilt. The reason accounting for this difference often relates to the availability and application of funds. The cost of legal aid may be prohibitive especially in a developing country where scarce resources have to be allocated amongst a long and competing list of priorities.

B. The Problem in Malaysia

The system of trial in Malaysia is adversary. The problems earlier outlined exist if an accused person is left to face a charge in court without the assistance of counsel. The State is therefore obligated to furnish assistance to an indigent accused.[6] However prohibitive funding costs have prevented the implementation of a comprehensive legal aid scheme for both civil and criminal cases. Indeed, financial considerations

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[6] Prior to the implementation of the Legal Aid Act, 1970 there were two situations in which an indigent accused or defendant could obtain assistance from the State. First, an indigent accused charged for a criminal offence punishable with death would be assigned counsel at State expense. Secondly, in civil cases, a poor person may apply to the court or a Judge for leave to sue, defend or proceed as a pauper. If leave is granted, the court appoints an Advocate and Solicitor to represent such pauper: Order 22 Rules of Supreme Court, 1957. The pauper is exempted from paying any court fees or lawyers fees: Order 23 and 24, Rules of Supreme Court, 1957.

seem to have determined the scope and extent of the legal aid scheme set up in 1970.[7] The Committee appointed by the then Minister of Justice in 1963 to enquire into the need for the establishment of legal aid service in Malaysia had as one of its three terms of reference: "To establish the amount of expenditure to be borne by the Government per annum if the scheme is to be implemented."[8] The then Chief Justice opposed the idea because he felt that it would be costly to maintain the personnel as the funds needed annually would be in the region of M$3,200,000. In June 1965 the then Minister of Justice stated in Parliament that while he agreed that the principle of legal aid was desirable, he was unable to consider it owing to financial reasons. The Committee, basing on the $194,000 spent by the Singapore legal aid scheme, projected a cost of $2 million annually to run a similar Malaysian scheme. As this was felt to be too heavy a financial commitment, it was decided to look into the

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[7] The Legal Aid Bureau was set up in 1970 under the Emergency (Essential Powers) Ordinance No. 39 of 1970, and subsequently replaced by the Legal Aid Act, 1971.

[8] Report of the Committee appointed by the Minister of Justice to enquire into the need for the establishment of Legal Aid Service in Malaysia. The account that follows is mainly from information obtained from this Report. I am grateful to the Legal Aid Bureau, Kuala Lumpur for giving me access to this Report and related documents.

question of providing legal aid for only certain types of cases. At the third meeting of the Committee it was decided that a limited scheme with an annual budget of $750,000 would be set up. The fifth meeting had already whittled down this figure to "not more than $300,000" to run a pilot scheme for one year. However the final meeting decided to initiate a pilot scheme at a cost of $100,000 "...taking into account the present financial situation of the country." The pilot scheme was recommended to be converted into a permanent project with the setting up of legal aid bureaus by phases throughout the country.

Owing to financial considerations legal aid in criminal cases is limited to advancing pleas of mitigation on behalf of a convicted accused.[9] No research preceded the decision to implement the legal aid scheme in this way. Nor has there been any evaluation research to determine whether scarce funds are being efficiently utilised by supplying counsel

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[9] See Second Schedule, Legal Aid Act, 1971. Initially civil proceedings in respect of which aid could be given were confined to maintenance cases. Since then the limited jurisdiction has been expanded steadily, and now includes as well: Workmen's compensation, small estates distribution, accident claims, money lender's cases, maintenance, custody, divorce and property proceedings in Muslim Courts. Legal advice is available in respect of proceedings for divorce and custody, tenancy and hire purchase matters.

at this stage of the trial process.

This study hopes to cast some light on this question. This study will ascertain the differences, if any, between cases where the accused was represented by counsel and where he was not represented. It is hoped that by highlighting these differences with regard to the various stages of the trial process, namely, the plea, the finding and the sentence, a reasonable basis will be provided for determining, given the scarce resources, the stage at which it is most critical to provide the services of counsel. This research hopefully, will also provide pointers as to whether the implementation of a more extended legal aid scheme is imperative to preserve the rule of law in the criminal area.

C. Research Objectives and Organization of the Study

The central aim of this study is the investigation of the position of the unrepresented accused in the subordinate courts in Malaysia. Subsequent chapters of this thesis are directed towards the following objectives.

The rest of this chapter elaborates on the research design. The study sample, research instruments, and procedure used to collect and to analyse the data

are discussed. The reasons for the choice of the subordinate courts are also adumbrated.

Chapter II ascertains the level of representation at each stage of the trial process, in relation to the seriousness of the offence, as well as in relation to the kind of charges. An assessment is also made whether the location of the court affects representation levels. Reasons for the high level of unrepresentation are also advanced.

Chapter III examines legal representation at the plea stage as well as the impact of counsel on changes of pleas.

Chapter IV examines the relationship between representation and findings in cases where the accused pleads not guilty and proceeds to a trial of his case. Representation and finding is also related to the type of offence charged.

Chapter V examines the impact of representation at the final stage of the trial process, namely the imposition of the sentence. Some of the variables which affect outcome are identified and are controlled to make more reliable inferences possible. A special evaluation is made of the role of counsel for mitigation purposes.

Chapter VI examines the actual position of the accused in court. The lay-out of the court, court procedures and mannerisms are evaluated to ascertain whether they create problems for the unrepresented accused in articulating his case.

Chapter VII describes the various legal aid systems which have evolved to provide counsel to an indigent accused. The relative merits of these models are traced and the main features of a model delivery system are suggested. A brief account of novel funding sources for this model delivery system is also presented. The main findings of this study are also recounted.

D. Research Objectives and Methods

No study of the position of the unrepresented accused in Malaysia has ever been attempted.[10] The dearth of official statistical information relating to the work of courts has no doubt contributed to this. This study then may be described as formulative or exploratory as it is directed to eliciting information

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[10] The only exception has been an undergraduate project paper done under this writer's supervision. See Lim Heng Seng, "Unrepresented Accused Persons in the Lower Courts," Kuala Lumpur, Faculty of Law, University of Malaya, Unpublished Project Paper, 1975. This paper was in part fulfilment of the LL.B. examination. I have incorporated some of the data in this study and it appears as Studies 3 and 4. I am grateful to the Law Faculty for the use of the said material.

about the relative position of the represented and the unrepresented before our courts. This task, elementary as it may seem, is nonetheless necessary as the search for facts and their efficient description, classification and correlation is the necessary first step without which the discovery of general relationships cannot proceed fruitfully.[11] This study also seeks to establish the relationship or association between two variables, namely, representation and outcome. The strength of this relationship is also measured. The further task of establishing whether a causal relationship exists between these two variables, that is whether non-representation causes the kind of result, will hopefully be undertaken by subsequent research.[12]

This is not an attitudinal or behavioral study. So the usual problems of reliability and validity of instruments of measurement associated with attitudinal studies do not arise.

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[11] Selltiz, Jahoda, Deutsch and Cook, Research Methods in Social Relations, New York, Holt, Rinehart and Winston, Inc., 1959, p. 51.

[12] To establish whether a causal relationship exists between two variables (X and Y) three types of evidence are necessary, namely,
(a) that X and Y vary together in the way predicted by the specific hypothesis;
(b) that Y did not precede X in time; and
(c) that other factors did not determine Y.
Ibid., p. 422.

E. Measuring Significance: The Chi Square Test

After a set of data has been collected and the hypotheses formulated, certain methodological questions arise, namely,

(1) Does the data establish any relationship between variables?

(2) If so, how strong is this relationship?

The first question relates to significance and the second to association. Tests of significance deal with the question whether the observed relationship actually exists or occurred purely by chance.

In this study to ascertain the relationship between a number of variables, for example, representation and the outcome of the trial, use is made of the chi-square statistical test which relates the observed frequencies of an event's occurrence with the expected frequencies of occurrence on the basis of pure chance. For example, suppose representation and the outcome of the trial were interrelated and the data summarized in the following 2 x 2 contingency table.

A chi-square test measures whether the distribution of data would be significantly different than a distribution which would have occurred by pure chance. The chi-square measures compare the observed

frequencies with expected frequencies. The formula for calculation is as follows:

$$x^2 = \Sigma \left[\frac{(fo - fe)^2}{fe} \right]$$

where x^2 = chi-square

fo = observed frequencies

fe = expected frequencies

Result	Representation		Total
	Represented	Unrepresented	
Acquitted	250	50	300
Convicted	100	200	300
	350	250	600

The steps in the test are first to compute the expected frequencies for each cell[13] then substract the expected frequency from the observed frequency, square the difference, and divide the squared difference by the expected frequency.[14] When this is done for each cell

[13] See generally on this: Blalock, Social Statistics, McGraw-Hill, 1960, Chapter 15, p. 212 onwards.

[14] Row total times column total divided by grand total.

the figures are added. The result, the chi-square value, is then looked up on a chart under the appropriate degree of freedom. The degrees of freedom equal the number of rows minus one times the number of columns minus one (r - 1)(c - 1). The significance value is chosen beforehand and then the chi-square value is judged to be significant on this basis.

Relationships were considered strongly significant at the .05 level and weakly significant at the .20 level.

F. Measuring Association: Phi Coefficient

Measures of association answer the question of how strong is the relationship. Like tests of significance, there are many measures of association. Phi is a measure of association based on the chi-square. It is used when the variables are grouped in a two by two table and are dichotomous, such as male-female.

The formula for computing phi = $\frac{(ad - bc)}{\sqrt{(k)(l)(m)(n)}}$

G. Data for the Study

To illustrate, let us suppose we are analysing the relationship between represented and non-represented accused and the outcome of the conviction.

We set up the data as follows:

Result	Representation		Total
	Represented	Non-represented	
Not Convicted	70 (a)	30 (b)	100 (k)
Convicted	30 (c)	70 (d)	100 (l)
	100 (m)	100 (n)	200 (N)

$$\text{Phi} = \frac{(70)(70) - (30)(30)}{\sqrt{(100)(100)(100)(100)}} = \frac{4900 - 900}{10{,}000} = \frac{4000}{10{,}000} = 0.40$$

Since phi is based on chi-square, an alternative formula for computing it is:

$$\text{Phi} = \sqrt{\frac{x^2}{N}}$$

Relationships were considered strong at 0.50 and above, moderately strong at 0.30 - 0.50, and weak at below 0.30.

G. Data for the Study

Data were collected from four Magistrates Courts and three Sessions Courts. The Magistrates Courts chosen were located in an urban area viz,

Kuala Lumpur, a semi-urban area viz, Batu Pahat and Kluang, both in the State of Johore, and a semi-rural area viz, Mersing also in Johore. The Sessions Courts were located in Kuala Lumpur, Kluang and Mersing. These data are presented as the following studies in this thesis:

Study 1 which consists of all criminal cases registered between January to July 1973 at the Magistrate's Court, Kuala Lumpur. The total sample is 309.

Study 2 consists of all criminal cases observed over a two-week period at the Batu Pahat Magistrate's Court in 1972. The total sample is 191.

Study 3A consists of all criminal cases registered in the Kuala Lumpur Magistrate's Court between August to December 1973. The total sample is 325.

Study 3B consists of all criminal cases registered in the Kuala Lumpur Sessions Court between August to December 1973. The total sample is 235.

Study 4A consists of all cases registered in the Kluang Magistrate's Court between August to December 1973 and in Kluang Sessions Court

for the whole of 1973. The total sample is 81.

Study 4B consists of all cases registered in the Mersing Magistrate's and Sessions Court in the whole of 1973. The total sample is 60.

Data were also collected by interviewing accused persons awaiting trial at the Magistrate's and Sessions Court, Kuala Lumpur as well as by observing accused persons "conduct" their trial at the Magistrate's and Sessions Court, Kuala Lumpur and the Magistrate's Court, Batu Pahat.

The primary analysis throughout this thesis is of data obtained from Study 1. As these data were obtained wholly from Court records, any information unobtainable from this study was supplemented by the other three studies. These other studies were also resorted to at varying frequencies to establish a pattern, or the lack of it, for the findings and to compare findings over a time period as well as in respect of courts located in different areas of the country.

H. Strengths and Limitations of the Data

The data collected were of all cases in a

given period. Thus the usual problems attendant upon probability sampling, purposive sampling, etc., did not arise. Further as the data were derived from courts located in urban, semi-urban and semi-rural areas, a fairly representative result was obtained.

The main limitation of the data was that as it consisted mainly of information from court files, it was not possible to ascertain some useful information, for example, the income levels of the accused persons. Nor was the occupation of the accused listed. It was also not possible to establish how the accused actually "conducted" his trial. To off-set these disadvantages, Study 2 was undertaken for a period of two weeks in which 191 accused persons arraigned were observed. A three week observation of court trials at the Kuala Lumpur subordinate courts was also undertaken. Finally an interview of 33 accused persons waiting to be tried at the Kuala Lumpur Magistrate's Courts was attempted. But as formal police permission to interview the accused was not always forthcoming, and as the interviewees were waiting to be taken to the Court for hearing that same morning, the interviews were often rushed. There was also the inevitable lack of privacy. Finally, the accused could hardly be in the ideal frame of mind for an interview.

Further, the samples when controlled for some variables became fractionated such that the drawing of reliable inferences may have been jeopardised. Where this danger is possible, it is indicated in the text.

I. Research Instruments and Procedures

Data were computed by reference to the accused person as distinct from charges or cases. It is not unusual for more than one charge to be levied against an accused. Thus X may be charged with four charges. To compute the data by reference to the charges would be to unduly inflate it. So in these circumstances as only one accused was involved, only one case was recorded. However, where several people were charged for the same offence, then the number of accused persons were counted to compute the data. Where an accused person was charged for related offences, for example, extortion and attempted extortion, only the more serious offence was taken into account.

The data were collected from three principal sources:

(1) Court Records: This formed the principal source. The charge sheets on which such information was recorded as the charge

against the accused, the age of the accused, the plea, the finding, the sentence and a transcript of the trial in cases where a full hearing was held, were carefully scrutinised.

(2) Observation: As earlier stated, the court proceedings of the court in Batu Pahat were observed over a two week period and information in relation to each case was carefully transcribed. A similar subsequent observation of the Kuala Lumpur subordinate courts over a three week period was also undertaken.

(3) Interviews: These interviews were unstructured and informal. The selection of the interviewees was based on accessibility to them. Thirty-three accused persons waiting to be tried by the Kuala Lumpur subordinate courts were interviewed in the waiting room. As police permission was not always forthcoming, the interviews were hurried. There was also no privacy. The accused, too, were not particularly good subjects in these circumstances as they were waiting to be tried. Their anxiety

over their imminent appearance in court was no doubt compounded by the presence of a private 'interrogator' whose role must have appeared somewhat suspicious!

J. Choice of the Subordinate Courts

The Subordinate Courts occupy a central role in the administration of criminal justice. As the President's Commission Report (U.S.A.), notes:

> "...the importance of these (lower) courts in the prevention or deterrence of crime is incalculably great for these are the courts that process the overwhelming majority of offenders."[15]

In this study, the Magistrates Courts and to a lesser extent, the Sessions Courts, were the focus of the study for three similarly prime reasons. First, the bulk of the criminal cases are heard by Magistrates Courts as Table 1.1 shows. The table indicates that in 1972 of a total of 103,026 criminal cases heard and disposed of, 99,781 were heard by the Magistrates Courts; this represents 96.9% of the total caseload. The Sessions Courts heard 3.0% of the cases whilst the High Courts heard a mere 0.1%. The Magistrates Courts heard the bulk of the charges: 142,617 out of a total

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[15] The President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society, Washington, 1967, p. 125.

of 146,499 or 97.3% of the total work-load. The Sessions Courts heard 3,750 charges, or 2.6% of the cases, whilst the High Courts heard a mere 132 charges or 0.1% of the total.

TABLE 1.1

CRIMINAL CASES HEARD BY COURTS IN MALAYSIA IN 1972

	High Court	Sessions Court	Magistrates Court	Total
Cases heard and disposed	103 (0.1%)	3142 (3.0%)	99,781 (96.9%)	103,026 (100%)
Charges	132 (0.1%)	3750 (2.6%)	142,617 (97.3%)	146,499 (100%)
Persons involved	135 (0.1%)	3778 (3.4%)	108,533 (96.5%)	112,446 (100%)
Convictions	79 (0.1%)	2768 (3.5%)	76,348 (96.4%)	79,195 (100%)

Source: Kuala Lumpur High Court Registry Files.

