HUMAN RIGHTS COMMISSION OF MALAYSIA (SUHAKAM)

Inquiry into the arrest and detention of the 5 lawyers of the Kuala Lumpur Legal Aid Centre.

An Interlocutory Decision

Introduction

By a memorandum dated 20.5.2009 the Bar Council Malaysia had requested Suhakam to conduct a public inquiry into the arrest of the 5 Bar Council Legal Aid Centre (KL) lawyers at Brickfields police station on 7.5.2009.

On 13.7.2009, as a result of the recommendation from the Complaints and Inquiries Working Group in Suhakam the Suhakam Commission at its monthly meeting had unanimously agreed to hold a public inquiry on the abovementioned issue. The 3 members constituting the current panel was empanelled on the same day.

The Commission had decided that the inquiry into the above matter be expeditiously conducted and a limited time frame was agreed upon. Mid August 2009 was the target set for the commencement of the public inquiry into this matter.

The terms of reference of the inquiry are:-

1. To determine whether the arrest and detention of the five KL LAC lawyers by the police at the Brickfields Police Station on May 7 2009, constitute a denial of legal representation and a contravention of Article 5 of the Federal Constitution and Section 28A of the Criminal Procedure Code (CPC) and therefore a violation of human rights;

2. To determine whether there was any justification or necessity to arrest and detain the KL LAC Lawyers under section 27 of the Police Act 1967 and therefore a violation of human rights;

3. If violation of human rights occurred, to determine:-

    i) which person or agency was responsible;

    ii) how did such violations occur;

    iii) what administrative directives and procedures, or arrangements contributed to them and

    iv) what measures should be recommended to be taken to ensure that such violations do not reoccur.

The public inquiry commenced on the 14.8.2009. After the initial introductory remarks by the Chairman of the Panel of Inquiry, witnesses from the Bar were immediately sworn in to testify. The inquiry continued on the 15th and 16th August 2009. Thereafter the Panel had fixed the continuation of the public inquiry on the 29.8.2009. On that morning, apart from the normal housekeeping directions by the Chairman, a matter arose with regards to the fact that most of the police witnesses had refused to give authenticated written statements or any written statements at all.

By way of background we need to mention that on the commencement date of the public inquiry the Chairman of the Panel had disclosed the

fact that due to constraint of time and the inefficient communication between the police and the Suhakam investigating officers, the written statements of the police personnel had not been recorded thus far. However, almost all the statements of witnesses from the Bar and certain journalists had been recorded by 14.8.2009 by Suhakam investigating team.

The police officers appearing on behalf of the police had informed the Panel that the relevant police officers were in fact providing their written statements to Suhakam investigating officers on the upper floor of Suhakam premises simultaneously to the public inquiry that was proceeding. For all intents and purposes everyone participating at the public inquiry was under the impression that the recording of statements from the relevant police officers was being conducted smoothly. However the Panel of Inquiry was officially informed by Suhakam investigating officers early in the morning of 29.8.2009 that almost all the relevant police officers had refused to provide written authenticated statements. In a few instances written statements were provided by police officers who had however refused to authenticate them.

When this fact was fully disclosed to all present on the morning of the 29.8.2009 at the continuation of the public inquiry Mr M Puravelan who was representing the Kuala Lumpur Legal Aid Centre had taken the objection as to the failure of the relevant police officers in providing written statements to Suhakam. Mr Puravelan argued that such refusal by the police would cause unfairness in the conduct of the public inquiry as the police could approbate and reprobate their testimony in accordance with what they would possibly learn from the evidence as it unfolded through the witnesses of the Bar. Mr Puravelan further submitted that he

was totally misled by the police into thinking that authenticated written statements by the relevant police witnesses would have been recorded. Mr Andrew Khoo representing the Bar Council supported and adopted Mr Puravelan's contention.

Supt Munusamy representing the police then informed the Panel that he too was not aware that the police officers had actually refused to give authenticated written statements or any statements at all to Suhakam investigating officers as required of them by Suhakam. He however maintained that there was no intention on the part of the police to mislead. Given the situation, the Panel had decided, after getting the views of all parties, to hear full submissions on this objection from all parties on 2.9.2009.

