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RECENT (NON-) DEVELOPMENTS IN AN ARRESTED PERSON'S RIGHT TO COUNSEL

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The right of an arrested person to consult a lawyer has long been in contention. An especially contested issue is the point of time from which such access is constitutionally mandated. Part II contains an analysis of the recent judgments of the High Court and Court of Appeal on this topic. It examines the soundness of legal reasoning and interpretation at both levels. Part III enters into broader discussion. It explores alternative interpretations of the relevant constitutional provision, considers the fairness of the way in which the law has been applied, makes comparisons with the legal positions taken elsewhere, and reflects on principles in the administration of criminal justice that ought to shape our attitude towards this basic right.**

I. INTRODUCTION

Few things can matter more to a defence lawyer than the ability to advise his client at the greatest moment of need. The greatest moment of need is the moment of greatest vulnerability. This is when the client is arrested by the police and detained in a usually hostile environment. He is alone against a vastly more powerful adversary, interrogated on matters the legal significance of which he may not be fully aware. To prevent the lawyer from gaining access to his client so that he may advise him on the law and on his legal rights, in a situation where his liberty or even life may be at stake, would appear to be a fundamental failure of criminal justice. It is therefore easy to see why there exists art 9(3) of the *Constitution of the Republic of Singapore*.[1] This provision guarantees in language that cannot be simpler that any person, "where… arrested,… shall be allowed to consult and be defended by a legal practitioner".[2]

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1 *Constitution of the Republic of Singapore* (1999 Rev Ed) [*Constitution*].

2 For a useful and detailed study of this right, see Michael Hor, "The Right to Consult a Lawyer on Arrest" (1989) CLAS News No 3, 4 and "The Right to Consult a Lawyer on Arrest—Part 2" (1989) CLAS News No 4, 4.

You would think this means what it says. But the reality is quite different. Normally, access to counsel is allowed not upon arrest, but only much later.

Over the years, there have been persistent calls to treat more seriously than we now do this constitutional right. This culminated in a recent challenge to the current position.[3] Since things have been happening, one can say that there have been developments. But the challenge came to nothing. The Court of Appeal has reaffirmed the status quo, or so it seems. In this sense, it is also correct to say that there has been no development—hence the title of this essay. Part II analyses the case in question. This case is used in Part III as a springboard for broader reflections on the right in art 9(3) and criminal justice in general. Along the way, some difficulties, even ironies, in the law and practice on the right to counsel of an arrested person will be highlighted.

II. *James Raj s/o Arokiasamy v Public Prosecutor*

A. *The Facts*

This case drew considerable attention because it involves allegations of a number of high profile hackings into government-related and other websites.[4] Mr James Raj Arokiasamy was arrested on the 4th of November 2013. The day after his arrest, Mr Raj was brought before the State Courts (then known as the Subordinate Courts).[5] He was initially charged under the *Misuse of Drugs Act*.[6] Further charges, including multiple charges under the *Computer Misuse and Cybersecurity Act*,[7] were added at later hearings.[8] On the occasion of the first mention on 5th November, the prosecution applied to have him remanded for one week to enable further investigation to be carried out. The court granted the application. Mr Raj did not have legal representation.

On the 11th of November, about a week after his arrest, a lawyer asked to see Mr Raj after having been contacted by an acquaintance of the latter. This request was rejected by the police. On the following day, Mr Raj was again brought before the State Courts. The prosecution sought an order for him to be remanded at the Institute of Mental Health for psychiatric evaluation. The hearing was ordered to be adjourned to the afternoon. Mr Raj's lawyer sought leave from the court to speak to his client for five minutes during the adjournment. This request was turned down.

When the hearing resumed in the afternoon, the district judge granted the order sought by the prosecution. The court also ordered that access to Mr Raj should be denied to all third parties, including his counsel, while he was being remanded at

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3 *James Raj s/o Arokiasamy v Public Prosecutor* [2014] 2 SLR 307 (HC) [*James Raj s/o Arokiasamy HC*]; [2014] 3 SLR 750 (CA) [*James Raj s/o Arokiasamy CA*].

4 *Ibid.*

5 Article 9(4) of the *Constitution* requires that a person be brought before a Magistrate within 48 hours of his arrest. See also s 68 of the *Criminal Procedure Code* (Cap 68, 2012 Rev Ed Sing) [*CPC*].

6 Cap 185, 2008 Rev Ed Sing.

7 Cap 50A, 2007 Rev Ed Sing.

8 See Francis Chan, "Man who allegedly calls himself 'The Messiah' is a drug offender on the run" *The Straits Times* (13 November 2013), Ng Jun Sen, Chai Hung Yin & Shaffiq Alkhatib, "Not so anonymous any more? Man believed to be 'The Messiah' arrested in KL, charged here" *The New Paper* (13 November 2013) and Elena Chong, "Alleged hacker faces over 100 fresh charges" *The Straits Times* (26 August 2014).

the Institute of Mental Health. The next day, on the 13th of November, the defence counsel applied to the High Court for a declaration in the following terms:[9] first, that there was an immediate right to counsel upon request by a person remanded for investigations, and, secondly, that the applicant be granted immediate access to counsel. The application was heard by Choo Han Teck J on the 15th of November. At the close of the hearing, Choo J reserved judgment and gave directions on the filing of further submissions. He permitted counsel to speak to Mr Raj "for a few minutes in court after the hearing".[10]

On the 26th of November, the case was again brought before the State Courts. The prosecution applied for Mr Raj to be remanded for one more week for further investigation with no access to counsel during this period. The application was granted. On the 3rd of December, 30 days after his arrest and when there had already been a series of court appearances and hearings, Mr Raj was finally granted full access to counsel. This was with the consent of the prosecution. One can only surmise that, by then, the police had completed their investigation and obtained all the statements that they had wanted to from Mr Raj.

B. *High Court Judgment*

Having set out the chronology of relevant events, the stage is set for examination of the decisions. The High Court delivered its judgment on the 14th of January 2014. As we may recall, by then Mr Raj already had access to counsel. Hence, the second declaration that was sought on his behalf—that he be allowed immediately to consult his lawyer—was no longer a live issue. But the first declaration raises a general point: does a person who is remanded for investigations have an immediate right to counsel upon request?