The figures available for the following year (1973) as presented in Table 1.2 indicate no appreciable difference in the work-load. The table indicates that of a total of 100,483 cases heard and disposed of in that year, 97,346 or 96.9% of the total were heard by the Magistrates Courts, 3,049 or 3.0% by the Sessions Courts and 88 or a mere 0.1% by the High Courts.

TABLE 1.2

CRIMINAL CASES HEARD BY COURTS IN MALAYSIA IN 1973

	High Court	Sessions Court	Magistrates Court	Total
Cases heard and disposed	88 (0.1%)	3049 (3.0%)	97,346 (96.9%)	100,483 (100%)
Charges	104 (0.1%)	3718 (2.9%)	121,868 (97.0%)	125,690 (100%)
Persons charged	104 (0.1%)	3718 (3.2%)	111,421 (96.7%)	115,243 (100%)
Convictions	55 (0.1%)	2616 (3.2%)	79,724 (96.7%)	82,395 (100%)

Source: Kuala Lumpur High Court Registry Files.

Thus the Magistrates and Sessions Courts heard and disposed of 99.8% of all cases in that year. In the same year, the Magistrates Courts heard 121,868 out of a total of 125,690 charges (97.0%), the Sessions Courts 3,718 charges (2.9%) and the High Courts 104 charges (0.1%). Secondly, the Magistrates Courts cases affect a far greater number of people. Thus in 1972, as Table 1.1 clearly indicates, the number of persons charged at the Magistrates Courts were 108,533 (96.5%) out of a total of 112,446. Figures for the Sessions Courts were 3,778 (3.4%) and for the High Courts 135 (0.1%). Comparable figures for 1973, as presented in Table 1.2, indicate the same trend: the

number of persons charged at the Magistrates Courts were 111,421 (96.7%) out of a total of 115,243, the Sessions Courts 3,718 (3.2%) and the High Courts 104 (0.1%). Finally, the quantitative impact of the lower courts is far greater insofar as the greatest number of convictions are recorded in Magistrates Courts. Table 1.1 shows that in 1972, out of a total of 79,195, the Magistrates Courts recorded 76,348 (96.4%) convictions, the Sessions Courts 2,768 (3.5%) and the High Courts, 79 (0.1%). The comparable figures depicted in Table 1.2 for 1973 out of a total of 82,395 were: Magistrates Courts: 79,724 (96.7%), Sessions Courts: 2,616 (3.2%) and the High Courts: 55 (0.1%). Admittedly, the jurisdiction of the Magistrates and Sessions Courts suggests that these Courts do not hear cases which are as serious as those heard by the High Courts.[16] But this does not mean that the Magistrates and Sessions Courts do not hear cases of any degree of seriousness.

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[16](a) Sessions Courts - The President of the Sessions Court has jurisdiction to try all offences for which the maximum term of imprisonment provided by law does not exceed ten years imprisonment or which are punishable with fine only and offences under Sections 409 (criminal breach of trust by public servant, or by banker, merchant or agent), 454 (lurking house trespass or house-breaking in order to the commission of an offence punishable with imprisonment) and 457 (an identical offence as 454 committed at night) of the Penal Code: S. 63(1), Subordinate Courts Act 1948 (Revised 1972) Laws of Malaysia Act 92. The

A breakdown of cases heard by Magistrates Courts in Kuala Lumpur (Study 1) is indicated in Table 1.3.

TABLE 1.3

NATURE OF OFFENCES HEARD BY MAGISTRATES COURT - STUDY 1

Offence	Number
Against the Person	62
Against Property	247
Total	309

President of the Sessions Court is empowered to pass any sentence not exceeding: (i) five years' imprisonment; (ii) a fine of $10,000.00; (iii) whipping up to 12 strokes; or (iv) any sentence combining any of the above: S. 64(1), ibid. The Sessions Courts may also impose a punishment in excess of that allowed and award the full punishment authorised by law for the offence of which the accused is convicted by reason of any previous conviction or of his antecedents: S. 64(2), ibid.

(b) Magistrates Courts - A Magistrate has jurisdiction to try all offences for which the maximum term of imprisonment provided by law does not exceed five years imprisonment or which are punishable with fine only and offences under certain sections of the Penal Code, for example, 380 (theft in dwelling house) 381 (theft by clerk or servant) 407 (criminal breach of trust by carrier): S. 85, ibid. A Magistrate may pass any sentence allowed by law not exceeding: (i) two years imprisonment; (ii) a fine of $5,000.00; (iii) whipping up to six strokes; (iv) any sentence combining any of the above: S. 87(1), ibid. A Magistrates Court may also impose a punishment in excess of that allowed and award the full punishment authorised by law for the

Offences against the person included such serious offences as malicious wounding and indecent assault. The property offences included those involving violence, for example, burglary, robbery and arson, as well as offences without violence for example, fraud, handling or receiving stolen property and stealing.

The maximum sentences imposable for some of the more serious offences for which convictions were recorded at the Magistrates Courts and Sessions Courts are indicated in Table 2.4.[17] These figures clearly indicate the central role of the subordinate courts in the administration of criminal justice. They also show that these courts try cases with potentially serious consequences.

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offence of which the accused is convicted by reason of any previous conviction or of his antecedents: S. 81(2), ibid.
Legislation has been passed to enhance considerably the jurisdiction and powers of the Subordinate Courts: see Subordinate Courts (Amendment) Act 1978, but no account is taken of these changes, which come into effect on 1st July 1978.

[17] See Chapter II, infra, p. 32.

CHAPTER II

LEVEL OF REPRESENTATION

A. Level of Representation

This chapter ascertains the level of representation at each stage of the trial process, in relation to the seriousness of the offence, as well as in relation to the kind of charges. An assessment is also made whether the location of the court affects representation levels. Reasons for the high level of unrepresentation are also advanced.

It was first sought to ascertain the overall level of representation and assess whether the location of the court (urban v. semi-urban/rural) affected representation levels. Table 2.1 presents the data for the overall representation for all the four studies. The overall representation figure was based on all types of proceedings including pre-trial hearings as well as hearings for sentences only. The figures indicate a high level of unrepresentation, there being an insignificant difference between the highly urban Kuala Lumpur Study (77.9%) and the semi-urban Batu Pahat Study (80.6%). The Kuala Lumpur Study 3 undertaken

a year later shows a lower level of unrepresentation in absolute terms but the percentages (66.4% for 1972 and 67.4% for 1973) are still high.

TABLE 2.1

LEVEL OF REPRESENTATION - ALL CASES

Study	Representation		Total
	Represented	Unrepresented	
1	68 (22.1%)	241 (77.9%)	309 (100%)
2	37 (19.4%)	154 (80.6%)	191 (100%)
3A	106 (32.6%)	219 (67.4%)	325 (100%)
3B	79 (33.6%)	156 (66.4%)	235 (100%)
4A	12 (14.8%)	69 (85.2%)	81 (100%)
4B	21 (35.0%)	39 (65.0%)	60 (100%)

Significantly, the level of representation at the Sessions Court, whose jurisdiction covers considerably graver offences was as low as the figures for the Magistrates Courts. It is also interesting to note that representation at the least urban court (Study 4B - Mersing) compared favourably with the more urban courts. The only possible explanation appears to be that the court, located in a fishing town heard a large number of cases relating to breach of fishing licenses.

On conviction the boat and the fishing gear was liable to be confiscated. Hence, almost invariably, boat owners who were also wealthy engaged counsel.

TABLE 2.2

LEVEL OF REPRESENTATION - FOR THOSE PLEADING NOT GUILTY

Study	Representation		Total
	Represented	Unrepresented	
1	60 (44.4%)	75 (55.6%)	135 (100%)
2	34 (54.8%)	28 (45.2%)	62 (100%)
3A	86 (65.2%)	46 (34.8%)	132 (100%)
3B	65 (66.3%)	33 (33.7%)	98 (100%)

Table 2.2 indicates the level of representation for those who claimed trial. (Data on this in respect of Studies 4A and 4B were not available). The level of representation is seen to have improved appreciably, being more than 65% for the 1973 studies as compared to 44.4% and 54.8% for the 1972 Studies 1 and 2 respectively. It must be emphasised that the bulk of the unrepresented pleaded guilty[1] and therefore were

[1]The number of persons pleading guilty expressed as a percentage of the total is: Study 1 : 56.3%
Study 2 : 67.5%
Study 3A : 59.4%
Study 3B : 58.3%

outside the computation. It is plausible that a higher percentage of those claiming trial recognise the futility of travelling the length of the trial process unaided by counsel and therefore they engaged counsel. Alternatively, it is equally possible that those who cannot afford counsel, recognise the futility of "going it alone" and consequently plead guilty. This would mean that counsel is chosen not because it is realised that help is needed to proceed through the intricacies of a trial but extraneous factors (possibly indigency) determine pleas in the first place so that only those who can afford counsel claim trial. Viewed from this perspective, the level of unrepresentation ranging from 55.6% in Study 1 to 33.7% in Study 3B appears inordinately high.

In Study 1, of the 68 represented, 38 were not convicted[2] whilst out of the 241 unrepresented, 53 or 17.2% were not convicted.[3] Thus a total of 218 people or 70.5% were convicted out of a total of 309 persons charged. The level of representation amongst

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[2]The breakdown is as follows: 28 acquitted and discharged, 5 discharged not amounting to an acquittal, 4 withdrawn, 1 transferred to different Court, 1 unclear.

[3]The breakdown is as follows: 22 acquitted and discharged, 10 discharged not amounting to an acquittal, 9 withdrawn, 10 transferred to different Court, 1 compounded with the leave of the Court.

the convicted at the sentencing stage is indicated in Table 2.3. (Data for Studies 2 and 4 were not available).

TABLE 2.3

LEVEL OF REPRESENTATION AT SENTENCING STAGE

Study	Representation		Total
	Represented	Unrepresented	
1	30 (13.8%)	188 (86.2%)	218 (100%)
3A	30 (14.2%)	181 (85.2%)	211 (100%)
3B	35 (21.5%)	128 (78.5%)	163 (100%)

These figures once again, ranging from 78.5% in respect of Study 3B and 86.2% in respect of Study 1, make abundantly clear the high level of unrepresentation at a fairly critical stage of the proceedings. The range of possible sentences imposable is wide: from an admonition and discharge without the conviction being recorded to long custodial sentences together with heavy fines and whipping. The sentences imposable, naturally vary according to the gravity of the offence. If these figures referred to relate primarily to minor offences, then the statistics may unjustifiably exaggerate the unfavourable position of the unrepresented accused at this stage. Primarily for this reason, it

was sought to relate the level of representation to the seriousness of offence with which the accused was charged. Table 2.4 sets forth the data in respect of Study 1.

TABLE 2.4

NUMBER OF UNREPRESENTED ACCUSED
BY SERIOUSNESS OF OFFENCE
STUDY 1

Seriousness of offence: Maximum Penalty	Unrepresented		Total	
Ten years and above	20	(100.0%)	20	(100%)
Five to seven years	62	(71.3%)	87	(100%)
Two to five years	148	(79.6%)	186	(100%)
Under two years	1	(100.0%)	1	(100%)
Total	231	(78.6%)	294	(100%)

The table shows that there is an alarmingly high proportion of cases in which the defendants were unrepresented even in the most serious kinds of cases tried by magistrates. No co-relation is apparent between representation and the seriousness of the offence. In the circumstances, there must certainly be other factors that determine the engaging of counsel as there is an equally high level of unrepresentation

for both the most serious and least serious of the offences tabulated. Possibly, those who feel that they are guilty would refrain from engaging counsel. But the more plausible reason points to the financial inability of the accused to retain counsel.

A similar trend is readily discernible from Table 2.5 which relates to Study 3.

TABLE 2.5

CHARGES IN TRIALS AND LEVEL OF REPRESENTATION - STUDY 3

Offence	Unrepresented	Represented	Total
Penal Code cases (Magistrates Court)	219 (66.8%)	109 (33.2%)	328 (100%)
Penal Code cases (Sessions Court)	66 (74.2%)	23 (25.8%)	89 (100%)
Dangerous Drugs Ordinance	62 (60.8%)	40 (39.2%)	102 (100%)
Arms Act	12 (70.6%)	5 (29.4%)	17 (100%)
Prevention of Corruption Act	3 (42.9%)	4 (57.1%)	7 (100%)
Customs Act	1 (25.0%)	3 (75.0%)	4 (100%)
Excise Act	7 (77.8%)	2 (22.2%)	9 (100%)
Road Traffic Ordinance	1 (33.3%)	2 (66.7%)	3 (100%)

The table indicates unrepresentation in relation to offences categorised more broadly than in Table 3.4. Again, the data presented indicate the high level of unrepresentation in offences punishable with heavy sentences. It may be noted that there is a high level of representation in offences under the Road Traffic Ordinance, the Prevention of Corruption Act and the Customs Act. Two reasons may be suggested for this high incidence of representation. First, the accused persons in offences under the Prevention of Corruption Act are clearly from a wealthier class. These accused persons are almost invariably people of power and authority charged for abusing their power and authority for financial gain. They are threatened with a loss of livelihood and stand to lose a great deal if convicted. They are known to employ some of the best counsel in the country. Offences under the Customs Act usually relate to the charge of possessing uncustomed commercial goods. The accused persons under the Customs Act are usually the drivers of vehicles but as the vehicles are liable to forfeiture on conviction, the owners of the vehicles, who are wealthier, have an interest in obtaining an acquittal for the accused; also the fine leviable is calculated by reference to the duty sought to be evaded[4]

[4]Section 135(1) Customs Act, No. 62 of 1967.

and may run into several thousand dollars. This possibly indicates that a correlation exists between the seriousness of the offence and representation where the accused is relatively well off. Secondly, offences under the Road Traffic Ordinance, 1958 which arise out of vehicular accidents are defended by lawyers supplied by the insurance companies.[5] In view of this it is surprising that the level of representation is not any higher.

B. The Reasons for the High Level of Unrepresentation

The tentative explanation proferred for the high level of unrepresentation is the financial inability of the accused person to engage the services of a lawyer. Various other reasons, often related to poverty, explicate the high level of unrepresentation. Wilkins suggests the following: ignorance as to the

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[5] Section 80 of the Road Traffic Ordinance 1958 imposes a duty on the insurers to satisfy judgments against persons insured in respect of third party risks. As a result invariably all insurance policies give the Insurance Companies the option to "undertake the defence of proceedings in any Court of Law in respect of any act or alleged offence causing or relating to any event which may be the subject of indemnity" (a typical insurance policy clause). In practical terms the Insurance Company provides its own lawyer to defend a vehicle driver/owner on charges under Sections 34A (causing death by reckless or dangerous driving), 35 (reckless and dangerous driving) and 36 (careless and inconsiderate driving) of the Road Traffic Ordinance 1958.

significance of a criminal record; concern that they (the poor) may lose their jobs; distrust, degradation, and fear often associated in their minds with welfare officers, and the quite conceivable extension of these feelings towards the lawyers associated with 'the system'; concern that a lawyer may only serve to complicate, and perhaps worsen, their position; the mere fact that the lawyer is associated with the criminal justice system, which may be perceived to be their oppressor.[6]

An accused person may also be refused police bail after arrest or court bail after he is produced in court. Alternatively, he may be allowed bail, but may be unable to furnish it. Once in remand he is cut-off completely from the people, such as relatives who mediate and secure the services of a lawyer on his behalf. His ability to contact the outside world depends largely on the co-operation afforded him by his prison warders. These accused who have been remanded in prison often complain about the total lack of sympathy in this respect shown by their custodians. Some support for this is provided by the statistics. Of a random survey of 56 represented accused in Study 1,

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[6] James L. Wilkins, Legal Aid in the Criminal Courts, University of Toronto Press, 1975, p. 51.

only 8 (14%) were recorded as represented the first time they appeared before the court. The remaining 48 (84%) were represented only after they were released on bail.

Which reason is decisive in a given case is difficult to determine. It was generally thought that lack of funds was the primary reason. But recent research[7] has shown that even where legal aid is provided, the unrepresented accused continue to exist in considerable numbers. The Canadian Joint Committee on Legal Aid in its deliberations concerning the replacement of the voluntary legal aid system in Ontario stated that it:

> "...was informed by many persons that a considerable number of indigent accused refused to apply for or accept legal aid even though they knew of its existence and it was offered to them."[8]

The Committee suggested some possible reasons for this: The Accused (a) knew he was guilty; (b) had no confidence in legal aid; (c) was not aware of legal aid or did not receive a sufficient explanation of legal aid facilities; (d) imagined that an appearance without counsel might propitiate the Court; (e) was advised to

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[7] Ibid., a study appraising the working of the Ontario Legal Aid scheme.

