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THE PRIVILEGE AGAINST SELF-INCRIMINATION AND FAIRNESS TO THE ACCUSED

PP v *Mazlan bin Maidun*

The privilege against self-incrimination is perhaps the most controversial concept in criminal justice. This article analyses the privilege in the context of pre-trial interrogation in the light of the recent and important decision of the Court of Criminal Appeal in *PP* v *Mazlan bin Maidun* and seeks to argue that, although the decline of the privilege is not to be lamented in itself, it cannot be simply discarded without the introduction of alternative safeguards.

I. Procedural Fairness And Self-Incrimination In Criminal Justice

PERHAPS there is no area in which the discrepancy between theory and practice is greater than in the privilege against self-incrimination. Conceptually, it would seem that if there is any single organizing principle in the criminal process, it is the right of the accused to resist any effort to force him to assist in his own prosecution. It provides substance to the common law ideal of a fair trial through an adversarial or accusatorial process. The parties to a criminal prosecution are seen as competitors and the trial the competition. The prosecution is to use its own resources to gather and marshal the evidence without the unwilling assistance of the accused, and the accused is left to defend himself if the prosecution succeeds in making out a case against him. It is thought to be behind key principles of criminal justice like the voluntariness rule for confessions, the discretion to exclude improperly obtained evidence and the presumption of innocence.[1] It finds expression in a number of constitutional documents of the common law world.[2]

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[1] For the association of the privilege against self-incrimination with: (a) the voluntariness rule, see the observations of Lord Griffiths in *Lam Chi-Meng* v *R* [1991] 3 All ER 172 (Privy Council, Hong Kong) and Michael Hor, "The Confessions Regime in Singapore" [1991] 3 MLJ lvii; (b) the discretion to exclude illegally obtained evidence, see the judgment of Lord Diplock in *R* v *Sang* [1979] 2 All ER 1222 (HL) and Tan Yock Lin, "Sing a Song of *Sang,* A Pocket Full of Woes" [1992] SJLS 365; and (c) the presumption of innocence, see the *Report of the Royal Commission on Criminal Procedure* Cmnd 8092 (1981), at ch 4.

[2] In the US, see the Fifth Amendment to the Constitution and *Miranda* v *Arizona* 384 US 436 (1966); in Canada, see Art 11 (c) of the Charter of Rights and Freedoms and Jack Watson, "Talking About the Right to Remain Silent" 34 CLQ 106; in New Zealand, see s 23(4)

The reality and practice of the privilege tell a different story. After a strong initial assertion of the need to enforce the privilege, the United States Supreme Court has had to cut back, using dubious distinctions to carve out exceptions to the application of the privilege.[3] In the UK (United Kingdom), the battle over the privilege, sparked off by the famous Eleventh Report of the Criminal Law Revision Committee, shows no sign of resolution.[4] If anything, the privilege seems to have suffered a number of set-backs. A recent House of Lords decision has ruled that the privilege has been statutorily abrogated in the context of questioning in serious fraud cases.[5] In Northern Ireland, the explicit threat of adverse inferences from silence, along the lines of the Eleventh Report, is now law.[6] And in Singapore, the privilege has ended up on the losing side in a number of significant occasions. Legislation sanctioning adverse inferences from silence has been in place here since 1976.[7] In 1981 the Privy Council lowered the burden of proof required of the prosecution to make out a *prima facie* case against the accused.[8] A recent decision of the Court of Criminal Appeal, which shall be analysed in detail below, has denied the privilege constitutional status.[9]

Whilst the privilege is certainly not dead in any of these jurisdictions,

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of the Bill of Rights Act 1990; and in the Irish Republic, see O'Connor and Thomas Cooney, "Criminal Due Process, the Pre-Trial Stage and Self-Incrimination" [1990] IJ 219.

3 See the account in Adrian Zuckerman, *The Principles of Criminal Evidence* (1989), at 307-311.

4 Cmnd 4991 (1972). For a summary of the contending positions, see Greer, "The Right to Silence: A Review of the Current Debate" (1990) 53 MLR 709 and Robert Gerstein, "The Self-Incrimination Debate in Great Britain" (1979) 27 Am J Comp L 81.

5 *R* v *Director of Serious Fraud Office, Ex parte Smith* [1992] 3 WLR 66. See also the rather deprecatory remarks in another House of Lords decision, *Istel Ltd* v *Tully* [1992] 3 WLR 344. These sentiments must be treated with extreme caution if they are sought as support for the down-playing of the privilege in Singapore as the opposition to the privilege in the UK is very much tied up with the stringent enforcement of detailed rules governing the treatment and questioning of suspects following the Police and Criminal Evidence Act 1984: see, *eg,* the remarks of Lord Lane CJ in *R* v *Alladice* (1988) 87 Cr App R 380.

6 Criminal Evidence (Northern Ireland) Order 1988. It was met with a storm of protest and, again, must be located in the context of the persistent terrorist problem in Northern Ireland. See the assessment in J Jackson, "Curtailing the Right of Silence: Lessons from Northern Ireland" [1991] Crim LR 404.

7 Criminal Procedure Code (Amendment) Act (No 10 of 1976). See the accounts in Stanley Yeo, "Diminishing the Right to Silence: The Singapore Experience" [1985] Crim LR 89 and Chandra Mohan, "Police Interrogation and the Right of Silence in the Republic of Singapore" [1986] 2 MLJ xxviii. Use of these amendments in the context of pre-trial silence appears for the first time in a reported decision in *Ng Chong Teck* v *PP* [1992] 1 SLR 863 (CCA).

8 *Haw Tua Tau* v *PP* [1981] 2 MLJ 49 (PC). See Choo Han Teck, "Haw Tua Tau – The Aftermath" (1987) 29 Mai LR 29 and Ahmad Ibrahim, "The Burden at the End of the Prosecution Case – Haw Tua Tau Revisited" [1987] 2 MLJ lxx.

9 *PP* v *Mazlan bin Maidun* [1993] 1 CLAS News 135, which is now also reported in [1993]

it is definitely on the decline. There appears to be a very strongly held belief that the privilege is, at least to some extent, incompatible with the effective investigation and prosecution of crime. A thorough-going adversarial model of the criminal process is no longer in favour. On this view, the accused must, in the public interest, be pressured or required to assist in his own prosecution. The problem is that the privilege has been, at least notionally, the guardian of more fundamental aims of criminal justice: the protection of the innocent from conviction and the protection of the accused from improper conduct by law enforcement officials.[10] With this shift away from adversarial justice, the criminal process must, to preserve fairness, find ways to fulfil these aims. If the accused is to be enlisted to help the police and the prosecution, the law ought to ensure that this should only happen under conditions which will protect the innocent from conviction and the accused from improper treatment.[11] One difficulty, for example, is that the conceptual focus of the criminal process has been the trial. It is at this climactic event that the law decrees that the accused is to be granted certain rights to defend himself. Proceedings are in the control of an independent judiciary and (with rare exceptions) conducted in public. The accused is advised and is represented by counsel of his choice. He need say nothing unless a prima facie case against him is made out. If the focus is to be shifted to pre-trial interrogation, then equivalent safeguards must be in place at that stage. Another problem is the attitude the courts should have concerning what remains of the privilege against self-incrimination in the criminal process. A number of existing provisions are explicable only by the privilege.[12] There is the temptation to encourage the decline of privilege by giving them a narrow construction.

