FUNDAMENTAL RIGHTS OF ARRESTED PERSONS

Aminah v. *Superintendent of Prisons Pengkalan Chepas, Kelantan*[1]

In 1957, Malaya gained her independence from Britain and adopted a form of government whereby the supreme law of the land was the written constitution. Part II of this instrument dealt with fundamental liberties and both lawyers and laymen wondered to what extent the courts would be willing to implement such rights. When the first case of *Chia Khin Sze* v. *The Mentri Besar of Selangor* appeared before the High Court, the legal world held its breadth with expectation. However all high hopes were disappointed. The courts gave a restrictive interpretation to the Constitution reducing it to a mere declaratory function.

This interpretation however was impliedly disapproved by the Privy Council in the case of *Surinder Singh Kanda* v. *The Government of the Federation of Malaya*[2] where Lord Denning expressed the opinion of the Privy Councillors in the following words: [3]

> In a conflict of this kind between the existing law and the Constitution the Constitution must prevail. The Court must apply the existing law with such modifications as may be necessary to bring it into accord with the Constitution.

This approach in the interpretation of fundamental rights provisions promised the subject a fairer chance against oppression. In *Aminah* v. *Superintendent of Prisons Pengkalan Chepa,' Kelantan*[4] which arose before the High Court at Kota Bharu, Wan Suleiman J. took the opportunity to pronounce *Chia Khin Sze* wrongly decided. To understand the full significance of *Aminah's* case a brief consideration of *Chia Khin Sze's* case would be necessary.

In 1958, one Mr. Chia Khin Sze was arrested and detained under the Selangor Restricted Residence Enactment.[5] He claimed the protection of the Constitution, then newly established. Article 5(3) of the Constitution provides, "Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice."

22. Straits Times, 7th September, 1967.

1. [1968] 1 M.L.J. 92.
2. (1962) 28 M.L.J. 169.
3. Ibid., at p.171.
4. (1958) 24 M.L.J. 92.
5. Cap. 39.

Sutherland J. who heard the case decided that Article 5(3) was not applicable to the Restricted Residence Enactment and therefore the application was dismissed. His lengthy judgment detailed the following reasons.

(1) Article 5(3) was meant to apply only to criminal proceedings under the Criminal Procedure Code.

(2) This is confirmed by reference to the Reid Commission Report.6 The effect of Article 5(3) was to be the same as the 6th Amendment of the American Constitution, being restricted to criminal proceedings under the Code.

(3) Article 5(4) gave the arrested person a right to appear before a Magistrate within 24 hours of the arrest. This conflicts with the provisions of the Restricted. Residence Enactment: therefore it is not applicable.

(4) The Mentri Besar under the Restricted Residence Enactment acts in a ministerial capacity. He has a discretion on the question of an enquiry. Under such circumstances, there can be no right of defence.

(5) Reference to English decisions of a similar nature confirms the validity of argument.

(6) Article 4(1) makes laws passed after Merdeka Day which are inconsistent with the Constitution void to the extent of the inconsistency. This section therefore does not affect laws passed before Merdeka Day.

(7) Article 5 of the Constitution is merely declaratory of the position existing at the time of promulgation of the Constitution.

The decision was approved by the Government[7] but suffered criticism from academicians.[8] Professer Sheridan remarked: [9]

> It may be remarked that there is little precedent for interpreting a constitution in the light of ordinary laws for restricting a constitution to a declaratory function because the parent Commission took a rosy view of the previous state of affairs or for using a clause safeguarding an arrested person to encourage executive detention.

Against Sutherland J.'s reasoning Sheridan, the most eloquent of the critics, forwarded the following arguments.

(1) There is nothing in Article 5(3) of the Constitution to show that the provision is restricted to criminal proceedings under the Criminal Procedure Code alone.

(2) Reference to the Reid Commission is hazardous. The Commission had seen it fit not to adopt the wording of the 6th Amendment. The fact that there is a conflict between Article (5) (4) and the Restricted Residence Enactment does not mean that the constitutional provision automatically does not apply. Instead the Court should utilise Article 162(6) of the Constitution to modify the Restricted Residence Enactment to bring it in line with the Constitution.

(3) Since the Constitution gives a right of defence the Restricted Residence Enactment must give way, the Constitution being supreme. (Article 4(1)).

(4) Analogies cannot be drawn to English cases. There is no written constitution in England.

(5) Article 4 is applicable to laws passed after Merdeka Day, but Article 162(6) gives the Court the power to modify existing laws. The word 'may' in Article

6. "The rights which we recommend should be defined and guaranteed are all firmly established now throughout Malaya and it may seem unnecessary to give them special protection in the Constitution."