Choo J gave a negative answer. He had to because he was bound by the Court of Appeal judgment in *Jasbir Singh v Public Prosecutor*.[11] In *Jasbir Singh*, the Court of Appeal held that there was no immediate right to consult a lawyer. A person may be denied the right for a "reasonable time" after his arrest. In deciding what is reasonable for this purpose, account must be taken of "the duty of the police to protect the public by carrying out effective investigations"[12] and "allowance" must be given "for police investigations".[13] "[T]he police could deny him that right if they needed time to complete investigations."[14]

The High Court judgment[15] is very significant in two respects. First, Choo J stressed that the critical issue was not whether police investigation was ongoing. The critical issue was whether allowing access would impede the investigation. It was

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9 The application was made by way of a criminal motion. The Court of Appeal held that the applicant should instead have filed a petition for criminal revision of the District Judge's order. But this was not a fatal flaw: see *James Raj s/o Arokiasamy CA, supra* note 3 at paras 21, 22.

10 *Ibid* at para 7.

11 [1994] 1 SLR(R) 782 (CA) [*Jasbir Singh*]; for a commentary, see KS Rajah, "The Constitutional Right of Access to Counsel" *The Singapore Law Gazette* (August 2002).

12 *Jasbir Singh, supra note* 11 at para 46.

13 *Ibid* at para 48.

14 *Ibid.*

15 *James Raj s/o Arokiasamy HC, supra* note 3.

for the prosecution to prove that it would.[16] This allocation of the burden of proof is fair as the relevant information is with the prosecution whereas the defence "may have little or no knowledge of what and how the investigation is proceeding, nor how it might be disrupted or tampered."[17] Choo J added that "the burden is to prove that it is necessary, and not merely desirable or convenient, to derogate from [the constitutional right in art 9(3)]."[18] In the present case, the prosecution fell short. They failed to show that allowing Mr Raj to see his lawyer would jeopardise police investigation.

This aspect of the decision is significant because one does not see the prosecution being held to the burden of proof in the other reported judgments. For example, in *Jasbir Singh*, the Court of Appeal ruled that a two-week delay was reasonable without offering any basis for thinking that the police investigation would be hampered by granting legal access. Nor was there reference to any evidence that supported this conclusion. It was similar in *Public Prosecutor v Leong Siew Chor*,[19] where a 19-day delay was found to be justified. The High Court pointed out that the police had a duty to gather evidence before it disappeared or was destroyed.[20] It did not explain how allowing the accused to consult his lawyer would lead to the destruction or disappearance of the evidence. Despite the disclaimer by the judge,[21] it is difficult to see how the offered justification for the denial of access does not imply an indictment on the professionalism of the defence counsel before him.[22] The defence counsel was Mr Subhas Anandan, a senior and respected lawyer who was then the President of the Association of Criminal Lawyers of Singapore. If even he was not beyond suspicion, rare indeed must be the member of the criminal bar who can pass muster. In fairness to the judge, it must be stressed that he explicitly denied any imputation that Mr Anandan would destroy evidence. The concern must have lain elsewhere. But where? A guess will be hazarded later.

There is another aspect of the judgment of Choo J that is significant. Even though he considered himself bound by *Jasbir Singh*, he took the opportunity to express doubt on the correctness of the interpretation of the right to counsel that was adopted in that decision. In *Jasbir Singh*, the Court of Appeal cited *Lee Mau Seng v Minister for Home Affairs*,[23] and a number of Malaysian cases[24] as being consistent with the

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[16] *Ibid* at para 12, relying on *Public Prosecutor v Leong Siew Chor* [2006] 3 SLR(R) 290 at para 85 (HC) [*Leong Siew Chor*] and *Halsbury's Laws of Singapore* (Singapore: Butterworths Asia, 1999), vol 1 at para 10.136, which in turn cited *Hashim bin Saud v Yahaya bin Hashim* [1977] 2 MLJ 116. *Cf Theresa Lim Chin Chin v Inspector General of Police* [1988] 1 MLJ 293.

[17] *James Raj s/o Arokiasamy HC, supra* note 3 at para 12.

[18] *Ibid.*

[19] *Leong Siew Chor, supra* note 16. There was an unsuccessful appeal from this decision: *Leong Siew Chor v Public Prosecutor* [2006] SGCA 38.

[20] *Leong Siew Chor, supra* note 16 at para 87.

[21] *Ibid.*

[22] *Cf Saul Hamid v Public Prosecutor* [1987] 2 MLJ 736 at 739 [*Saul Hamid*].

[23] [1971-1973] SLR(R) 135 (HC) [*Lee Mau Seng*]. Mr Lee was detained under the *Internal Security Act*. He was denied access to his solicitors for 20 days after his arrest, and was allowed to see his lawyer only after the Ministerial order for his detention was issued. While this amounted to a wrongful denial of the applicant's constitutional right to consult a lawyer, it did not render the detention unlawful: *ibid* at paras 12-22.

[24] *Ramli bin Salleh v Inspector Yahya bin Hashim* [1973] 1 MLJ 54; *Ooi Ah Phua v Officer-in-Charge, Criminal Investigation, Kedah/Perlis* [1975] 2 MLJ 198 [*Ooi Ah Phua*], and *Hashim bin Saud v Yahaya bin Hashim* [1977] 2 MLJ 116.

restrictive approach which it took. It is certainly true that in *Lee Mau Seng*, Wee CJ said that an arrested person should be granted access to counsel "within a reasonable time after his arrest".[25] He did use those words. However, when read as whole and in context, it is eminently clear that *Lee Mau Seng* was a decision that *vindicated* the right to counsel; it was not a decision that sought to water-down or restrict that right. In summary, the High Court held that if a person arrested under the *Internal Security Act*[26] were to be deprived of his constitutionally entrenched right to consult a lawyer, this had to be by an explicit provision in the *ISA* and there was none. It was accepted that the 20-day delay in granting access was an infringement of the applicant's right to counsel.[27]

In a pertinent passage, Wee CJ stated that he was "disturb[ed]"—a strong word for a judge to use—to hear the submission that by enacting s 74 of the *ISA*—that is, by giving the police the powers of arrest and detention—the Legislature, by implication, "must have intended to deprive a person of a 'fundamental liberty' which the [*Constitution*] guarantees to him, namely the right to be allowed to consult a legal practitioner of his choice".[28] Wee CJ was *disturbed* by the "*unacceptable*" suggestion that the person who is arrested may be denied this right "so as to enable a police officer… to better carry out enquiries or investigations".[29] *Lee Mau Seng* was a case that allegedly implicated issues of national security. Notwithstanding this, Wee CJ stood firm by the constitutional right to counsel. Choo J rightly observed that the views expressed by Wee CJ in *Lee Mau Seng* "ought to apply *a fortiori* to ordinary criminal proceedings".[30] It is ironic, then, to cite *Lee Mau Seng* for the principle that the right of counsel must give way to the needs of police investigation. The passage to which reference has just been made would appear to stand against that proposition.