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1 SLR 512. This important decision provides the appropriate opportunity for this general discussion of the privilege in the pre-trial process.

[10] See the writer's earlier discussion in Michael Hor, "The Confessions Regime in Singapore" [1991] 3 MLJ lvii, at lvii-lix. In the UK, there has been an increased consciousness of these concerns following the quashing of the convictions in the "Guildford Four" and "Birmingham Six" cases: see Adrian Zuckerman, "Miscarriage of Justice and Judicial Responsibility" [1991] Crim LR 492. In Singapore, similar concerns were raised in the wake of the abandonment of the prosecution of Samat Dupree because of the extraction of a false confession: correspondence from Hussin Mutalib, *The Straits Times,* 24 March 1993. See the reply from the Permanent Secretary of the Ministry of Home Affairs, *The Straits Times,* 30 March 1993. Notwithstanding the assurance therein that "all proper procedures" were followed, there is considerable doubt as to whether the prevailing "proper procedure" is sufficient. There is, *eg,* no independent account of what took place in the interrogation room.

[11] This concern comes across strongly in the writings of Adrian Zuckerman in "Trial by Unfair Means – The Report of the Working Group on the Right of Silence" [1989] Crim LR 855 and "Procedural Fairness During Police Interrogation and the Right of Silence" [1991] JCL 499.

[12] See, *eg,* s 122 (accused not compellable at his trial) and s 134 (compelled self-incriminating evidence of witness not to be used against him) of the Evidence Act (Cap 97, 1990 Ed);

This is a dangerous course. If we see the role of the privilege in the entire criminal process, and not as an isolated concept, removing or constricting it without the introduction of counter-balancing safeguards may seriously affect the fairness of the proceedings against the accused.

I propose to examine some aspects of the decline of the privilege against self-incrimination in Singapore at the pre-trial stage to see if the accused has been unfairly prejudiced by the progressive dismantling of the privilege against self-incrimination.

II. The Privilege Against Self-Incrimination and Pre-Trial Process

The recent decision of the Court of Criminal Appeal in *PP* v *Mazlan bin Maidun*[13] provides an appropriate springboard for the examination of the privilege against self-incrimination in the pre-trial process. The privilege was dealt a crushing blow. Save for the one point in time where the accused is "charged...or officially informed that he might be prosecuted" (where adverse inferences from silence may be drawn through the section 122(6) procedure), the Criminal Procedure Code (the "Code")[14] preserves the privilege against self-incrimination for the accused in the face of police interrogation on all other occasions by virtue of section 121(2). This notwithstanding, it was held, firstly, that the accused did not have the further right to be informed of his privilege, secondly, that the privilege was not a fundamental rule of natural justice and therefore failed to qualify as a constitutional right under Article 9(1), and thirdly,[15] that even if there were a right to be informed, breach of that right had no bearing on the admissibility of any statement given by the accused. These rulings and the reasoning behind them have grave implications, not only for the privilege against self-incrimination, but also for the law of criminal procedure, constitutional law and the law of evidence in Singapore respectively. They ought to be examined in some detail.

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and s 121 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed), which is discussed in detail below.

[13] [1993] 1 CLAS News 135. The judges who sat in the Court of Criminal Appeal were Yong Pung How CJ (who delivered the judgment), Lai Kew Chai and Chao Hick Tin JJ. This judgment is now also reported in [1993] 1 SLR 512. The High Court decision of Amarjeet Singh JC in *PP* v *Chin Siew Noi,* unreported, 26 February 1993, Criminal Case No 6 of 1990, which independently arrived at a similar result, will be mentioned where appropriate.

[14] Cap 68, 1985 Rev Ed.

[15] The High Court in *Chin Siew Noi, supra,* note 13, did not seem to have thought it necessary to make this third ruling.

III. The Statutory Right to be Informed of the Privilege Against Self-Incrimination

I have argued elsewhere that the wholesale repeal of Schedule E to the Criminal Procedure Code in the amendments of 1976 has left the law almost entirely without any prescription for the proper manner in which police interrogation should be carried out.[16] The courts are left with the unenviable task of trying to make some sense of what is left. This the courts cannot do with a narrow, literal approach to the interpretation of the Code. Instead they ought to be engaged in the process of purposive interpretation to ensure that fairness to the accused is preserved wherever it is possible.[17]

Although this would have probably shocked the drafters of the Code, it is now clear that section 121 has become the focal point of the law of police interrogation.[18] The police may interrogate "any person supposed to be acquainted with the facts and circumstances of the case". The suspect or accused must answer all questions but may decline to do so if the answer would expose him to criminal liability. This position remains true throughout the entire process of police interrogation with the one modification contained in section 123 that adverse inferences from silence may be drawn against him if he fails to mention his defence "on being charged with the offence or officially informed that he might be prosecuted for it". Thus, the privilege against self-incrimination of the suspect or the accused person is much more intact in the pre-trial criminal process under the Code than is generally thought.[19]

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[16] Criminal Procedure Code (Amendment) Act 10 of 1976. See generally, Michael Hor, "The Confessions Regime in Singapore" [1991] 3 MLJ lvii, at lxxiii-lxxv.

[17] The purposive approach to statutory interpretation has received explicit legislative approval: s 9A of the Interpretation Act (Cap 1, 1985 Ed), inserted by Act 11 of 1993. See also the cogent argument for a "contextual approach" to the interpretation of Codes in M Sornarajah, "The Interpretation of The Penal Codes" [1991] 3 MLJ cxxix, at cxxxix-cxlii.

[18] What is now s 121 of the Code was generally thought to apply only to the questioning of witnesses and not to either suspects or accused persons. See the marginal note to the section and the assurances given by the then Minister for Labour and Law, K M Byrne, during the Legislative Assembly debates occasioned by the 1960 amendments to the Code, which for the first time sought to make police statements admissible: *Report of the Select Committee on the Criminal Procedure Code (Amendment) Bill 1960,* at 45-46. The Minister said: "I have also submitted...that the statements that are taken under the provisions of s 120 (now s 121)...of the Criminal Procedure Code are statements taken from witnesses *other than the accused person.* (Parenthesis and italics added.)
It is evident that this is not the current view of the judiciary – *Mazlan* is an example. For a discussion of some of the difficulties arising from this, see Michael Hor, "The Confessions Regime in Singapore" [1991] 3 MLJ lvii, at lxxiv-lxxv.