7. Federation of Malaya, Legislative Council Debates, Sixteenth and Seventeenth Meetings of the Third Session of the Second Legislative Council Column 4488, 1958, per Tun Abdul Razak, Deputy Prime Minister.

8. (1958) 24 M.L.J. xli; see also Professor Sheridan's article on "Constitutional Problems of Malaysia"60 (1964) 13 *I.C.L.Q.* at p.1349.

9. *Ibid*.

162(6) [10] must be read as 'must'. There can be no question of a discretion if there is to be a uniform system of laws.

(6) Article 5(5) specifically excepts enemy aliens from the protection of clause (3). It might be concluded that no other exceptions are intended. This argument is strengthened by considering the Indian Constitution. Article 22 of the Indian Constitution, which is similar to our Article 5, expressly exempts enemy aliens and arrests under preventive detention. If the Malayan Constitution had intended to exempt arrests under the Restricted Residence Enactment, such a clause could have been written into the Article.

The arguments, it would seem, have not fallen on barren soil for in *Aminah* v. *Superintendent of Prisons, Pengkalan Chepa, Kelantan,* Wan Suleiman J. rejected the decision in *Chia Khin Sze,* and walked the path advocated by the academicians. Mr. Haron bin Jaffar was detained at the Pengkalan Chepa Prison and an application for a writ of *habeas corpus* was made by his wife Aminah. The contention by the applicant was that there had been non-compliance with Article 5(3) of the Constitution in that the detainee had not been informed as soon as may be of the grounds of his arrest. The learned judge found as a fact that the detainee had been told the grounds for his detention some hours after the arrest thus satisfying the requirements of Article 5(3). Wan Suleiman J. then poceeded to say: [11]

> Before proceeding any further, I must make it clear that I have considered the decision of Sutherland J. in the case of *Chia Khin Sze* v. *Mentri Besar* of Selangor wherein the learned judge held, *inter alia* that Article 5(4) was intended to apply to arrests under the Criminal Procedure Code and not to arrests under the Restricted Residence Enactment and that Article 5(3) does not apply to cases under the Enactment, I would with great respect, say that I am unable to agree with this decision. Article 5 is clearly meant to apply to arrests under any law whatsoever in force in this country.

He then applied Article 162(6) of the Constitution and read into the Enactment the right of an arrested person to be informed within a reasonable time of the grounds of his arrest.

The decision in *Aminah's* case seems to indicate, if it is at any indication at all, that the courts have after ten years of Merdeka, found the courage to uphold the Constitution against convenient policy decisions on the matter of fundamental liberties. However, some questions are raised following the wake of the judgment. If article 5(3) is no longer a declaratory provision but one of substantive law it would follow that there is not only a right to be informed of the grounds of arrest but the detainee has a right to consult and be defended by a legal practitioner of his choice. So far as the right to be informed of the grounds is concerned the court in this case has applied the criterion of the Indian courts that there is no necessity to furnish full details but sufficient details. What is "sufficient details"? Would the determination of this be a question of law or one of fact? The right of counsel and of defence is not new to constitutional law but more than one method of implementation has been found. The Indian courts limit the right to cases where the accused wants and can afford to hire a lawyer.[12] There is no duty on the court to provide the accused with counsel.[13] The federal courts in the United States have made it the duty of the federal government to appoint a lawyer for the accused if he cannot afford one financially.[14] The State courts have made the duty less onerous on the State: a counsel will be assigned to the accused in capital offences and in all other cases where his absence would be prejudicial to the accused.[15] It is questionable which standard the local courts will adopt, or whether there is in fact a duty under the Constitution to provide for compulsory legal aid as suggested by some academicians. Time and opportunity alone can tell.

10. "Any court or tribunal applying the provision of any existing law which had not been modified on or after Merdeka Day under this Article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution."

11. [1968] 1 M.L.J. 92 at p.93.

12. Basu's *Commentary* on the *Constitution of India* (6th ed.) vol. 2 at p. 104.

13. *Tara, Singh* v. *The State* (1911) S.C.R. 729; *Janardhan* v. *State of Hyderabad* (1951) S.C.R. 344.

14. Under the Sixth Amendment, see *Johnson* v. *Zerbst.*

It is however regrettable that the learned judge who had chosen to differ from the decision in *Chia Khin Sze's* case should not have thought it fit to elaborate on his decision and give reasons for his difference of opinion with the case. It would be mere speculation to read into the judgment an adoption of the arguments extended by academicians. Also, Wan Suleiman J.'s statement that Article 5 was meant to apply to "arrests under *any law whatsoever* in force in this country" cannot be taken too literally. This all embracing statement must be read subject to the qualification imposed by Article 149 which allows laws to be made which override Article 5.

In conclusion it is submitted that the decision in *Aminah's* case is a step forward in the protection of those fundamental rights of arrested persons under the Constitution.

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