

## REVISITING THE RIGHT TO REMAIN SILENT IN MALAYSIA: ITS SIGNIFICANCE TO THE ACCUSED IN CRIMINAL TRIALS

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### ABSTRACT

*When a person faces trial in Malaysia, he has the right to refuse to testify and cannot be forced to do so, known as the right to remain silent. This right protects individuals from self-incrimination. In Malaysia, the right to remain silent is enshrined in the Federal Constitution. However, following the 2006 amendment of the Criminal Procedure Code, the right of the accused to remain silent during trial may not necessarily be advantageous. An analytical approach is adopted throughout the analysis of this issue. This article looks into this amendment which states that when a prima facie case is established against the accused and the prosecution presents credible evidence substantiating each element of the offense, this would justify a conviction if the evidence goes un rebutted or unexplained. It follows that under such scenario, the accused right to remain silent now no longer protects him anymore, rather such right to remain silent exposes himself to a risk of a conviction. Hence this article delves into the current ensuing problem of the increased risk of conviction should the accused choose to remain silent when the prosecution is able to prove prima facie case against him via presentation of credible proof which prove all elements of crime. The article eventually suggests that in overcoming such predicament, the right of the accused to remain silent under such circumstance should be eliminated to ensure that the right to a fair trial is accorded to the accused at all times during trial.*

*Keywords: criminal justice; right to remain silent; Federal Constitution*

### INTRODUCTION

The right to remain silent is an important aspect of the criminal justice system in many countries, including Malaysia. This right is known as *nemo debet se ipsum prodere* which is known as no one can be required to be his own betrayer. Lord Diplock, in the case of *R v. Sang [1980]*, stated that this maxim means an individual cannot be compelled to provide evidence that contradicts themselves. Lord Griffiths in the case of *Lam Chi Ming v. The Queen [1991]*, explained that:

“The privilege against self-incrimination is deep rooted in English law and it would make a grave inroad upon it if the police were

to believe that if they improperly extracted admissions from an accused which were subsequently shown to be true, they could use those admissions against the accused for the purpose of obtaining a conviction. It is better by far to allow a few guilty men to escape conviction than to compromise the standards of a free society.”

The right to remain silent is applicable in two situations; during investigation and during trial. Generally, it means that individuals cannot be forced to incriminate themselves during police questioning or legal proceedings (*Saunders v. United Kingdom [1996]*). During an investigation, a suspect can choose to remain silent and not answer questions posed by the

authorities. During the trial, this right applies during the defence case, allowing the accused to remain silent. However, if the accused chooses to remain silent during trial, they can still call witnesses to testify on their behalf as per section 174 of the Criminal Procedure Code (CPC). Practically, the right to remain silent carries greater weight during pre-trial proceedings than during the trial itself. This distinction arises because, during the trial, the judge oversees the proceedings, whereas in the pre-trial phase, the suspect's interactions are mainly with the authorities. The situation becomes more complex if they lack or are unable to secure legal representation to aid them during the investigative processes. In this regard, Sallmann and Willis (1984) have stated:

“A great many persons convictions have been signed, sealed and delivered in the police station during the criminal investigation process...Criminal investigation is a stage of the criminal process which is almost completely dominated by the police. With the full resources of a powerful State behind them, the police pursue the suspect as the adversary. They are usually in a position of enormous physical, psychological, emotional and legal superiority.”

In Malaysia, the right to remain silent is based on the principles of a fair trial and the presumption of innocence (*Public Prosecutor v. Krishna Rao a/l Gurumurthi [2000]*). It allows individuals to abstain from disclosing self-incriminating information, protecting them from being forced to provide evidence against themselves. For example, section 37B of the Dangerous Drugs Act 1952 was inserted for a reason and that was to preserve the constitutional right of an arrested person to not incriminate himself by exercising the right to remain silent (*Public Prosecutor v. Muhammad Ng Wah Ling [2021]*). It is important to note that the right to remain silent reflects the principle that the burden of proof lies with the prosecution in criminal law. Additionally, the right to remain silent aims to minimise the risk of convicting an innocent person (Leng, 2001;

Stein, 2008). According to Gomez (1995), there are various reasons why an accused chooses to remain silent and among others are:

1. He may remain silent because his lawyer advised him to
2. He may be emotional and not in the proper frame of mind to speak
3. He may feel guilty and confess to an offence he really did not commit
4. He may be ignorant of vital facts or evidence which explain why otherwise suspicious circumstances.
5. He may be silent because he has done something morally wrong and thus not want that to come to light.
6. He may be silent to protect others.
7. He may remain silent so as not to be stigmatised as an informer which may have dire consequences in his neighbourhood, especially a situation like the one in Northern Ireland (terrorist cases).

Meanwhile Leshem (2011) said:

“We show that a right to silence benefits innocent suspects by inducing them to shift from speech to silence, thereby providing them with a safer alternative. Moreover, a right to silence benefits innocent suspects even if it does not alter their decision to speak or to remain silent. Specifically, a right to silence decreases the probability of wrongful conviction of innocent suspects who always remain silent or always speak irrespective of whether a right to silence exists.”

