1995

Speech by the Attorney-General

WE have left behind us another eventful legal year. The Law Page of the Times of London, December 27, 1994, reviewed the legal year in UK and USA with the caption "A stressful year was had by all". The reviewer identified "all" as lawyers, judges and litigants, in that order. I think the President of the Law Society will agree with me that that caption also fits the Singapore legal scene in 1994, in much the same order.

1994 was a year when our legal system and the administration of criminal justice in Singapore became the focus of world attention, illuminated liberally by the media spotlight. The cause celebre was the punishment of caning to which a young man was sentenced after he had pleaded guilty to 2 offenses of vandalism following a plea bargaining on 45 counts of vandalism. Because the accused was an American citizen, the case was played up by the US media for its readers and listeners, resulting in a divisive debate on crime and punishment in that country.

Given the Government's tough stand on the maintenance of law and order and the large number of foreigners working and living here, our legal system and administration of justice will continue to be subject to over-exposure by the foreign media, especially in cases where non-Singaporeans are involved. But we should neither resent nor fear such attention, even when unnecessarily hostile, as long as we believe that what we are doing is right for our society and our laws are applied equally to all who live here, citizens and non-citizens alike.

Our colonial past has given us a priceless legacy in the rule of law and a legal system with established laws, procedures and practices and attendant institutions, viz. a court system staffed by independent judges conducting trials in open court with the assistance of lawyers from a self-regulated legal profession. Some years ago, an English Queen's Counsel wrote an article about his experience and impressions of Singapore after defending a case here. The title of the article was, to the best of my recollection, "OUR LAW IN THEIR HANDS". Whatever meaning this Delphic title was intended to convey, we have no cause to feel inadequate in our understanding or appreciation of the English legal system and the societal values it embodies. The common law and rules of equity reflect the ideas and principles of right and justice in English society at various periods of history. We cannot change our legal history but we can continue to adapt and modify our legal inheritance to promote the social and cultural values appropriate to our society, as for example, giving primacy to community rights over individual rights and promoting the virtue of social obligations over the demand of individual rights.

Last month at a conference on human rights held in Kuala Lumpur, a speaker was reported to have decried the rejection of fundamental human rights by Asian nations on the ground they originated from the decadent West and were therefore deemed unsuitable to Asian societies and their values. He also commented that this argument had crept into the interpretation and application of legal principles in the decision of Malaysian courts and that the judges had adopted the approach that legal principles enunciated by western judges were no longer suitable in Malaysia because of its different culture, tradition, practices and values.

We cannot change our legal history but we can continue to adapt and modify our legal inheritance...

Whatever its truth or validity, the keyword in the criticism is, of course, the word "fundamental". Societies at different stages of social and economic development disagree, and are entitled to disagree, on the values and interests that are fundamental to their societies. Any modern society with an established legal system has a body of laws that reflect its current values and interests. English common law, being judge made law, is imbued with the social and cultural values of English judges over many centuries. The shifting boundaries of its underlying principles can be seen in certain recent decisions of the House of Lords and of the Privy Council, thus demonstrating its ability for adaptation to promote the current values of English society. What the common law can do in England, it can likewise be made to do in Singapore. This is the task of you, Honourable Members of the Supreme Court as the embodiment of the common law in Singapore.

The Court of Appeal has on 11 July 1994 issued the Practice Statement on Judicial Precedent. The Statement is not a mere statement of judicial freedom from the shackles of stare decisis but more importantly is a recognition of the imperative to re-examine the underlying principles of precedents, whether in statutory interpretation or of the common law, for their suitability in our current circumstances. The unwritten law in Singapore must reflect the values of our society or be abrogated by legislation. I am not advocating a cavalier rejection of established principles of law and procedures, but a realistic appraisal of their relevance to what Singapore society is today. Innovation in the law has to be tempered with caution. Parties who have relied on established law to arrange their personal or commercial affairs should not suffer for having done so, but what was right in the past is not necessarily right the future. Accordingly, there should be place in our jurisprudence for the doctri of prospective over-ruling so as to brid the gap between what was right in the p and what is right for the future. But for t present, we are long past the age when should regard English law as "THEIR L IN OUR HANDS". In view of the Practi Statement, we have, at last, "OUR LAW OUR HANDS".

