CONSUMERS' ASSOCIATION OF PENANG

SEMINAR ON LAW, JUSTICE AND THE CONSUMER
19 - 23 November, 1982
PENANG, MALAYSIA.

ADMINISTRATION OF LAWS : A STUDY OF THE ACCESS OF THE COMMON MAN TO THE LAW, ITS PROCESS AND INSTITUTIONS.

by

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I. INTRODUCTION

It is trite to observe that the proper administration of laws requires a legal system replete with adequate procedural and evidentiary safeguards which allows the efficient resolution of conflicts (in the civil law) and the proper adjudication of guilt or innocence (in the criminal law).

But it is equally trite that the most elaborate legal system may be inaccessible to the populace either because of its :

(i) failure to identify a conflict situation and recognise it as amenable to the legal process, or

(ii) lack of knowledge as to the remedies to pursue, or

(iii) inability to understand and utilise efficiently the safeguards provided by the legal system.

In developing countries such as ours this problem of access is exacerbated, if not caused, by poverty. If the widespread incidence of poverty impedes the proper use of the legal system then the administration of laws and the proper functioning of the rule of law is in question.

The question of access is therefore critical in determining the efficacy of the legal system and ascertaining whether the administration of laws is compatible with the fundamental norms of a democratic society.

II. THE LEGAL PROBLEMS OF THE RURAL POOR: A STUDY OF ACCESS IN THE CIVIL LAW AREA

1. OBJECT OF THE STUDY

A study of 3 rural poor communities was undertaken in 1975 to ascertain the use value of the legal system by poverty communities to seek and secure the resolution

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of legal problems they confronted. Ultimately the study helped evaluate the efficacy of the legal system by providing incisive insights into the accessibility of the legal system to poverty communities. More specifically, the primary purposes of the study were to:

(1) determine the types of legal problems confronting the rural poor person;
(2) identify the categories of problems he perceived as 'legal';
(3) ascertain the typical problem solving methods and institutions he employed and their effectiveness;
(4) identify categories of problems not perceived as being legal which are amenable, nonetheless, to resolution through the legal process;
(5) assess the perception of the poor of the possible effectiveness of legal intermediaries on their behalf in specific problems;
(6) identify factors which heightened legal perception and problem-solving ability.

2. THE COMMUNITIES SURVEYED

The 3 communities consisted of:

(1) a Malay community located in Southern Johor, just outside Mersing. 80% (N=160) households were interviewed.
(2) a predominantly Malay community in Northern Malaya, located about 7 miles from Alor Star. 150 households were interviewed.
(3) a community in a FELDA scheme situated about 18 miles from the township of Kota Tinggi in Southern Malaya. 70% (N=254) of the settlers were interviewed.

3. THE SURVEY - METHODOLOGY

The survey was conducted on two levels:

First, a questionnaire was administered to the sample community.

Secondly, answers obtained thereform were utilised in a series of unstructuted interviews with the community leaders and service agency personnel whom the sample groups identified as "sources" they turned to. This was done to ascertain the community leaders' perception of problems the poor in their community faced, and the problem-solving mode they employed or would recommend. Their ability to identify a problem as 'legal' and their suggestion of legal solution were particularly noted.

4. THE RESULTS SUMMARISED:

A. The Hypothetical Problems

The first set of questions consisted of hypotheticals designed to elicit responses on areas which, it was thought, affected the life of the poverty communities. These hypotheticals were generally utilized to test perception of a problem as legal, knowledge of legal and other problem solving means and willingness to take action.

The following results may be summarized:
First, the communities' perception of a problem as legal and their knowledge of legal and other problem solving means and willingness to utilize these means were conditioned by their understanding of their rights. Given that their conception of their rights was very poor, the poor were unable to perceive problems as amenable to legal redress. Consequently the remedy resorted to was self-help.

Arising out of their failure to recognise problems as legal, a disturbingly large majority said they would not know what to do.