The Malaysian Constitution, presumably, under Article 5 protects this right and plays a vital role in safeguarding individuals' rights throughout legal processes. In the recent Federal Court case of *Ketheeswaran Kanagaratnam & Anor v. Public Prosecutor [2024]*, Chief Justice Tun Maimun said:

“..... the general concepts in criminal law are given their due place such as the presumption of innocence, that the prosecution must prove its case beyond a reasonable doubt, that where an inference of fact is made, it should be done in a manner most favourable to the accused and among other things, that the accused can retain the right to remain silent without having an

adverse inference made against him. These and other broader principles collectively constitute the facets of the right to a fair trial and as regards this right, it must be gleaned from whether as a whole, the criminal trial was compromised to the extent that the trial as a whole was unfair.”

However, there are arguments that the right to remain silent can hinder a fair trial by impeding the collection of essential evidence. Some claim that only the guilty choose to remain silent (Greer, 1990). Critics of the right to remain silent also argue that it is a privilege primarily sought after by the guilty. The question arises as to why an innocent individual would choose not to cooperate with police interrogation, as they should, in theory, have no reason to withhold any information (Murphy & Bronitt, 2009). On the other hand, proponents argue that the right to remain silent is fundamental to protecting individuals’ rights within the justice system (Daly et al., 2021). They assert that compelling individuals to disclose information can lead to coerced or false confessions, potentially compromising the integrity of legal proceedings and resulting in unjust outcomes (Greer, 1990). Consequently, the application of the right to remain silent in Malaysia has become a topic of debate and scrutiny. The discussion surrounding this right in Malaysia is multifaceted, with various perspectives on its impact on the pursuit of justice. While some argue that it may impede the collection of crucial evidence, others emphasise its role in preventing coerced or false confessions, thereby upholding the integrity of legal proceedings. Nevertheless, it is undeniable that the right to remain silent is a fundamental aspect of the criminal justice system. However, the right of the accused to remain silent during trial may not necessarily be advantageous, given the increased risk of conviction. According to the Federal Court in the case of *Raman a/l Kunjiraman v. Public Prosecutor [2018]*:

“We appreciate that no adverse inference may be drawn against the appellant for remaining silent upon his arrest. The

appellant does not have any duty to disclose his defence and entitled to remain silent after his arrest and when his cautioned statement was recorded. Similarly, no adverse inference is to be drawn against the appellant for remaining silent for not disclosing his defence. However, his silence would entitle the learned trial judge to give whatever weight considered appropriate.”

This raises concerns about the suitability of such a right in the context of a fair trial. A right should ideally confer benefits rather than potential drawbacks. If a specific right consistently leads to negative consequences, it may no longer be considered legitimate or justifiable. Rights are understood as protections or freedoms that promote positive outcomes for individuals or society. When a right consistently results in harmful effects, it raises questions about its true nature and whether it should be recognized. Therefore, the impact and consequences of a right are crucial factors in determining its validity. Thus, given the potential negative impact of the right to remain silent during a trial, it is necessary to consider whether it is still appropriate to grant this right to an accused during criminal proceedings.

#### RIGHT TO REMAIN SILENT IN TRIAL

The Latin maxim ‘semper necessitas probandi incumbit ei qui agit’ essentially means ‘he who asserts must prove’. In a criminal trial, the burden of proof lies with the prosecution to establish their case. After successfully establishing a prima facie case against the accused, it becomes the accused’s turn to present their defence. Before doing so, as provided by section 173(ha) of the CPC, the court will provide the accused with the following warning:

When the Court calls upon the accused to enter on his defence under subparagraph (h)(i), the Court shall read and explain the three options to the accused which are as follows:

- (i) to give sworn evidence in the witness box;
  - (ii) to give unsworn statement from the dock;
- or

(iii) to remain silent.

In the case of *Public Prosecutor v. Khantan a/l Namasivayam & Ors [2022]*, it was decided that:

“The three options were read and explained to the accused with regard to their respective defence. The first is the right to give sworn evidence in the witness box, the second is the right to give unsworn statement from the dock and the third is the right to remain silent. The consequences of having chosen any of the options were also explained to the accused. All the accused chose to give sworn evidence in support of their respective defence.”

Thus, during the defence case, the accused has three options for presenting evidence: to choose to remain silent, to testify from the witness stand, or to provide an unsworn statement. However, even if the accused chooses to remain silent, they can still call witnesses to testify on their behalf (*R v. Mutch [1973]*). There are several reasons why the accused elected to remain silent at this stage. Section 174(b) of the CPC provides:

“when the accused is called upon to enter on his defence, he or his advocate may before producing his evidence open his case stating the facts or law on which he intends to rely and making such comments as he thinks necessary on the evidence for the prosecution, and if the accused gives evidence or witnesses are examined on his behalf may sum up his case...”

Therefore, even though the prosecution has succeeded in proving a prima facie case against the accused, the prosecution’s case can still be overturned if the witnesses for the defence succeed in raising doubts about the case being tried (Rajah, 1982). If the accused chooses to testify, then he can do so in the language of his choice (Joseph Jr., 1976). Additionally, the prosecution is precluded from questioning the actions of an accused person who opts to remain silent during their defence case (Section 257(2) CPC).