[8] Province of Ontario Report of the Joint Committee on Legal Aid (1965), p. 20 cited in Wilkins, ibid., p. 49.

plead guilty by police officers or by other prisoners in the hope of receiving a light punishment; (f) believed that he had no need for a lawyer; (g) thought he was not entitled because of a previous conviction.[9]

The Committee went on to suggest that an improvement in the legal aid services plan would result in the virtual elimination of the 'unrepresented accused.' However despite improvements made, 36.0% of Wilkins sample were unrepresented and 29.3% were unrepresented when the finding of the court was made[10] indicating that the Committee's expectations were not realized. Wilkins suggests some explanations for this. His explanations may be summarised as follows.

First, the potential recipient has to go through the "proper channels." These channels are sufficiently complicating as to discourage him to avail himself of these services. Secondly, an accused who obtains a legal aid certificate then proceeds to a lawyer's office. But the lawyer may refuse his case, as he is perfectly entitled to do. It is the duty of counsel to provide the accused with sufficient information to enable him to make an informed plea. Counsel no

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[9] Ibid.

[10] Ibid.

doubt goes into an elaborate explanation of the law. To an often frightened and bewildered accused, this law lecture hardly sounds like help. Thirdly, there are many accused who simply do not wish to engage a lawyer. The accused may believe so completely in his innocence and in the infallibility of justice that counsel may appear superfluous. He may think that no special skills are required for going through a trial. He may think that his pathetic plight will result in a lenient sentence; or a speedier disposition of his case which is especially attractive if he is in custody. Finally, earlier experiences of contact with lawyers may result in his refusal to engage lawyers services, even at State's expense. Wilkins cites Blumberg's research,[11] based on a random sample of male defendants who pleaded guilty in Metropolitan Court of New York City between 1962 and 1964, which indicated a high level of dissatisfaction with lawyers.

It therefore appears that despite the provision of free legal services, this phenomenon of the "unrepresented accused" may persist. But three

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[11] Ibid., p. 51; Abraham Blumberg, Criminal Justice, Chicago, 1967, pp. 89-90. Also Abraham Blumberg, "The practice of law as a confidence game," in Wilhelm Aubert, ed., Sociology of Law, England, Penguin Books, 1969, pp. 321-31.

observations may be made on this. First, this may indicate a failing in the legal aid system itself, for example, a complicated "proper channels" procedure which discourages the use of the service as Wilkins has suggested. Secondly, most of the problems referred relate to poverty for example, three persons charged at the Kuala Lumpur Sessions Court for assembly and rioting said they did not engage a lawyer because "it was a small matter" and they felt certain of being let off leniently. The offence however was a serious one carrying a maximum penalty of two years imprisonment. The cause of ignorance among the poor can be traced to

> "...low education levels and ineffective communication of legal norms (which contribute to a failure to recognise situations where legal services are required or advantageous."[12]

Thirdly, it is not disputed that legal aid as presently constituted succeeded in eliminating unrepresentation dramatically, albeit not completely. Finally it may be noted that in a study undertaken in 1975 of the responses of poverty communities[13] to the criminal process, amongst

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[12] Barry Metzger, "Legal Services to the Poor and National Development Objectives," by the Committee on Legal Services to the Poor in the Developing Countries, in Legal Aid and World Poverty, Praeger Publishers, 1974, p. 9.

[13] See Gurdial Singh Nijar, "Legal Needs of the Poor in Malaysia," in Journal of Malaysian and Comparative Law (JMCL) Vol. 5 Part 1.

those few who considered the services of a lawyer for their child who was charged for a criminal offence, prohibitive costs was identified as a reason for failing to engage a lawyer. Another reason given was the difficulty of contacting a lawyer, a point suggestive not merely of a logistical but, as well, a cultural problem - the cultural alienation of the poor from the professional elites.

In Study 2, it was possible to ascertain the income levels of 73 accused persons. Their income distribution was as follows:-

TABLE 2.6

INCOME AND REPRESENTATION - STUDY 2

Income ($ per month)	Represented	Unrepresented	Total
$ 0 - $100	0	32	32
$101 - $200	1	24	25
$201 - $250	11	3	14
$251 - $300	0	1	1
$301 - $400	0	1	1
Total	12	61	73

All the accused, except two, earned less than $250 per month. The bulk of them (43.8%) earned less than

$100 per month. None of this latter group was represented. The highest percentage of representation (19.2%) was seen amongst those in the $201 - $250 income level. But a breakdown of those represented showed that four of them were charged for an offence of careless driving under the Road Traffic Ordinance, 1958 and legal representation was paid for by the insurance company with whom the car was insured.[14] Five of them were charged for trawler fishing without licence, and obviously their representation was financed by the wealthy boat owner who stood to have his boat and fishing apparatus forfeited if his employees were convicted. This table shows that indigency may account for the low representation level.

Also the usual reponses from accused asked why they did not engage a counsel were "I can't afford it" and "I don't have any money." A random survey of thirty-six accused persons charged with various offences in the Kuala Lumpur courts showed the following result: 33 of them (91.7%) were earning monthly incomes ranging from $0 - $250. Only 3 (8.3%) earned $390 per month. 18 of them were daily paid in such jobs as contract labourers, lorry attendants, carpenters and blacksmiths.

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[14] See supra, n. 5.

Interestingly only the three earning monthly incomes of $390 were represented. Thus in Malaysia at least poverty does seem to have a critical role in explaining the high level of unrepresentation. This position will in all probability be exacerbated as economic development proceeds. As Metzger points out, economic development may adversely affect the supply of legal services to lower income groups as well as affecting the demand for such services.[15] As he puts it succinctly:

> "Economic growth in most developing countries has been associated with a general inflationary trend, as much the result of discontinuities in the development process as of the forces of industrialization and urbanization. Lower income groups are most adversely affected by such inflation. Increases in the price of legal services and the general impact of inflation on disposable income available for expenses other than food and shelter have tended to make legal services relatively less accessible to lower income groups than such services were at earlier stages in the development process."[16]

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[15] Barry Metzger, Op. Cit. n. 12, p. 9.

[16] Ibid. This kind of impact is evident in Malaysia. For example, the income level of the poor has dropped dramatically since Independence (1957). In 1957 the top 20% of the household population received almost 50% of total income while the bottom 20% received barely 6% of it. In 1970 the top 20% have increased their share of total income to 55% while the bottom 20% decreased their share to only 4%: See, Malaysia, Mid-Term Review of the Second Malaysia Plan 1971 - 1975, Kuala Lumpur, Government Printers, 1973, p. 2 onwards. According to the Treasury Report 1974 - 1975, the top 10% of households increased their average monthly incomes by 46% from $766 in 1957 to $1,130 in 1970. On the other hand, the incomes of the bottom 10%

declined by 31% from $48 to $33 during the same period: See Malaysia, Economic Report 1974 - 1975, The Treasury Malaysia, Kuala Lumpur, Government Printers, p. 84. The reference in both these reports is to absolute incomes. With the impact of inflation recognised, the position of the poor if measured in terms of real income would be appreciably worse.

Plea, finding and sentence are the most crucial decision points for individual cases. For those who plead guilty, the proceedings are determined. A narration of the facts constituting the charge by the prosecution usually follows the plea of guilty and a further opportunity is given to the accused to confirm or deny these facts.[1] Once confirmed the plea cannot be changed except upon valid and sufficient grounds which satisfy the magistrate that it is proper in the interests of justice that a change be allowed.[2] The accused is then subject to the production of a probation report in the case of juveniles and a past criminal record in the case of others, found guilty and sentenced. A plea of guilt constitutes then a waiver by the accused of his right to have the case proved against him beyond reasonable doubt and a further right for him to rebut the prosecution case on a balance of probabilities. It is therefore critical in the administration of justice

[1] Yap Tan Lim v. R (1930) 2 M.C. 119, 124, 125.

[2] P.P. v. Sam Kim Kai (1960) M.L.J. 265, 267.

CHAPTER III

LEGAL REPRESENTATION AND PLEAS

Plea, finding and sentence are the most crucial decision points for individual cases. For those who plead guilty, the proceedings are determined. A narration of the facts constituting the charge by the prosecution usually follows the plea of guilt and a further opportunity is given to the accused to confirm or deny these facts.[1] Once confirmed the plea cannot be changed except upon valid and sufficient grounds which satisfy the magistrate that it is proper in the interests of justice that a change be allowed.[2] The accused is then subject to the production of a probation report in the case of juveniles and a past criminal record in the case of others, found guilty and sentenced. A plea of guilt constitutes then a waiver by the accused of his right to have the case proved against him beyond reasonable doubt and a further right for him to rebut the prosecution case on a balance of probabilities. It is therefore critical in the administration of justice

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[1] Yap Tan Lim v. R (1930) 2 M.C. 119, 124, 125.

[2] P.P. v. Sam Kim Kai (1960) M.L.J. 265, 267.

that the plea recorded is correct and truly reflects the guilt of the accused.

Herein lies the crux of the problem. For a plea can only be correctly made if the accused is sufficiently informed of the integral elements of the charge. Thus Fitzpatrick talks of "...the crucial decision on how to plead, a decision that to be intelligent usually requires legal advice."[3] Hudson states succinctly counsel's constribution in this respect to the administration of criminal justice generally, in these terms:

> "To provide the accused sufficient information to make an informed plea is not only desirable for the aims of justice, but may also be a device for streamlining criminal procedures."[4]

Except in the simplest of offences, it is logical to assign a crucial role to counsel in helping the accused make an informed plea.

In the first step towards establishing this, a study was made to ascertain the relationship between representation and the plea recorded. Tables 3.1 to 3.3 set forth the data.

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[3] Thomas Fitzpatrick, "Legal aid for criminal cases in England: Part I," Legal Aid Briefcase 26 (4 April, 1968), 148 quoted in Wilkins, p. 31 supra, Chapter II, n. 6.

[4] Eugene A. Hudson, 'Streamlining criminal procedures,' in Judicature 53 (January 1970), 491, quoted in Wilkins, p. 120, supra, Chapter II, n. 6.

TABLE 3.1

REPRESENTATION AND PLEA - STUDY 1

Representation	Formal Plea		Total
	Guilty	Not Guilty	
Represented	7 (10.3%)	60 (88.2%)	67 (100%)
Unrepresented	153 (60.6%)	75 (31.1%)	231 (100%)
Total	163 (54.7%)	135 (45.3%)	298 (100%)

Chi-square = 68.07, df = 1, p = $<$0.001
phi = 0.48

This table shows that there exist significant differences in the pleas recorded between cases which are unrepresented as compared with those which are represented. (Chi-square = 68.07, p = $<$0.001). A very small percentage (10.3%) of the represented pleaded guilty as contrasted with a very high percentage (60.6%) of the unrepresented who pleaded guilty. There exists a strong association between being unrepresented and pleading guilty (phi = 0.48). This table establishes clearly that the unrepresented accused are more likely to enter pleas of guilty than those represented. Tables 3.2 and 3.3 confirm this association.

TABLE 3.2

REPRESENTATION AND PLEA - STUDY 2

Representation	Plea		Total
	Guilty	Not Guilty	
Represented	2 (5.3%)	36 (94.7%)	38 (100%)
Unrepresented	127 (83.0%)	26 (17.0%)	153 (100%)
Total	129 (67.5%)	62 (32.5%)	191 (100%)

Chi-square = 84.27, df = 1, p = <0.001
phi = 0.66

TABLE 3.3

REPRESENTATION AND PLEA - STUDY 3A

Representation	Plea		Total
	Guilty	Not Guilty	
Represented	23 (21.7%)	83 (78.3%)	106 (100%)
Unrepresented	173 (79.0%)	46 (21.0%)	219 (100%)
Total	196 (60.3%)	129 (39.7%)	325 (100%)

Chi-square = 97.98, df = 1, p = <0.001
phi = 0.55

Not only was the difference more significant than in Table 3.1 (chi-square = 84.27 and 97.98 respectively,

$p = <0.001$ for both), but the association between being unrepresented and pleading guilty was considerably stronger (phi = 0.66 and 0.55 respectively).

In Study 2, there was an almost 5 times greater chance of the unrepresented pleading guilty than the represented; In Study 3A there was an almost 4 times greater chance of this happening.

These figures could possible suggest that those who believe they are guilty, think it unnecessary to engage counsel and plead guilty unaided. They thus save themselves an unnecessary and expensive trial process. But if the belief expressed in the previous Chapter is correct - that a lack of means determines the low level of representation - then a serious threat to the fair administration of criminal justice exists. Unaided by counsel, he is unable to make an informed plea. Also left to himself, often ignorant and illiterate and placed in a culturally alien environment he falls easy prey to the pressures of overzealous officers keen to secure a conviction on any account. Thus, unaided by counsel, a high percentage of the unrepresented may plead guilty for reasons extraneous to their guilt or innocence.

As the data was from court records, it was not possible to interview those convicted on a plea of

guilty to establish why they so pleaded. A meagre attempt to interview those in the "bull pen" where lower court accused often wait prior to being called to the court showed that out of the 26 accused in Study 3, 22 (84.6%) had been subjected to some form of pressure or threat by the police to plead guilty. It was not possible, however, to ascertain whether this pressure in fact led to guilty pleas. It may be useful to look at one study[5] where convicted accused were interviewed. 56 (52.8%) of the 106 interviewees who denied their guilt pleaded guilty. The reasons given ranged from police pressure or "advice" (17 or 30.4%), a feeling of futility in defending an action in which the court would have to believe the accused's version of events in preference to that advanced by the police (8 or 14.3%), desire to get the case over with and

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[5] Susanne Dell, "Silent in Court," in Occasional Papers on Social Administration No. 42, London, 1971, p. 64. Mrs. Dell's study was part of a wider investigation financed by the United Kingdom Home Office. It was based on a random sample of 565 interviews with inmates of Holloway Prison in London, which draws its women from Courts all over the South of England. The sample was every fourth prisoner received in the year 1967, other than women transferred from other prisons, representing about an eighth of all the women received in prison in 1967 in England and Wales. These interviews were supplemented by corroborative information from records of the Courts, the prison and prison hospital, from probation officers and from the Criminal Records Office. See Justice Report: The Unrepresented Defendant in Magistrate's Courts, 1971, London, para. 30, p. 10 onwards.

thus avoid a remand (5 or 8.9%), fear that any other plea would be misconstrued by the court resulting in a harsher sentence (5 or 8.9%).

In Dell's sample, 78 women who denied guilt had no legal advice before pleading. Two thirds of them or 66.7% pleaded guilty. In sharp contrast, of the 22 women who denied guilt and had legal advice before pleading only 3 or 13.0% pleaded guilty. This justifiably led the Justice Report to conclude that those who had legal advice before pleading were much less likely to give in to the temptation to plead guilty to an offence they believe they have not committed.[6]

The 1975 Study earlier referred to[7] of, inter alia, the responses of needy communities to the criminal process is also instructive. As part of this study a questionnaire was dispensed to subjects in three rural areas in Malaysia. The subjects interviewed were asked what they would do if their child was charged with a criminal offence. Almost all responded that as the criminal process was initiated only if the person

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[6] Justice, loc. cit. para. 47, p. 14.

[7] See Nijar, supra, Chapter II, n. 13; See also Lim Yee Lan, "The Legal Problems And Legal Needs of the Poor"; Zainun bte. Ali, "An Insight into the Legal Needs of the Poor"; and Aziah bte. Ali, "Legal Needs of the Poor Community in Kuala Kedah: An Assessment"; all, Kuala Lumpur, Faculty of Law, University of Malaya, Unpublished Project Papers, 1975.

was in fact guilty there was little that could be done or they could do except plead to the police for clemency. This reflects as well the overawing view of authority by the needy communities. In the circumstances, only a negligible number considered the services of a lawyer.

The foregoing analysis suggests that representation at the plea stage should result in a greater percentage of accused claiming trial. One of the obvious ways of testing this hypotheses is to ascertain how many of those who were unrepresented and pleaded guilty, changed their plea to not guilty after retaining counsel. Only in Study 3A was clear information available showing the change of plea after retention of counsel. Tables 3.4 and 3.5 set forth the result.