<u>Hearing on the 2.9.2009 on the interlocutory issue</u>

Arguments advanced by the Bar Council KL Legal Aid Centre and Bar Council Malaysia were as follows:-

a) that the Police had given a commitment to have their statements recorded by Suhakam officers (as part of Suhakam's investigation) prior to hearing the lawyers testimony at the hearing proper.

b) that as a result of the representation by the Police the counsel representing the KL Bar Legal Aid and the Bar Council were misled.

c) Further the KL Bar Legal Aid and Bar Council felt that it would be advantageous to the Police and prejudicial to the Bar's case if the Police are allowed to listen to the Bar's case without the Police "staking" their case in writing before hand. This they argue would

allow the Police to approbate and reprobate their case as the evidence from the Bar unfolded.

d) They argue that s.14 read with s.15 of Suhakam's Act 1999 are wide enough to confer power on Suhakam to compel the recording of all witness statements (including the Police witnesses) in a pre-investigation before the hearing proper at the Inquiry. In particular they stressed on the words "shall", "power", "procure" and "receive" in s.14(1)(a) of the Act as indicative of the presence of these powers.

e) Further they contend that apart from the express power earlier mentioned, there are implied powers of the same nature under ss. 40 and 95 of the Interpretations Act 1948 and 1967 read with s.14 of the Suhakam Act.

f) the Bar Council further argued that such investigative powers of Suhakam commissioners can be delegated to their officers by virtue of ss. 16 and 17 of the Suhakam Act. Therefore a request by an officer of Suhakam for statements to be recorded in an investigation is lawful and must be adhered to.

Argument by the Police

a) The Police on the other hand argued that the Suhakam Act is unclear. They submitted that while s.14 seems to indicate the existence of such powers, in reality it does not confer those powers. They invited us to consider the contrast in the scheme of the Commission of Enquiry Act 1950 (hereinafter the "1950 Act").

(Section 8 of the 1950 Act is in pari materia to s.14(1) of Suhakam Act). However, they argue that s.8 of the 1950 Act seems to require the aid of a separate section 16 of the 1950 Act to repose such powers of recording statements in a pre-investigation to a Commission of Enquiry. They therefore contended that if s.8 of that Act requires the aid of s.16 in order to arrogate to the Commissioners in the 1950 Act such investigative powers, then section 14 of the Suhakam Act standing by itself could not have that very power of investigations.

b) The Police felt that at most Suhakam can only "interview" witnesses on a voluntary basis without powers of compulsion and the case of ***Subramaniam Vythiligam v Human Rights Commission Malaysia [2003] 6 CLJ 175*** was cited in support.

Issues before the Panel of Inquiry:-

Having considered the parties' respective arguments we consider the following to be the relevant issues:-

a) whether the Suhakam Commission has the power under the Human Rights Commission Act 1999 (Act 597) to compel witnesses to have their statements recorded and affirmed for purposes of being used subsequently at the hearing in the Inquiry?

b) in the event witnesses refuse to allow their statements to be recorded, are there available remedies or powers of enforcement with Suhakam to discourage such refusal with threats of legal consequences?

The Panel's findings and opinion

1. **S.14** of the Suhakam Act is clear. It allows 2 types of inquiries. One is the investigative sort of inquiry without a public hearing (closed investigations). A Closed investigation is conducted mainly by interview and recording of statements of witnesses and reception of documentary and other exhibits. When a public inquiry becomes necessary Suhakam's panel of Inquiry would be at liberty to use the closed inquiry statements of the interviews and exhibits for purposes of the hearing of witnesses viva voce.

2. There are times that certain factual scenarios may demand Suhakam to declare that it would undertake a public inquiry on a certain issue on an expedited basis. If this were to happen Suhakam can then set a time period for purposes of conducting the closed investigation prior to the actual public hearing in the inquiry. This is in fact the case in this inquiry.

3. The wordings in s.14(1)(a) of the Suhakam Act seem to provide a support for both the closed and open inquiry mechanism.

Section 14(1)(a) of the Suhakam Act reads as follows:-

"14. Powers relating to inquiries

(1) The Commission shall, for the purposes of an inquiry under this Act, have the power -

(a) to procure and receive all such evidence, written or oral, and to examine all such persons as

witnesses, as the Commission thinks necessary or desirable to procure or examine."

The above sub-section in no uncertain terms declares that Suhakam has the power:-

i) to procure and receive all such evidence;

ii) the evidence to be either written or oral;

iii) to examine all such persons as witnesses;

iv) as Suhakam thinks necessary or desirable to procure or examine.