## THE SITUATIONS IN WHICH THE ACCUSED IS OBLIGATED TO PRESENT EVIDENCE AT TRIAL

Though the accused typically enjoys the right to remain silent, certain circumstances can negate this privilege. In accordance with statutory provisions, the accused may be compelled to present evidence in specific situations. The accused is required to meet a higher standard of proof. For instance, when the accused raises a statutory defence, such as the defence of unsoundness of mind, accident, or self-defence, respectively in section 84, 80 and 96 of the Penal Code, section 105 of the Evidence Act 1950 imposes a burden on the accused to prove the existence of the fact that they alleged. This section elaborates on these obligations, outlining the conditions under which the accused must present evidence. Moreover, when an accused intends to introduce a fact in court, the responsibility of substantiating the truth of that fact lies with the accused as stated in section 103. Concerning this matter, it is essential to interpret section 105 of the Evidence Act 1950 not in isolation but in the broader context of the entire Act, particularly section 103 (*Ikau Anak Mail v. Public Prosecutor [1973]*). Section 103 requires that the burden of proof for any specific fact lies with the person who wishes the court to believe in its existence. However, this rule may not apply if there is a law in place that specifically states that the burden of proof for that fact lies with a particular person. However, Sections 101 and 102 of the Evidence Act 1950 specifically dictate that, in criminal proceedings, the burden lies with the prosecution to prove the accused’s commission of an offence. In the case of *Wong Chooi v. Public Prosecutor [1967]*, it was established that when a statutory or common law obligation requires the accused to prove a fact, the burden imposed is relatively minor. This is attributed to the fact that the burden can be discharged through the utilization of both the prosecution’s witnesses’ testimonies and the evidence presented by the defence.

Therefore, in the specific framework outlined in section 105, the accused is obligated to present evidence to validate their defence (*Public Prosecutor v. Lee Poh Chye & Anor [1997]*). This implies that if the accused fails to present their defence or chooses to remain silent during the proceedings, it significantly increases the risk of being convicted. By not exercising their right to speak or present evidence in their favour, the accused may unintentionally weaken their position in court, potentially resulting in an unfavourable outcome.

Furthermore, the presence of the concept of presumption in certain statutes necessitates the accused to present evidence in court. For example, section 37(d) of the Dangerous Drugs Act 1952 and section 50 of the Malaysian Anti-Corruption Commission Act 2009. However, it's important to note that the prosecution must first establish its basic or primary facts before this presumption can be invoked (*Public Prosecutor v. Sukumaran a/l Sundram [1999]*). Justice Mohamed Azmi S.C.J. in the case of *Mohamed Radhi bin Yaakob v. Public Prosecutor [1991]* said:

“In our opinion unless the evidence in a particular case does not obviously so warrant, it is incumbent for the Court to consider whether on the balance of probabilities, the evidence of the defence has rebutted the statutory presumption of trafficking under s. 37(da) as a separate exercise even though the Court is satisfied on balance that the presumption of possessions under s. 37(d) has not been rebutted. In this case, the failure to do so was a material misdirection and was fatal to the conviction.”

In this situation, if the accused chooses to exercise his right to remain silent when circumstances require him to present evidence, this decision is likely to have a detrimental impact on his case. There is an increased risk of conviction associated with opting for silence. The Privy Council in the case of *Yuvaraj [1970]* explained that:

“Generally speaking, no onus lies upon a defendant in criminal proceedings to prove

or disprove any fact: it is sufficient for his acquittal if any of the facts which, if they existed, would constitute the offence with which he is charged ‘are not proved’. But exceptionally, as in the present case, an enactment creating an offence expressly provides that if other facts are proved, a particular fact, the existence of which is a necessary factual ingredient of the offence, shall be presumed or deemed to exist ‘unless the contrary is proved’ will be an acquittal, whereas the absence of such finding will have the consequence of a conviction...In their Lordships’ opinion the general rule applies in such a case and it is sufficient if the court considers that upon the evidence before it, it is more likely than not that the fact does not exist. The test is the same as that applied in civil proceedings: the balance of probabilities.”

Federal Court in the case of *Mohamed Radhi bin Yaakob v. Public Prosecutor [1991]* also explained that:

“It is well-established principle of Malaysian criminal law that the general burden of proof lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the accused for the offence with which he is charged. There is no similar burden placed on the accused to prove his innocence. He is presumed innocent until proven guilty. To earn an acquittal, his duty is merely to cast a reasonable doubt in the prosecution case. In the course of the prosecution case, the prosecution may of course rely on available statutory presumptions to prove one or more of the essential ingredients of the charge. When that occurs, the particular burden of proof as opposed to the general burden, shifts to the defence to rebut such presumption on the balance of probabilities which from the defence point of view is heavier than the burden of casting a reasonable doubt.”

Therefore, with the existence of this presumption concept, remaining silent will not benefit the accused (Williams, 1963). Moreover, section 256(1) of the CPC provides that the court holds the authority to ask any necessary questions to the accused. In such instances, the accused is required to respond to all inquiries posed by the court. Should the accused refuse to answer the questions directed at them, the court may draw inferences from this refusal (Section

256(2)). Nevertheless, the prosecution cannot criticise the accused for failing to adduce evidence (Section 257(2)). Thus, it is evident that if the accused chooses to remain silent when they are obligated to provide a statement, it will not favour their case. Instead, this decision is likely to increase the chances of being convicted due to the court's inference from the accused's silence. Remaining silent may weaken the accused's defence, making the prosecution's case appear stronger with no rebuttal. Therefore, statements from the accused are vital in ensuring a fair and impartial proceeding.