How then should we read the passing statement by Wee CJ that the right of access to counsel may be delayed for "a reasonable time after… arrest"? Choo J suggested a very plausible answer. The then Chief Justice, he said, must have had in mind "necessary or unavoidable delay occasioned by practical or administrative concerns", such as having to contact the counsel of the arrested person's choice.[31] For instance, if a person is arrested at an unearthly hour, it would be reasonable for the police to tell him to wait till the morning to see his lawyer.

C. *Court of Appeal Judgment*

Following the High Court judgment, defence counsel took the matter one step further. An application was made to the Court of Appeal under s 397(1) of the *Criminal*

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[25] *Lee Mau Seng, supra* note 23 at para 12. This was preceded by the remark that the arrestee is entitled "beyond a shadow of doubt" to have his constitutional right granted to him.

[26] Cap 143, 1985 Rev Ed Sing [*ISA*].

[27] This can be inferred from *Lee Mau Seng, supra* note 23 at para 18.

[28] *Ibid* at para 17.

[29] *Ibid* [emphasis added].

[30] *James Raj s/o Arokiasamy HC, supra* note 3 at para 6.

[31] *Ibid.* See s 52 of the *Interpretation Act* (Cap 1, 2002 Rev Ed Sing), which provides: "Where no time is prescribed… within which anything shall be done, that thing shall be done with all convenient speed". What speed is "convenient" in the present context will have to be construed with reference to practical or administrative problems of the sorts contemplated by Choo J.

Procedure Code[32] for leave to refer to it two putative questions of law of public interest. The questions were, first, whether there was an immediate right to counsel upon the request of a person remanded for investigations. And if the answer to this was "no", "what is a 'reasonable time' within which the right to counsel can be exercised"?[33] The Court of Appeal dismissed the application on the ground that "the references sought did not relate to questions of law of public interest".[34] It is unclear whether this meant that there was no question of law or that the question of law presented was not one of public interest.

The second premise was unlikely to have been the determining factor. Surely there is public interest in the fundamental liberty of the right to counsel. This is, after all, not a mere legal technicality.[35] It has been acknowledged in previous criminal references that the court will generally be more receptive to entertaining questions of law where they raise constitutional rights.[36] Furthermore, the present topic has received regular overage in the newspapers.[37] One report even carried the title: "Hot Issue: Early Access to a Lawyer".[38] The proceedings and judgments in the present case drew considerable press attention, which must seem a little ironic for a case that purportedly presented no question of law of public interest.[39] It must be remembered that the Presidents of the Law Society, both past[40] and present,[41] and members of the criminal bar[42] have been speaking out on the matter; they have been urging that early legal access be granted. The topic has also been raised in Parliament a number of times. One such occasion was during the second reading of

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32 *CPC, supra* note 5.

33 *James Raj s/o Arokiasamy CA, supra* note 3 at para 1.

34 *Ibid* at para 2.

35 It is said to be "one of the most important and fundamental rights of a citizen": *R v Samuel* [1988] 1 QB 615 at 630 (CA).

36 See *Jeyaretnam Joshua Benjamin v Public Prosecutor* [1990] 1 SLR(R) 567 at para 8 (HC), where Chan CJ "agree[d] with the proposition that any question which raised constitutional rights would be one of public interest which ought to be decided, whenever appropriate, by the final appellate court in Singapore." He decided, however, that the questions before him did not raise any constitutional issue. See also *Chan Hiang Leng Colin v Public Prosecutor* [1995] 1 SLR(R) 388 at para 21 (HC) [*Colin Chan*]; *Bachoo Mohan Singh v Public Prosecutor* [2010] 1 SLR 966 at para 36 (CA) [*Bachoo Mohan Singh*]: "the courts have considered questions raising constitutional rights… to be apt for reference to the Court of Appeal for its determination."

37 See *eg*, Selina Lum, "Concerns over rights of those arrested to see counsel" *The Straits Times* (19 May 2010); Selina Lum, "Access to counsel: Minister rejects call for changes" *The Straits Times* (20 May 2010).

38 KC Vijayan, "Hot issue: Early access to a lawyer" *The Straits Times* (3 March 2009).

39 See *eg*, Ashley Chia, "Lawyer of suspected hacker files application for access to client" *Today* (14 November 2013); "Judgement reserved in lawyer's appeal for access to suspected hacker" *Today* (15 November 2013); Neo Chai Chin, "Police need to justify delaying access to lawyers, says judge" *Today* (15 January 2014); Selina Lum, "'Access to counsel' issue already settled" *The Straits Times* (8 May 2014); KC Vijayan, "Court rules on access to lawyer" *The Straits Times* (31 May 2014).

40 See *eg*, Philip Jeyaretnam SC, "Expectations of Justice" *The Singapore Law Gazette* (February 2006) (speech given as the President of the Law Society of Singapore at the Opening of the Legal Year 2006).

41 Lok Vi Ming SC, "President's Message: When the Incredible Lawyer isn't an Appropriate Adult" *The Singapore Law Gazette* (March 2013).