TABLE 3.4

RETENTION OF COUNSEL AND CHANGE OF PLEAS

Representation at Trial	Plea		Total
	Plea changed from Not Guilty at 1st Mention to Guilty at Trial	Plea of Not Guilty Maintained	
Counsel Retained	9 (14.3%)	54 (85.7%)	63 (100%)
Counsel Not Retained	37 (47.4%)	41 (52.6%)	78 (100%)

Chi-square = 17.41, df = 1, p = <0.001

phi = 0.35

This table shows unequivocally that there is a significant difference between retaining counsel and changing plea from not guilty to guilty (chi-square = 17.41, p = <0.001). Of the 141 unrepresented accused who pleaded not guilty at the first mention, 63 engaged counsel. Of this, 9 (14.3%) changed their pleas to guilty. Of the remaining 78 unrepresented, 37 (47.4%) changed their pleas to guilty. The association between not retaining counsel and changing pleas from not guilty to guilty is moderately strong (phi = 0.35).

The same trend is seen from Table 3.5.

TABLE 3.5

RETENTION OF COUNSEL AND CHANGE OF PLEAS

Representation at Trial	Plea		Total
	Plea changed from Guilty at 1st Mention to Not Guilty at Trial	Plea of Guilty Maintained	
Counsel Retained	8 (57.1%)	6 (42.9%)	14 (100%)
Counsel Not Retained	5 (3.6%)	135 (96.4%)	140 (100%)

Chi-square = 40.62, df = 1, p = <0.001

phi = 0.51

Of the 154 who pleaded guilty at the first mention, 14 subsequently retained counsel. Of these, 8 (57.1%) changed their pleas to not guilty. Of the remaining 140 only 5 (3.6%) changed their pleas to not guilty. The table shows the differences in change of plea according to the retention of counsel to be highly significant (chi-square = 40.62, $p = <0.001$). The association between retaining counsel and changing plea from guilty to not guilty is strong (phi = 0.51). These latter two tables support the hypothesis earlier advanced that an unrepresented accused is more likely to plead guilty. It is seen that even of those unrepresented who claimed trial at the first mention, a significant proportion changed their pleas to guilty on the day of the trial. This possibly suggests that factors other than the guilt or innocence of the accused determine his plea. The extraneous factors earlier adumbrated cannot be easily discounted.

Finally it is appropriate to refer to the on-going debate on the impact of counsel at the plea stage. One line of thinking suggests that the provision of counsel at this stage will result in unwarranted not guilty pleas being entered as a matter of course even when it is patent that the accused is guilty. The other line of thinking disputes this strenously. Callon,

for example, has warned that,

> "...it would ... be a serious error to assume that ... representation of the accused by counsel in criminal matters, with the resulting consequence that there are fewer pleas of guilty and a greater exercise of rights, is an undesirable state of affairs or is indicative of abuses."[8]

Thomas Heald states that,

> "...as to the possibility that legal aid has increased the proportion of unwarranted pleas of not guilty, one can only say (a) that there is no empirical evidence whatsoever to support this suggestion, and (b) that it seems to be a libel on the legal profession."[9]

Given the lack of evidence, it would indeed be unfair to the legal profession to assume that its members would encourage unwarranted pleas of guilty; nor can it be concluded that a greater number of pleas of not guilty are necessarily undesirable.

In conclusion it may be surmised from the data that the unrepresented accused are more likely to enter pleas of guilty than their represented counterparts. Further it appears that a high percentage of the unrepresented may plead guilty for reasons extraneous to their guilt or innocence. Some confirmation of this comes from the significant corelation between retaining counsel and changing pleas from guilty to not guilty.

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[8] T.P. Callon, "The treasurer reports - Legal Aid Committee," Law Society Gazette, 5 (March 1971), 11.

[9] Thomas Heald, "The bar after Beeching - a personal view," Criminal Law Review 5 (December 1969), 630-1.

CHAPTER IV

REPRESENTATION AND THE FINDING

Although the plea, finding and sentence are the most crucial decision points for individual cases the finding is easily the more important of the three in cases where the accused pleads not guilty. Whether from the point of the State or the accused, the finding - guilty or not guilty - is the test of the State's case and determines whether the accused shall be marked by a record of conviction. The finding of the court is also a fairly straight forward and important indicator of differences according to representation.

TABLE 4.1

REPRESENTATION AND FINDINGS - STUDY 1

Representation	Finding		Total
	Guilty	Not Guilty	
Represented	29 (50.9%)	28 (49.1%)	57 (100%)
Unrepresented	188 (89.5%)	22 (10.5%)	210 (100%)

Chi-square = 4.49, df = 1, p = <0.001

phi = 0.41

Table 4.1 sets forth the number of cases in which there was an overall finding of guilty by the court in respect of all cases[1] and compares them with cases in which the finding was not guilty. It also shows the manner of representation according to the finding of the court. The data is in respect of Study 1. The statistical test produces a highly significant value (chi-square = 4.49, $p = <0.001$). The unrepresented accused had a very much greater chance of being found guilty when compared with his represented counterpart. A very high proportion of the unrepresented (89.5%) were found guilty as compared with 50.9% of the represented who were so found. The unrepresented had thus an almost one and a half times greater chance of being found guilty. Similarly the represented had an almost five times greater chance of being acquitted when compared with his unrepresented counterpart. The association between being unrepresented and a finding of guilt was moderately strong (phi = 0.41).

Tables 4.2 and 4.3 present the data in respect of cases which proceeded to trial. The data is in respect of all cases registered in the Kuala Lumpur Magistrate's and Sessions Courts in 1973. Table 4.3 sets

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[1] About 42 cases were excluded from the computation. These involved cases which were transferred, otherwise disposed of, or unclear.

forth the data in respect of Study 3B.

TABLE 4.2

REPRESENTATION AND FINDINGS

Representation	Finding		Total
	Guilty	Not Guilty	
Represented	20 (40.8%)	29 (59.2%)	49 (100%)
Unrepresented	42 (87.5%)	6 (12.5%)	48 (100%)

Chi-square = 22.83, df = 1, p = $<$0.001
phi = 0.49

Here again the statistical test produces a highly significant value (chi-square = 22.83, p = $<$0.001). An inordinately high proportion (87.5%) of the unrepresented were found guilty as compared to 40.8% of the represented. The unrepresented had more than twice as much chance of being found guilty. Conversely, the represented had an almost five times greater chance of being acquitted compared to the unrepresented. The association between non-representation and a finding of guilt was strong (phi = 0.49).

TABLE 4.3

REPRESENTATION AND FINDINGS - STUDY 3B

Representation	Finding		Total
	Guilty	Not Guilty	
Represented	24 (61.5%)	15 (38.5%)	39 (100%)
Unrepresented	17 (77.3%)	5 (22.7%)	22 (100%)

Chi-square = 1.56, df = 1, p = <0.20
phi = 0.16

In respect of Table 4.3, the differences were insignificant (chi-square = 1.56, p = <0.20). The association between non-representation and a finding of guilt was weak (phi = 0.16). In an attempt to ascertain the reason for this statistical result, the finding in relation to the nature of the offence was tabulated. Table 4.4 presents the data.

This table shows that a very high conviction rate was recorded in respect of offences under the Dangerous Drugs Ordinance, Customs Act, Arms Act, Prevention of Corruption Act and the Road Traffic Ordinance. Except for the last mentioned, there is a statutory reversal of the onus of proof from the prosecution to the defendant and this probably accounts

for the high conviction rate regardless of representation. Also the intense barrage of propaganda from high governmental quarters against drug offenders cannot altogether be discounted for the high conviction rate in respect of drug offences. The figures of conviction were thereby inflated and were probably not representative of the usual pattern of convictions and acquittals.

TABLE 4.4

REPRESENTATION AND FINDINGS BY TYPE OF OFFENCE - STUDY 3B

Representation	Finding		Total
	Guilty	Not Guilty	
Penal Code Cases:			
Represented	4 (36.4%)	7 (63.6%)	11 (100%)
Unrepresented	6 (60.0%)	4 (40.0%)	10 (100%)
Dangerous Drugs:			
Represented	15 (65.2%)	8 (34.8%)	23 (100%)
Unrepresented	10 (90.9%)	1 (9.1%)	11 (100%)
Customs Act:			
Represented	1 (100%)	0	1 (100%)
Unrepresented	1 (100%)	0	0
Arms Act:			
Represented	1 (100%)	0	1 (100%)
Unrepresented	1 (100%)	0	1 (100%)
Prevention of Corruption Act:			
Represented	2 (100%)	0	2 (100%)
Unrepresented	0	0	0
Road Traffic Ordinance S.34A(1):			
Represented	1 (100%)	0	1 (100%)
Unrepresented	0	0	0

Further the sample is seen to be so fragmented that inferences from these may not be reliable. The total number of cases under the Customs Act, the Arms Act and the Prevention of Corruption Act were 5. Of these only 1 was unrepresented.

However when the Penal Code category of cases are subjected to the statistical test, it is seen that the differences are insignificant (chi-square = 0.36, p = 0.50). The association between non-representation and a finding of guilt is weak (phi = 0.13). It is difficult to explain this. It may be suggested that Magistrate's who are relatively new to magisterial work are more likely to be impressed by counsel than the more experienced and relatively more mellowed President of the Sessions Court. This is purely speculative however. On the given data it is possible to state that the association between non-representation and a finding of guilt diminishes with the seriousness of the offence, although the unrepresented had a slightly more than one and half times greater chance of being found guilty compared to his represented counterpart; and the represented had a more than one and half times as much chance of being found not guilty than his unrepresented counterpart.

It is instructive to look to other jurisdictions on this important question of the co-relation between representation and finding. In England a study undertaken in June 1969 observed magistrates courts over a period of one week and yielded the following result:[2]

TABLE 4.5

FINDING IN CASES WHERE DEFENDANT PLEADED NOT GUILTY

Representation	Finding		Total
	Guilty	Not Guilty	
Represented	32 (57.0%)	24 (43.0%)	56 (100%)
Unrepresented	33 (62.0%)	20 (38.0%)	53 (100%)

Source: Michael Zander.[2]

The table shows that of the represented 57.0% were found guilty and 43.0% not guilty, as compared with 62.0% guilty and 38.0% not guilty of those who were unrepresented. This led Zander to conclude that these figures,

> "...show a slight indication that representation may improve the prospects of an acquittal..."[3]

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[2]Michael Zander, "Unrepresented Defendants in Criminal Courts," in (1969) Criminal Law Review, 632.

[3]Ibid.

although he cautioned that

> "...it remains for further and more sophisticated inquiry to explore this further and to discover whether this is a relationship of cause and effect."[4]

In Australia, based on the data collected by the New South Wales Bureau of Crime Statistics and Research, a report on the relation between representation and findings of court of petty sessions throughout New South Wales was compiled.[5] Table 4.6 shows the results of the report.

TABLE 4.6

LEGAL REPRESENTATION AND OUTCOME

Representation	Finding		Total
	Guilty	Not Guilty	
Represented	2383 (72.3%)	911 (27.7%)	3294 (100%)
Unrepresented	6603 (90.8%)	662 (9.2%)	7265 (100%)

Source: Vinson and Homel.[5]

The comparison was confined to cases where there were no previous convictions, "...to avoid confusing the effects of representation and previous criminal history."[6]

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[4] Ibid.

[5] T. Vinson and R. Homel, "Legal Representation and Outcome" in The Australian Law Journal, (1974) vol. 47, p. 132.

[6] Ibid., at p. 133.

While this study was essentially to compare the sentences received by the represented and the unrepresented, it gives an idea of the relationship between representation and finding. Of the represented, 27.7% were found not guilty while 72.3% were found guilty. The comparable figures for the unrepresented were 9.2% not guilty and 90.8% guilty. Thus the represented had a three times greater chance of securing an acquittal compared to their unrepresented counterpart; whilst the unrepresented had a slightly more than one times greater chance of securing a conviction in relation to his represented counterpart.

In Canada a study by Wilkins of the working of legal aid in the criminal courts led him to conclude that

> "There is ... a noteworthy difference in finding according to whether the accused represented himself as opposed to those cases in which the accused had either a legal aid certificate or private retained lawyer, with the unrepresented accused much more likely to be found guilty."[7]

Wilkins data is presented in Table 4.7.

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[7] James L. Wilkins, Legal Aid in the Criminal Courts, Toronto, 1975, p. 115.

TABLE 4.7

REPRESENTATION AND FINDINGS

Representation	Finding		Total
	Guilty	Not Guilty	
Unrepresented	103 (75.2%)	32 (24.8%)	137 (100%)
Legal Aid Certificate Lawyer	60 (69.0%)	27 (31.0%)	87 (100%)
Privately retained Lawyer	101 (64.3%)	56 (35.7%)	157 (100%)

Source: Wilkins.[8]

All these jurisdictions yield fairly consistent results not dissimilar from those obtaining in this study and show the existence of a distinct corelation between representation and finding. Further the unrepresented had a much greater chance of being found guilty when compared with his represented counterpart.

[8] Ibid.

CHAPTER V

LEGAL REPRESENTATION AND SENTENCE

This chapter seeks to examine the impact of representation on the final outcome of the case namely, the sentence imposed. The objective was to ascertain the relationship between representation and the severity of the sentence imposed.

A. Problems Related To Sentencing

This part of the study was beset by problems as a number of factors, apart from representation, may affect the severity of the sentence imposed. Indeed sentencing practices are conditioned by such numerous variables that they have been justifiably described as "mysterious to everybody."[1] Professor Hans Zeisal aptly comments that

> "the factors that come into play are so manifold and possibly so idiosyncratic that it is difficult to make general rules about sentencing."[2]

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[1] James L. Wilkins, Legal Aid in the Criminal Courts Toronto, University of Toronto Press, 1975, p. 128.

[2] Hans Zeisal, "Methodological problems in Studies of sentencing," in Law and Society Review 3, 621.

The task of evaluating sentencing practices is made doubly difficult as the most significant source of variation in sentences is the individual judge's evaluation.[3]

A report for the President's Commission (U.S.A.) entitled "Task Force Report: the Courts" acknowledged that 'within certain limits a lack of uniformity in sentences is justifiable'. This is based on the hypotheses that adjudicators possess wide discretionary powers in the choice of sentence and that this choice must be exercised in accordance with the concept of individualized justice where great emphasis is laid on considering the interest of individual offenders.[4] Roger Hood in his pioneering study on sentencing preferred to talk in terms of 'equality of consideration' -

> "...that is, that similar general considerations ... be taken into account when a decision is made."[5]

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[3] John Hogarth, Sentencing as a Human Process Toronto, University of Toronto Press, 1971. Hogarth's work abundantly reviews the literature on sentencing.

[4] President's Commission on Law Enforcement and Administration of Justice, Task Force Report: the Courts, Washington D.C., 1967, p. 23, cited in Keith Bottomley, Decisions in the Penal Process, London, 1973, p. 132.

[5] R.G. Hood, Sentencing in Magistrate's Courts, London, 1962, pp. 14 - 16.

Aubert makes this penetrating comment

> "Paradoxically enough, to invoke this principle (that like cases shall be handled alike) is to contend that each case shall be treated according to its peculiarities, if we interpret 'likeness' to mean something more than that two cases shall be judged exactly alike if they fulfil exactly the same clear and simple conditions which are to be read from the law."[6]

Thus a determination of the relevant and irrelevant variables must necessarily be preceded by a discovery of the aims of a particular criminal justice system.

> "To the extent, therefore, that there exists a lack of consensus about the aims of the penal process in any society, to that extent it is inevitable that there will be disparity in sentencing decisions, not only becuase different factors are relevant to different aims but also because there is likely to be very real disagreement about what factors are rightly considered relevant for the same aim."[7]

Be that as it may, a report on the relation between legal representation and the findings of courts of petty sessions throughout New South Wales[8] stated:

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[6] V. Aubert, "Conscientious Objectors before Norwegian Military Courts," cited in Bottomley, supra, n.4, p. 132.

[7] Ibid., at p. 132.

[8] T. Vinson and R. Homel, "Legal Representation and Outcome," in the Australian Law Journal (1974) vol. 47, p. 132, 133.

> "Thus it is possible to obtain some idea of the overall effect of legal representation by comparing the severity of sentences for represented and unrepresented people respectively, provided that they are as alike as possible in other respects. (emphasis added)."[9]

Given this caveat, we may proceed to pick out "like cases" for purposes of comparison. Even so as Mannheim observes in relation to his study of eight juvenile courts in London of convictions of larceny to assess the uniformity or otherwise of court decisions made by certain courts in a particular area:

> "It was difficult to recognize cases in which circumstances of the offence and the offender were so similar that we might have expected all courts to prescribe a similar form of treatment. In essence the task was to establish the uniformity or non-uniformity of those factors which were significant to the study .... The fundamental problem remained - what constituted a classification of essentially significant factors."[10]

The following factors may affect the severity of the sentence:

(1) previous criminal history of the accused;

(2) whether the accused is a juvenile or an adult;

(3) the nature of the offence;

(4) the seriousness of the offence.