### RISK OF CONVICTION

The reality is that choosing to remain silent during trial only amplifies the risk of conviction for the accused. This heightened risk is attributed to the amendments introduced to the CPC in 2007, specifically clarifying the meaning of prima facie. Prima facie is now defined as the point where the prosecutor presents compelling evidence that substantiates every element of the offence. Failure to refute such evidence would warrant a conviction. This principle was underscored in the case of *PP v. Mohd Amin Mohd Razali & Ors [2002]*, where the High Court ruled that when an accused opts for silence during their defence, the court should be prepared to proceed with a conviction. In this context, the court has firmly decided that:

“I have already ruled that at the end of prosecution case, the prosecution has made out a prima facie case where the prosecution has already proved the essential ingredients of the charge against the first accused. What it means in reality is that the prosecution has established the charge based on credible evidence as opposed to a situation where at the conclusion of the trial the case is said to have been proved beyond reasonable doubt in which case the word doubt refers to doubt which is raised by evidence adduced by the defence during the defence case. Therefore, when the first accused chooses to remain silent or not to call evidence the court can lawfully convict him.”

This is due to the fact that, at the conclusion of the prosecution's case, the court reviews whether the prosecution has effectively established a case against the accused, justifying a conviction in the absence of evidence to counter it. In such instances, the court places significant emphasis on the testimony presented by the prosecution. This principle was affirmed by the Federal Court in the case of *Public Prosecutor v. Mohd Radzi bin Abu Bakar [2005]*, where Justice Gopal Sri Ram ruled that:

“The court must be ready to convict if the accused elects to exercise his statutory right to remain silent. The court must take into consideration that it cannot convict if the prosecution has not proven its case beyond reasonable doubt. Logically, the court has no alternative but to apply the beyond reasonable doubt standard at the end of the prosecution case.”

In the case of *Public Prosecutor v. Chung Chung Kiang & Ors [2008]*, the court took a slightly different approach. It was decided that at the conclusion of the prosecution's case, only a cursory evaluation was conducted to determine if the prosecution had effectively proven its case against the accused. Subsequently, if the accused opts for silence, the court will conduct a more thorough assessment of the evidence presented to determine whether it justifies a conviction. In this specific situation, an accused who chooses to remain silent may still be acquitted if the court is satisfied that the prosecutor has not presented sufficient evidence to warrant a conviction. Justice David Wong, in this case, rendered the decision that:

“It is my humble view that the maximum evaluation approach as it is understood today does not reflect the intention of Parliament when s 180 was amended in 1997. Parliament's intention, in my view, is what the learned DPP in the case of *Public Prosecutor v. Sidek bin Abdullah [2006]* 3 MLJ 357 contended and that was that the amendment in 1997 was made with the intention of restoring the minimal evaluation principle as enunciated by the Privy Council

in the landmark case of *Haw Tua Tau* [1981] 3 All ER 14, and nullifying the effect of the Federal Court judgment in *Arulpragasam Sandaraju v. Public Prosecutor* [1997] 1 MLJ 597, which enunciated the maximum evaluation principle. What this means is that the court at the end of the prosecution's case will embark on minimal evaluation of the evidence and should the accused remain silent, the court will then evaluate the evidence again to determine whether the prosecution had proven its case beyond reasonable doubt. Hence there is nothing illegal if a presiding judicial officer in a trial call for the accused to enter his or her defence upon prima facie evidence being adduced and then acquit and discharge even when the accused remains silent and calls no evidence if he or she is not satisfied that the charge has been established beyond reasonable doubt by the prosecution (see Edgar Joseph J (as he then was) in *Pavone v. Public Prosecutor* [1984] 1 MLJ 77)."

However, at this juncture, it becomes redundant for the court to conduct two assessments in each case. This is because the amendment introduced by Act A1274 explicitly states that a prima facie case should establish a level of proof justifying conviction if the accused opts to remain silent. Consequently, the court should be prepared to convict the accused after the prosecution successfully proves a prima facie case. Looking at section 180(4) and section 173(h)(iii) of the CPC, it is clear that a prima facie case is established against the accused when the prosecution presents credible evidence that proves each element of the offence. If this evidence is not contradicted or explained, it would justify a conviction. In the Federal Court case of *Tan Kim Ho v. Public Prosecutor* [2009], counsel for the appellant argued that the right to remain silent is a substantive right, and if, upon exercise of the right, conviction follows automatically, that is a denial of the right. Thus, according to the counsel, upon the first appellant exercising his right to remain silent the court should have re-evaluated the evidence for the prosecution. However, Abdul Aziz Mohamad FCJ said:

"That is illogical and farcical. In the first place, the right to remain silent is a right to something of a negative nature, a right not to do anything. Logically such a right can only be said to be denied if the person is compelled to do something, in this case if the first appellant was compelled to say something. But he was allowed his right. He was not compelled to say anything. That the consequence of the right to remain silent is automatic conviction cannot, logically, be a denial of the right to remain silent."

While in the case of *Kartigeyan a/l Krishnan v. Public Prosecutor* [2013] the Court of Appeal stated that:

"The legal position as it stands is that when the appellant elects to remain silent, the court is put in a situation where it has no other choice but to convict the appellant on the charges as the appellant had failed to rebut the evidence adduced by the prosecution's witnesses."