42 See *eg*, "Editorial", *Pro Bono* 2:1 (February 2006) (newsletter of the Association of Criminal Lawyers of Singapore).

the Criminal Procedure Code Bill in May 2010.[43] Prior to this, there was a public consultation exercise on the bill. Feedback was provided by the Law Society. It recommended, among other things, that a provision be included to allow an arrested person to consult a lawyer upon request—within two hours if the request was made during office hours and by 10 am the next day if made after office hours.[44] These recommendations were not accepted.[45] But the relevant point is this: the lack of early access is a matter of genuine concern and it has found expression in public discourse. It does seem—to borrow the journalistic tag—like a 'hot' topic.

A better reading of the Court of Appeal decision is that it turned on the first premise. No question of law was raised. This contains two sub-premises.[46] First, a question is not one of *law* if it is only one of fact.[47] As we will see, the Court of Appeal treated the second question placed before it, namely, what is a "reasonable time" within which the right to counsel can be exercised, as one of fact. The second sub-premise is that a *question* of law is one that raises an open question. On one reading of the decision, the first of the referred questions did not qualify as a question of law in this sense. The reasoning of the Court of Appeal may be extrapolated as follows: the law on whether there was an immediate right to counsel upon the request of a person remanded for investigations was settled long ago at the highest level in *Jasbir Singh*. It has been followed in subsequent decisions. No other authority stands against it. The law is clear. So, on the first question of whether there is an immediate right to counsel, as the authorities stand, the answer is clearly no. There is no question about it. And if there is no question—no *open* question—of law, it follows that there can be no question of law of public interest.

It is certainly true that the judiciary has long been reluctant to entertain a reference on a point of settled law.[48] But the matter is not as straightforward as it may seem. In this connection, three related observations may be made. First, it was not beyond argument that there was no open question of law. Consider the test used by the Court of Appeal itself. This test was drawn from earlier decisions, including the oft-cited decision of the Malaysian Federal Court in *A Ragunathan v Pendakwa*

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43 See *Parliamentary Debates Singapore: Official Report,* vol 87 at col 430, 431, 444, 445 (18 May 2010) [*Parliamentary Debates 18 May*], and vol 87 at col 559, 560 (19 May 2010) [*Parliamentary Debates 19 May*].

44 The Law Society of Singapore, *Report of the Council of the Law Society on the Draft Criminal Procedure Code Bill 2009*, (Singapore: The Law Society, 2009), online: <http://www.lawsociety.org.sg/Portals/0/ResourceCentre/FeedbackinPublicConsultations/pdf/ReportofCouncilLawSocietyDraftCPCBill2009.pdf> [Law Society Report]. This was not the first time that the Law Society has broached the topic with the Law Ministry: see KC Vijayan, "Lawyers seek early access for suspects" *The Straits Times* (20 October 2005).

45 During the second reading of the Bill, the Minister for Law Mr K Shanmugam noted that since "March 2006, the police have had an 'access to counsel' scheme, to grant an accused person access to counsel before his remand period ends, as long as investigations have been completed or are near completion." (*Parliamentary Debates 19 May, supra* note 43 at col 559).

46 See *James Raj s/o Arokiasamy CA, supra* note 3 at para 14 (requirement (b)). That these are separate requirements is long recognised. See, *eg*, *Bachoo Mohan Singh*, *supra* note 36 at para 29; *Mah Kiat Seng v Public Prosecutor* [2011] 3 SLR 859 at para 12 (CA) (requirements (a) and (b)).

47 See *eg*, *Phang Wah v Public Prosecutor* [2012] SGCA 60 [*Phang Wah*].

48 See *eg*, *Mohammad Faizal bin Sabtu v Public Prosecutor* [2013] 2 SLR 141 at para 22 (CA); *Wong Sin Yee v Public Prosecutor* [2001] 2 SLR(R) 63 at para 28 (HC); *Colin Chan, supra* note 36 at para 20; *Abdul Salam bin Mohamed Salleh v Public Prosecutor* [1990] 1 SLR(R) 198 at para 30 (HC).

Raya.[49] An "open question", according to the Court of Appeal, is one that "had not finally been settled by the apex court or that admitted of continuing difficulty or that called for the discussion or further consideration of alternative views".[50] The test is framed in the disjunctive. Even if there was no conflict of authorities, might it not be that the question of when the right to counsel arises called for the "discussion or further consideration of alternative views"?[51] An alternative view of art 9(3) will be suggested later.

Secondly, as mentioned, the application for leave was made under s 397 of the *CPC*.[52] Subsection (6) of that provision states that, "for the purposes of this section, any question of law... regarding which there is a conflict of judicial authority shall be deemed to be a question of public interest." This provision creates a presumption that operates in the specified context. It does not follow from this presumption that where there is *no* conflict of judicial authority, there can *never* be a question of law of public interest. If we trace s 397 back to its origin in the *Supreme Court of Judicature Act*,[53] just before it was amended in 1998,[54] we will find an explicit provision that states that the precursor of what is now subsection (6) is without prejudice to the generality of the first subsection.[55] The clear implication is that a conflict of judicial authority is not the only way in which a question of law public interest can arise. It can arise even if there is no conflict of judicial authority.[56]

Thirdly, the Court of Appeal is not strictly bound by its earlier decisions. Even if the law is settled, it is open for the Court of Appeal to break away from it. According to the Practice Statement on Judicial Precedent issued in 1994, the Court of Appeal may depart from precedents "where adherence to… prior decisions would cause injustice".[57] Obviously, a law, although settled, may yet be unjust. And where a settled judicial interpretation is unjust, the Court of Appeal has the power to depart from it. This power must, of course, be exercised sparingly. Much will depend on

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49 [1982] 1 MLJ 139 at 141. For earlier decisions of the Singapore Court of Appeal that have followed this case, see *eg*, *Bachoo Mohan Singh, supra* note 36 at para 33; *Phang Wah, supra* note 47 at para 37.

50 *James Raj s/o Arokiasamy CA, supra* note 3 at para 33.

51 *Ibid.*

52 *Supra* note 5.

53 Cap 322, 1985 Rev Ed Sing [*SCJA 1985*].

54 *Supreme Court of Judicature (Amendment) Act 1998* (No 43 of 1998), s 4. This amendment does not have any bearing on the present argument. As the then Minister for Law explained, the purpose of the amendment was "to deem any question of law referred to the Court of Appeal by the Public Prosecutor arising from any criminal matter determined by the High Court to be a question of public interest" (*Parliamentary Debates Singapore: Official Report*, vol 69 at col 1628 (26 November 1998) (Professor S Jayakumar)).