[19] The amendments of 1976 specifically modified the proposals of the UK 11th Report to curtail the right of silence at only one point in time, that is "on being charged or officially informed" of the possibility of a charge: See the *Report of the Select Committee on the Criminal Procedure (Amendment) Bill,* Parl 4 of 1976, at 3.

The question which has exercised judicial minds is whether the suspect or accused must be informed of his privilege against self-incrimination. After a period of judicial disagreement in the High Court,[20] the Court of Criminal Appeal in *Mazlan* has decided that there is no requirement to inform the suspect or accused of his privilege. It is true that section 121 does not expressly impose a duty on the police to inform the accused, nor does it expressly confer on the accused a right to be told. On a literal reading of the Code, the Court of Criminal Appeal cannot be faulted. But this is precisely where pure literalism will not do. The Code does confer the privilege or the right not to answer self-incriminatory questions and it should not be held to have done so in vain. It cannot be denied that the reality of police interrogation is such that tremendous pressure is placed on the accused to answer self-incriminatory questions.[21] The privilege cannot exist in any real sense unless the accused is, at least, informed of his right not to answer those questions.[22] It must be made clear at this point that it is an entirely different question whether or not the right should exist. The point is that once the law says that it does exist, the accused should be accordingly informed, if the right is to have any substance. The result of this decision is that only those who for some fortuitous reason already know of the right will be in a position to exercise it. Our system of criminal justice should not be seen to take advantage of the ignorant, who are likely to be the more vulnerable, less formally educated or less economically well-off members of our society.

The case for an implicit right to be informed of the privilege is even more cogent for post-charge questioning. Section 122(6) demands that, on being charged or officially informed that he may be charged, a warning be issued to the accused that adverse inferences may be drawn against him if he does not mention anything which he may rely on in court. It is surely not unreasonable for the accused, if he is not told anything else, to assume that for subsequent questioning the same warning applies. This is, as we have seen, quite wrong as the risk of adverse inferences only occurs for silence on being charged or officially informed of the possibility of a charge. Thus, failure to inform the accused of his privilege is tantamount to

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[20] The High Court was divided on this question of the right to be informed. For: *PP* v *Mazlan,* unreported, 23 May 1992, Criminal Case No 28 of 1989. The decision of the Court of Criminal Appeal under discussion was an appeal from this. Against: *PP* v *Chandran* 1989 3 CLAS News 11, *PP* v *Tan Ho Teck* [1988] 3 MLJ 264, and *PP* v *Chin Siew Noi,* unreported, 26 February 1993, Criminal Case No 6 of 1990.

[21] See Adrian Zuckerman, *The Principles of Criminal Evidence* (1989), at 302-304.

[22] The very similar question of the right to be informed of the right to counsel has been answered by the Privy Council in favour of the right to be informed: *A G of Trinidad and Tobago* v *Whiteman* [1991] 2 WLR 1200. See also Michael Hor, "The Right to Counsel – The Right to be Informed" (1993) 5 S Ac LJ 141.

misleading him on his legal rights.[23] The tragedy is that there is evidence that some police officers had already adopted the practice of informing the accused of his privilege under section 121 interrogations and, it appears, without detriment to their investigative work.[24] It can only be hoped that the decision will not encourage them to stop doing so.

It only remains to deal with the reasons which the Court of Criminal Appeal in *Mazlan* and the High Court in *PP* v *Chin Siew Noi*[25] (which arrived at the same result independently) found to be supportive of their conclusion that the right to be informed of the privilege should not be implied into section 121. Although this is not entirely clear, the Court of Criminal Appeal appears to have found some significance in the legislative events of 1976.[26] Schedule E, with its provision for informing the accused of his right to silence along the lines of the English Judges' Rules, was repealed together with the proviso to (what is now) section 122(5), which rendered statements which were recorded without substantial compliance with the Schedule liable to be excluded. The implication seems to be that these amendments demonstrated a legislative intention that the accused need not be informed of his right to refuse to answer self-incriminatory questions. Fortunately, we are now clearly permitted to look at Parliamentary material as an aid to the discernment of legislative intent.[27] It would appear from the proceedings that the only thing in the mind of the legislature (relevant to our discussion) was the need to enact the recommendation of the Eleventh Report on the drawing of adverse inferences from silence.[28] Indeed, contrary to the Eleventh Report, the legislature expressly limited this curtailment of the privilege to the one point in the pre-trial process when the accused is charged or officially informed of the possibility of a charge. There appears to have been no conscious intention of affecting any other part of the pre-trial process. The 1976 amendment was not meant to change anything in either pre- or post- charge interrogation. The complete repeal of Schedule E was, as astutely pointed out by Associate Professor Winslow in his

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[23] The Court of Criminal Appeal was itself disapproving of "a positive misrepresentation of the rights of the person questioned" in the context of its treatment of the question of voluntariness. See the discussion below.

[24] The High Court, in its judgment at first instance, mentions the "standard form used by the police to record statements under s 121 of the CPC" which contains a caution "which accords with s 121(2) of the CPC": *PP* v *Mazlan,* unreported, 23 May 1992, Criminal Case No 28 of 1989.

[25] *Supra,* note 13. The judgment of the Court of Criminal Appeal in the first case was released on 31 December 1992, but it appears that the High Court in the second case was written before that although it was dated later.

[26] The Criminal Procedure Code (Amendment) Act (No 10 of 1976).

[27] S 9A of the Interpretation Act (Cap 1, 1985 Rev Ed), inserted by Act 11 of 1993.

[28] See the speech of the then Minister for Law, E W Barker, in *Parliamentary Proceedings*, 19 August 1975, at 1218-1224.

submission to the Select Committee, unnecessary and admittedly clumsy,[29] but that is very far from saying that the legislature has shown a clear intention to affect the privilege in general.

However, the High Court in *Chin Siew Noi*[30] found comfort in the existence of a provision in the pre-1960 amendments Code which "expressly forbade the administration of a caution to a person from whom a statement was intended to be taken."[31] The practice of informing the accused of his privilege was, in the opinion of the Court, "deliberately not ... part of our criminal process." The reasoning seems to be that we do not need it now because we did not have it before. There was indeed such a provision, but what the learned Judicial Commissioner failed to point out was that the law governing police statements was radically different before 1960. Use of police statements was severely restricted by two rules then in force. First, statements made to a police officer in the course of an investigation were generally not admissible.[32] Secondly, confessions made when the accused was in custody were also not generally admissible.[33] It should not be difficult to see that in such a regime, the need for the accused to be told of his privilege is considerably less. Whatever he said could not be used against him in court anyway. All this changed in 1960 when police statements were made generally admissible[34] and it should be no surprise that the provision now under discussion was repealed and replaced by Schedule E, which clearly provides for such cautions to be administered. The stakes had become much higher. The lesson to learn seems to be that, at least until 1976, for as long as police statements have been generally admissible, the requirement for caution has been in place.