Secondly, there were some members of the sample communities who had a general notion of wrong, and on

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this formed a broad notion of their rights. But, when aggrieved they felt unable to assert and establish these rights. Instead they placed reliance on others. In some instances their reliance would lead to an effective resolution of their problem. But often the communities were almost totally dependent on those who invariably stood in a more or less exploitative relationship to them. The boat-owners and shop-keepers were unlikely to undermine their own interest by advising the rural poor to assert their rights against them. Thus the communities' reliance on them sometimes stultified perception of problems as legal.

Indeed against them there is little the poor think of doing nor even think they are entitled to do. Legal remedies against them were rarely contemplated. For example, if they fall into arears in their loan repayments with a moneylender or if he charges them high interest rates or where the lender also, for example, owns the boats they use for fishing enterprise and he makes them sell their catch at depressed rates, their only recourse is to entreat him with pleas of mercy to be charitable.

Thirdly, those who asserted they would take action appeared to react more out of indignation based on their broad notions of right and wrong. But they were not aware of their rights, the consequences of ascertaining their rights and whether they had taken these consequences into account when suggesting their answers.

Fourthly, it appeared that prior contact with an administrative source may have not only improved their knowledge of their rights but increased as well their willingness to pursue their rights within the administrative framework.

Conversely previous experience also appeared to work negatively. For example in relation to the child custody poser, 40% said they would do nothing. This was because from their previous experience they knew

that the Kathi did nothing against the errant spouse.

Fiftly, the poverty community had an overwhelming view of authority which inhibited or stultified their ability to perceive a problem as amenable to the legal process. This was most strikingly demonstrated in the answers to the query - what the parent would do if the child was charged for a criminal offence. It was generally felt that the authorities would not have initiated the criminal process unless their child was in fact guilty. Consequently, although experience had proved their intercession with the police authorities futile, they still felt that was the only "remedy" to pursue. Intercession meant the usual pleas for clemency.

Sixthly, it may be tentatively suggested that the poverty communities preferred conciliation to conflict. Perhaps for this reason they did not think of 'asserting' rights, as is required under an adversary legal process. The use of the lawyer, associated with the process, was therefore never even contemplated, even in the child arrest problem where the role of the court and the "law" is more clearly visible.

Finally, our legal system is based on self-identification of injury and wrong and self-selection of a remedy. Amongst the poor, as we have seen, this self-identification /selection process is virtually non-operative. Consequently the viability of the legal system, in relation to poverty communities at least, is questionable.

B. KNOWLEDGE AND USE OF RESOURCES

The following conculsions may be summarised:
First, knowledge of existing services was often non-existent in important areas where distributive mechanisms theoretically exist to mitigate some of the harsher consequences of poverty. Where knowledge existed, it was extremely rudimentary and confined to areas of immediate use to the subject.

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Secondly, as a consequence, the use of the services was small. Their use was greater in relation to immediate bread and butter questions. Use was also heightened where there was intensive propaganda coupled with constant supervision and careful guidance.

Finally, they acquired knowledge and use of resources primarily through bodies of which they were members and which provided them with a steady flow of information on specific services. Intensive education via voluntary organisations was also useful where it was sustained and carefully followed-up.

C. STUDY OF ACTUAL PROBLEMS

This part tested the way in which the communities handled actual problems they faced. Their methods, course of action and the success or otherwise of the outcome were compared with their answers to the hypotheticals and their levels of knowledge of available resources. The effect of problems as a learning experience and the factors which enhanced the ability of particular individuals to become more effective problem solvers were analysed.

Conclusion

Generally, the communities responded feebly when confronted with a problem. Their choice of problem-solving channels was ineffective. They performed particularly well where they had no choice, eg over-due payments, in which situations they adopted viable non-legal means of redress. Prior experience with agencies, either direct or indirect, sometimes tended to discourage use where there was a failure to obtain an effective remedy. This also explained, in some cases, the wide divergence between answers in hypotheticals and responses to actual problems. Even where a remedy was pursued, there was no follow up until final resolution. Often a mere denial resulted in an abrupt end to the subject's quest for a remedy.

(/ in a real life situation. Consequently access to existing legal problem)

There was practically no recourse to lawyer's services. Generally there was reflected in the answers, a difficulty in identifying a legal problem /solving styles was hampered. All in all, by way of impressionistic comment, it may be concluded that

(a) The impact of even the skeletal knowledge of the poor about legal resources and problem solving styles upon the use of such resources and styles was practically nil.