55 *SCJA 1985*, *supra* note 53 at s 60(5). On the legislative history, see *Bachoo Mohan Singh, supra* note 36 at paras 27, 28; and *Public Prosecutor v Goldring Timothy Nicholas* [2014] 1 SLR 586 at paras 17-22 (CA).

56 It is arguable that such a possibility was envisaged by Rajah JA in *Bachoo Mohan Singh, supra* note 36 at para 36, when he stated that "the focus should always be on… whether [the] questions are of such public interest that the Court of Appeal's authoritative views, whether it be a result of difficult and/or controversial points of law *or otherwise*, are required" [emphasis added]. Conversely, as the judge rightly also pointed out, a "novel question of law will not always satisfy the public interest threshold" [emphasis omitted]: *ibid* at para 37; *cf Zeng Guoyuan v Public Prosecutor* [1997] 2 SLR (R) 999 at para 19 (HC).

57 [1994] 2 SLR 689: "it is proper that the Court of Appeal should not hold itself bound by any previous decisions… binding on it, in any case where adherence to such prior decisions would cause injustice".

whether the Court of Appeal sees anything wrong with the existing legal position. It noted that the effect of *Jasbir Singh* was that the right to counsel "could be postponed for such period as might reasonably be required by the police to enable them to carry out their investigations".[58] This, according to the Court of Appeal, was not only settled law, it was "good law".[59] "Good", meaning substantively good, as in 'fair' or 'just'. Whether the accepted interpretation of the law is indeed fair invites general reflections that transcend the particulars of the case.

III. Broader Reflections

A. *Interpretation of Article 9(3)*

In justifying a restrictive interpretation of the right to counsel, there is an all too easy recourse to the balancing argument.[60] But a fundamental right must not be treated like any other interest that may be balanced freely against countervailing considerations in deciding whether to give it effect. It is an uncontroversial principle that such rights have special weight by virtue of their constitutional status. The restrictive reading of art 9(3) that was taken in *Jasbir Singh* is not easy to reconcile with the well-known statement by Lord Diplock in *Ong Ah Chuan v Public Prosecutor*[61] that Part IV of the *Constitution*, where art 9(3) is located, must be given "a generous interpretation", one that is "suitable to give to individuals the full measure of the [fundamental liberties]" referred to in that Part.[62] An interpretation is ungenerous where it gives an overly narrow meaning to the text; but, at least, it pays heed to the words that are used. The restrictive reading adopted in *Jasbir Singh* was, arguably, worse than ungenerous: it seems to deprive a key term in art 9(3) altogether of legal significance.

There has to be some reason for using the term "arrest" in art 9(3). There must be something about an arrest that makes it important to allow the person who has been arrested to get legal help. There are two possible ways of making sense of this. First, when a person is arrested, art 9(4) of the *Constitution* requires that he be brought before a magistrate within 48 hours.[63] On a purposive reading, the rationale of art 9(3) is to allow the arrestee to see a lawyer so that the lawyer may be instructed in time for him to effectively represent his client before the magistrate. The right to legal representation must mean the right to *effective* legal representation, and the legal representation cannot be effective if the person is denied the opportunity to consult

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58 *James Raj s/o Arokiasamy CA, supra* note 3 at para 11.

59 *Ibid* at para 36.

60 See *eg, Ooi Ah Phua, supra* note 24 at 200; *James Raj s/o Arokiasamy CA, supra* note 3 at para 36.

61 [1979-1980] SLR(R) 710 (PC).

62 *Ibid* at para 23, repeating what was said by Lord Wilberforce in *Minister of Home Affairs v Fisher* [1980] 1 AC 319 at 328, 329 (PC). See also *Haw Tua Tau v Public Prosecutor* [1981-1982] SLR(R) 133 at para 7 (PC). Hope inspired by Lord Diplock's soothing assurance of a generous interpretation was dampened somewhat by the dismissal of the constitutional challenges in both cases. But neither of them involved the right to counsel.

63 See also s 68(2) of the *CPC, supra* note 5. Where the person is freed earlier than this, the police are not required to bring him before the magistrate: *Yan Jun v Attorney-General* [2014] 1 SLR 793 at para 67 (HC).

with his lawyer for the purposes of that representation.[64] That the right to counsel and the right to be brought before a magistrate are thus connected explains why they are provided for in two adjoining clauses in the very same article of the *Constitution*. This approach of finding the meaning of one clause in light of other clauses and of the scheme of art 9 as a whole finds support, albeit in a different context, in the reasoning of the Court of Appeal in *Lim Meng Suang v Attorney-General*.[65] An argument along the suggested line was advanced by a defence counsel in *James Raj s/o Arokiasamy CA*. It was dismissed by the Court of Appeal on the basis that the matter has been settled since *Jasbir Singh* and the court saw no need to revisit the matter.[66] But, so far as one can tell from the reported judgment, this argument was never raised in *Jasbir Singh*. To return to the test of an "open question", it is at least arguable that this interpretation qualified as an "alternative view" that deserved "discussion or further consideration" on its own merits. After all, an issue of fundamental fairness is involved. As we may recall, Mr Raj was denied the opportunity to speak to his counsel, not even for five minutes, during the hearing of the prosecution's application for him to be remanded at the Institute of Mental Health. It is perplexing how the counsel can be expected to represent his client effectively at this hearing under such circumstances and difficult to see how this is not a violation of his right to legal representation.

There may be something else about an arrest that makes it important for an arrestee to be allowed to consult a lawyer. Here is how the argument might go. In the typical case, a person is arrested because he is suspected of having been being involved in a crime which needs to be investigated.[67] As noted at the outset of this essay, a person who is being detained for investigation is in a vulnerable position. In the present case, Mr Raj seemed to have been especially vulnerable given the allegations about his mental state. A possible rationale for allowing an arrestee access to a lawyer is so that he can be advised on his rights *qua* arrestee and as a safeguard against improper pressure to confess or as a form of deterrence against possible mistreatment or inaccurate recording of statements.[68] Questioning by the police is not audio or

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[64] Section 236 of the *CPC*, *supra* note 5 states: "Every accused person before any court may of right be defended by an advocate". On the right to legal representation at remand proceedings, see *Saul Hamid, supra* note 22; *Sundar Singh v Emperor* AIR 1930 Lahore 945 [*Sundar Singh*].