The learned Judicial Commissioner also found support in certain dicta of the Privy Council on an appeal from Canada in *R* v *Coote*.[35] His Honour thought it "instructive" that the Privy Council rejected a suggestion from the court below that the accused may have been ignorant of his privilege against self-incrimination and that he may not have answered certain questions if he had known of the privilege. The Privy Council said that ignorance of the law was no excuse and that to inquire into what the accused did or did not know would result in "endless confusion". Again, it is dangerous to lift these pronouncements out of their context. The taking of depositions on oath in this case is very far removed from the interrogation of an accused

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[29] Report of the Select Committee on the Criminal Procedure (Amendment) Bill, Parl 4 of 1976, Paper 5.

[30] *Supra*, note 13.

[31] S 122 of the Criminal Procedure Code, Straits Settlements Ordinance (X of 1910).

[32] S 121(1) of the Criminal Procedure Code, Straits Settlements Ordinance (X of 1910).

[33] S 26 of the Evidence Ordinance, Straits Settlements Ordinance III of 1893.

[34] Criminal Procedure (Amendment) Ordinance (18 of 1960).

[35] (1873) 4 LRPC 599.

person in police custody under suspicion of, or even charged with, committing an offence. The statements were given by Coote as a witness in a formal inquiry by Commissioners into the cause of a fire. These were the circumstances: "he acted voluntarily and without constraint; there was no charge or accusation against him or any other person; he was free to answer or not the questions put to him, and frequently exercised his privilege of refusing to answer such questions."[36] It is no wonder that the Privy Council was completely (and justifiably) unimpressed with the suggestion that Coote ought to have been informed of his privilege. He was merely a witness at that stage, was neither charged nor in custody and could well have been advised by counsel if he so desired. In any event, he did in fact exercise his privilege during the questioning. The principle that ignorance of the law is no excuse has never prevented the requirement that accused persons be informed of their privilege during interrogation. Indeed, it is evident from the case that there was in existence in Canada at the relevant time a statutory requirement that had Coote been charged or arrested, "then it would have been proper to caution him before any further statement from him had been received."[37]

There is no support for the proposition that accused persons or suspects need not be informed of their privilege against self-incrimination in either the legislative history of the Code or in cases concerning the application of the privilege in the context of witnesses. It is true that section 121 does not expressly confer the right to be informed of the privilege. But that is only to be expected as section 121, as originally conceived, was never meant to govern the questioning of suspects and accused persons. The amendments of 1976 however have necessitated the conscription of section 121 to govern such questioning. Our courts should not retreat to narrow literalism. The way was open for them to impose an implied requirement that suspects and accused persons be informed of the privilege against self-incrimination, a practice which, it appears, has already been adopted by some police interrogators.

IV. The Constitutional Basis of the Privilege Against Self-Incrimination

More than a decade ago, the Privy Council introduced the idea of the fundamental rules of natural justice as a constitutional concept in Singapore under Articles 9(1) and 12(1).[38] Since then, the issue of the precise content

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[36] *Ibid,* at 604-605.

[37] *Ibid,* at 608.

[38] Arts 9(1) and 12(1) of the Constitution of the Republic of Singapore (1992 Ed), guarantee suspects and accused persons justice "in accordance with law" and the "equal protection of the law". Settling a long-running controversy, the Privy Council in *Ong Ah Chuan* v

of these fundamental rules has proved to be one of the most difficult questions in the law of criminal justice.[39] The question is complicated in the case of the privilege against self-incrimination. One problem is that the privilege is not a single, discrete entitlement, but a general principle behind a number of rules which govern different stages of the criminal process. These rules do not support the privilege with equal strength. The other complication is the paradox which the privilege finds itself in in contemporary criminal jurisprudence: it lacks a convincing independent rationale and is in most cases not very effective in preserving fairness to the accused,[40] yet at the same time some important rules of criminal procedure and evidence which still exist cannot be explained without it and other potentially more effective safeguards to the accused do not exist and are not likely to be in place in the near future.

The Court of Criminal Appeal in *Mazlan* decided with alarming finality that the privilege against self-incrimination "has never been regarded as subsumed under the principles of natural justice" and that the contrary view would require an unjustifiable degree of "adventurous extrapolation".[41] This complete banishment of the privilege from the constitutional realm carries with it the danger that many rules which are based on the privilege (and which continue to exist) will not be taken seriously and of the privilege being removed without the establishment of alternative safeguards to the accused.

There is another approach and we ought to begin with first principles.

PP [1981] MLJ 64 ruled that "law" did not merely mean positive or enacted law but a system of law which incorporated the fundamental rules of natural justice.

[39] See Andrew Harding, "Natural Justice and the Constitution" (1981) 23 Mal LR 226 and, in the context of the presumption of innocence, Michael Hor, "The Burden of Proof in Criminal Justice" (1992) 4 S Ac LJ (Part II) 267, at 300-308.

[40] See Adrian Zuckerman, "The Right Against Self-Incrimination: An Obstacle to the Supervision of Interrogation" (1986) 102 LQR 43; although Zuckerman himself is not in favour of simply abolishing the privilege, without establishing alternative safeguards: "Trial by Unfair Means – The Report of the Working Group on the Right of Silence" [1989] Crim LR 855. The only available study in Singapore shows that the 1976 amendments on adverse inferences from silence have had little effect in practice: Stanley Yeo, "Diminishing the Right to Silence: The Singapore Experience" [1983] Crim LR 89. This matches the research into the workings of the UK Police and Criminal Evidence Act 1984 which indicates that the increased rights given to suspects and accused persons have not resulted in more of them exercising the right of silence: David Dixon, "Politics, Research and Symbolism in Criminal Justice: The Right of Silence and the Police and Criminal Evidence Act" (1991) 20 Anglo-American LR 27. However, Dixon, in another piece, advances the argument that the privilege is useful as a bargaining chip in the interrogation process and that its abolition would unfairly tilt the balance against the accused: "Common Sense, Legal Advice and the Right of Silence" [1991] PL 233.

[41] The reasoning of the Court of Criminal Appeal on the constitutional question is found in [1993] 1 CLAS News 135, at 138-140.