(b) The poor's non-use of the legal system suggested that they perceived the legal system as largely expensive and therefore inaccessible.

III ACCESS TO JUSTICE IN THE CRIMINAL LAW AREA:

A. THE UNREPRESENTED ACCUSED

The efficacy of the legal system in the criminal law area is best evaluated by focussing attention on the accused persons - the grudging "consumers", [illegible] group. The question that needs answering is whether the accused persons can understand and utilise efficiently the procedural and evidentiary safeguards, with which our laws are replete, to establish their innocence. This necessarily leads us to the ubiquitous /unrepresented accused.

The plight of the unpresented accused is now widely acknowledged. In Powell v. Alabama Justice Sutherland of the U.S. Supreme Court pointedly, stated:

> "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 if 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."[5]

Justice Wan Yahya bin Pawan Teh of the High Court Malaysia has re-echoed this view in these terms:

> " ... The complex procedures of our court with all its technical refinements may pose serious obstructions to the poor unpresented laymen from successfully obtaining justice."

2. <u>THE IMPORTANCE OF ADDRESSING OURSELVES TO THE PROBLEMS OF THE UNREPRESENTED ACCUSED</u>

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 Governemnt 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

interest 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 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.

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.

3. THE POSITION IN MALAYSIA

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

Records show quite clearly that financial consideration determined the scope and extent of the legal aid scheme set up in 1970. For this reason legal aid in criminal cases is limited to advancing pleas of mitigation on behalf of a convicted accused. 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 at this stage of the trial process.

4. STUDY OF THE POSITION OF THE UNPRESENTED ACCUSED

A formulative or exploratory study was undertaken by this writer in 1974-1975 and published in 1978[8]. The study examined the position of the unpresented accused and sought to establish the relationship between representation and the outcome of the case.

[8] G.S.Nijar, "The position of the Unrepresented Accused in the Subordinate Courts in Malaysia, "Kuala Lumpur, Faculty of Law, University of Malaya, 1978 (LL.M. Dissertation). I am grateful to the Law Faculty for the use of data and material from this study.

5. THE DATA FOR THE STUDY

Data was collected from the records of the Magistrate's Court Kuala Lumpur in respect of all criminal cases registered between January to July 1973. The total sample is 390. To supplement this study, data were also collected from the Subordinate Courts at Batu Pahat, Kluang and Mersing. Interviews were also conducted of some of the accused persons. Unpresented

accused persons were also observed "conducting" their own defence. As the courts were located in highly urban, semi-urban and semi-rural areas, a fairly representative result was obtained.

B. THE LEVELS OF REPRESENTATION

1. THE LEVELS OF REPRESENTATION ALL CASES

The level of unpresentation was very high and quite unaffected by the location of the Court, as the table below indicates:

TABLE 1.

LEVEL OF REPRESENTATI N - ALL CASES

Study 14A	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%)

14A

Study 1 (all criminal cases registered at Kuala Lumpur Magistrates Courts January - July 1973. Total sample: 309)

Study 2 (Batu Pahat Magistrates Court, 2 weeks in 1972 - Total sample: 191) - in respect of criminal cases

Study 3A (all criminal cases registered at Kuala Lumpur Magistrates Court August-

December 1973. Total sample: 325)

Study 3B (all criminal cases registered at Kuala Lumpur Sessions Court August - December 1973. Total sample: 235)

Study 4A (all criminal cases registered at Kluang Magistrates and Sessions Courts August-December 1973. Total sample: 81)

Study 4B (all criminal cases registered at Mersing Magistrate and Sessions Courts. Total sample: 60)

2. LEVELS OF REPRESENTATION FOR THOSE PLEADING GUILTY

The table below summarises the date:

TABLE 2
LEVEL OF REPRESENTATION - FOR THOSE PLEADING NOT GUILTY

Study	Representation		Total
	Represented	Unpresented	
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%)

The level of representation is seen to have improved appreciably, being more than 65% for the 1973 studies as compared with 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 and therefore were

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 engage 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 from this perspective, the level of unrepresentation ranging from 55.6% in Study 1 to 33.7% in Study 3B appears inordinately high.