I would like to refer to o example of such a developme in our law of crimin evidence. Judicial activi may be seen in the decisi of the Court of Appeal CHIN SEOW NOI [1994 SLR 135 where the Co departed from its o previous decisions a held that under secti 30 of the Evidence A the confession of co-accused implicati another accused may, in joint trial, be sufficie evidence, in itself, to convict t other accused.

The decision caused great surprise a consternation to the criminal bar and h also received strong criticism from acaden lawyers [see (1994) 6 SAcJL 366] on t ground that it would "place an innoce person in serious and intolerable risk conviction, a possibility that any crimin justice system can ill afford". It is al argued that such a confession is unreliat (and more so when obtained in custody) being hearsay evidence and also as bei accomplice evidence.

The Court of Appeal was fully aware these concerns but was satisfied that t real issue was one of reliability and that professional judge would be able to asse the probative value of such evidence. other words, the Court of Appeal allow the possibility of a judge giving no weight all to such evidence or giving it some weig but not sufficient to found a convictio However academic scepticism remains, the argument that "a judge would not able to perform this function properly if he has before him is a piece of paper which are supposedly the words of anoth person".

In my view, this decision is defensib not only in the light of professionalis experience and fair-mindedness of o judges but also in the larger context of t changes that have developed in our crimin justice system over the last 20 years. criminal lawyers are aware, the sacr principles which in the past have erected iron curtain to protect an accused in criminal trial are: (1) the presumption innocence which imposes on the prosecuti the heavy burden of proving that an accus is guilty beyond any reasonable doubt; a

2) the right to silence of the accused, both uring the stage of police investigations and t the trial, which requires that the accused e not compelled to incriminate himself.

The decision in CHIN SEOW NOI ltimately impinges on the right to silence. eaving aside for the moment the resumption of innocence, the question is hether the right to silence is so ndamental to the fairness of our criminal stice system that any diminution of this ght will render a fair trial difficult or npossible. What value should we give to e right of silence in a criminal justice ystem that is fair to society as well as the ccused? To those of a Benthamite ersuasion, not much, as this was what eremy Bentham wrote:

If all the criminals of every class had ssembled and framed a system after their wn wishes, is not this rule the very first they ould have established for their security? nnocence never takes advantage of it. nnocence claims the right of speaking as uilt in[illegible]s the privilege of silence."

In [illegible]6 Parliament amended the riminal Procedure Code to give an accused a) when cautioned by the police, the choice f disclosing any facts which he might wish o rely by way of defence and of being isbelieved if he failed to do so but nentioned them later at the trial, and (b) hen called upon by the court to enter his efence, the choice of testifying under oath r of allowing the court to draw such nferences as appear proper if he fails to do o. I refer to what are now sections 122(6), 23 and 189 of the Criminal Procedure ode.

The constitutionality of sections 189 hen read with 196(2) was challenged by he appellant in HAW TUA TAU [1982] AC 36 on the basis that the principles (a) that defendant is presumed innocent until roved guilty and (b) that he is not a ompel[illegible] witness at his own trial, were undamental rules of natural justice which ad been given constitutional recognition y Article 9(1) of the Constitution. It was ontended that sections 189 and 196(2) when ead together violated the right or privilege f silence because they had the practical ffect of compelling the accused to give vidence.

The Privy Council rejected this argument nd held that these provisions did not in law ompel the accused to say anything or to ive evidence. Lord Diplock, in his judgment, aid that even if their Lordships were of the pinion that the effect of the amendments as to create a genuine compulsion on he accused to submit himself to cross-xamination by the prosecution, as dis-inguished from creating a strong nducement to do so, at any rate if he were nocent, their Lordships, before making up eir own minds, would seek the views of e Court of Criminal Appeal as to whether e practice of treating the accused as not compellable to give evidence on his own behalf had become so firmly based in the criminal procedure of Singapore that it would have been regarded by lawyers there as having evolved into a principle of natural justice by 1963 when the Constitution came into force.