We learn from the decision of the Privy Council in *Haw Tua Tau* v *PP* that the essence of natural justice is fairness.[42] The guarantee of justice "in accordance with law" is nothing more or less than the right to a fair trial. Fair trial demands fair procedure. Fair process requires simply that the legitimate interests of both prosecution and defence are adequately provided for. In the most controversial aspects of criminal procedure, where the interests are thought to clash, there ought to be reasonable accommodation. In the context of police interrogation, the prosecution ought to be given a reasonable opportunity to question suspects and accused persons. The accused must be reasonably protected against both the danger of extraction of unreliable statements and the danger of (even reliable) statements being extracted in an improper manner. Lord Diplock points the way to the appropriate methodology:[43]

> in considering whether a particular practice ... offends against a fundamental rule of natural justice, that practice must not be looked at in isolation but in the light of the part which it plays in the complete judicial process....

Looked at in isolation, the privilege against self-incrimination may seem to be a hindrance to police investigation and a generally ineffective way to protect the interests of the accused. But in the light of the complete judicial process, which is still predominantly adversarial, the privilege, since police statements were rendered admissible, has been and still is the basis of much of the remaining law governing police interrogation. Modern justifications of the privilege locate its rationale in the role which it plays in protecting the suspect against the extraction of unreliable and improperly obtained statements. That the accused stands in such danger cannot be denied.

Because of the many different rules and practices which give expression to the privilege, it would be unwise to decide once and for all whether they are all either constitutionally required or not. Here the discussion must descend to the precise practice in question. The question was whether it was constitutionally required for the police to inform the suspect or accused person of his privilege against self-incrimination in the pre- and post- charge phases of interrogation.[44] The situation is this: in the 1976 amendments

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[42] [1981] 2 MLJ 49, at 50, Lord Diplock said: "So no amendment is needed to empower the legislature ... to enact whatever laws it thinks appropriate to regulate the procedure to be followed ... subject only to the limitation that ... such procedure does not offend against some fundamental rule of natural justice. It must not be *obviously unfair*." (Italics added.)

[43] *Ibid,* at 53.

[44] The question of whether it would have been unconstitutional for the Legislature to have provided against a requirement to inform the suspect does not arise. Neither was it necessary

to the Code,[45] the legislature after much deliberation decided to affect the privilege against self-incrimination in a very specific manner and in only two specific instances. Adverse inferences may be drawn against the accused for silence "on being charged or officially informed" of the possibility of a charge, and when he is called upon to make his defence at the trial. It is only reasonable to assume that the legislature intended to leave other stages of the criminal process as they were. Ever since the 1960 amendments[46] made police statements generally admissible, the accused has had the right to be informed of the privilege. Even after the 1976 amendments, some police interrogators still continued the practice.[47] It did not seem to be of any particular inconvenience to the police. There did not seem to be any evidence that the practice prevented the police from a reasonable opportunity of investigating crimes. On the other hand, the right to be informed of the privilege could well be of some importance to the accused. There seems to be no clear requirement for him to be told anything else.[48] There is no clear right for him to seek legal advice or advice of any other kind (as he is in custody). Indeed it appears that the prevalent view is that he does not have the right to consult his lawyer either before or during interrogation.[49] There seems to have been nothing to prevent the court from holding that where criminal justice is predominantly adversarial, and where the Legislature has decided expressly to confer the privilege against self-incrimination, the fundamental rules of natural justice require that the suspect or accused be informed of the privilege so that he may make an intelligent decision as to the extent to which he is willing to answer self-incriminating

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for the Court to decide on the constitutionality of a legislative attempt to abolish the privilege altogether in pre-trial procedure. If these questions should arise, the Court may have to ask whether the legitimate needs of the administration of justice are important enough to override the value of the privilege in the protection of the legitimate interests of the accused.

[45] The Criminal Procedure Code (Amendment) Act (No 10 of 1976).

[46] Criminal Procedure Code (Amendment) Ordinance (No 18 of 1960). See especially, Schedule E.

[47] *Supra,* note 24.

[48] The only exception is the warning in s 122(6) of the Code (Cap 68, 1985 Rev Ed) which is required to be given once in the entire pre-trial process — when the accused is "charged or officially informed" of the possibility of a charge. Much may have happened before and much may happen thereafter.

[49] Although Art 9(3) of the Constitution of the Republic of Singapore (1992 Ed) provides for a general right to counsel and no Singapore decision seems to have decided the point under discussion, the Malaysian courts seem to have practically ruled out consultation before and during interrogation, when the accused needs it most. It is striking that in none of the written judgments in Singapore pertaining to the taking of custodial confessions is there ever any mention of the appearance of a lawyer at the police station. For an argument that the courts in Singapore can and should build a more robust jurisprudence on the right to counsel, see Michael Hor, "The Right to Consult a Lawyer on Arrest" (1989) 3 CLAS News 4 and (1989) 4 CLAS News 4.

questions. There is nothing "adventurous" about this. The Court was not called upon to decide whether the accused should have the privilege, but whether, having the privilege, he ought to be told.

The Court of Appeal however chose to make the sweeping decision that the privilege against self-incrimination is not (and, it would seem, has never been) a fundamental rule of natural justice. It failed both to appreciate the many-sidedness and enduring significance of the privilege and to analyse the function of the privilege in the entire criminal process. It is now necessary to examine the Court's reasons for this remarkable conclusion.

The Court seems to have felt it easier to arrive at this result because the privilege had "no explicit expression in the Constitution" and was "largely evidential in nature". Both these factors are not however of much significance. That the privilege is not express merely means that it has to be decided whether it is a fundamental rule of natural justice. Indeed, much of what is generally accepted to be fundamental rules of natural justice is not express.[50] The evidential nature of the privilege should not disincline the court from deciding that it is a fundamental rule of natural justice. The one principle mentioned by Lord Diplock in *Haw Tua Tau,*[51] the presumption of innocence, is about as "evidential" as a rule can get but is, nevertheless an "undoubted fundamental rule of natural justice".[52]

The next line of reasoning is perhaps more to the point. The Court went through the usual rehearsal of what was thought to be the historical origin of the privilege in connection with the Court of Star Chamber[53] and held that nothing remained of the dangers which the privilege used to guard against. The "risk of unreliable confessions being extracted by force", in the view of the Court had been adequately dealt with by other rules of

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[50] The Court is surely not trying to say that only express rules of natural justice are constitutional. This would be contrary to the two Privy Council decisions of *Ong Ah Chuan* [1981] 1 MLJ 64 and *Haw Tua Tau* [1981] 2 MLJ 49. In the first case, Lord Diplock said that "a person should not be punished for an offence unless it has been established to the satisfaction of an independent and unbiased tribunal that he committed it." None of this is expressly mentioned in the Constitution.