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[9] Ibid.

[10] H. Mannheim et. al. "Magisterial Policy in the London Juvenile Courts," in Brit. Jo. Del. vol. 7 (1957) pp. 13, 119, cited Bottomley, supra, n. 4, p. 134.

To this may be added three other factors which are generally recognized as causing disparities in sentencing, viz.,

(5) the role of individual personality characteristics and attitude of judges;

(6) the relationship between sentencing disparities and the social/community context in which these decisions are taken; and

(7) the use made of information during the sentencing process.

To minimise the impact of these variables the offences were, where possible, classified into property and non-property offences; the offenders who had no previous criminal history were separated from those with a previous conviction and separate consideration was given to those above 21 years and those below this age.

The impact of the "human equation" was greatly minimised as the cases from each study were from courts where it is reliably learnt only one Magistrate sat throughout the time when the data were recorded. Further in respect of the study of the Kuala Lumpur Court, the community context was unchanging. The impact of the last variable could only be minimised in relation to juvenile offenders. This is because, after a juvenile is convicted but before sentence is passed, a probationer's report covering the juvenile's social

and class background, his job opportunities, his adjustment to the society, etc., is made available to the court. As regards adults, there was no such consistent and exhaustive presentation of information to assist the court.

B. The Data

Table 5.1 shows the final result of all cases by reference to the factum of representation in respect of Study 1. Light sentence was defined as a discharge or a binding over without a conviction being recorded under S. 173A of the Criminal Procedure Code.[11]

TABLE 5.1

REPRESENTATION AND SENTENCE
IN ALL CASES - STUDY 1

Representation	Sentence		Total
	Light	Severe	
Represented	6 (20.7%)	23 (79.3%)	29 (100%)
Unrepresented	12 (6.3%)	177 (93.7%)	189 (100%)

Chi-square = 5.52, df = 1, p = <0.02
phi = 0.16

[11] This power is exercised if the Court is of the opinion that, having regard to the character,

The relationship between being represented and obtaining a lighter sentence and vice-versa was not very significant ($p = <0.02$). The association between non-representation and receiving a severe sentence was weak (phi = 0.16). Thus a large proportion (79.3%) of the represented were given severe sentence. However an even greater proportion (93.7%) of the unrepresented received severe sentences. The unrepresented had a slightly more than one times greater chance of being given severer sentences as compared with their represented counterparts.

Table 5.2 looks at representation and two kinds of sentences, namely, the imposition of fines and custodial sentences.

TABLE 5.2

REPRESENTATION AND NATURE OF SENTENCE

Representation	Nature of Sentence		Total
	Fines	Custodial	
Represented	6 (28.6%)	15 (71.4%)	21 (100%)
Unrepresented	38 (26.0%)	108 (74.0%)	146 (100%)

antecedents, age, health or mental condition of the person charged, or to the trivial nature of the offence, or to the extentuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment or that it is expedient to release the offender on probation.

The table shows that the chances of the represented and the unrepresented being imposed with these two kinds of sentences were about even with the unrepresented being marginally disadvantaged when compared with his represented counterpart. Six (28.6%) of the represented had fines imposed against them as compared with 38 (26.0%) of the unrepresented; 15 (71.4%) of the represented had a custodial penalty imposed against them as compared with 108 (74.0%) of the unrepresented.

Tables 5.3 - 5.5 show the data relating representation to the range of fines imposed. (No chi-square and phi values for Tables 5.4 and 5.5 were calculated as it is obvious from the data that the result will not be different from the values obtained in Table 5.3).

TABLE 5.3

REPRESENTATION AND FINES
($100 and more = severe fine)

Representation	Sentence		Total
	Light	Severe	
Represented	0	6 (100%)	6 (100%)
Unrepresented	10 (26.8%)	28 (73.0%)	38 (100%)

Chi-square = 0.82, df = 1, p = $<$0.30
phi = 0.14

TABLE 5.4

REPRESENTATION AND FINES
($200 and more = severe fine)

Representation	Sentence		Total
	Light	Severe	
Represented	1 (17.0%)	5 (83.0%)	6 (100%)
Unrepresented	15 (39.0%)	23 (61.0%)	38 (100%)

TABLE 5.5

REPRESENTATION AND FINES
($500 and more = severe fine)

Representation	Sentence		Total
	Light	Severe	
Represented	1 (17.0%)	5 (83.0%)	6 (100%)
Unrepresented	15 (39.0%)	23 (61.0%)	38 (100%)

Difficulties in analysing the data presented in these tables need noting. First, the sample was small, making comparisons and inferences less reliable. Secondly, it was difficult to establish definitively what constituted a "severe" fine. To obviate or mitigate

the latter problem, three different "cut-off" points were identified. Table 5.3 used a fine of $100 and more as severe, Table 5.4 used a fine of $200 and more and Table 5.5 used a fine of $500 and more as severe. In all the three cases the relationship between representation and receiving a lighter sentence was insignificant and the association between being represented and receiving a severer fine was very weak. (In Table 5.3 for example, chi-square = 0.82, $p = <0.30$, phi = 0.14). In all three cases however, the represented had a greater chance of being given a severer sentence. In Table 5.3 where the cut-off point for severe sentence was $100 and more, the represented had slightly more than one times greater chance of receiving a severer sentence; In Table 5.4 (severe fine = $200 and more) he had also slightly more than one times greater chance and in Table 5.5 (severe fine = $500 and more) he had more than two and a half times greater chance. It ought to be commented that both Table 5.3 and Table 5.4 indicate that a very high proportion of the unrepresented too received severe sentences, 73.0% and 61.0% respectively.

This pattern alters when representation is related to the range of custodial sentences imposed. Using imprisonment of 3 months and more as a criterion

for severe sentences, Table 5.6 demonstrates the results.

TABLE 5.6

REPRESENTATION AND CUSTODIAL SENTENCE
(3 months and more = severe)

Representation	Sentence		Total
	Light	Severe	
Represented	8 (53.3%)	7 (46.7%)	15 (100%)
Unrepresented	18 (16.7%)	90 (83.3%)	108 (100%)

Chi-square = 7.11, df = 1, p = <0.01
phi = 0.24

There was a relationship between being represented and receiving a lighter sentence (chi-square = 7.11, p = <0.01), but the association was not very strong (phi = 0.24). But the unrepresented nonetheless fared badly compared to his represented counterpart. Of the unrepresented 17.0% had a lighter sentence imposed against them compared with 53.0% of the represented; the unrepresented had an almost twice as much chance of receiving a severer custodial sentence when compared with the represented. The following tentative conclusions may be drawn: First, the unrepresented was more likely to receive a sentence entailing a fine or imprisonment.

Secondly, the unrepresented was given a custodial sentence more often than the represented. Thirdly, the unrepresented was more likely to receive a severer custodial sentence than his represented counterpart. Fourthly, the unrepresented accused fared better compared to the represented only insofar as he was less likely to receive a severe fine when such a sentence was imposed against him.

C. Controlling The Variables Affecting Sentence

To ascertain accurately the impact of representation on severity of sentence, it is necessary that all dependent variables which may affect the outcome are controlled. The represented and unrepresented must be as alike as possible in other respects. The four factors earlier identified as having an effect on sentence and which for that reason need to be controlled are:

(1) the criminal history of the accused;

(2) the age of the offender;

(3) the nature of the offence;

(4) the seriousness of the offence charged.[11A]

[11A] Supra, p. 66.

Tables 5.7 - 5.10 set forth the data with the variables controlled

TABLE 5.7

REPRESENTATION AND OUTCOME
(no previous convictions, accused under 21 years, property offences)

Representation	Sentence		Total
	Light	Severe	
Represented	2 (66.7%)	1 (33.3%)	3 (100%)
Unrepresented	3 (37.5%)	5 (62.5%)	8 (100%)

Chi-square = 0.03, df = 1, p = <0.90
phi = 0.05

TABLE 5.8

REPRESENTATION AND OUTCOME
(no previous convictions, accused 21 years and above, property offences)

Representation	Sentence		Total
	Light	Severe	
Represented	0	8 (100%)	8 (100%)
Unrepresented	1 (2.6%)	37 (97.4%)	38 (100%)

Chi-square = 0.57, df = 1, p = <0.50
phi = 0.11

TABLE 5.9

REPRESENTATION AND OUTCOME
(no previous convictions, accused
under 21 years, non-property offences)

Representation	Sentence		Total
	Light	Severe	
Represented	1 (50.0%)	1 (50.0%)	2 (100%)
Unrepresented	3 (20.0%)	12 (80.0%)	15 (100%)

Chi-square = 0.00, df = 1, p = <0.99
phi = 0

TABLE 5.10

REPRESENTATION AND OUTCOME
(no previous convictions, accused
21 years and above, non-property offences

Representation	Sentence		Total
	Light	Severe	
Represented	3 (50.0%)	3 (50.0%)	6 (100%)
Unrepresented	0	17 (100%)	17 (100%)

Only all those cases where the accused had no previous convictions were computed.

The first striking observation which may be made is that there was no significant co-relationship between severity of sentence and representation when the samples were controlled for age (21 years and below and above 21 years) and the nature of the offence (i.e. property/non-property). The association between representation and severity of sentence was also very weak in all these tables. The chi-square and phi values for Table 5.7 is: chi-square = 0.03, $p = < 0.90$ phi = 0.05; for Table 5.8 is: chi-square = 0.57, $p = < 0.50$, phi = 0.11; and for Table 5.9 is: chi-square = 0.00, $p = < 0.99$, phi = 0. (No chi-square and phi values for Table 5.10 were calculated as it is clear from the data that there will be no appreciable difference in the result.)

Secondly, the tender age of the accused did not result in the imposition of a lighter sentence where he was unrepresented. Thus Tables 5.7 and 5.9 show that 62.5% and 80.0% respectively of the unrepresented under 21 years of age obtained severer sentences while a mere 37.5% and 20.0% respectively received light sentences. In contrast, these tables show that a high percentage of their represented counterparts - 66.7% and 50.0% respectively received lighter sentences. The unrepresented in both these tables had an almost twice as much chance of receiving a severer sentence

than their represented counterparts, whilst the represented had in Table 5.7 almost twice as much chance of receiving a lighter sentence compared with his unrepresented counterpart.

Thirdly, the same pattern was seen in respect of those aged 21 and above in respect of non-property offences (Table 5.10). Thus the unrepresented had twice as much chance of securing a severer sentence compared to their represented counterpart. This altered a little in respect of property offences (Table 5.8). The represented fared badly compared with the unrepresented. The difference however, was marginal, the represented having once as much chance of securing a severer sentence than their represented counterpart.

However in all these four tables, the samples were so small that it is difficult to draw any firm inferences.

Thus the variables did not alter the earlier conclusion that indicated an insignificant relationship between representation and the severity of the sentence imposed. This appears to rebut the folklore that an unrepresented accused fares better with regard to sentence.[12] Also despite exhortations to Magistrates

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[12] James L. Wilkins, Legal Aid in the Criminal Courts op. cit. vol. 1, p. 130.

to treat juveniles with greater leniency,[13] the tender age of an accused by itself did not result in lighter sentences.

D. Legal Aid for Mitigation

A separate sub-section on this is warranted for the reason that in Malaysia, legal aid in criminal cases is confined to advancing pleas of mitigation on behalf of the convicted accused. This is justified on the inarticulated premise that scarce funds are best applied to a stage in the criminal process where legal aid will make a fairly critical impact. One can draw on fairly abundant literature arguing a case for legal aid mitigation. In England, in particular, there has been a growing recognition for the need of legal assistance at this stage. The Lord Chief Justice Parker of England argued strongly in favour of legal aid for mitigation in these terms:

> "It is sometimes said that in the case of prisoners who are going to plead guilty there must be but few cases where it is desirable in the interests of justice that he should have legal aid. With that I am afraid I entirely disagree. I would myself put it the other way round, and say that even in the case of pleas of guilty there will seldom be a case where it is not desirable in the interests of justice."[14]

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[13] See for example, Tukiran v. P.P. [1955] M.L.J. 24 Tan Kah Eng v. P.P. [1965] 2 M.L.J. 272.

[14] Home Office Circular 90/1961, Appendix A, quoted by Howard Levenson, "Legal Aid for Mitigation," Modern Law Review, vol. 40 (September 1977), 523, 525.

The Departmental Committee on Legal Aid in Criminal Cases, chaired by Widgery J. in its report published in March 1966[15] although stating that legal aid should rarely be necessary for advancing mitigation pleas in summary cases, emphasized that it was

> "...desirable that anything which could be said on the prisoner's behalf should be said effectively."[16]

For this purpose the Committee felt that no valid distinction could be made between persons committed for trial and persons committed for sentence. Thus it was that Part IV of the Criminal Justice Act 1967, and in particular section 73, implemented the Widgery Committee's recommendation by clearly placing proceedings relating to sentence on a par with proceedings to determine guilt or innocence.

Further, a recent series of pronouncements by the Criminal Division of the Court of Appeal in England emphasized that where the Magistrate was contemplating the imposition of a heavy sentence then it was most desirable that legal aid was offered and that

> "...the court should take it upon itself to offer legal aid so that, albeit there may be guilty pleas before the court, any matters

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[15] Report of the Departmental Committee on Legal Aid in Criminal Proceedings, Cmnd. 2934 (1966).

[16] Ibid., para. 147.

> which might even remotely tell in favour of the accused person may be properly advanced through a skilled advocate."[17]

The necessity for counsel at sentence stage is considered so important that legislation was introduced to give it added effectiveness. By section 21 of the Powers of Criminal Courts Act, 1973, courts are prevented from imposing a custodial sentence on a person who has not previously been sentenced to that particular punishment and is without legal representation, unless legal aid has been refused on the grounds of means or the defendant has failed to apply for legal aid after having been informed of his right and given the opportunity to do so.

It is pertinent, however, that the real concern as made especially patent by the Court of Appeal pronouncements, is with the length of the sentence - and this too when the injustice thereby occasioned was by reason of the imposition of a rather long sentence and for that reason blatant.[18] For purpose of our present study it is useful to note that all the sentences

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[17] R. v. Serghion [1966] 1 W.L.R. 1613 (Unrepresented Defendant's sentence of five years imprisonment for larceny, forgery and falsification, reduced to three years). See also R. v. Stockdale [1967] Crim. L.R. 430 (seven years sentence for forgery reduced to three years); R. v. Tipping [1967] Crim. L.R. 488 (30 months sentence was halved).

[18] Levenson, op. cit. p. 528.

substituted by the Court of Appeal would still be considered severe. Representation may at best mitigate marginally the severity of a sentence. From the point of view of the individual accused, this may seem important. But, it is respectfully submitted, that on the question of applying scarce funds, this study shows that the funds are not quite as well utilised by confining legal assistance to the mitigation stage.

Finally, the provision for providing legal aid in Malaysia[19] to advance pleas of mitigation is also nearly never used. Referrals to the legal aid office have to be made by the Magistrate. An informal enquiry showed that most Magistrates were not even aware of their powers to make such referrals. Not surprisingly therefore, since its setting up the Legal Aid Bureau has supplied officers to advance mitigation pleas in only 83 such cases.[20]

The impact of representation appeared insignificant at the sentence stage. First, the relationship between being represented and receiving

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[19] Legal Aid Act, 1971, Second Schedule. Legal aid for mitigation purposes was brought into effect on 7th April 1973 by the Legal Aid (Amendment) Order, 1973. (PU(A) 104/1973).

[20] The figures are for the period commencing April 1973 until June 1978. The breakdown is as follows:- 1973: 4, 1974: 1, 1975: 12, 1976: 20, 1977: 28, 1978: 18.

a lighter sentence was insignificant. The association between representation and sentence was also weak. Secondly, the chances of the represented and the unrepresented being imposed either custodial sentence or a fine were about even. Thirdly, the relationship between representation and receiving a light sentence of a fine was insignificant and the association very weak. The pattern altered somewhat when representation was related to the imposition of custodial sentences. There was a relationship between representation and sentence but the association was not very strong. There was no difference in the result when the variables (age, criminal history of the accused, nature of the offence) were controlled. The conclusion, therefore, is that representation does not affect sentence, although in absolute terms, the unrepresented was marginally worse off than the represented. This suggests that confining legal aid to the sentence stage, as is presently done in Malaysia, is a waste of scarce funds.

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[1] See Pat Carlen, Magistrates' Justice, London, 1976, from which the ensuing discussion is largely derived (referred hereinafter and in the text as 'Carlen'). The study is based on a six months' observation in the London Stipendiary magistrates' court and gaoler's office, a two months' observation of the London lay magistrate's courts, and further twelve months regular visits to six other Stipendiary Magistrates' Courts.