3. LEVELS OF REPRESENTATION AT THE SENTENCING STAGE

In study 1, of the 68 represented, 38 were not convicted whilst out of the 241 unrepresented, 53 or 17.2% were not convicted. Thus a total of 218 people or 70.5% were convicted out of a total or 309 persons charged. The level of representation amongst the convicted at the sentencing stage is indicated in the Table 3. (Data for Studies 2 and 4 were not available).

TABLE 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%)

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These figures once again, ranging from 78.5% in respect of Study 38 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 4 sets forth the data in respect of Study 1.

TABLE 4
NUMBER OF UNREPRESENTED ACCUSED
BY SERIOUSNESS OF OFFENCE
STUDY 1

Seriousness of offence: Maximum Penalty	Unpresented	Total
Ten years and above	20 (100%)	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%)	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.

4 THE REASONS FOR THE HIGH LEVEL OF UNREPRESENTATION

The tentative explanation preferred 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 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.

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

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after they were released on bail.

Which reason is decisive in a given case is difficult to determine. But the central role of poverty is difficult to rule out. Many of the reasons given result from ignorance which in turn may be fairly directly traceable to poverty and low education levels. In study 2 it was possible to ascertain the income levels of 73 accused persons. Their income distribution was as follows:-

TABLE 5
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

Also the usual response 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 results: 33 of them (91.7%) were earning income 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. Interestingly only the three earning monthly income of $390 were represented. Thus in Malaysia at least poverty does seem to have a critical role in explaining the high level of unrepresentation.

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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. As he puts it succinctly:

> "Economic growth in most developing countries have 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."[3]

C. 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.[4] Once confirmed the plea cannot be changed be changed except upon valid and sufficient grounds which satisfy the magistrate that it is proper in the interest of justice that a change be allowed.[25] The accused is then subject to the production of a

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

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23 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 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 income 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.

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

25 P.P. v. Sam Kim Kai (1960) M.L.J. 265, 267

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.

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.

TABLE 6
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, $p \leq 0.001$, phi= 0.48

This table shows that there exists 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 are more likely to enter pleas of guilty than those represented.

These figures could possibly 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 earlier 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 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 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 the 1975 study earlier referred to on the legal needs of the poor, the responses of needy communities to the criminal process was also investigated. 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 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 over drawing 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. Table 7 set forth the result.

TABLE 7

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

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This table shows unequivocally that there is a significant difference between retaining counsel and changing plea from not guilty (chi-square =17.41, p = 0.001). Of the 141 unrepresented accused who pleaded bot 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).

Finally is 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 consequences that there are fewer pleas of guilty and a greater exercise of rights, is an undesirable state of affairs or is indicative of abuses."[31]

Thomas Heald states that,

> " ... as to the possibility that legal aid has increased the proportion of <u>unwarranted</u> 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."[32]

Given the lack of evidence, it would indeed be unfair to

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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.

D. 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 pleas 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

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31 T.P. Callon, "The treasurer reports - Legal Aid Committee," Law Society Gazette, 5(March 1971).II

32 Thomas Heald, "The bar after Beeching - a personal view," Criminal Law Reviews 5 (December 1969), 630-1.

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TABLE 8

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 8 sets forth the number of cases in which there was an overall finding of guilty by the courts in respect of all cases[33] and compares them with cases in which the findings 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 as 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 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).

Table 9 presents the data in respect of cases which proceeded to trial. The data is in respect of all cases registered in the Kuala Lumpur Magistrates and Sessions Courts in 1973.

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

TABLE 9

REPRESENTATION AND FINDINGS

Representation	Finding		Total
	Guilty	Not Builty	
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. 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).

E. REPRESENTATION AND SENTENCE

1. GENERALLY

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.

It is generally recognised that a number of factors, apart from representation, may affect the severity of the sentence imposed.