Therefore, there is no necessity for a second comprehensive assessment following the accused's decision to maintain silence, as section 180(4) of the CPC clearly defines the meaning of prima facie. The comprehensive assessment should occur at the prima facie stage. It is important to note that this does not imply an immediate conviction at this stage, as the evidence can still be contested during the defence case. However, the author asserts that a conviction can be warranted if the accused fails to present evidence, aligning with the interpretation of section 180(4) and section 173(h)(iii) of the CPC. In such cases, the court has the authority to acquit the accused without requiring them to present a defence if the prosecution fails to meet the prima facie standard. Nonetheless, it is apparent that the accused faces an increased risk of conviction if they choose to remain silent during the trial.

## RIGHT TO REMAIN SILENT IN OTHER JURISDICTIONS

In 1976, an amendment was made to Singapore's Criminal Procedure Code, incorporating recommendations from the United Kingdom's Criminal Law Revision Committee. This amendment restricts the options available to an accused person, who must now choose between testifying under oath and subjecting themselves to cross-examination or remaining silent. Opting to remain silent allows the court to draw inferences against the accused. However, before these inferences can be invoked, the court must inform the accused in a language they understand about the consequences of remaining silent. If the accused persists in refusing to present a defence, the court is then able to make the appropriate inference (*Suradet & Ors v Public Prosecutor [1993]*). The question is what inference the court in Singapore can draw against an accused who chooses to remain silent during the trial? In the case of *Took Leng How v. Public Prosecutor [2006]*, the inference that can be made is that the accused does not have any evidence to present based on the evidence presented by the prosecution. The court in this case decided that;

“A court would be in grave error if it drew an adverse inference of guilt if such an inference was used solely to bolster a weak case. The inference was properly drawn where the silence of an accused affected the probative value of the evidence which had been given. Where the evidence which had been given called for an explanation which an accused alone could give, then silence on his part could lead to an inference that none was available and that the evidence was probably true.”

Meanwhile in the case of *Chou Kooi Pang & Anor v. Public Prosecutor [1998]*, the Singapore Court of Appeal stated that:

“In the present case, given the evidence which was led against the appellant, including his own statements which he did not challenge, it was reasonable for the trial judge to have expected him to proffer some

explanation in court if he was truly innocent of the offence charged. The trial judge was, therefore, entitled to draw an adverse inference against the appellant for electing to remain silent when his defence was called.”

Based on the above cases, it is evident that in Singapore, the court can infer guilt against an accused who exercises their right to remain silent. Although, in Singapore, the accused has the right to remain silent during the trial, it is important to note that the court may interpret this silence negatively, which could potentially lead to a higher chance of conviction. Thus, choosing to remain silent will not provide any advantages to the accused in their defence (Wan, 1996).

While in the United Kingdom, the situation is more or less similar. That is, although the accused can choose to remain silent during the trial, the court is allowed to draw inferences from this choice. This can be observed in section 35(2) of the Criminal Justice and Public Order Act 1994, which states that:

“Where this subsection applies, the court shall, at the conclusion of the evidence for the prosecution, satisfy itself (in the case of proceedings on indictment [with a jury] , in the presence of the jury) that the accused is aware that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence and that, if he chooses not to give evidence, or having been sworn, without good cause refuses to answer any question, it will be permissible for the court or jury to draw such inferences as appear proper from his failure to give evidence or his refusal, without good cause, to answer any question..”

In relation to this matter, the Court of Appeal provided its comments on section 35 of the CJPOA in the *Billy-Joe Friend [1997]* case. In its statement, the court mentioned various aspects, including the fact that the jury can draw inferences from the accused's failure or refusal to give evidence without good cause or answer any question, as deemed appropriate. In this case, the Court of Appeal mentioned that:



“The Criminal Evidence Act 1898 section 1(b) provided that the failure of the accused to testify was not to be made the subject of any comment by the prosecution. Comment by the judge was permissible but the scope for it was limited and had always to be accompanied with a reminder that the accused was not bound to give evidence and that, while the jury had been deprived of the opportunity of hearing his story tested in cross-examination, they were not to assume that he was guilty because he had gone into the witness box. Stronger comment was permitted where the defence case involved the assertion of facts which were at variance with the prosecution evidence, or additional to it or exculpatory, and which if true, would have been in the accused’s own knowledge. The Criminal Justice and Public Order Act 1994 repealed section 1(b) of the 1898 Act. Section 35(2) requires the court to testify itself that the accused is aware that the stage has been reached at which evidence can be given for the defence, that he can, if he wishes, give evidence and that, if he chooses not to give evidence or, having sworn, without good cause refuses to answer any question, it will be permissible for the jury to draw such inferences as appear proper from his failure to give evidence or his refusal without good cause, to answer any question.”

However, the accused in a single criminal case cannot be convicted simply because he chooses to remain silent. This matter is explained under section 38 (3) of the CJPOA which states that:

“A person shall not have the proceedings against him transferred to the Crown Court for trial, have a case to answer or be convicted of an offence solely on an inference drawn from such a failure or refusal as is mentioned in section 34(2), 35(3), 36(2) or 37(2).”

In this regard, two restrictions must be met before the court can draw inferences against the accused: substantive and procedural restrictions. In terms of the substantive aspect, if, at the end of the prosecution’s case, the accused informs the court that he will provide evidence, the court must be satisfied that the accused understands his right to provide evidence and that his failure to do so may lead the court to draw an inference (Cape, 1999). Failure of

the court to establish this will prevent any inference being made against the accused. In the procedural aspect, inferences cannot be drawn against the accused if the court determines that the accused’s mental or physical condition prevents him from giving evidence in court.