[2] ibid. at p.21.

CHAPTER VI

THE UNREPRESENTED ACCUSED IN COURT

Apart from the actual disadvantage of an accused in the 'handling' of his case, it is now beginning to be recognised that the set-up of court procedures and the manner in which court rituals are observed and enacted can intimidate an unrepresented accused sufficiently as to impair the production of justice in Magistrates' Courts.[1]

The first such factor identified is space.

> "Spatial dominance is achieved by structural elevation, and the magistrate sits raised up from the rest of the court. The defendant is also raised up to public view but the dock is set lower than the magisterial seat, whilst the rails surrounding it are symbolic of the defendant's captive state. Of all the main protagonists the defendant is the one who is placed furthest away from the magistrate."[2]

This spatial arrangement to an onlooker suggests little

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[1] See Pat Carlen, Magistrates' Justice, London, 1976, from which the ensuing discussion is largely derived (referred hereinafter and in the text as 'Carlen'). The study is based on a six months' observation in the London Stipendiary magistrates' court and gaoler's office, a two months' observation of the London lay magistrate's courts, and further twelve months regular visits to six other Stipendiary Magistrates' Courts.

[2] ibid. at p.21.

more than an orderly display of justice. But it has definite repurcussions. The arrangement combined with poor acoustics result in endemic hearing problems. The result often is that the accused hears very little of what is said to or of him. Many leave the court not really knowing what has been decided. A female accused in Dell's study is quoted as saying:

> "The judge mumbles away, and you don't know whether or not he's supposed to be talking to you."[3]

Carlen cites an interview with a probation officer depicting this problem vividly and which description fits our courts so completely:

> "There are practical difficulties relating to that building. The acoustics are so bad. We're sitting up in that little box which is half as near again to the magistrates; I often can't hear, so they literally can't hear. Also the procedure isn't made sufficiently plain to them, um, particularly first hearings - or when they just appear and are remanded to another date - and you see people with a sort of blank - and perhaps later on a confused expression - and they go rushing out not sure what's happened - being pushed along by the police. I really don't think they know what has happened in court. They know they've been charged, and they probably know what they've been charged with, but they don't know why the case has been put off. They can't understand the jargon, the terms in which it is put to them, unless they are sufficiently forceful or aggressive characters to say in court, 'I don't understand...would you repeat

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[3] Cited in A Report by Justice, The Unrepresented Defendant in Magistrates' Courts, London, 1971, p. 15.

> that?' which many of them aren't. I think they just miss it - and they really rely on the police in the gaoler's office, or just anyone who happens to be about to say, uh - but quite often it's the constable who's prosecuting, the arresting policeman, who gives them an idea, before they go in and when they come out, of what's happening. Which, on the one hand is fair enough - some of the police are quite good. But on the other hand they're bound to give them a biased picture of their position in court. (Miss S, probation officer)."[4]

The placing and distant spacing of the accused from the Magistrate is also not conducive to the eliciting of intimate details, in themselves not infractions of the law, from a person merely accused of breaking the law. In public, the accused is degraded or humilated, explanations of his private life often attended to by giggles and laughs from others hearing. As Dell points out, many accused when asked 'What have you to say?' replied simply 'I'm sorry.'

> "They felt it impossible or inappropriate in the formal atmosphere of the court to talk about the background of the offence."[4A]

There is also the violation of the usual conversational practice which exacerbates the bewilderment of the accused. In conventional social practice, it is assumed that one answers <u>to</u> the questioner. But as Carlen

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[4] Carlen, <u>op. cit.</u> n. 1, p. 22.

[4A] Justice Report, <u>op. cit.</u> n. 3, p. 15.

observes:

> "In magistrates' courts, however, defendants often find that they are continually rebuked, either for not addressing their answers to the magistrate or for directing their answers to their interrogators in such a way that the magistrate cannot bear them. As a result, defendants are often in the position of having to synchronize their answers and stances in a way quite divorced from the conventions of everyday life outside the courtroom."[5]

The effect on an accused may be "paralysing."

The other major "coercive" factor is time. The police stage manage the entire proceedings and ensure its continuity: putting some 20 - 30 accused or more before the magistrate. They ensure the presence of the accused in court, that they stand in or out of the dock when the case is called and that charge sheets are properly drawn up and before the court. They 'program' the business, calling out remand cases first. Although they may not have, in lower court prosecutions at least, any vested interest in the accused pleading guilty, yet time is valued greatly. 'A shortened session can provide a leisure bonus'. Given the volume of cases before lower courts, these bonuses only materialize if the majority of the accused plead guilty. And so police pressure to save time is always exerted. Their concern for time-saving often reflects in the nature of the charge. Often an accused is charged with an offence to which the police are certain he will plead guilty.

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[5] ibid., p. 24.

There also exist various factors which inhibits the accused's presentational style. The accused are taken from the prison, and taken to the court where they are kept in the court lock-up. Then follows a series of monitoring and scheduling where the accused are led from lock-up to court just before the case starts. Often a switch of courts is involved. A policeman escorts the accused into the dock and tells him when to stand, to sit, to answer and to be quiet, to stop leaning against the dock, to stand up straight, etc., As Carlen states

> "These physical checks, together with a battery of commands and counter-commands more readily produces an accused with such a distraught state of mind that he just wants to get the whole thing over with."[6]

The presentation of the magistrate is attended with some ceremony; his entrance is heralded, with the "All Stand" shout, any noise which detracts from the dignity of the court is immediately checked. Throughout the magistrate is given utmost deference. The sense of authority is reinforced by the ceremonial form of addresses. Everyone is complimentarily addressed - "Your Honour" 'Learned Counsel' 'Honourable Prosecutor' - except of course the accused who is unceremoniously presented as 'this man' unentitled, Ahmad. The

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6 ibid., p. 29.

inhibiting effect these factors must have on an unrepresented accused is patent.

Then of course there is the stark contrast between legal rhetoric and judicial reality in defining the status of the accused. According to the rules of the game of justice, and in legal rhetoric, an accused is innocent until proven guilty. But to the police he is a prisoner for whose safe-keeping they are accountable. So he is both innocent and a prisoner.

Carlen sums up the two main functions for such ascription to the accused:

> "...it diminishes the interactional uncertainty characteristic of encounters in which the status of one person remains undefined; it provides tautological justification for the narrow range of styles adopted by police in police/defendant encounters."[7]

But while such ascription may have its justification, and it may be acceptable in the abstract to characterize a person as both a prisoner and an innocent, in reality and to the accused this position is hardly intelligible. This adds to the intimidation of the accused person with its consequent adverse effect on the production of justice in the courts.

As a result of the coercive effect of these procedures and rituals, it is not unsurprising that the

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[7] ibid., p. 33.

bulk of the unrepresented accused plead guilty in our courts. As Chapter III showed, of the unrepresented 60.6% (Study 1), 83.0% (Study 2) and 79.0% (Study 3) pleaded guilty. It was analysed that there existed a significant relationship between being unrepresented and pleading guilty. More significantly, it was shown that there is a significant relationship between retaining counsel and changing pleas from guilty to not guilty.

Dell's study is more significant in this respect insofar as it reveals that a large number of those who denied their guilt but pleaded guilty nonetheless, were unrepresented. Out of the 527 women tried there were 106 who denied their guilt totally. Of these, 56 pleaded guilty and 47 pleaded not guilty. Seventy-eight of the women who denied guilt had no legal advice before pleading. A very high proportion - two-thirds of them, pleaded guilty. By contrast, of the 22 who denied guilt and had legal advice before pleading only three (13%) pleaded guilty.[8]

Wilkins study in the provincial courts (Criminal Division) of Toronto, Canada showed that 72.2% of the unrepresented pleaded guilty leading him to

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[8] Cited in A Report by Justice, The Unrepresented Defendant in Magistrates' Courts, London, 1971, p. 14.

conclude that

> "Unrepresented accused are more likely to enter formal pleas of guilty than are those represented either under the certificate plan or privately."[9]

The small number of the accused who are unrepresented and claim trial are also under a severe handicap in the conduct of their trial. As Carlen states pointedly

> "As a captive player he cannot physically (though he often does symbolically) withdraw from the game. This handicap exists even in courts like Metropolitan Courts where magistrates, clerks, policemen and probation officers spend much time explaining both the formal rules and the state of play to the defendants. It exists inextricably in the formal legal structure of court hearings..."[10]

Bad acoustics and the unfamiliar, ritualistic setting results in a bewildered and frightened accused, hardly able to participate meaningfully in a trial process. Often his attempts to explain situations are treated as being out of time ('You explain that later, not now'), ('You can't say that kind of thing') and ('I certainly hope you know what you are saying'). Attempts by magistrates to explain legal procedures and meanings to accused, often adds confusion to confusion. In a quick barrage of words, an accused is apprised of the meaning of 'intent' 'without just cause' etc.

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[9] James L. Wilkins, Legal Aid in the Criminal Courts, University of Toronto Press, 1975, p. 17.

[10] Carlen, op. cit. n. 1, p. 81.

Safeguards such as provided by S. 173(a) and (b) of the Criminal Procedure Code are often meaningless in a real sense. Section 173(a) provides that when an accused appears before the court, a charge containing the particulars of the offence of which he stands accused shall be read and explained to him and he shall be asked to plead to the charge. Sub-section (b) provides that if the accused pleads guilty, he may be convicted thereon, provided that before a plea of guilty is recorded the court shall ascertain that he understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him.[11]

But this "explanation" of the charge consists almost always of a quick reading of the charge by an interpreter to a baffled accused who has, more often than not, decided to plead guilty to extricate himself from this generally overawing if not frightening experience. The charge is often couched in technical language incomprehensible to most laymen.

Section 257(i) of the Code provides that when the court calls upon the accused to answer the

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[11] Courts have quashed convictions based on guilty pleas entered in contravention of this provision: See Cheng Ah Sang v. D.P.P. [1948] M.L.J. 82; Koh Mui Kiow v. R [1952] M.L.J. 214; Yeo Sun Huat v. P.P. [1961] M.L.J. 328; P.P. v. Chamras Tasaso [1975] 2 M.L.J. 44.

prosecution case, and if the accused is unrepresented, the court shall

> "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."[12]

Not only is this section hardly used, but it is hardly possible to explain the prosecution case and the ingredients of the offence adequately in a short span of time to a bewildered accused.

More importantly although the accused may understand what is being conveyed, he will almost invariably miss its procedural or juristic significance. One clear example is when the three choices are put to the accused, that is whether he wishes to speak from the dock, make a statement on oath, or remain silent. The accused understands what choices exist but clearly is in no position to appreciate the advantages of one option over the other.

It was sought to determine to the extent possible, the extent to which the unrepresented accused who claimed trial was handicapped in the conduct of his

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[12] In Shaari v. P.P. (1963) M.L.J. 22, it was held that although the Magistrate had failed to explain the main points of the evidence against the appellant, the appellant was not prejudiced insofar as he was able to give an "intelligent reply" in his defence.

defence. The data collected was based on sitting in two separate courts and evaluated how effectively the accused conducted his case. This was really difficult to assess inasmuch as the questions asked by the accused had to be related to the substantive law as well as facts peculiarly within his knowledge. But these problems appeared difficult to surmount. However the impact of such a limitation was minimized considerably in Study 2 as those who are listed as unable to conduct an effective cross-examination, could little more than keep asserting that the prosecution witness was telling a lie and that his version was the correct one. In Study 2, of the 28 unrepresented who claimed trial all were observed to have conducted an ineffective cross-examination of the prosecution witness as well as an inadequate presentation of their defence. A more detailed study of the position of the defendant at the various stages of the trial was undertaken in respect of Study 3A. The results are indicated in Table 6.1. The results make patent the failure of the unrepresented defendant to utilise efficiently, if at all, the crucial procedural devices representative of the adversary trial process. Ten accused or 24.0% failed to cross-examine at all. The cross-examination by the rest (66.0%) was largely superficial and consisted of little more than

protestations of innocence.

TABLE 6.1

CONDUCT BY THE ACCUSED OF HIS TRIAL - STUDY 3A

	Yes	No	Total
Cross-examination	31 (66.0%)	10 (24.0%)	41 (100%)
Submission after prosecution case	0	41 (100%)	41 (100%)
Defence called	38 (93.0%)	3 (7.0%)	41 (100%)
Accused gives evidence	33 (87.0%)	5 (13.0%)	38 (100%)
Accused calls other witnesses	6 (16.0%)	32 (84.0%)	38 (100%)
Submission at end of Defence case	0	38 (100%)	38 (100%)
Found guilty	37 (98.0%)	1 (2.0%)	38 (100%)

No submissions at the end of prosecution case by the accused were made. In the circumstances, quite expectedly, in 93.0% of the cases the defence was called. Although some 87.0% of the accused gave evidence, it consisted of little more than a bare statement of their version of their story and a bald assertion of innocence. More significantly, 84.0% called no witnesses at all. Between a well-marshalled prosecution case and a mere statement by the accused without the help of other

witnesses, the court's choice is predictable. This, coupled with no submission at the close of the case for the defence, resulted inevitably in a very high rate of convictions (98.0%). Finally it is noted that 5 of the accused gave no evidence at all on their behalf. They also did not cross-examine the witnesses. That they claimed trial at all indicates their refusal to plead guilty and possibly suggests that, despite the heavy odds stacked against them their belief in their innocence was staunch. Possibly too they also had faith that the court process would vindicate their position. If these suggestions are correct then there exists a very serious problem of justice in the criminal arena.

CHAPTER VII

DELIVERY MODELS

This chapter describes the various systems designed to provide counsel to an accused person, reviews their relative merits and demerits, and outlines the desirable features to incorporate in a model delivery system.

The delivery systems chosen reflect, in the main, two basic and alternative methods of protecting the right of a citizen to social equality - in this case, the right of equal access to courts.[1] The first is an essentially juridical approach, combined where necessary with affirmative state action; whilst the alternative method involves the instituting of a state social services programme resembling the modern welfare apparatus. These models will be briefly examined in turn.

A. Legal Aid as a Juridical Right

The traditional conceptions of liberty and equality were relied upon to protect many older political

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[1] See James Gordley, "Variations on a Modern Theme" in M. Cappelletti, J. Gordley, E. Johnson, Jr., Toward Equal Justice, Oceana, 1975, p. 86. This part of the text draws largely on this article.

rights. This involved the just assignment of rights and responsibilities to each individual, the provision of objective uniform standards and ensuring that these standards were impartially applied to all. The use of this traditional approach was extended to protect many of the newer social rights - the right to counsel, legal aid being one such right. Originally, this right to aid remained in large part charity because of distrust of affirmative state action. Further as the initial concern was only for formal equality, it led to reliance on charitable services of the Bar. But the concern for real equality resulted in the acceptance of affirmative state action and this combined with the traditional approaches to give this programme of legal aid its basic structure. Thus the programme's basic structure is derived mainly from the characteristics of the traditional approach, that is, uniform standards impartially applied and the assignment of rights and responsibilities to individuals.

The emphasis on uniformity and impartiality has definite implications. First, the programme stipulates a uniform criteria of eligibility and provides a uniform level of aid to all who qualify. Any problems arising are handled such as are consistent with these aims. If the programme faces shortage of

funds, the response is to tighten eligibility requirements or reduce the level of aid provided. Secondly, the programme is administratively structured to ensure that these criteria remain uniform and are uniformly applied. Third, the efficiency of the programme in allocating resources to maximize services provided is inherently limited. Funds are spent to ensure administrative uniformity.[2]

The emphasis on the rights and responsibilities of individuals also has specific implications. First, the standards of the programme and the aid it provides are designed to enable individuals to redress their legal rights. Second, the poor are left on their own to identify their problems and to bring them to the programme's attention. Third, group or class interests which may prove more effective if litigated upon are ignored in favour of promoting and protecting individual rights and interests.[3]

Legal aid as a juridical right is effectuated through compensated assigned private counsel. Examples are the programmes of Germany and England.

The Assigned Counsel system is simple in its concept and basic operation. A lawyer is appointed to

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[2] Ibid., at p. 88.

[3] Ibid., at p. 88.

represent an accused in a criminal prosecution if he has none and cannot afford to hire one. The appointment is made on a case to case basis and the lawyer appointed is expected to represent his client with the same professional standards as if he had been privately retained. There are various methods of appointing lawyers under this system. A trial judge may do the appointment from a list the court maintains or, which is rare, from amongst lawyers present in court. The selection may be left to the local bar association; or left to a committee or body directly responsible to the local legal aid association. Payments are usually made and are derived from the State. Usually the amount payable is limited to per day or per case; sometimes the amount is left to the court's discretion.