In 1993, the Court of Criminal Appeal answered No in MAZLAN [1993] 1 SLR 512 when it held that a suspect or an accused need not be expressly informed of his right to remain silent when a statement is recorded from him under section 121(1) of the Criminal Code, and that a failure to so inform him is not a breach of his constitutional rights. Another indication of the approach of the Court of Criminal Appeal to the right of silence of an accused may also be seen from its decision in MOHAMMED BACHU MIAH v PP [1993] 1 SLR 249 in declining to interpret sections 121 and 122 of the Criminal Procedure Code as having the effect of prohibiting the police from recording further statements from an accused after he has been charged and after a section 122(6) statement has been obtained from him. To round up my review of this topic, I may mention that the UK Parliament in December 1994 enacted legislation similar to section 122(6) of our Criminal Procedure Code.

HAW TUA TAU represents the law in Singapore today. But, across the Causeway, the Supreme Court of Malaysia, after initially accepting its authority, has decided in KHOO IT CHIANG [1994] 1 MLJ 265 to reject it on the ground that Lord Diplock's analysis was flawed in that he equated a non-jury trial with a jury trial, and that it was also contrary to well established authorities in Singapore and Malaysia. The Court held that "the duty of the court at the close of the case for the prosecution, is to undertake, not a minimal evaluation of the evidence tendered by the prosecution – the HAW TUA TAU test – but a maximum evaluation of such evidence, to determine whether or not the prosecution has established the charge against the accused beyond all reasonable doubt": ibid, per Justice Edgar Joseph Jr, SCJ at pp.289 and 290.

"Innocence claims the right of speaking as guilt invokes the privilege of silence."

– Jeremy Bentham

HAW TUA TAU and KHOO IT CHIANG may be considered as representing different perspectives on what procedures a criminal code should have to give an accused a fair trial. It is in the public interest that an accused should have due process but at the same time the public is entitled to a criminal justice system which does not make it easy for the guilty to go free. CHIN SEOW NOI may therefore be regarded as part of the on-going development of a criminal justice system which seeks to establish a fair and just balance between the right of an accused to due process and the interest of the State in securing the conviction of criminals. Everyone agrees that it is only justice that the innocent be not wrongly convicted. Everyone also agrees, or should agree, it is also a miscarriage of justice if a guilty accused is acquitted.

In relation to CHIN SEOW NOI, the immediate issue is whether the Court of Appeal's judgment is unfair to a co-accused who has been implicated by his accomplice. It can be strongly argued that the Court of Appeal's judgment is not unfair to a co-accused in the circumstances, if the presumption of innocence and the burden of proof that has to be discharged by the prosecution are taken into account. If there were no joint trial, the accomplice could testify against him without the need for corroborative testimony. If the accomplice testifies against him at a joint trial, he can be cross-examined by his co-accused. If he does not, there is nothing to prevent the other accused from testifying in his own defence, in which event and if he is innocent, he should have no trouble in rebutting the probative value of a statement which is both unsworn and untested by cross-examination. No doubt he will expose himself to cross-examination, but again if he is innocent, he should have no trouble in raising a reasonable doubt as to his guilt.

Last year, Chief Justice, you referred to the need for comprehensive amendments to the Penal Code and the Criminal Procedure Code to make them more efficient and effective. My Chambers have made the recommendations for amendments to the Penal Code and have also completed the first review of the Criminal Procedure Code. The demands of court time on the Deputy Public Prosecutors have delayed the completion of these two tasks last year. I hope that our work will bear fruit this year.

The opening of the Legal Year is the time when you, Chief Justice, announce your agenda for the year. It will, I expect, set goals and targets that require for their attainment extraordinary dedication, effort and co-operation from all of us who are involved in the administration of justice. My legal officers, especially my Deputy Public Prosecutors, will render their dedicated co-operation in this common cause to fulfil your mission for 1995. On behalf of my colleagues in the Legal Service, I wish your Honours, especially you, Chief Justice, the very best of health in the eventful year ahead of us.