In the case of *Murray v. DPP [1994]*, Lord Slynn provided clarification on the situation in which the accused chose to remain silent despite being capable of presenting evidence. Lord Slynn explained that if the accused does not provide an explanation when one exists, it may be inferred, as a matter of common sense, that no explanation is available and that the accused is guilty. However, in the case of *Regina v. Cowan, Gayle, and Ricardi [1995]*, it was decided by the Court of Appeal that the court or jury may regard the inference from failure to testify as, in effect, a further evidential factor in support of the prosecution case. It cannot be the sole factor to justify a conviction; the totality of the evidence must prove guilt beyond a reasonable doubt. Therefore, when an accused chooses to remain silent in a situation where providing evidence is expected and deliberately refrains from doing so, the court may draw an inference from their actions. This was further explained in the case of *R v. Friend [1997]*, where it was decided that:

“Accordingly, if the accused failed to give evidence at his trial following the judge’s direction to the jury that he was capable of so doing, the jury, in determining the issue of guilt, were entitled under s 35(3) to draw such inferences as appeared proper from that failure and in doing so could take account of medical or other evidence directed to that issue.”

Meanwhile, South Africa also protects the right of an accused person to remain silent during the trial. This protection is placed under Section 35(3)(h) of the South African Constitution which provides that the accused has a right to be presumed innocent, to remain silent, and not to testify during the

proceedings. However, despite the accused's right to remain silent, the risks they face are significant. Once the prosecution establishes a prima facie case against them, their silence allows the presented evidence to remain unchallenged (*S v. Scholtz and Another*, 1996). Furthermore, the failure of an accused person to testify in circumstances where he reasonably needs to testify will only strengthen the prosecution's case (*S v. Masia*, 1962). Consequently, the likelihood of conviction increases substantially. However, the court also emphasized that convictions must be based on the evidence presented rather than solely on the accused's decision to remain silent.

This contrasts with the right to silence in the United States, which is protected by the United States Constitution. In the United States, individuals have the right to remain silent, as stipulated in the Fifth Amendment. Consequently, individuals who exercise this right are protected from any adverse inferences being drawn against them (Penny, 1998). The court is prohibited from making such inferences because the right to silence is intended to shield individuals from being compelled to provide evidence that may be used against them in the trial. Therefore, individuals who choose to remain silent during a trial cannot be penalised (*Stewart v. United States* [1961]). This was further explained in the case of *Griffin v. California* [1965]. In this case, the defendant was charged with one count of murder. Throughout the trial, the defendant chose not to provide any statement refuting the charges. The prosecution contended to the jury that the defendant's silence implied an admission of guilt. However, the Supreme Court later deemed these remarks unconstitutional. Furthermore, the court asserted that no inference could be drawn from the defendant's decision not to testify during the trial. Allowing such an inference would effectively penalise the defendant for exercising their right to remain silent, thus contravening the Fifth Amendment of the United States Constitution.

## RIGHT TO A FAIR TRIAL

The right of an accused to receive a fair trial is a fundamental element of the Malaysia criminal justice system (*Hong Yik Plastics (M) Sdn Bhd v. Ho Shen Lee (M) Sdn Bhd & Anor* [2020]). This right must be upheld according to the law (*Dato' Sri Mohd Najib bin Hj Abdul Razak v. Public Prosecutor* [2023]). A fair trial is commonly understood as a trial conducted by an unbiased and impartial tribunal, following the law. It is generally associated with the principle of the rule of law. In the case of *Hong Yik Plastics (M) Sdn Bhd v. Ho Shen Lee (M) Sdn Bhd & Anor* [2020], Vernon Ong Lam Kiat JCA (now FCJ) explained the right of a fair trial as below:

“A fair trial is generally defined as a trial by an impartial and disinterested tribunal in accordance with law. The right to a fair trial is generally construed in the light of the rule of law. The right to a fair trial is also a fundamental right pursuant to art 8 of the Federal Constitution which provides for equality before the law and equal protection under the law; otherwise described as the principle of equality among citizens. In this connection, the common law has long recognized two minimum fair trial guarantees known as the principle of natural justice: (a) the principle of judicial impartiality (*nemo iudex in causa sua*); and (b) the right to be heard (*audi alteram partem*) (Jackson, 1973). The right to a fair trial has also evolved to encompass a right to access to the courts, public hearings and a hearing within a reasonable time.”

Additionally, the right to a fair trial is recognized as a fundamental right under Article 5 and Article 8 of the Federal Constitution, guaranteeing equality and equal protection before the law. In *Alma Nudo Atenza v. Public Prosecutor and another appeal* [2019], this is what the court had to say regarding the right to a fair trial:

“Accordingly, art 5(1) which guarantees that a person shall not be deprived of his life or personal liberty (read in the widest sense) save in accordance with law envisages a state of action that is fair both in point of procedure and substance. In the context of a

criminal case, the article enshrines an accused's constitutional right to receive a fair trial by an impartial tribunal and to have a just decision on the facts."

In law, the concept of 'justice' has been elucidated by Hegde J in *Krishna Murthy v. Abdul Subban [1965]*, wherein the learned judge explains that the term 'justice' encompasses not only a just decision but also a fair trial.