[51] *Ibid.*

[52] What the Privy Council did say in *Ong Ah Chuan, supra,* note 50, was that the Constitution does not call for the perpetuation of "technical rules of evidence". It has been argued that far from being technical, the privilege is the expression of the fundamentally adversarial nature of criminal trials in the common law world.

[53] Although this was the view of the great American evidence scholar, Wigmore, whom the High Court in *Chin Siew Noi, supra,* note 13, explicitly quotes, it has been seriously challenged by other legal historians who trace the origin of the privilege to a much earlier time. L Levy, *eg,* rejects the idea that the privilege arose solely in response to the Court of Star Chamber and argues that it is rooted in the common law form of criminal procedure: See M MacNair, "The Early Development of the Privilege Against Self-Incrimination" (1990) 10 OJLS 66.

evidence and procedure, particularly the voluntariness principle.[54] The deficiencies of the voluntariness principle need no repetition and, ironically, is itself a manifestation of the privilege against self-incrimination.[55] The fact remains that, notwithstanding whatever development there has been since the practices of medieval England, the "risk of unreliable confessions being extracted by force" remains a very real one which the present legal regime does not adequately deal with. Even if the voluntariness principle is theoretically sufficient, it is extremely difficult for the accused to show this in court. There is no really unbiased account of the interrogation proceedings. There is no clear right to consult a legal adviser or to have him present during interrogation. There are no clear, enforceable rules on the proper treatment of suspects and accused persons being questioned in custody. If any criticism is to be levelled at the privilege, it is certainly not that the dangers it seeks to guard against no longer exist, but that the privilege is itself inadequate to deal with these dangers.

The Court of Criminal Appeal then sought support from the decision of the Privy Council in *Jaykumal* v *PP*.[56] This case had applied the reasoning in *Haw Tua Tau*,[57] which approved of the drawing of adverse inferences from silence at the trial stage, to the drawing of such inferences during pre-trial interrogation. The reasoning of the Court of Criminal Appeal appeared to proceed as follows: the 1976 amendments expressly derogated from the privilege against self-incrimination. They were found to be constitutional by the Privy Council; therefore, the implication was that the privilege was not a constitutional right. This line of argument exhibits a serious misapprehension of the judgment of Lord Diplock in *Haw Tua Tau*. Nothing could be clearer than the express intention of Lord Diplock not to decide on the question of whether the privilege was a fundamental rule of natural justice. This excerpt from the judgment demonstrates this beyond any doubt:[58]

> their Lordships *do not find it necessary to decide* (italics added) whether by virtue of that maxim (*nemo debet se ipsum prodere)* it should be recognised, as a fundamental rule of natural justice....
>
> Their Lordships recognise, too, that.... rules of natural justice change with the times .... Nevertheless, throughout all that period (from the

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[54] This rule finds expression in s 122(5) of the Code (Cap 68, 1985 Rev Ed) for police statements, and s 24 of the Evidence Act (Cap 97, 1990 Ed) for confessions in general.

[55] This is discussed in Michael Hor, "The Confessions Regime in Singapore" [1991] 3 MLJ lvii.

[56] [1981] 2 MLJ 297.

[57] [1981] 2 MLJ 49.

[58] *Ibid,* at 53.

> abolition of the Star Chamber in the seventeenth century to the passing of the Criminal Evidence Act 1898, which, for the first time, allowed the accused to testify) the rule that an accused person could not be *compelled* to submit to hostile interrogation ... remained intact; and if their Lordships had been of the opinion that there was any substance in the argument that the effect of the amendments ... was to create a genuine *compulsion* ..., their Lordships, before making up their own minds, would have felt it incumbent on them to seek the views of the Court of Criminal Appeal as to whether the practice ... had become so firmly based in the criminal procedure of Singapore that it would be regarded ... as having evolved into a fundamental rule of natural justice ....

As it turned out, the Privy Council found that the amendments did not create a genuine compulsion, but only a strong inducement. The privilege against self-incrimination was thus not sufficiently implicated and there was no need to decide on the issue of whether it was at all a fundamental rule of natural justice.[59] If there is any lesson to be learnt, it is the reluctance of the Privy Council in deciding whether the privilege *in general* was or was not fundamental.[60] Indeed the entire approach of Lord Diplock seemed to focus on the particular manifestation of the privilege which, it was argued, prevented the drawing of adverse inferences from silence. It was only after Lord Diplock observed that the privilege had never prohibited the drawing of adverse inferences from silence and that to expect the reasonable judge to refrain from doing so would be hopeless, that his Lordship decided that the amendments did not breach the privilege against self-incrimination. Unfortunately, the Court of Criminal Appeal would have none of this subtlety; but it could certainly seek no support from the Privy Council for either its reasoning or its conclusion.

The High Court in *Chin Siew Noi*[61] however thought it significant that the fundamental nature of the privilege was in some doubt because of the "many legislative qualifications" that exist. There is the UK (United

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[59] The High Court in *Mazlan,* unreported, 23 May 1992, Criminal Case (No 28 of 1989), came to the opposite, but equally erroneous, conclusion that Lord Diplock decided that the privilege

[60] was a fundamental rule of natural justice.
See the very similar sentiments of the House of Lords in *R* v *Director of Serious Fraud Office, ex pane Smith* [1992] 3 WLR 66. In the context of the unwritten constitution of UK, where constitutional issues proceed on the level of statutory interpretation, Lord Mustill had this to say (at 76) of the privilege against self-incrimination: "given the diversity of immunities and of the policies underlying them ... it is not enough to ask simply whether Parliament can have intended to abolish a long-standing right of silence. Rather, an essential starting point must be to identify what variety of this right is being invoked, and what are the reasons for believing that the right in question ought at all costs to be maintained."

[61] *Supra,* note 13.

Kingdom) Criminal Justice Act 1987 which provided for compulsory examination of suspects in serious fraud cases.[62] There has been an equivalent provision in the Prevention of Corruption Act for many years.[63] The existence of legislative qualifications alone is not dispositive of the constitutional question. These qualifications may themselves be unconstitutional. Even if they are, the existence of exceptions does not necessarily mean that the privilege is in general not constitutionally protected. For example, it is accepted that although the presumption of innocence is a fundamental rule of natural justice, exceptions in the form of presumptions are in some circumstances justifiable.[64] It is well beyond the scope of this discussion to consider the constitutionality of these statutory exceptions, but any proper constitutional analysis would require inquiry into whether the particular social evil is pressing enough to warrant a system of interrogation different from the normal criminal procedure and whether the extent to which the privilege is sought to be curtailed in the legislation is no more than that which is necessary.