[65] [2014] SGCA 53. See also Karpal Singh, "When does the Right of an Arrested Person to Consult Counsel under Article 5(3) of the Federal Constitution Begin?" [1973] 1 MLJ xxi at xxi-xxii; AJ Harding, "The Right to Counsel—A Privy Council View: *Thornhill v Attorney-General of Trinidad and Tobago*" (1980) Mal LR 160 at 164.

[66] *James Raj s/o Arokiasamy CA, supra* note 3 at para 36.

[67] *CPC*, *supra* note 5, s 64.

[68] See Gabe Tan Si Han, "Access to Counsel and the Rights of the Accused: Reflections on the case of *PP v Leong Siew Chor*", *Pro Bono* 4:2 (February 2008) at 5:

> [D]efence counsel… play a pertinent role in informing the accused of his rights and protect the accused from being coerced, confused or induced into making incriminating statements… Procedural safeguards and constitutional rights… exist not only to protect the accused; they are in place in order to ensure the reliability of evidence and consequently, the safety of criminal convictions.

See also Karpal Singh, *supra* note 65 at xxiii ("Where an arrested person expresses a desire to make a confession, the benefit of legal advice would go a long way to ensure that the confession is voluntary and not the product of dubious mechanisations on the part of the police"). The unreliability of confession evidence is under-noticed and underrated. See *eg,* Saul M Kassin *et al*, "Police-Induced Confessions: Risk Factors and Recommendations" (2010) 34 Law and Human Behavior 3. That the risk of the police

video-recorded in Singapore; no law requires this and it is not done.[69] In the absence of other safeguards, it becomes all the more important to protect the right of access to a lawyer. If the access is denied until the completion of investigation, the safeguard would kick in only after it has lost much of its relevance: it is effectively not a safeguard. To allow this postponement of the right would be to deprive the term "arrest" in art 9(3) of any meaningful role in the exercise of purposive interpretation.

If it was felt that there was such a need for safeguard when the Reid Commission wrote its report on the Federal Constitution of Malaya, to which art 9 of the *Constitution* can be traced—the need is even greater today.[70] There was then a provision in the *Evidence Act*[71] which rendered any confession made while in police custody strictly inadmissible. Sir James Fitzjames Stephen, the drafter of the *Indian Evidence Act 1872*[72] on which the Singapore counterpart is based, saw the need for this section. The fear was that to admit such confessions might hold out too great a temptation for abuse. As he put it, "[i]t is far pleasanter to sit comfortably in the shade rubbing pepper into a poor devil's eyes than to go about in the sun hunting up evidence".[73] But the law has changed. Statements obtained during police custody are admissible so long as they pass the so-called voluntariness test.[74] Another important development is that adverse inferences may be drawn from his silence and used against him at the trial.[75] The legal position of an arrestee is more complicated than it was when the *Constitution* came into being. There is, therefore, greater reason now that he should be allowed to receive legal advice during the course of investigation and not only after it is completed.

B. *International Benchmarking*

Our current practice does not measure up to international standards. Assistant Professor Jack Lee has conducted an extensive survey of the law on the right to counsel

procuring false confession is not fanciful in Singapore, see *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at para 190 (CA) [*Muhammad bin Kadar*] where the Court of Appeal found aspects of the case that "point unequivocally towards a series of false confessions procured by questionable means". The Appropriate Adult Scheme is a welcome, though limited, development. Under this new scheme a neutral third party (an 'appropriate adult' but not a lawyer) is allowed to sit in during police questioning of a person with intellectual disability. The role of the appropriate adult is not to give legal advice but to prevent miscommunication and ensure the reliability of recorded statements. See Lok Vi Ming SC, *supra* note 41. In England, s 77 of the *Police and Criminal Evidence Act 1984* (UK), c 60 [*PACE*], requires special caution when convicting a mentally handicapped person on a confession made in the absence of an independent person. The judge should withdraw the case from the jury where the case depends wholly upon an unconvincing confession of a defendant who suffers from a significant degree of mental handicap: *R v McKenzie* [1993] 1 WLR 453 (CA).

[69] Legislative reform in this area has been ruled out. See *Parliamentary Debates 18 May, supra* note 43 at col 457; and *Parliamentary Debates 19 May, supra* note 43 at col 558.

[70] Reid Commission, *Report of the Federation of Malaya Constitutional Commission 1957* (Rome: Food and Agriculture Organisation of the United Nations; Kuala Lumpur: Government Printer, 1957). Unfortunately, the report does not contain much discussion on the right to counsel.

[71] Cap 97, 1997 Rev Ed Sing.

[72] Act No 1 of 1872 [*Indian Evidence Act*].

[73] James Fitzjames Stephen, *A History of the Criminal Law of England*, vol 1 (London: Macmillan and Co, 1883) at 442.

[74] *CPC, supra* note 5, s 258(3).

[75] *CPC, supra* note 5, s 261(1).

in ASEAN countries and Commonwealth jurisdictions.[76] This and other studies show that the law in Singapore, in the way in which it has been applied, is out of step with—to use 'management speak'—'international best practices'. In many other countries, the person arrested is informed of his right to counsel, is allowed to consult a lawyer upon request, and in some jurisdictions, there is even a right for the lawyer to be present during the police questioning. None of these hold true in Singapore.