It would seem that the powers granted to Suhakam under this sub section are manifold. The phrase procure and receive all such evidence would suggest the mechanism of investigation to be undertaken by Suhakam. The ordinary meaning of **procure** in the ***Oxford English Dictionary (2nd Edition) Vol. XII*** is:-

"3. to contrive or devise with care (an action or proceeding)"

"5. *to obtain by care or effort;*

to gain, win, get possession of, acquire. (now the leading sense)"

"6. *to prevail upon, induce, persuade, get (a person) to do something*."

"To contrive on the other hand means to discover (the answer to a problem etc); find out" (See The New Shorter Oxford English Dictionary (on historical principles) Vol.1)

In ***Black's Law Dictionary 8th edition***, "**procurement**" means

"*1. the act of getting or obtaining something. – also termed procuration.*"

The meaning of "**procure**" suggests some kind of interview and/or interrogation of potential witnesses in order to uncover or discover the answer to a particular issue.

When these answers are uncovered they are then received by the interrogator as evidence.

This mechanism is to be contrasted with the other mechanism of examining witnesses which seems to suggest a more formal setting in a tribunal like situation.

In ***Words, Phrases & Maxim Legally Defined by Anandan Krishnan 2008 Edition,*** "to examine" means:-

to formally interrogate a witness or an accused person;

to test critically

Similarly in ***The New Shorter Oxford Dictionary Vol. 1 (1993),*** the word "**examine**" is given the meaning

"5. interrogate formally (especially a witness or an accused person). Formerly also, investigate the guilt or innocence (of an accused person)."

The phrase "written or oral" in the said sub section is most telling as it suggests that a written testimony suggested to be used before the Panel of Inquiry would have to be undertaken earlier through a separate process altogether, either through the investigative mechanism or recording by one's own solicitor.

One need also take into consideration the overall meaning of "inquiry". In the Indian Supreme Court case of ***Real Value Appliances Ltd v Canara Bank & Others [1998] 5 SCC 554*** at page 566, the Supreme Court resorted to the meaning of "inquiry" as provided in the New Standard Dictionary as including "investigation" into facts, causes, effects and relations generally; "to inquire", according to the same dictionary means "to exert oneself to discover something". Chambers 20th Century Dictionary lays down that the meaning to the term "inquiry" among others is given as "investigation".

Quite clearly therefore in our opinion the mechanism of inquiry in the context of s.14(1)(a) of the Suhakam Act encompasses two separate procedures:

a) a closed investigation for purposes of uncovering and discovering facts in issue;

b) a formal public inquiry which necessitates the process of hearing witnesses in a tribunal like situation.

We feel justified in interpreting this sub section in this manner because one can hardly imagine a public inquiry being undertaken without recorded statements of witnesses being provided earlier to the Panel to facilitate the navigation of questions to be posed by the Panel to the witnesses.

Cases are replete with the suggestion that it is a necessity to have prior recorded statements of witnesses before an official public inquiry is embarked upon.

For instance, in **R(D) v Secretary of State for the Home Department (Inquest intervening)** [2006] 3 All ER 946, at pg 956, Sir Anthony Clarke MR at the Court of Appeal said:-

> "*…No inquiry is ever wholly in public. Thus for example the police investigate a death and report to the Coroner. Their investigation is not in public. Nor is the preliminary process of obtaining evidence, including witness statements in any public inquiry….*"

In **Mohon v Air New Zealand** [1984] 3 All ER 201 at pg 205, Lord Diplock sitting in the Privy Council said:-

> "*…At that stage it was contemplated that the parties represented should furnish the counsel assisting the judge written briefs of the*

evidence to be given by their witnesses and that this should be done well in advance of those witnesses being called, so as to enable the evidence to be collated and, if need be, elaborated…"

The above underscores the importance of a prior statement to be made available to a commissioner/coroner to facilitate his inquiry.