V. The Evidential Effect of Wrongful Denial of Privilege

Since the Court of Criminal Appeal in *Mazlan* had decided that there was neither a statutory nor a constitutional right to be informed of the privilege against self-incrimination, there was no need for it to answer the final question referred to it – that of the evidential effect of a breach. Nevertheless, the Court appeared to have gone out of its way to say that, even if there had been a statutory requirement to inform the accused of his privilege under section 121 of the Code, and that requirement had not been fulfilled, the admissibility of statements obtained would be completely unaffected.[65] I have, in the past, drawn attention to the then incipient attitude of the Court of Criminal Appeal in turning a blind evidential eye, as it were, to police impropriety in the extraction of statements and confessions.[66] The stream is now a flood. This unfortunate attitude has now been applied to almost every procedural safeguard provided by the law; to the administration of the warning in section 122(6) (*Tsang Yuk Chung* v *PP* and *Tan Boon Tat*

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[62] See *R* v *Director of Serious Fraud Office, Ex parte Smith, supra,* note 60.

[63] S 26 of the Prevention of Corruption Act (Cap 241, 1985 Rev Ed). See also *Tang Tuck Wah* v *PP* [1991] 2 MLJ 404 (HC).

[64] Although I argued against this, it is, nevertheless, the established jurisprudence of the Supreme Court of Canada, the European Court of Human Rights and the Court of Appeal of Hong Kong: "The Burden of Proof in Criminal Justice" (1992) 4 S Ac LJ (Part II) 267, at 300-308.

[65] The discussion on admissibility of statements obtained in breach of s 121 of the Code is found in [1993] 1 CLAS News 135, at 140-141.

[66] Michael Hor, "The Confessions Regime in Singapore" [1991] 3 MLJ 1vii, at 1xvi-1xxii.

v *PP*),[67] the prohibition against cross-examination (*Sim Ah Cheoh* v *PP*),[68] the recording procedure under section 121 (*Vasavan* v PP),[69] and now even to a hypothetical procedure of informing the accused of the privilege against self-incrimination. I have argued that this trend is contrary to the historical role of the courts in dealing with impropriety through the exclusion of statements and that it may well create the sad impression that the courts are not particularly concerned about whether the police themselves obey the law. I have also argued that the correct response is for the courts to exercise their discretion to exclude illegally obtained evidence. The Court of Criminal Appeal in *Mazlan* came up with fresh reasons to justify its stand. These must now be examined.

The first discernible reason appears to be more like an assertion than a justification. The Court of Criminal Appeal said:

> Section 121 of the CPC does not concern admissibility; it is not conceptually connected in any way with Section 122 though as a matter of empirical fact many Section 121 statements are subsequently admitted in evidence at trial after passing the test in Section 122(5).

The Court did not say what these mutually exclusive concepts were. One supposes that the Court wished to imply that the law governing the manner in which police statements are properly taken has nothing to do with the law governing the admissibility of such statements at the trial. This approach imposes an extremely artificial demarcation between trial and pre-trial process.[70] It ignores the reality that once a pre-trial statement is admitted as evidence against the accused, such a statement becomes his testimony in court for all practical purposes. It has often been observed that the trial really begins at the police station.[71] The court should, accordingly, ensure that standards of propriety are as scrupulously followed in the police station as they are in a court of law. The only effective way to do this is through judicious use of the discretion to exclude improperly obtained statements. The courts in the UK have been doing just this following the enactment of the Police and Criminal Evidence Act 1984 and the impact

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[67] [1990] 3 MLJ 264 and [1992] 2 SLR 1, respectively.

[68] [1991] 2 MLJ 353.

[69] (1992) 4 CLAS News 28.

[70] Even the voluntariness principle, which the Court places so much reliance on, breaches the supposed boundary. The manner in which the evidence is taken is relevant to its admissibility.

[71] In the context of the right to counsel, Raja Azlan FJ (as His Majesty then was) in *Hashim bin Saud* v *Yahya bin Hasim* [1977] 2 MLJ 116 (Federal Court, Malaysia) said: "In our view it is at the police station that the real trial begins and a court which limits the concept of fairness to the period when police investigation is completed recognises only the form of criminal justice process and ignores its substance."

on the observance of proper standards of behaviour during custody and interrogation has been significant and positive.[72]

The Court then argued that as no "evidential penalty" is prescribed anywhere for failure to observe section 121, the only legal effect is that the investigating officer concerned "may be liable in civil proceedings for breach of a statutory duty, or a complaint may be made about him to the appropriate disciplinary tribunal, or he may be found guilty of a minor offence under section 225C of the Penal Code." Literalism reared its ugly head again and, in the context of the very messy situation created by the 1976 amendments, this has the disastrous effect of the court relinquishing its traditional responsibility of the supervision of pre-trial interrogation process. Nowhere was the decision of the Court of Criminal Appeal itself in *Cheng Swee Tiang* v *PP,*[73] which clearly recognised the existence of a judicial discretion to exclude improperly obtained evidence, either discussed or even mentioned. The Court listed the possible civil and criminal liabilities of the police officer who flouts section 121. If these are meant to be sufficient remedies for the accused, they fail miserably. It is entirely against basic human psychology for the person aggrieved to muster enough determination to pursue these matters himself. The natural reaction would be to stay as far away as possible from the police and the courts. Embarking on a civil claim or a disciplinary or criminal complaint is potentially time consuming and emotionally taxing. Breaches of interrogation procedure there must have been, but we have no evidence that either civil, criminal or disciplinary proceedings have been initiated against the police officers concerned.

The Court finally re-emphasised the boundary between the relevance of evidence and the methods employed in obtaining such evidence, this time by reference to section 29 of the Evidence Act,[74] which was described by the Court as an express statutory provision permitting a statement thus obtained to be used in evidence. We encounter the perennial problem of construing this century-old piece of legislation in the context of subsequent and fundamental changes in evidence jurisprudence. Admittedly, back in 1893, when the legislation was first introduced, the law concerning the discretion to exclude improperly obtained evidence was hazy and uncertain; but to be fair to Sir James Stephen,[75] section 29 and its predecessors were

[72] See Adrian Zuckerman, "Procedural Fairness During Police Interrogation and the Right of Silence" [1991] JCL 499. The Police and Criminal Evidence Act 1984 regime for police interrogation and admissibility of police statements is well described in Mark Berger, "Legislating Confession Law in Great Britain: A Statutory Approach to Police Interrogation" (1990) 24 University of Michigan Journal of Law Reform 1.

[73] [1964] MLJ 291.

[74] Cap 97, 1990 Ed.