B. Legal Aid as a Welfare Right

The second approach sees legal aid as a welfare right. Recognising legal aid as a modern social right and an inextricable part of the struggle against poverty, a programme is devised based on a non-traditional approach.

In essence, it consists of the establishing of a government programme, funded and staffed with experts. The end is to ameliorate a particular social

condition, the means employed is the rational allocation of limited resources to produce the maximum impact. From these means and ends the approach derives its strength. Insofar as the approach attacks social conditions it promotes a more effective economic and social equality. By allocating resources for maximum impact it strives to provide aid that the needy will actually be able to use rather than merely have the formal liberty to use. It thus has the power to deal directly with the gaps between formal and effective liberty.[4] This rational allocation has several implications. First, eligibility stands and the kind of aid provided are determined by what will be most effective. There is no premium on uniformity of standards. As a result greater flexibility to conform standards to local conditions is permitted. Second, the programme's administrative structure is based on functional criteria designed to give it the widest impact. In this way, a greater number of legal problems are dealt with. Further such a structure allows experimentation and flexible adaptation to local conditions. Third, insofar as these standards are not uniform, individual aid recipients are often dealt with arbitrarily. The goal of attacking the social condition of poverty has also

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[4] M. Cappelletti, et al, supra, n. 1, p. 110.

specific implications for the programme. First, the standards of the programme and the kind of aid it provides emphasize the pursuit of class interests rather than the redressing of individual grievances. Second, the administrative structure does not place such heavy responsibility on the poor man; emphasis is consequently laid on making services accessible, relating legal and social problems and adapting to the cultural background of the poor.

Legal aid as a welfare right is seen in programmes relying on salaried staff attorneys working in neighbourhood law offices. A defender system, in contrast to the assigned counsel system, relies on salaried or staff lawyers who devote all their time to the specialized practice of representing indigent accused. They are usually classified into three types: public, private (or voluntary); and private - public.[5] These are distinguished from one another by two main characteristics, namely, the source of financial support and the method of creation of the office. A public defender office is paid for wholly out of public funds, a private defender is funded by private gifts, example,

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[5]See Lee Silverstein, Defense of the Poor in Criminal Cases in American State Courts: A Field Study and Report, vol. 1, New York, 1965, p. 39.

local bar associations, philanthropists, community organisations and private funding bodies. A private - public defender office is a private organisation which depends upon a combination of public and private funds. The most striking example of a public defender programme is the Legal Services Programme instituted in the U.S.A. under the Economic Opportunity Act of 1964. It was designed as part of a coordinated attack on poverty as a social condition; hence the programme's emphasis on attacking broad social conditions rather than meeting individual needs for legal services.

Eligibility standards are established locally within the limits fixed by broad national guidelines so that aid can be given where it will be most effective under varying local conditions. There are no fixed standards as such, only a set of priorities for the most effective use of its funds.

These priorities have been directed towards the goal of defeating poverty. The provision of standard legal services is given considerable priority as the redress of individual legal grievances is one way of attacking poverty. This trend has been the subject of attack as it deemphasizes class advocacy. Class advocacy has been advanced through "test case" litigation and the promotion of legislative reform.

These have been combined with the activity of organising poverty groups.

The administrative structure of the programme, its standards and the type of aid it provides reflect the emphasis on the allocation of resources for maximum impact on poverty. The offices are decentralized, small and located in the midst of poor communities. The lawyer handles a vast number of cases reflecting the whole range of problems facing the poor in that area. This vast caseload of the lawyer makes the cost of the programme per case much cheaper than the assigned counsel system. As a result, the programme can maximize its impact on the legal problems of the poor. The emphasis on defeating poverty meant the creation of a core of lawyers who would serve the poor community full time and be sufficiently responsive to the interrelationship of their social, legal, and economic problems. The lawyer was supposed to become an integral part of the poor community, gaining their trust, articulating their needs and communicating their grievances. He was to go to the root cause of the problem and go beyong legal redress. He was to aid his client in an extended way, seeking jobs for the destitute who had been denied help by welfare departments, seeking alternative accommodation for those evicted from houses. He was to help in educating the poor, not only helping them understand

their rights but generally of the workings of the law itself.

The limitations of this kind of programme are twofold. First, it leads to arbitrariness from the viewpoint of the individual. Eligibility standards are flexible permitting a large number of potential beneficiaries. But as funds are limited, only a section of these are aided. The choice of receipients can be arbitrary and there is no appeal from a refusal. Further, a successful recipient has no guarantee as to the amount of aid he will receive, especially in view of the heavy caseload of the neighbourhood lawyer. Secondly, the attack on a broad social condition means emphasis on pursuing class interests. This results in the neglect of the poor with peculiarly individual problems. There is a view that the poor, or a section of it, may not share the view that their individual grievances be sacrificed for some larger common class interest.

These two basic choices are not entirely uninterchangeable. A combination of the more attractive features of each approach may result in the most acceptable programme. Indeed this interchangeability of approaches already exist in most programmes. In the United States, for example, accused in criminal cases are entitled to legal representation as a juridical right. Yet aid is given through a model associated

with welfare right philosophy - the public defenders who are salaried staff attorneys. In Malaysia which option is adopted will depend in large part on which approach rates better in terms of economy, comprehensiveness and effectiveness. These factors have been well evaluated by a fair expert in the field whose conclusions may be summarised as follows:[6]

(1) The economic costs of delivering a given quantity of legal assistance is cheaper through the staff-salaried delivery system as:

(a) The salaried staff lawyers deliver the same services at less cost than a compensated private counsel system. This is especially true where a significant disparity exists between private lawyers fee and the allocated hourly cost of maintaining a salaried lawyer. In one study the salaried lawyers cost one-fourth the costs of the latter. The attempt by the state to give a lower fee to assigned counsel may make them competitive with salaried staff lawyers but may generate new problems, such as the government schemes only attracting lawyers with marginal ability.

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[6] See Earl Johnson, Jr., "Further Variations and the Prospect of some Future Themes," in M. Cappelletti et al, supra, n. 1, p. 135.

(b) The average private lawyer enjoys no substantial advantage over salaried lawyers as regards the quality of their work. Also, insofar as the problems of the poor require special handling and sensitivity, the staff lawyer possesses the kind of expertise that will contribute to greater productivity.

(c) Staff-salaried offices are managed more efficiently. Legal problems of the poor fit into recurring patterns which allows for rationalization: Standardization of forms, training of back-up staff especially paralegals and other short-cuts learnt through specialization.

(2) Staff attorney offices, for considerations of expertise and motivation may enjoy an advantage in the performance of high benefit functions, i.e. pursuing a remedy in court which, for example, produces a new rule of law benefitting a large number of people.

These arguments, it is submitted, apply with greater force to civil legal aid programme than to criminal work.

Numerous weighty factors have been advanced as detracting from the value of a public defender system

in the criminal arena. They may be summarised as follows:[7]

(1) It is wrong in principle to have both prosecutor and defence counsel employed by the same master. The essence of defence counsel's position over the centuries has been his complete independence and his undivided loyalty to his client;

(2) The public defender might be cheaper but cheapness is not a proper criterion;

(3) The very volume of cases in which the public defender must appear must tend to cause the individual defence to become perfunctory;

(4) The public defender system emphasizes the difference between rich and poor. It clearly smacks of charity;

(5) The public defender system causes an undue and unhealthy familiarity to grow up among prosecutor, judge and defender.

These reasons are real and a model delivery system must necessarily eliminate or reduce the impact of

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[7] Province of Ontario Report of the Joint Committee on Legal Aid (1965) p. 103, cited in Wilkins, Legal Aid in the Criminal Process, infra, n. 16, p. 7.

these factors. What follows is an adumbration of the basic features which are felt integral to a model delivery system. Only a broad outline of the essential features can be attempted at this stage.

C. A Model Delivery System: Some Aspects

a) Administration

To eliminate the first factor above, it is crucial that the administration of the plan be taken away from the government. The only other appropriate body left to administer the plan would be the professional lawyers body - in Malaysia, the Bar Council. As reliance will still have to be placed, at least initially, on Government funds, some formula for the Bar Council maintaining an autonomous relationship nonetheless will have to be worked out. A possible model to adopt would be the Ontario Legal Aid Act 1967. The administration of the scheme rests with the Law Society. It appoints all executive personnel, including the chief executive officer of the plan. It administers all funds of the plan. However the Law Society reports annually to the Attorney-General on the nature and amount of the legal aid given as well as the financial aspects of the fund. An advisory committee is set up which reports to the Attorney-General both on this report by the Law Society as well as on the general

working of the legal aid plan.

b) Location: Physical Access

Legal aid schemes will be of little value if the potential beneficiaries face substantial physical barriers hindering them from gaining access to services required. For this reason a vast network of legal aid offices ought to be established in areas which facilitate its easy accessibility to poor communities. This means that the offices must be located where the rural poor live - in kampungs or towns which service these villages. Another problem is that the legal aid offices maintain normal working hours. This creates difficulties for the poverty communities whose members are usually daily-paid and for whom taking leave from work means a loss of a day's wage. Moreover they are bound to be reluctant to seek formal leave from their employer especially if they need help in relation to a criminal charge which they are accused of. The opening hours of the legal aid offices will have to be adjusted accordingly to meet this peculiar problem.

But the difficulties may not be created by the geographical location of these offices. As has been noted before the poor do not usually identify their problem as legal and capable of legal resolution.

Community legal education may be the only effective way of overcoming this problem. The problem, however, may be more real in relation to civil than criminal cases as once a person, no matter how illiterate, comes into contact with the police, he readily recognises the need for help. Even so as a study earlier referred to[8] showed, even in this situation a lawyers' services may not be considered. The Poor may consider a lawyer as unable to influence outcome in respect of a criminal charge because of their belief that unless a person is guilty he would not have been charged.

c) Eligibility

This ought to be based on financial circumstances of the applicant and not be dependent on the discretion of any officer. This eligibility requirement is opposed to the requirement of "legal merit." Some criminal legal aid services are directed by statute to provide aid only when it is "in the interests of justice" to do so.[9] There is usually little or no authority as to the applicability of this criterion. It is clear that this vague criterion is wholly inappropriate to

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[8] See supra, Chapter 2, n. 13.

[9] See for example in Australia - the Public Solicitor's scheme in Victoria and the Public Defender Scheme in Queensland.

applications for legal aid in criminal cases. As this study shows clearly, accused persons require representation to protect and assert their rights regardless of whether they intend to plead guilty or not. The criterion for the grant of aid should be disposeable income and capital as this refers to the actual need of the applicant. The present Legal Aid Act for civil cases uses this desirable test.[10] Financial eligibility ought to be determined by a welfare board. This is necessary so that an assessment independent of the legal merits or the legal costs of the case may be effectively made. The welfare board too considers whether based on his needs it ought to grant a complete subsidy or to require a contribution from the recipient.[11]

Aid ought to be provided for all offences, irregardless of the level of the court, where there is a likelihood of imprisonment or loss of income upon conviction. The Ontario Act is most comprehensive in this respect. Aid is given not only where the applicant is charged with an indictable offence or where an application is made for a sentence of preventive

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[10] S. 15(2)(b) Legal Aid Act 1971.

[11] A contribution may be required of the recipient: see S. 18, Legal Aid Act 1971. Also see Appendix One, infra.

detention, but as well, subject to the area director's discretion all offences where the State may choose to proceed summarily or by indictment. Also subject to his approval are, inter alia, any proceedings in juvenile or family court, and before a quasi-judicial or administrative board or commission. Legal aid may also be given for 'drawing documents, negotiating settlements or giving legal advice wherever the subject matter or nature thereto is properly or customarily within the scope of the professional duties of a barrister and solicitor.'[12] It is this provision which gives the Ontario scheme a distinctive comprehensiveness as it envisages the concept of "preventive law."

It is recognized that a plan as comprehensive as the Ontario scheme would be too ambitious for a developing country but the point of the scheme must be appreciated: that real equality cannot be achieved by imposing a cut-off eligibility point which, from the point of view of the individual aggrieved, may appear arbitrary and unfair. As many situations in which the accused may face serious consequences must be identified and included for entitlement to legal aid. Implementation may be by phases, depending on the adequacy of funds. Further the grant to the area director of a discretion

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[12] Legal Aid Act, 1966, S. 13, c. cited in Wilkins, ibid., p. 9.

may introduce vague eligibility criterion but this is justified on the ground that it is only for marginal cases that such discretion is vested. Alternatively, administrative instructions may be relied upon to provide guidelines as to when aid ought to be granted.

d) Establishment of normal Lawyer-Client relationship

This ought to be striven for and may be effectuated by maintaining and extending the existing practice in Malaysia under the Legal Aid Act 1977 in respect of civil cases. A lawyer wishing to participate in the scheme submits his name to the Legal Aid office; his name is put on the panels from which the legal aid beneficiary chooses his counsel. The choice may not be real for a poor person who would probably never have heard of any lawyer, let alone a specific lawyer on the panel. But the ultimate aim of such a scheme ought to be that a person will go to a lawyer of his choice who then makes a preliminary determination as to the merits of the case and prepares the necessary application for legal aid. This will have the added advantage of reducing the legal aid officers' workload.

e) Duty Counsel

Prior to the actual application for aid which is practically made after a person is arraigned, the

accused may require a lawyer for a variety of reasons: advice on the plea, application for bail, plea in mitigation prior to sentence. This role, may best be fulfilled by the duty solicitor scheme.

The scheme was originally devised in Scotland where it operates thus:[13] Two or three solicitors drawn from a roster are on duty each day for periods of the week in the court. Prior to the mention, they interview clients. They usually have the police papers, the charge and details of previous convictions before them. The solicitor on duty helps the accused decide on the plea to be advanced. If the case is to be remanded he ascertains the facts for the making of a bail application. If the accused intends to plead guilty he collects information for mitigation purposes. If a full defence is required, a Law Society official tells the accused he could choose the duty solicitor he was interviewed by or any other solicitor on a list. The scheme is available for all cases where the accused comes to court on the first appearance in custody.

Ontario adopted the Scottish duty-solicitor scheme but with some important variations. First, it caters as well for those on bail or who have been

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[13] See Justice Report, supra, Part III para. 73, p. 23.

summonsed. Secondly, the lawyer who has acted as duty counsel for an accused is prohibited from accepting a legal aid certificate from that accused unless a prior client - lawyer relationship has existed.[14] Thirdly, the Ontario scheme permits the duty counsel to conduct a full defence when necessary - usually this is when the case can be dealt with during the duty solicitor's term of duty. The aim of this is to curtail further adjournments and hence avoid further expenses.

Solicitors are paid by per session work. The Scottish scheme cost an average of £2.50 per case; the Ontario scheme, an average of $11.08 per case. The duty solicitor scheme fulfils an important role and for this reason ought to be incorporated into any model delivery system.

In an earlier chapter it was shown that a large number of unrepresented pleaded guilty and that many who were not guilty pleaded guilty for a variety

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[14] But see R.M. Crotty, "The Duty Solicitor Scheme," in The New Zealand Law Journal, 17 May 1977, p. 189. Crotty suggests that it is important to have duty solicitors who are also on the legal aid list so that a person granted legal aid (in New Zealand - by the courts) will be told while he is still in the dock to see the particular solicitor before he leaves the court. Thus the solicitor can take instructions immediately and this results in the speedy disposal of the case. This also means that counsel "can undertake a number of legal aid assignments on the day he appears as duty solicitor and can complete such assignments in the following weeks. At present he is granted an isolated legal assignment from time to time." ibid.

of extraneous factors, for example police pressure. Many made uninformed pleas, and were unable to recognise that they had a valid legal defence to the charge. The provision of a duty solicitor to assist all unrepresented accused would therefore provide representation at the critical first stage of the proceedings. Further the duty solicitor could acquaint the accused whose case had merits of the legal aid scheme and even help him make the necessary application. Those pleading guilty could immediately have the assistance of counsel to advance mitigation pleas who could help place all legally relevant considerations before the court. He could also help in making the necessary bail applications. Finally if necessary he could ask for the necessary adjournments on behalf of the accused to investigate the matter further or help place before the judge important evidence not immediately available. Commentators of Australian Legal Aid schemes have spoken favourably of the Duty Solicitor scheme but only as

> "...one element in effective legal aid at the magistrate's court level - they cannot themselves provide it."[15]

Two main problems to the instituting of this scheme must be considered, namely, man-power and cost.