Another case that illustrates the need of a private inquiry (ie recording of witness' statements) is the case of **Regina (Wagstaff) v Secretary of State for Health** [2001] 1 WLR 292 (QB Division) at pg 322 where the Court opined:-

> " *But the taking of a statement from a lay witness dealing with facts possibly some time ago and covering a substantial period of time is a skilled art; so is the eliciting of evidence on the basis of such a statement, and in each case it is a lawyer's art. If, after questionnaires have been completed, the solicitor to the inquiry were to take statements from those witnesses who might be called, he or she would be able to follow up useful leads; and if counsel to the inquiry were to examine witnesses when called, their evidence could be properly tested against evidence coming from other sources. The members of the inquiry panel would then have a better opportunity to receive the information and to assess it without entering into the arena, and it is unlikely that significant extra costs would be involved. An alternative would be to instruct the solicitor already acting for the families to prepare their statements and to appeal on their behalf.*"

This case also brings to attention the advantages of a public hearing with a prior recorded statements of witnesses. At pg 319, it is stated:-

> "*There are positive known advantages to be gained from taking evidence in public, namely: (a) witnesses are less likely to exaggerate or attempt to pass on responsibility; (b) information becomes available as a result of others reading or hearing what witnesses have said; (c) there is a perception of open dealing which helps to restore confidence; (d) there is no significant risk of leaks to distorted reporting.*"

See also:-

Regina (Amin) v Secretary of State for the Home Department (House of Lords) [2003] UKHL 51; [2004] 1 AC 653.

The above opinion that we have expressed on the interpretation of s.14(1)(a) of the Suhakam Act is an analysis of the express powers of Suhakam in an inquiry under s.14. However should we be wrong in our opinion pertaining to the express power, we are also relying in the alternative that there are ample implied powers within the meaning of s.40 and 95 of the Interpretation Acts 1948 & 1967 read with section 14 of the Suhakam Act.

N S Bindra's Interpretation of Statute 9th Edition, at page 1293 says the following;

"The doctrine of Implied Powers is embodied in the maxim 'Quando lex aliquid alicue concedit concediture et id sine quo res ipsa esse non

potest.' Its full and true import is set out in the judgment in the case of ***Fenton v Hampton*** (11 Moo PCC 347) as follows:

> " *Whenever anything is authorised and especially if, as matter of duty, required to be done by law, and it is found impossible to do that thing unless something else not authorised in express terms be also done, then that something else will be supplied by necessary intendment. But, if, when the maxim comes to be applied adversely to the liberties or interests of others, if it be found that no such impossibility exists, that the power may be legally exercised without the doing that something else, or even going a step further, that it is only in some particular instances, as opposed to its general operation that the law fails in its intention unless the enforcing power be supplied, then, in any such case, the soundest rules of construction point to the exclusion of the maxim, and regard the absence of the power which it would supply by implication as a cassus omissus.*"

In other words, when any power or control is expressly granted, there is included in the grant, to the full extent of the capacity of the grantor and without special mention, every power and every control the denial of which would render the grant itself ineffective. Where an Act confers jurisdiction it impliedly also grants the power of doing all such acts or employs such means as are essentially necessary to its execution. This is, in truth, not a doctrine of any special system of law, but a statement of a necessary rule of construction of all grants of power, whether by unwritten Constitution, formal written instrument, or other delegation of authority and applies from the necessity of the case to all to whom is committed the exercise of powers of government."

Sections 40 and 95 of the Interpretation Acts 1948 & 1967 respectively reads as follows;

"***40. Implied powers***

(1) Where a written law confers a power on any person to do or enforce the doing of any act or thing, all such powers shall be understood to be also given as are reasonably necessary to enable the person to do or enforce the doing of the act or thing.

(2) Without prejudice to the generality of sub section (1)-

(a) power to make subsidiary legislation to control or regulate any matter includes power to provide for the same by licensing and power to prohibit acts whereby the control or regulation might be evaded;

(b) power to grant a licence, permit, authority, approval or exemption includes power to impose conditions subject to which the licence, permit, authority, approval or exemption is granted; and

(c) where a power is conferred on any person to direct, order or require any act or thing to be done, there shall be deemed to be imposed on any person to

whom a direction, order or requisition is given in pursuance of the power a duty to comply therewith"

"Section 95. Construction of enabling words.