The concept of equality under the law is enshrined in Article 8 of the Federal Constitution. The application of this concept in the context of justice is discussed in the case of *Public Prosecutor v. Su Liang Yu [1976]*. It is explained that:

"Article 8(1) of the Constitution states that "All persons are equal before the law and entitled to the equal protection of the law." We are not concerned here with the exceptions provided in the other clauses. This article embodies a concept which is familiar in democratic constitutions. It is in fact an old concept originating probably in the 40th Article of Magna Carta ("to none will we sell, to none will we deny, to none will we delay right or justice"). This concept subsequently found expression in the forerunner of democratic constitutions -- the U.S. Constitution, in the last part of the Fourteenth Amendment which states that "No State shall deny to any person within its jurisdiction the equal protection of the laws." More recent constitutions also carried this concept for example the Indian Constitution in its Article 14 and the Pakistan Constitution in its Article 4. The Fourteenth Amendment in the U.S. Constitution is reflected in a number of articles in the Indian Constitution. Although the Fourteenth Amendment does not contain the phrase "equality before the law" as in the Indian Constitution there is in fact no significant difference as a result. As tautological as both the Indian and the Pakistan provisions our Merdeka Constitution also emerged with the provision of Article 8(1) which provision was carried in to into the Malaysian Constitution today. The dominant idea in both the expressions "equal before the law" and "equal protection of the law" is that of equal justice."

Therefore, in a criminal trial, it is necessary to ensure that the accused person

is given their rights based on the concept of the right to a fair trial. When a right is granted to the accused, they can enforce it without fear of facing negative consequences for their actions. However, if this is not the case, the right to a fair trial will certainly be compromised. For instance, if the right to remain silent during the trial is given to the accused, no presumptions can be made about their actions (*Ketheeswaran a/l Kanagaratnam & Anor v. Public Prosecutor [2024]*). Making a negative inference about the actions of an accused will violate their right to remain silent and would undermine the concept of the right to a fair trial. In criminal proceedings, it is well-established that the legal burden of proving the guilt of the accused beyond a reasonable doubt lies with the prosecution (*Public Prosecutor v. Gan Boon Aun & Anor [2012]*).

However, in Malaysia, although the accused can still choose to remain silent during a trial, doing so carries a significant risk. This is due to the amendments made to the CPC by Act A1274, which now explicitly states that if there is a prima facie case against the accused, the prosecution only needs to establish a sufficient level of proof to justify a conviction if the accused decides to remain silent. The risk of remaining silent during trial can be seen in the decision of the Federal Court in the case of *Balachandran v. Public Prosecutor [2005]*. In this case, it was decided that:

"A prima facie case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can only be overthrown by evidence in rebuttal...The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a prima facie case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court

must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established. As the trial is without a jury it is only with such a positive evaluation can the court make a determination for the purpose of s. 180(2) and (3). Of course in a jury trial where the evaluation is hypothetical the question to be asked would be whether on the evidence as it stands the accused could (and not must) lawfully be convicted. That is so because a determination on facts is a matter for ultimate decision by the jury at the end of the trial. Since the court, in ruling that a prima facie case has been made out, must be satisfied that the evidence adduced can be overturned only by evidence in rebuttal it follows that if it is not rebutted it must prevail. Thus if the accused elects to remain silent he must be convicted. The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a prima facie case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no prima facie case.”

Consequently, the right to remain silent during a trial does not provide any assistance to the accused. It is ironic that the concept of ‘rights’ typically implies principles that protect and aid the accused, but in the case of the right to remain silent during trial, a different principle applies. Thus, it is pertinent to understand the reason for the amendment to the CPC in 2007. Historically, the amendments were made to sections 173 and 180 due to the issue of prima facie. Briefly, the definition of prima facie has been an issue in Malaysia for years until the amendment made to the CPC after the case of *Arulpragasam v. Public Prosecutor* [1997] which the Federal Court of the view that there should be a maximum evaluation of the prosecution evidence at the end of the prosecution case as opposed to the minimum evaluation decided by the Privy Council in the case of *Haw Tua Tau v. Public Prosecutor* [1981]. In the Federal Court case

of *Public Prosecutor v. Mohd Radzi bin Abu Bakar* [2005], Justice Gopal Sri Ram said:

“For the guidance of the courts below, we summarise as follows the steps that should be taken by a trial court at the close of the prosecution’s case:

(i) the close of the prosecution’s case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinise the credibility of each of the prosecution’s witnesses. Take into account all reasonable inferences that may be drawn from that evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused;

(ii) ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to that question is ‘Yes’, then a prima facie case has been made out and the defence should be called. If the answer is ‘No’ then, a prima facie case has not been made out and the accused should be acquitted;

(iii) after the defence is called, the accused elects to remain silent, then convict;

(iv) after defence is called, the accused elects to give evidence, then go through the steps set out in *Mat v. Public Prosecutor* [1963] MLJ 263.”

Therefore, due to the high risk and severe consequences, we believe that maintaining the accused’s right to remain silent may no longer be suitable. Additionally, upholding this right and subsequently convicting the accused who exercises it may not align with the principles of a fair trial. Moreover, a fair trial entails not only protecting the rights of the accused but also pursuing justice. If the accused exercises their right to remain silent and is subsequently convicted, doubts may arise regarding whether their trial truly adhered to the principles of fairness and due process. This situation challenges the balance between protecting individual rights and ensuring justice for all parties involved. Therefore, while the right to remain silent is traditionally fundamental in criminal legal systems, its application and implications in modern contexts, particularly regarding the

risk of conviction, require careful consideration and possibly re-evaluation to ensure a fair trial.