One response to this comparison might be: so, what? We should chart our own legal destiny. Indeed, we should. But if many other countries consider the kind of practice that we have adopted here as somehow unfair or unwise, this should give us pause for serious reflections. Another response might be: we are different; we are Asians.[77] But the right to counsel is not a peculiar Western obsession. In South Korea, where it is as close as one can get to a 'Confucianist' society, the client can even have his lawyer with him during the police interrogation.[78] In India, a person has a right to legal advice while he is in police custody.[79] The need for this right is made less pressing by the fact that under the *Indian Evidence Act*, no confession made to a police officer is admissible against the accused[80] and no confession made by a person while in police custody is admissible against the person unless it was made before a magistrate.[81] Nevertheless, the Indian Supreme Court has held in one case that "if an accused person expresses the wish to have his lawyer by his side when his examination goes on, this facility shall not be denied" and any such denial will attract "serious reproof",[82] and, in a different case, it was held that the "arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation".[83]

Our nearest neighbour, Malaysia, amended their Criminal Procedure Code in 2006 and the amendment came into force in 2007.[84] Under the new s 28A, the

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[76] Jack Tsen-Ta Lee, "Reforming the Right to Legal Counsel in Singapore" (2012), online: <http://ink.library.smu.edu.sg/sol_research/1101/>. For other comparative surveys, see Law Society Report, *supra* note 44, at 16-20; Ho Hock Lai, "The Privilege against Self-incrimination and Right of Access to a Lawyer" (2013) 25 SAcLJ 826 at 835-843.

[77] *Cf* Ho Hock Lai, "'National Values on Law and Order' and the Discretion to Exclude Wrongfully Obtained Evidence" [2012] Journal of Commonwealth Criminal Law 232 at 248-251.

[78] Yong-sik Lee, "Expansion and Development of the Right to Counsel in Korea", in *Criminal Procedure in the Changing World: Current Issues, Recent Reforms and Further Challenges* (2013) 83 at 109-117. It is also noteworthy that China has recently strengthened the right of access to a lawyer during custody: see Yi Yanyou, "State Ideology Transition and Procedure Model Reformation: China's Criminal Procedure Law and its Revisions" (2012) 4 Tsinghua China Law Review 155 at 209-211.

[79] *Eg*, *Re Llewelyn Evans* AIR 1926 Bom 551; *Sundar Singh, supra* note 64; *Moti Bai v State* AIR 1954 Rajasthan 241.

[80] *Indian Evidence Act, supra* note 72 at s 25.

[81] *Ibid* at s 26.

[82] *Nandini Satpathy v Dani* AIR 1978 SC 1025 at para 59. India has a provision similar but not identical to art 9(3) of the *Constitution*: see art 22(1) of the Indian Constitution. The right against self-incrimination is entrenched in art 20(3) of the Indian Constitution but not in Singapore.

[83] *Basu v State of West Bengal* AIR 1997 SC 610 at para 36. See also *Senior Intelligence Officer v Jugal Kishore Samra* (2011) 12 SCC 362.

[84] *Criminal Procedure Code (Amendment) Act 2006* (Act A1274, Malaysia); further amended by *Criminal Procedure Code (Amendment) (Amendment) Act 2007* (Act A1304, Malaysia). The amendments were prompted by the findings made in the *Report of the Royal Commission to Enhance the Operation and Management of the Royal Police Force* (Kuala Lumpur: Government of Malaysia, 2005), and recommended in a report of a Parliamentary Select Committee: Baljit Singh Sidhu, "Amendments to

police must, before they begin to question the person whom they have arrested or before they record a statement from him, inform him that he may communicate and consult with a lawyer of his choice. He must also be told that he can communicate with a relative or friend to inform them of his whereabouts.[85] If he wishes to exercise these rights, the police must allow him to do so "as soon as may be".[86] They must also defer questioning or recording of any statement for a reasonable time until he has consulted his lawyer.[87] In Singapore, on the other hand, the police do not have to inform the person arrested of his right to counsel.[88] Neither has he any right to contact family members or friends.[89] The police do not have to wait for him to receive legal advice before they start to question him, and the lawyer is not and does not need to be present during the questioning.[90] It is apparently not uncommon to deny access to counsel until the completion of police investigation when all the statements have been taken from the suspect. Should we be content with the current state of affairs?

C. *Assessment of Current State of Law and Practice*

The law, we are told, is good. At one level, it is manifestly[91] reasonable. The law says so itself: access to counsel may be denied for a "reasonable" time. If the delay is "reasonable", surely it must be fair. It is ironic that a law that proclaims itself reasonable is capable of operating in a manner that is seemingly unreasonable. Let us return to *Public Prosecutor v Leong Siew Chor*.[92] The trial judge could not have thought that the defence counsel, Mr Subhas Anandan, might be tempted to pervert the course of justice and destroy evidence on his client's behalf. As already mentioned, the judge was quick to disavow any intention to suggest as much. What,

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the Criminal Procedure Code: Radical or Piecemeal Legislation?", *Praxis—Chronicle of the Malaysian Bar* (January/June 2008) 28. The Royal Commission was set up following well-publicised instances of police mistreatment of persons under arrest and detention. Expanding the right of an arrestee to consult his lawyer was thought to be a safeguard against such abuse of police power. See Salim Farrar, "The 'New' Malaysian Criminal Procedure: Criminal Procedure (Amendment) Act 2006" (2009) 4 Asian Criminology 129, especially at 136, 137.

85 *Criminal Procedure Code* (Act 593, Malaysia), s 28A(2).

86 *Ibid*, s 28A(3).

87 *Ibid*, s 28A(4).

88 *Rajeevan Edakalavan v Public Prosecutor* [1998] 1 SLR(R) 10 at paras 19-21 (HC).

89 *Sun Hongyu v Public Prosecutor* [2005] 2 SLR(R) 750 (HC); forcefully criticised in Thio Li-ann, *A Treatise on Singapore Constitutional Law* (Singapore: Academy Publishing, 2012) at paras 12.088, 12.089.

90 See *Muhammad bin Kadar, supra* note 68 at para 57: "Even after the accused engages counsel (assuming he does), there is no legal rule requiring the police to let counsel be present during subsequent interviews with the accused while investigations are being carried out." But the situation appears to be different after the investigation has been completed. In *Azman bin Mohamed Sanwan v Public Prosecutor* [2012] 2 SLR 733 (CA), the investigating officer visited the accused at the Queenstown Remand Prison after investigation had apparently been completed and he took further statements from the accused. These visits were made without informing and in the absence of counsel appointed by the accused. The Court of Appeal and the Deputy Public Prosecutor himself were of the view that the conduct of the investigating officer was improper.