(1) *where a written law confers power on any person to do or enforce the doing of any act or thing, all such powers shall be understood to be also conferred as are reasonably necessary to enable the person to do or enforce the doing of the act or thing.*

(2) *Without prejudice to the generality of the foregoing-*

(a) *power to control or to regulate any matter includes power to provide for the same by the licensing thereof and power to prohibit acts whereby the control or regulation might be evaded;*

(b) *power to grant a licence, permit, authority, approval or exemption includes power to impose conditions subject to which the licence, permit, authority, approval or exemption is granted."*

Siti Norma Yaakob J (as she then was) in ***Bank Pusat Kerjasama Berhad (in receivership) v Mahkamah Perusahaan & Anor [1994] 4 CLJ 341***, had occasion to invoke s.40 of the Interpretation Act 1967 and held that when interpreting an enabling section resort to section 40 for necessary implied

powers should be undertaken. She adopted Hashim Yeop Sani J's (as he then was) decision in ***Lee Wah Bank's case [1981] 1 MLJ 169*** when the learned judge construed such powers:

> *"these are powers which are necessarily implied and nothing more. Since the Industrial Court is a creature of the Industrial Relations Act 1967, its powers must be discovered only from the four corners of the Act – expressly or by necessary implication."*

In the ***AG of The Gambia v Momodou Jobe [1984] AC 689***, Lord Diplock had occasion to comment on matters pertaining to implied or inferred powers in a legislation:

> "...where, as in the instant case, omissions by the draftsman of the law to state in express words what, from the subject matter of the law and the legal nature of the processes or institutions with which it deals, can be inferred to have been Parliament's intention, a court charged with the judicial duty of giving effect to Parliament's intention, as that intention has been stated in the law that Parliament has passed, ought to construe the law as incorporating, by necessary implication, words which would give effect to such inferred intention, wherever to do so does not contradict the words actually set out in the law itself and to fail to do so would defeat Parliament's intention by depriving the law of all legal effect."

In another Canadian case ***Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy) [1995] 2 SCR 97***, the Court there held:-

> "Courts should give a generous interpretation to a Commissioner's power to control his or her own proceedings under the Nova Scotia Act. The Commissioner must be responsible for ensuring that the hearings are as public as possible yet still maintain the essential rights of the individual witnesses. It is the commissioner who will first determine whether exceptional orders should be issued. The authority to make these orders derives from and relates to the conduct of the inquiry hearings and should be given a reasonable and purposeful interpretation in order to provide commissions of inquiry with the ability to achieve their goals."

It is therefore our opinion there are clearly implied powers in s.14 of the Suhakam Act for us to construe that the word 'inquiry' encompasses the two mechanism of interview and recording of statement on one hand and the public hearing on the other.

Supt Munusamy's reliance on Subramaniam Vythilingam v The Human Rights Commission of Malaysia (Suhakam) & Ors [2003] 6 CLJ 175 at 224, 225 is misplaced. He contended that since the Judge in that case referred to the recording of statements from witnesses by Suhakam investigating officers as merely "interviews", it is a far cry from having the power to compel and record statements of witnesses, especially police witnesses.

Firstly we take note that for every recording of a witness statement there must surely be an interview preceding that or simultaneously conducted. The word 'interview' in the judgment therefore does not help and resolve the current issue before this Panel. In any case the Learned Judge therein could have used the word 'interview' by adopting certain averments by parties in their respective affidavits. By the same token, one could also

have argued that since the Learned Judge had used the phrase investigating officers of Suhakam then there must be powers of investigation by Suhakam, including interview and recording of statements of witnesses. Such tenuous argument in either situation cannot hold water.

Supt Munusamy of the Police further raises the point that if one were to compare the similar wording in s.8(a) of the Commission of Enquiry Act 1950 to s.14(1)(a) of the Suhakam Act the wordings are identical. And yet he argues, there exists a separate s.16 in the 1950 Act wherein the commissioner or commissioners in an inquiry under the 1950 Act may require the public prosecutor to cause any matter relevant to the inquiry to be investigated. In particular s.16(2)(a) empowers the Public Prosecutor to appoint any person to investigate any such matter who shall "for the purposes of the investigation, have all the powers in relation to police investigations given to police officers in any seizable case under the provisions of Chapter XIII of the Criminal Procedure Code (FMS Cap 6), …."