These factors may be identified as follows :

(1) the previous criminal history of the accused;
(2) the age of the accused (whether juvenile or adult);
(3) the nature of the offence;
(4) the seriousness of the offence;

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(5) the role of individual personality characteristics and attitude of the 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 case 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.

Two sets of data were compiled: one in respect of all cases without controlling the above factors which may affect sentence, and the other which took these variables into account.

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.

2. CONTROLLING THE VARIABLES AFFECTING SENTENCE

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.

Secondly, the tender age of the accused did not result in the imposition of a lighter sentence where he was unrepresented.

Thirdly, the same pattern was seen in respect of those aged 21 and above in respect of non-property offences.

By way of conclusion the following observations may be made. 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 or a fine were 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 s 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.

F. 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.[38]

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."[39]

This spatial arrangement to an onlooker suggests little more than an orderly display of justice. But it had definite repurcussions. The arrangement combined with poor acoustics result in endemic hearing problems. The result often is that the accused hears very little of

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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."[40]

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38 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 magistrates courts and further twelve months regular vists to six other Stipendiary Magistrates Courts.

39 ibid. at p. 21

40 Cited in a Report by Justice, The Unrepresented Defendant In Magistrates Courts, London, 1971, p. 15.

Carlen cites an interview with a probation officer depicting this problem vividly and which description fits our court 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,

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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 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, one 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 cour . (Miss S, probation officer)."[41]

The placing and distant spacing of the accused from the magistrate is also 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.'

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> "They felt it impossible or inappropriate in the formal atmosphere of the court to talk about the background of the offence."[41A]

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 to the questioner. But as Carlen observes:

> "In magistrate's 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 hear them. As a result, defendants are often in the position having to synchronize their answers and stances in a way quite divorced from the conventions of everyday life outside the courtroom,"[42]

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 the 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

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[41] Carlen, op.cit n.1. p.22

[41A] Justice Report, op, cit. n. 3, p. 15

[42] ibid p. 24

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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.

There also exist various factors which inhabits 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."[43]

The presentation of the magistrate is attended with some ceremony: his entrance is heralded, with the "All Stand" shout, any notice 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 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

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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 underfined: it provides tautological justification for the narrow range of styles adopted by police in police/defendant encounters."[44]

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 t the accused this position is hardly intelligible. This adds to the imtimidation 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 bulk of the unrepresented accused plead guilty in our courts. As earlier shown some of the unrepresented 60.6% (Study 1), 86.0% (Study 2) and 79.0% (Study 3) pleaded guilty. It was analysed that there exists a significant relationship between being unrepresented and pleading guilty. More significantly it was shown that there is a significant relationship between retaining counsel abd changing pleas from guilty to not guilty.

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43 ibid p. 29

44 ibid p. 33

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Dell's study is more significant in this respect in sofar 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 of the women 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.[45]

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

> "Unrepresented accused are more likely to enter formal pleas of guilty than are those represented either under the certificate plan or privately."[46]

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 ....[47]

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, aften adds confusion to confusion. In a quick barrage of words, an accused is apprised of the meaning of 'intent' 'without just cause' etc. 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.[48]

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 incomprehensive to most laymen.

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48 Courts have quashed convictions based on guilty pleas entered in contravention of this provision: See Cheng Ah Sang c 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 Tassaso (1975) 1. M.L.J.44

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Section 257 (i) of the code provides that when the court calls upon the accused to answer the 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."[49]

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 defence. The data collected were 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

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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 degendant at the varioes stages of the trial was undertaken in respect of Study 3A. The results are indicated in Table 10. The results make patent the failure of the unrepresented defendant to utilise efficiently, if at all, the crucial procedural devices 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 10
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%)

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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 "intelligent reply" in his defence.

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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 the 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 innonence. More significant, 84.0% called no witness at all. Between a well-marshalled prosecution case and a mere statement by the accused without the help of a 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 witness. 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 innonence 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.

G. 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 unrepresented. Evidence exists to suggest that a high percentage of the unrepresented may plead guilty for reasons extraneous to their guilt or innocence. Studies

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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 helplessnessin 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 needs protection; wider and more important interests are at stake. Ultimately the proper functioning of the rule of law in the criminal arena is in jeopardy.