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[15] Ronald Sackville, Legal Aid in Australia, Canberra, 1975, p. 121.

Man-power problems are not likely to be significant. Most large towns in this country have a good number of law firms: the towns of Kuala Lumpur, Ipoh, Johore Baru and Penang have well in excess of 100 lawyers. The other towns like Seremban, Kota Baru, Kuantan support a more than adequate number of lawyers. Even smaller towns without resident law firms are always serviced by lawyers who travel from nearby towns. Where there is a genuine dearth of lawyers then the particular court affected could be exempted from this scheme. To ensure a supply of lawyers for this scheme all those signing up for the legal aid scheme should be obligated to serve as well on the duty solicitor scheme. Interestingly, in Ontario the Advisory Committee on Legal Aid has approved the contribution of second and third year law students. These students are entitled to appear in court in criminal legal work. This source of man-power could be resorted to and the scheme itself would be an important clinical legal education component for the law school.

It is left now to direct attention to some of the problems that may arise or have been apprehended as attendant upon the implementation of such a scheme. Without doubt such a scheme must have an impact on the Bar as it is presently constituted. The number of

lawyers required to 'run' the scheme adequately will not really pose a problem. The existing lawyers are engaged mainly in civil practice. Criminal legal aid, with reasonably attractive renumeration rates coupled with its 'repay-debt-to-society' facet, may draw enthusiastic response from a great number of lawyers. But such a comprehensive scheme may be looked upon as a threat to the income of marginal lawyers. But if the renumeration is sufficiently attractive, this section of the legal fraternity too may benefit from participating in the scheme.

There has also been considerable concern expressed about an artificial increase in appeals by legal aid lawyers to inflate their renumeration. This will clog the appeal courts and interfere with the early resolution of appeals genuinely pursued. Wilkins study of the Ontario courts shows this concern to be unfounded. Table 7.1 showing his study of cases appealed according to representation shows that 73.4% of the appeals were lodged in equal numbers by unrepresented accused or those with privately retained lawyers. Similarly concern that criminal legal aid will attract younger and relatively inexperienced members of the bar thereby rendering elusive equal justice for the poor have also been disproved by Wilkins. His study

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[16] See Wilkins, supra n. 7, Chap. 6, p. 85.

shows

(1) that the median years of experience at the bar for lawyers acting under legal aid certificates is 7.125 years and for privately retained lawyers, 10 years;

(2) a difference of this size occurs only in approximately one of ten sample comparisons, which is of hardly any significance.[16]

TABLE 7.1

CASES APPEALED ACCORDING TO REPRESENTATION - ONTARIO

Representation	Cases Appealed	
	Number	Percentage
Unrepresented	11	36.7
Legal Aid Certificate lawyer	6	20.0
Privately retained lawyer	11	36.7
Duty Counsel	2	6.7
Total	30	100.0

Source: Wilkins[16]

[16] See Wilkins, supra, n. 9, Chap. 6, p. 85.

Admittedly each country's experience will differ. However, the list of lawyers who are on the Malaysian civil legal aid scheme shows a fairly even panel of experienced and junior lawyers. At any rate, it is moot whether a younger lawyer is necessarily a disadvantage. The exuberance of youth to advance a fresh, innovative and thorough defence may well mean that younger counsel is preferable.

Wilkins also highlights three related concerns: First, there might grow up a 'legal aid bar' - an identifiable group of lawyers who take on a large number of legal aid cases to make up for the reduced renumeration. Their reduced renumeration is likely to lead them to fix cases to maximise their fees, thus unwarrantedly increasing costs to the taxpayer. This specialization will also show that there is one justice for the rich and another for the poor - a disadvantage associated with the public defender scheme. Second, the bigger law firms may farm out cases to juniors in their firm. Third, a greater number of solo practitioners may take on legal aid cases. Insofar as they will lack the necessary supportive staff, there will necessarily be a drop in the quality of aid provided. Wilkins study examined each of these problems in turn and concluded that[17]

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[17] Wilkins, ibid., pp. 87 - 92.

(1) there was no evidence suggesting that a group of lawyers were taking on an inordinately large number of legal aid cases;

(2) only a negligible number of lawyers given certificates gave the work to others in their firm. Even so, insofar as this occurs even in the ordinary practice of law, the accused was at no greater disadvantage;

(3) in comparison to privately retained lawyers, lawyers acting under legal aid certificates are more likely to be attached to a firm.

Again the value of these findings to Malaysia must be necessarily conditioned by local circumstances. For example, a large number of lawyers in this country are solo practitioners; a large number of them undertake criminal legal work. This suggests that the legal aid accused would be at no greater disadvantage if he is serviced by these groups of lawyers. Other abuses may receive special attention and may be checked fairly easily, for example, each lawyer's legal aid caseload can be limited by statute; also it can be made mandatory for lawyers to whom legal aid certificates are issued

to handle the case personally.

Yet again there is widespread belief that lower quality representation is given through the legal aid scheme when compared with private lawyers. Wilkins articulates this problem in these terms:

> "Because the client does not pay, some expect that the lawyer will be indifferent and treat his cases perfunctorily. He may allow, and even encourage, guilty pleas in order to speed the matter along. Because preparing a defence involves work, this line of thought would predict that by default a larger proportion of legal aid clients would be found guilty."[18]

Wilkins sought to ascertain the extent to which this held true in the Ontario plan. Table 7.2 presents his analysis. The results showed that there is no significant difference in the findings between cases defended by legal aid certificate and those defended by privately retained lawyers. Wilkins further found that the legal aid lawyer was not at all reluctant to advance an available defence on his clients behalf; also, legal aid lawyers are less likely to enter pleas of guilty than privately retained lawyers.

Indeed some commentators have proferred reasons which suggest why a private lawyer has an interest in resolving a case often against the client's interest. Abraham Blumberg is pointed in his comments:

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[18] Wilkins, supra, p. 146.

"However, the criminal lawyer develops a vested interest of an entirely different nature in his client's case: to limit its scope and duration rather than do battle. Only in this way can a case be 'profitable.' Thus, he enlists the aid of relatives not only to assure payment of his fee, but he will also rely on these persons to help him in his agent-mediator role of convincing the accused to plead guilty, and ultimately to help in 'cooling out' the accused if necessary."[19]

TABLE 7.2
FINDING BY REPRESENTATION

Representation	Finding		Total
	Guilty	Not Guilty dismissed or withdrawn	
Unrepresented	103 (75.2%)	34 (24.8%)	137 (100%)
Legal Aid Certificate lawyer	60 (69.0%)	27 (31.0%)	87 (100%)
Private retained lawyer	101 (64.3%)	56 (35.7%)	157 (100%)
Duty Counsel	72 (83.7%)	14 (16.3%)	86 (100%)

Chi-square = 11.66, df = 3, $p = <0.005$

Legal Aid Certificate Lawyer X Privately Retained Lawyer: Chi-square = 0.59, df = 1, $p = <0.05$

(Source: Wilkins, p. 116)

[19] Abraham S. Blumberg, "The Practice of Law as Confidence Game" in Vilhelm Aubert (ed.), The Sociology of Law, Penguin, 1969, p. 328.

The apprehension of lower quality representation may thus not be well-founded. The relevance of these studies to Malaysia may be asserted negatively: they show, at the very least, that the "setbacks" listed are not necessarily attendant upon the implementation of the kind of legal aid delivery scheme suggested.

f) Funding Sources[20]

The model delivery programme adumbrated would require a fairly heavy financial commitment. It was stated at the outset that almost always the structure and form of the legal aid scheme adopted is dependent substantially on the funds available. Indeed this was made explicit in the Malaysian experience. The cost of funding a comprehensive legal aid scheme can be prohibitive to a government especially in a developing country where limited funds have to be spread amongst a long list of competing priorities. For this reason attention must be directed to the means of supplementing the traditional funding sources namely government grants and charity.

There also exist other traditional but informal sources of fundings. The most widely known is the

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[20] See generally on this: Financing Legal Services to the Poor, a memorandum prepared for the International Legal Center's Committee on Legal Services to the Poor in Developing Countries by Terence Purcell, Executive Director, New South Wales Law Foundation, Sydney, Australia, September 1973. (unpublished).

discount on fees in judicare schemes. Lawyers participating in the scheme forego part of their fees paid to them from the legal aid fund. In the Ontario scheme, lawyers charge 75% of the fee normally chargeable. This 25% discount represents a contribution by the legal profession to the scheme. In Malaysia yet another informal source is the use of law students in legal aid delivery schemes. Programmes using students benefit not only the scheme in this way but as well enable students to develop the necessary lawyering skills; hopefully, too, it imbues the student at an early stage with a sense of social responsibility to the community and sensitises him to the problems of the poor in a living way.

It is left now to explore more novel funding sources. Court fees is one such source. A percentage of all court fees collected in every court in the country or state could be directed to be paid to a special legal aid fund. In the Philippines legislation enacted in 1964 requires 1% of all finding fees in specified courts to be collected and paid to the University of the Philippines Law Centre, a legal education cum legal research unit. This levy yields U.S.$600,000 per year. The Philippine experience is particularly instructive as it is a developing country

with a per capita income of US$160 per year. A small enough levy of this kind would hardly be felt by litigants. If a greater sum is required, then a progressive levy may be considered - that is levying certain types of legal processes with larger court fees. This would shift the burden to frequent users of the court process, for example, businessmen and petty traders. Other heavy users of the legal process could be identified for purposes of this extra levy. These groups could be, for example, insurance companies, banks or, perhaps, even foreign-owned companies.

A significant source of finance for establishing and expanding legal aid programs in Australia is interest derived from monies in attorneys' trust or escrow accounts. Legislation was passed in 1967 in New South Wales which required every attorney with a trust account for clients' money to deposit one-third of the minimum balance in his trust account to the interest of the Law Society.[21] Previously no interest was paid by the banks on this account. The legal aid scheme operated by the Law Society was made one of the recipients of these funds. A similar scheme in Ontario requires interest to be paid on all trust

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[21] Legal Practitioners (Amendment) Act 1967.

account monies deposited with banks. The Law Society of Upper Canada has stipulated that attorneys must lodge all client trust monies in interest-bearing bank accounts.

Both these novel sources rely on existing sources which have yet to be tapped. But as legal aid schemes become more extensive in scope and the kind of services provided, even newer sources of financing will have to be thought about which will neither require a mere redirection of funds which are already being channelled into the government's coffers nor interfere with established government fiscal policies. The search for such sources must necessarily be directed to those areas and groups who, for some reason or other, come into contact with the law and its institutions. The question will be: which of these groups ought to bear the primary burden? Some groups have already been identified, for example, frequent users of legal processes. The most obvious group is the legal profession itself. It is possible to assert, in Malaysia at least, that there exists great scope for the skills of the legal profession to be harnessed to contribute towards a legal aid scheme.

Some alternative ways by which the legal profession may be obliged to undertake legal aid work may be suggested. First, the grant of a practising

certificate for lawyers newly admitted to the Bar could be made conditional upon the lawyer undertaking to perform a minimum amount of legal aid work within a given time period. Alternatively, a condition could be imposed that a specified period each week or month, for example one or two days, be spent doing legal aid work. Lawyers could also be made to make direct financial contributions by, for example, increasing the amount to be paid on the issuance of a practising certificate. This increased amount will be paid into a legal aid fund. Recently the legal profession has been made to pay a sum of money to be determined from time to time by the Bar Council annually for the Compensation Fund set up. The sum so collected may be invested.[22] With 1100 lawyers in the profession, the amount yielded is not insubstantial.

Yet another possibility is to require a fixed percentage of party and party costs of successful litigants to be paid into a legal aid fund. This would in all probability mean that lawyers must accept a reduction of their income from legal costs.

Legal institutions may also be resorted to share the burden. The levy on court filing fees earlier discussed is one possibility. Yet another source is

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[22] Sections 80(1)(2) and 4 of the Legal Profession Act, 1976.

the imposition of an additional amount to fines and penalties imposed on convicted accused. Many serious moral questions arise out of this imposition. But these could be met by imposing this levy only in respect of certain types of offences, for example commercial crimes, and in respect of certain kinds of wealthier accused. At any rate if the levy is a small standard amount the objections to it may not be critical.

A similar additional levy could be imposed by other government institutions in respect of certain documents which require registration or stamping, for example, contracts, powers of attorney, land title transfers, company registrations and probate applications.

These sources discussed, in themselves, may be insubstantial; but cumulatively they will be substantial enough to fund a fairly comprehensive and dynamic model delivery scheme.

D. Conclusion

This study shows how severely handicapped an unrepresented accused is as compared to his represented counterpart. At the plea stage, data shows that the unrepresented accused are more likely to enter pleas of guilty than those represented. Evidence exists to suggest that a high percentage of the unrepresented may plead guilty for reasons extraneous to their guilt or

innocence. Studies in countries as diversely apart as U.S.A., Australia and England show a striking similarity of the reasons: police pressure, desire to get the case over with, a feeling of helplessness in claiming trial, not knowing how to plead, etc. These reasons are thought to be applicable to Malaysia. Confirmation of this comes from the significant corelation in this study between retaining counsel and changing pleas from guilty to not guilty.

The impact of counsel on the trial of the case is also significant. There was a significant corelation between representation and the finding by the court. Also the unrepresented accused had a much greater chance of being found guilty when compared with his represented counterpart.

The impact of representation appeared insignificant at the sentence stage. First, the relationship between being represented and receiving a lighter sentence was insignificant. The association between representation and sentence was also weak. Secondly, the chances of the represented and the unrepresented being imposed either custodial sentence or a fine were about even. Thirdly, the relationship between representation and receiving a light sentence of a fine was insignificant and the association very weak. The pattern altered somewhat when representation

was related to the imposition of custodial sentences. There was a relationship between representation and sentence but the association was not very strong. There was no difference in the result when the variables (age, criminal history of the accused, nature of the offence) were controlled. The conclusion, therefore, is that representation does not affect sentence, although in absolute terms, the unrepresented was marginally worse off than the represented. This suggests that confining legal aid to the sentence stage, as is presently done in Malaysia, is a waste of scarce funds.

Finally this study shows that there is an urgent need to direct attention to extricating accused persons, who are hauled in daily to and through our courts, from their plight. As was stated at the outset, it is not only the interests of the accused which need protection; wider and more important interests are at stake. Ultimately the proper functioning of the rule of law in the criminal area is in jeopardy.

APPENDIX 1

Group 1: FREE LEGAL AID

A. Possess Property not exceeding $500/- and

B. Disposable income not exceeding:

(a)	Unmarried	(not paying rent)	: $104.00 per month
		(rent paying)	: $134.00 per month
(b)	With one dependent:		
		(not paying rent)	: $117.00 per month
		(rent paying)	: $147.00 per month
(c)	With two dependents:		
		(not paying rent)	: $128.00 per month
		(rent paying)	: $159.00 per month
(d)	With three dependents:		
		(not paying rent)	: $141.00 per month
		(rent paying)	: $171.00 per month
(e)	With four dependents:		
		(not paying rent)	: $154.00 per month
		(rent paying)	: $184.00 per month
(f)	With five dependents:		
		(not paying rent)	: $165.00 per month
		(rent paying)	: $197.00 per month
(g)	With six dependents:		
		(not paying rent)	: $179.00 per month
		(rent paying)	: $209.00 per month
(h)	With seven dependents:		
		(not paying rent)	: $191.00 per month
		(rent paying)	: $221.00 per month

Group 2: LEGAL AID FOR WHICH CONTRIBUTION PAYABLE

A. Possess Property more than $500.00 but not exceeding $3,500.00 and

B. Disposable income not exceeding.

(a) Unmarried	(not paying rent)	: $291.00 per month
	(rent paying)	: $321.00 per month
(b) With one dependent:		
	(not paying rent)	: $304.00 per month
	(rent paying)	: $334.00 per month
(c) With two dependents:		
	(not paying rent)	: $317.00 per month
	(rent paying)	: $347.00 per month
(d) With three dependents:		
	(not paying rent)	: $329.00 per month
	(rent paying)	: $359.00 per month
(e) With four dependents:		
	(not paying rent)	: $341.00 per month
	(rent paying)	: $371.00 per month
(f) With five dependents:		
	(not paying rent)	: $354.00 per month
	(rent paying)	: $384.00 per month
(g) With six dependents:		
	(not paying rent)	: $367.00 per month
	(rent paying)	: $397.00 per month
(h) With seven dependents:		
	(not paying rent)	: $379.00 per month
	(rent paying)	: $409.00 per month
(i) With eight dependents:		
	(not paying rent)	: $391.00 per month
	(rent paying)	: $421.00 per month

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