Supt Munusamy therefore argues the fact that in the Commission of Inquiry Act 1950 the legislature had deemed it necessary to provide separately a distinct power of investigation to a designated person and this implies that in the absence of similar provisions in the Suhakam Act, s.14(1)(a) alone, standing by itself, could not be the authority for an express or implied enabling power to record an authenticated statement or any statement from witnesses, including police witnesses. At first glance, Supt Munusamy's argument seems to have force and is attractive. But on critical analysis of the two legislation the following distinctions must be drawn:-

(a) Suhakam was created under the Human Rights Commission of Malaysia Act 1999 (Act 597) to be a permanent independent commission for the protection and promotion of human rights in Malaysia. It is not an ad-hoc body. Section 3(2) of the Suhakam Act creates Suhakam "…as a body corporate having perpetual succession and common seal, which may sue and be sued in its name and, subject to and for the purposes of the Suhakam Act, may enter into contracts and may acquire, purchase, take, hold and enjoy movable and immovable property of every description…"

For purposes of discharging its functions a maximum of 20 commissioners are allowed to be appointed (s.5(1)). There is a permanent secretary to the Commission being appointed under s.16(1) and permanent officers and servants of the Commission that the Commission may appoint as may be necessary to assist the Commission to discharge its function under the Act. Further s.17 of the Suhakam Act allows the Commission to delegate to any of its officers any of its powers and the officers to whom such powers are delegated may exercise those powers subject to the direction of the Commission. Section 17 is important in relation to the activities of Suhakam officers conducting interviews and recording statement of witnesses under s.14(1)(a) of the Act. This must surely be lawful delegated duties.

On the other hand, the commission formed under Commission of Enquiry Act 1950 are not permanent bodies,

they are ad-hoc in nature, being formed for purposes of a particular requirement at the time. Section 2 of the Commission of Enquiry Act 1950 clearly provides that the Yang di-Pertuan Agong may, where it appears to Him to be expedient so to do, issue a Commission appointing one or more Commissioners and authorizing the Commissioners to enquire into the conduct of any federal officer, the conduct of any management or department of the public service or public institution etc etc. (see also s.2(3) in relation to the State Authority appointing the State Commissions of Inquiry). Section 3 of the same Act provides the period for which the Commission shall hold its inquiry and to render its report thereof. And section 5 empowers the Yang di-Pertuan Agong or the State Authority to enlarge the time for the execution of the Commission of its ad-hoc duty. Section 21 of the Suhakam Act enacts that Suhakam shall submit an annual report of its activities to Parliament and that Suhakam may, when it considers necessary, submit special reports to Parliament. It is not responsible to any other body or bodies.

(b) because of the aforesaid, it is not strange for the Commissions of Enquiry Act 1950 to provide for assistance of another body like the Public Prosecutor or the police to aid the ad-hoc commissioners in their duties at the specific inquiry as such Commissions of Inquiry do not have their own permanent establishment, officers, staff or facilities. Suhakam on the other hand is an independent body, self sufficient, complete with its permanent premises, budget, commissioners, officers and staff to man the duties imposed by law under the Suhakam

Act. The Suhakam Act therefore does not require the aid of the equivalent of s.16 of the Commissions of Enquiry Act 1950. Both sections 14(1)(a) of Suhakam Act and s.8 of the Commissions of Enquiry Act 1950 confer power to the respective bodies to conduct the dual mechanism of inquiry, namely, closed investigation and open public hearing. Suhakam is able under the Act to conduct both functions independently without resort to any outside help. This is important to Suhakam as it needs to preserve its independence. The Legislature in its wisdom has created Suhakam as such. On the other hand, the Commissions of Enquiry under the 1950 Act, although similarly empowered as Suhakam to conduct interview and to record statements from witnesses are however handicapped in their facilities, officers and staff. It is for that reason, s.16 was specially crafted in the Commissions of Enquiry Act 1950 to bridge such handicap of the Commissions of Enquiry.

(c) The Suhakam Act being a human rights statute created by the Legislature for the protection of fundamental liberties of persons and citizens under Part II of the Federal Constitution (defined as Human Rights) is a statute sui generis, akin to that of the Constitution and its provisions must be interpreted liberally and not pedantically with a view to advancing its objects. This is to be contrasted from the normal legislation in the Commissions of Enquiry Act 1950 (the subject matter of interpreting the Suhakam Act sui generis will be dealt with later in this opinion.)

Therefore all enabling powers in the provisions of the Suhakam Act must be construed widely to incorporate necessary implied powers to ensure the effective operation of Suhakam as the guardian and custodian of human rights.