[75] This gentleman drafted the Evidence Act for India. The legislation in Singapore is very closely modelled on the Indian one.

never meant to deal with the circumstances now under discussion. As originally conceived, statements made to a police officer in the course of an investigation and statements made to any person by anyone in police custody were generally inadmissible.[76] Indeed, as we have seen, the early Criminal Procedure Code contained the companion provision that prohibited police officers from cautioning persons wishing to make statements of their own free will. The adversarial balance was fundamentally different. What section 29 envisaged was a situation where a person, not under custody or being questioned in the course of an investigation, wished to give a confession of his own free will. The gravity of any failure to caution such a person is understandably far less than it is now, with a regime of almost comprehensive admissibility of police statements. The supposed "boundary" between relevance and methods could be kept only because of the existence of other provisions which dealt with the dangers of police impropriety.

Here again, narrow literalism will not do. Section 29 need not be an obstacle to the existence of a judicial discretion to exclude improperly obtained evidence. The relevant portion of the section reads: "If a confession is otherwise relevant, it does not become irrelevant merely because ... he (the accused person) was not warned that he was not bound to make such confession ...."

Whilst an automatic exclusionary rule requiring the exclusion of statements obtained in breach of the privilege may be precluded, the section says nothing contrary to an exclusionary discretion permitting the court to exclude statements after weighing the circumstances under which the breach occurred. If the court does, in a particular case, exercise its discretion to exclude a confession, it would not be "merely because" of the existence of a breach. If this analysis is correct, then secton 2(2) of the Evidence Act allows the operation of such a discretion at common law. Indeed, the Court of Criminal Appeal itself refused to insist on its literalist philosophy when it later ruled that section 29 did not prevent the exclusion of statements obtained through a positive misrepresentation of the rights of the person questioned because the reference in the section to a deception practised on the accused "referred to a deception in the form of a factual situation, ... and not to a deception by positive misrepresentation of the law."[77] This distinction is not prescribed anywhere in the Evidence Act. Neither did the Court venture to give any reason or justification for it.

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[76] See the discussion *supra.*
[77] See the discussion *infra.*

VI. Self-Incrimination and the Voluntariness Rule

In the final part of the judgment of the Court of Criminal Appeal in *Mazlan,* we come to the twist in the tale.[78] After routing the privilege against self-incrimination, the Court turned its attention to the voluntariness rule. There was a difference, the Court said, between the police not saying anything at all to the suspect (which was alright), and the police (or, as in this case, the interpreter) telling the suspect that he was bound to tell the truth without the accompanying reference to the privilege against self-incrimination, which amounted to an "inducement" within the meaning of the voluntariness rule[79] and resulted in the exclusion of the statement concerned. We first ask whether, in the context of the realities of police interrogation, there is any real difference between the two situations. It should be obvious that there is none. It matters very little to the average person under interrogation whether he is or is not told that he is bound to tell the truth. The whole sequence of arrest, custody and interrogation creates, and perhaps is meant to create the impression that the suspect or accused is somehow bound to speak. This is a little more controversial, but this impression is compounded by a culture of deference to and fear of authority. The person under interrogation is likely to think that he is bound to speak and that questioning will not cease and he will not be released from custody until he does. The Court, in excluding the statement in this case, disapproved of creating a positive misrepresentation of the rights of the person questioned. But to inform him that he is bound to tell the truth is only to speak what is already operating in his mind. The Court should equally disapprove of an implied misrepresentation of the rights of the person questioned by requiring the person under interrogation to be told of his right to refuse to answer self-incriminating questions.

This brings us to the reason why the Court felt that the statement obtained by such a "positive misrepresentation" should be excluded. The Court said:

> it would be reasonable to assume that such an omission (to inform the accused of his privilege where he has been told that he was bound to tell the truth) might have caused that person to say what he might not otherwise have said. At least, we think a reasonable doubt could arise as to whether he would have said the same things if he had been informed that he was entitled to refrain from doing so. In short, the seeming lack of choice might be an inducement to follow the only course of action which apparently remains.

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[78] This portion of the judgment is found in [1993] 1 CLAS News 135, at 142-144.
[79] S 122(5) of the Code (Cap 68, 1985 Rev Ed).

A number of reasons are thought to underlie the voluntariness rule.[80] It is at least a little surprising that the Court chose to emphasise the one principle it seemed to have been disparaging all along – the privilege against self-incrimination. The statement was excluded because the accused was given the impression that he had no choice but to speak. The direct concern of the Court was not that the reliability of the statement was rendered in doubt, but that the choice of the accused to answer or not was adversely affected. One might well ask why, if the Court was so concerned with preserving this choice, did it not show a more favourable attitude towards the privilege (which is the basis of this choice) in the rest of the judgment. As we have seen, the circumstances of police interrogation are such that, as far as the choice of the accused is concerned, there is little real difference between telling the accused nothing directly and telling him that he is bound to speak.

VII. Future of the Privilege Against Self-Incrimination and the Pre-Trial Process

The present state of the law governing police interrogation is unsatisfactory because of its ambivalent attitude towards the privilege against self-incrimination. It appears that it can neither live with it nor without it. This is reflected in the rather contradictory position of the Court of Criminal Appeal in *Mazlan.* It decided against the right to be informed of the privilege, denied the privilege constitutional status, and yet excluded statements under the voluntariness rule because they were extracted under circumstances which adversely affected the privilege against self-incrimination. The legislature and the judiciary have to decide whether the privilege is to remain as the organising principle of the pre-trial process. If it is to stay, then much more will have to be done to protect its integrity. If it is to go, then much more is necessary to ensure that the accused is protected from false or improperly obtained confessions or statements being admitted as evidence at his trial.

The shift away from adversarial justice to a more inquisitorial one where the accused is expected to cooperate and to divulge what he knows before the trial is perhaps irreversible. There is a very strong belief, especially amongst those responsible for law enforcement, that this change is necessary to bring offenders to book and therefore to preserve law and order. This belief is not necessarily wrong and it is perhaps futile to expect police officers to pay very much respect to the privilege, even if the law were to provide for it. The demise of the privilege against self-incrimination is not in itself a bad thing. But the right of the accused to a fair criminal

[80] See *Lam Chi-Meng* v *R* [1991] 3 All ER 172 (Privy Council, Hong Kong).

process, which is anchored in Articles 9 and 12 of the Constitution demands that the conditions under which the accused is expected to speak adequately protect him against the potential dangers of interrogation and extraction of incriminatory statements. Clear standards in the treatment of persons undergoing interrogation in custody must be expressed and teeth given to them in the form of a discretion to exclude statements obtained in breach of those standards.

Legislative change may, however, be slow in coming and, in the meantime, the courts are in a dilemma. How seriously are they to take the privilege against self-incrimination? They cannot ignore it, because many existing provisions, like section 121 of the Code and the voluntariness rule, are based on the privilege. They cannot really enforce it for fear that police investigations will be affected. The courts have to play a very sensitive role in making the best of a bad situation. They have to be resourceful in fashioning and enforcing proper standards of police behaviour. This they cannot do by the sort of narrow literalism exhibited in *Mazlan.*

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