#### A WAY FORWARD FOR THE RIGHT TO REMAIN SILENT DURING TRIAL IN MALAYSIA

Currently, as discussed earlier, when a prima facie case has been made against the accused, the accused is given three options to enter their defence. In the case of *Mohammad Alhalki v. Public Prosecutor [2021]*, it was decided by the High Court that:

“The accused has three options. The accused must decide on one of the three options. He may choose to give sworn evidence in the witness box where he will be subject to cross-examination. The accused may elect to give an unsworn statement from the dock where he cannot be cross-examined or that he may choose to remain silent, in which case this Court must proceed to convict the accused.”

This demonstrates that the right to remain silent during a trial does not assist the accused in evading conviction when there is a strong case against them. The fact that exercising this right can potentially result in a conviction is inconsistent with the notion of ‘rights’ from a legal standpoint. If exercising this right has an adverse impact on the accused, then it is necessary to eliminate it as it contradicts the principle of a fair trial. What kind of justice can the accused achieve by exercising this right during the trial? If this right does not provide any benefits to the accused, then it no longer aligns with the fundamental concept of a ‘right.’ If these rights do not aid the accused, perhaps it is best to abolish such a right. It is submitted that it amounts to misleading the accused with a false understanding of the concept of ‘right’ and contradicts the notion of ‘justice’ in a criminal trial. Considering the current interpretation of the right to a fair trial, it is suggested that the right to remain silent during a trial should be abolished. By doing so, once a prima facie case has been established, the accused would have only two

options to present their defence: providing a sworn statement or an unsworn statement. The Court of Appeal case of *Choon Jong Hong v. Mohd Zawawi [2018]*, Salleh JCA (as His Lordship then was) said:

“It is trite law that the appellants’ unsworn statements from the dock were evidence. However, their unsworn statements were not subject to the acid test of cross-examination. Consequently, their unsworn statements would not carry the same weight as opposed to oral evidence given by a witness under oath for which the said witness would be cross-examined.”

Despite the limited credibility of an unsworn statement, it is the responsibility of the trial Judge to carefully evaluate the statement in light of all the evidence presented. Only after doing so can the judge determine whether the prosecution has proven its case against the accused beyond a reasonable doubt. This choice provides significant benefits to the accused, as compared to remaining silent (*Public Prosecutor v. Fikri Hakim bin Kamarudin & Anor [2021]*). Thus, eliminating the right to remain silent aligns with the principle of a fair trial. As previously discussed, there are minimal advantages for the accused if they choose to remain silent during trial. The trial serves as their opportunity to refute the charges against them, and opting for silence may only reinforce the perception that only the guilty choose to remain silent. After the amendments to sections 180 and 173 of the CPC via Act A1274, choosing to remain silent is no longer the best option for the accused, as it now increases the chances of conviction (*Ahmad Najib bin Aris v. Public Prosecutor [2009]*). As a result, this right could essentially be considered obsolete and no longer in line with the right of a fair trial. This is because the essence of a criminal trial is to deliver justice by convicting the guilty while safeguarding the innocent. Therefore, the trial should prioritise the pursuit of truth over an excessive focus on technicalities. It should operate under regulations that guarantee the protection of the accused’s innocence and the appropriate punishment of

the guilty. In *Zahira Habibulla H Sheikh v. State of Gujrat* [2004], Justice Arijit Pasayat of the Supreme Court of India held that:

“Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial. A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant facts which may lead to the discovery of the fact issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not about over technicalities and must be conducted under such rules as will protect the innocent and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial, and not by an isolated scrutiny.”

## CONCLUSION

In conclusion, the argument for eliminating the right to remain silent during trial is based on a nuanced understanding of justice and fairness within our legal system. Abolishing the right to remain silent in trials would not only enhance the efficiency of legal proceedings but also provide advantages to the accused. It is no longer justifiable to uphold the right to remain silent as an unquestionable ‘right,’ as its negative consequences outweigh its positive aspects. Furthermore, maintaining the right to remain silent in a trial is no longer in line with the principles of a fair trial, as the accused is generally expected to address the allegations made against them. This is because a trial is the only place where the accused have the chance to prove their innocence without fear

of the authorities, as each trial is supervised by a judge. Furthermore, deciding to remain silent not only weakens their defence but also lets the accusations go unchallenged, possibly leading to their conviction. While some may argue in favour of upholding this right, it begs the question of what purpose it serves if its enforcement only leads to detrimental consequences for the accused. Hence, the abolition of the right to remain silent in a trial is crucial for the administration of justice, especially when considering the rights of all parties involved, particularly the accused. The right also contradicts the right to be heard, which focuses on the rights of the accused to oppose the accusations against them in trial. When the accused chooses to remain silent, they effectively forfeit their right to be heard. By waiving this right, they may inadvertently increase the risk of being convicted.

Thus, as discussed throughout this article, the right to remain silent in trial is no longer suitable to be called and maintained as a right because it doesn’t provide any benefit to the accused. Any right that doesn’t have any benefit is no longer suitable to be maintained and goes against the principles of justice and fair trial. We believe that the option for the accused to remain silent during trial should be removed.

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## CONFLICT OF INTEREST

The authors have no conflict of interest related to this publication.

## AUTHORS’ CONTRIBUTION

Both authors contributed to designing the theme, drafting the article, preparing the materials, collecting and analyzing data, and developing the article’s concept.

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