Section 18(4) of the Suhakam Act declares that such Chapters in the Penal Code shall apply to the commissioners, officers and servants of the Commission as if they are public servants within the scheme in those Chapters. The impact of s.18(4) is monumental. In effect, since we have opined that we have the powers to compel the recording of statements of interviews of witnesses be they civilians, police officers or otherwise, non compliance with such lawful directions of Suhakam's Commissioners or officers would attract the sanctions in those two Chapters of the Penal Code. For instance, s.179 of the Penal Code (falling within Chapter X) states:-

> *"Whoever, being legally bound to state the truth on any subject to any public servant, refuses to answer any question demanded of him touching that subject by such public servant, in the exercise of the legal powers of such public servant, shall be punished with imprisonment for a term which may extend to six months, or with fine which may extend to two thousand ringgit, or with both."*

The above provision creates an offence to any person who refuses to answer any question demanded of him such as in an interview for the recording of a statement by Suhakam Commissioners or officers and such an offence attracts a punishment with imprisonment which may extend to six months or with fine which may extend to two thousand ringgit or with both. Interestingly, following that section, section 180 of the Penal Code

creates an offence for any person who refuses to authenticate the statement required of him in that interview. This offence carries a term of imprisonment of a maximum of three months or with fine which may extend to one thousand ringgit or with both.

However, where witnesses are called to testify at the hearing of the inquiry, there are adequate safeguards incorporated under sections 15(1) and 15(2) of the Suhakam Act. No self incriminating statements or testimony can be used against a witness in any other proceedings.

Provisions in Chapters IX and X in the Penal Code read with section 18(4) of the Suhakam Act and sections 40 and 95 of the Interpretation Acts 1948 and 1967 are meaningful in two respects ;

(i) They enhance and support our interpretation of the powers of Suhakam such as that in section 14(1)(a) of the Suhakam Act;

(ii) As they are enforcement mechanisms in Chapters IX and X of the Penal Code available to Suhakam, its Commissioners or officers have at their disposal powers to compel witnesses to provide authenticated statements in an interview. We realize however, the powers of enforcement in the two Chapters in the Penal Code do not lie with Suhakam;

(iii) Suhakam would have to be a complainant in a police report to investigating agencies for purposes of initiating action to be taken against the recalcitrant witnesses;

(iv) Suhakam's Act does not provide us with contempt powers as compared to the contempt powers available in the Commissions of Enquiry Act 1950.This we recognize. Perhaps the Legislature would consider granting us such

contempt powers to enable us to conduct public inquiries more effectively. We see no relevance or impact on our interpretation of section 14 to the fact that we do not have powers for contempt.

The Suhakam Act *"sui generis"* interpretation

The starting point to interpreting legislation on Human Rights lies in the Hallmark decision by Lord Wilberforce in **Minister of Home Affairs and anor v Collins Macdonald Fisher and anor (1980) AC 319**

Although the question in that case turned on interpretation of the Constitution of Bermuda we are more concerned ,however with the second principle enunciated in that case, ie that Human Rights instruments should be treated " ***sui generis"*** as well.

In **Law Society of Lesotho v Prime Minister of Lesotho (1986) LRC 481,** the point was made that although the Human Rights Act ,though in terms not a constitutional instrument, was similar to one and should be interpreted ***sui generis*** following Fisher's case. (**See page 499 paragraphs a-c** and **See pages 497-499)**

It was very clearly stated in Fisher's case that

> ***"….A Constitution is a legal instrument giving rise,amongst other things,to individual rights capable of enforcement in a court of law.Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language.It is quite consistent with this,and with recognition that***

rules of interpretation may apply.to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument,and to be guided by the principle of giving full recognition and effect to those <u>fundamental rights and freedoms</u> with a statement of which the Constitution commences".
<u>(See page 329 , paragraphs E-F)</u>

<u>Quasi-constitutional effect of human rights legislation,an alternative view</u>

The reason why Constitutional interpretation principles are equally applicable to Human Rights legislation is because of the quasi Constitutional effect and nature of Human Rights Legislation. (See **Gould v Yukon Order of Pioneers (1996)LRC 72** where this is stated at page 111 paragraph "b" following the case of <u>Robichaud v Canada Treasury Board (1987) 2 SCR 84 at 89).</u>

In **Gould v Yukon Order of Pioneers (1996)LRC 72** it was held that Human Rights legislation should be interpreted purposively so as to advance its objects by giving it a fair, large and liberal interpretation.It was also well established that a true purposive approach considered the wording of the statute itself,with a view to discerning and advancing the intent of the legislature.
(See page 73 paragraph d ,page 80 paragraph e page 80 paragraph I page 111 paragraph b-d)

Human Rights instruments such as the Universal Declaration of Human Rights (UDHR 1948) has been incorporated into our domestic legislation by virtue of section 4 (4) of our Human Rights Act and it has found its way into the portals of our Malaysian courts . See the case of **Kerajaan Negeri**

Selangor & Ors v Sagong Tasi & Ors [2005] MLJ 6289 where the following was stated by Gopal Sri Ram JCA in the Court of Appeal

"It is therefore fundamentally a human rights statute. It acquires a quasi constitutional status giving it pre-eminence over ordinary legislation. It must therefore receive a broad and liberal interpretation".
(See paragraph 20 at page 304)

Dickason v University of Alberta [1992] 2 SCR 1103 at p 1154 was also quoted in the Sagong Tasi case (paragraph 23 and 24 st page 305) where <u>L'Heureux-DubeJ said J</u>

"In order to further the goal of achieving as fair and tolerant a society as possible, this Court has long recognised that human rights legislation should be interpreted both broadly and purposively. Once in
place, laws which seek to protect individuals from discrimination acquire a quasi-constitutional status, which gives them pre-eminence over ordinary legislation.

Now, although L'Heureux-Dube J (speaking for herself and McLachlin J) was in dissent on the final outcome of the case, she was in agreement with the majority who, speaking through Cory J, held that:

In the construction of human rights legislation, the rights enunciated must be given their full recognition and effect, while defences to the exercise of those rights should be interpreted

narrowly."

(paragraphs 23 and 24 at page 305)

Conclusion and Directions

The following are our conclusions and directions:-

1. The Suhakam Act, being a human rights statute stands close to legislations such as the constitutions. It ought to be treated sui generis attracting interpretations of its provisions in a liberal, fair and large fashion.

2. Section 14(1)(a) grants Suhakam with the power of recording statements of witnesses, whether they are civilians or police officers.

3. These witnesses are obliged to provide written and authenticated statements if and when requested to by Suhakam. In this context, we would suggest that in future proper notices are issued to witnesses for purposes of interview and recording of statements. The notice must quote the empowering provisions of Section 14(1)(a) and the consequent sanctions under Chapter IX and X of the Penal Code must equally be quoted to bring to notice of the witnesses of the peril of non-compliance.

4. We therefore direct the relevant named police officers who have been subpoenaed to appear before us to provide written statements of their interview with Suhakam officers. As this inquiry is urgently being conducted we further direct that these statements

must be recorded and authenticated before the 19th September 2009 (7 clear days).

Epilogue

Mr Puravelan's concern that if the inquiry were to proceed without Police witnesses statements having been recorded earlier by Suhakam his clients would suffer prejudice almost irreparable in nature. Whilst we agree that it is only fair that all witnesses, including police witnesses, should have given their statements in writing to Suhakam, we will not take the position that without such statements from Police witnesses the case of the affected members of the KL Legal Aid Centre would necessarily suffer prejudice. We say this because of the following:-

a) this is an inquiry, not an adversarial hearing. The control of the proceeding does not lie with any particular party or parties. The Panel would control the proceeding and would make the necessary directions in order to defeat any prejudice real or apparent;

b) In all previous public inquiries by Suhakam, except for one or two, Police witnesses have not come forward to provide recorded statements. In spite of that, every single public inquiry Suhakam has conducted did not show any signs of prejudice having taken place to any particular party or parties.

c) But we do recognize the observation made in certain cases that with recorded statements before us we could test the veracity of particular witnesses in a better light as we would have the

advantage of comparing the witnesses' testimonies to their recorded statements.

d) We have in our arsenal various techniques that we could employ to set off this apparent unfairness that may be prejudicial. We could for instance make observations of these facts when we evaluate the credibility of witnesses. On the other hand, counsel appearing before us would be able to employ strategic modes of cross examinations in eliciting the truth from fiction and therein achieve the balance in the apparent "inequality of arms".

Dated this 11th day of September, 2009

Commissioners

…………………………………………………………………..
Dato' Muhammad Shafee Abdullah (Chairman)

……………………………………………………
Datuk Dr Michael Yeoh Onn Kheng

………………………………………………
Datuk Dr Denison Jayasooria