91 On an old meaning as captured in The Oxford English Dictionary, a "manifest" is a "public proclamation or declaration".

92 *Leong Siew Chor, supra* note 16. There was an unsuccessful appeal from this decision: *Leong Siew Chor v Public Prosecutor* [2006] SGCA 38.

then, was the concern? We can guess. At the second mention of this case, the defence counsel had sought to see the accused to advise him of his rights and he even offered to do this in the presence of the Deputy Public Prosecutor and the Investigating Officer. The request was turned down.[93] Allowing access in such circumstances cannot possibly result in improper interference with the investigation. But if the accused is made aware of his rights, including the right against self-incrimination, it might result in him 'shutting up'.

We do not know if this was the real concern that motivated the denial of access. Assuming that it was, there are reasons to be troubled. It would mean that the prosecution, with the support of the court, was actively seeking to prevent the accused from knowing of his rights.[94] It is a dire situation indeed where the defence counsel has to offer the sacrifice of one right as the price for another, to give up the client's right to privileged communication—which is "a fundamental condition upon which the whole administration of justice rests"[95]—in return for the opportunity to speak to his client, an opportunity that is supposedly guaranteed under the *Constitution*.[96]

Perhaps the criticism is misplaced. Maybe the law is fair. It is just that it has not been applied fairly. The situation would be improved considerably if all judges are as rigorous as Choo J was in holding the prosecution to the burden of proof and in insisting that they show how allowing legal access would impede police investigation. The Court of Appeal did not find that Choo J was wrong in this respect. It declined to answer the question of what a "reasonable time" was. According to the Court of Appeal, this was not a question of law. It was a question of fact that called for "factual inquiry of all the relevant considerations" and cannot be answered "in the abstract".[97] This is very significant. It means that judges in State Courts are free to, if not must, follow the rigorous approach taken by Choo J. There are, of course, exceptional circumstances where it would be unreasonable to insist on the right to

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93 A similar application was made by the same counsel in a different case and it was also rejected by the court: Elena Chong, "Murder accused remanded for another week" *The Straits Times* (20 July 2011). The outcome was different in a recent case involving minors. See KC Vijayan, "Court to hear lawyer's bid for access to teen client" *The Straits Times* (14 May 2014); it is understood from the counsel involved that he was eventually allowed to meet his client in the presence and within the hearing of the police. *Cf Ramli bin Salleh v Inspector Yahya bin Hashim* [1973] 1 MLJ 54 at 56 (the Malaysian High Court stressed the importance of allowing the lawyer-client meeting to take place outside the hearing of the police).

94 One of the duties of the prosecutor (and the defence counsel) is to "respect the fundamental rights of suspects"; this is set out in "guideline" 7 of the Attorney General's Chambers and the Law Society of Singapore, *Code of Practice for the Conduct of Criminal Proceedings by the Prosecution and the Defence*, Singapore: Attorney General's Chambers and the Law Society of Singapore, March 2013, online: <http://www.lawsociety.org.sg/portals/0/NewsMedia/pdf/FINAL%20Code%20of%20Practice%20for%20the%20Conduct%20of%20Criminal%20Proceedings.pdf>.

95 *R v Derby Magistrates' Court*, Ex parte *B* (1996) AC 487 at 507.

96 *Cf R v Teo Kok Teck* (1958) 24 MLJ xxxv. Mr David Marshall was prevented from communicating with his client in confidence. The prison authority would only allow him to use the prison interpreter. At the trial, Mr Marshall argued that "when the right of direct access to his client is denied counsel, no counsel can conduct the defence of an accused." Since he could not advise his client, his client could not plead. In discharging the accused, the trial judge expressed strongly "the view that an accused person on a criminal charge… is entitled to the same facilities in respect of private consultation with his counsel as a free man."

97 *James Raj s/o Arokiasamy CA, supra* note 3 at para 39.

counsel. Even the Law Society in recommending reform of the law accepted that the exercise of this right may be deferred where allowing it will lead to interference with or harm to evidence, or interference with or physical injury to other persons, or will lead to alerting of suspected accomplices, or will hinder the recovery of criminal property.[98] Similar exceptions can be found in the legislation of other countries.[99] Even without legislative intervention, exceptions of these kinds can be developed by the judiciary in developing a reasonable concept of a reasonable delay. That is the fairest way forward. It is difficult to accept as reasonable—as capable of holding up to reason—the practice of preventing the exercise of the right so long as investigation is ongoing.

Will the State Courts start to be more inclined to grant access to counsel as a result of the Court of Appeal judgment? This remains to be seen. Or will the received message be that the *status quo* remains? That seems to be the main message. It is not an easy task to persuade the powers that be to change the law or to change the practice. What is needed is the ability and willingness to give effect to the spirit of due process, and this calls for a fundamental change of mind-set. A good starting point is to address the concerns that lie behind the resistance to change.

D. *Police Effectiveness and Early Access to Counsel*

It appears that the key concern is with police effectiveness in catching criminals and securing evidence of their guilt. The police have a duty to protect the public from criminals, to provide security against crimes.[100] As we are often reminded, there is a failure of the criminal justice system if the police are ineffective, crimes are rampant and many criminals are left to roam free. There is, undoubtedly, a great social interest in the efficacy of criminal investigations.[101] The natural way to enhance police effectiveness is to channel resources to the police force, to increase manpower, enhance professionalism, provide better training in evidence-gathering, raise the level of expertise and support in forensic science and so forth. If we want to boost police capability in combating crime, this is the first train of thought that comes naturally to mind. The first thought should not be to take away the accused's rights or to restrict the scope of those rights. Just as it is a fundamental principle that "the laws and criminal process must protect society from crime", it is equally a fundamental principle that "due process and the rule of law must be observed".[102] The balance between these two principles is not a zero sum game. Singapore has

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98 Law Society Report, *supra* note 44.

99 See *eg*, *Criminal Procedure Code* (Malaysia), Act 593, s 28A(8) and s 58(8); *PACE, supra* note 68.

100 For a careful study of the import and limits of the duty to protect and the right to security, see Liora Lazarus, "Positive Obligations and Criminal Justice: Duties to Protect or Coerce?" in Lucia Zedner and Julian V Roberts, eds. *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (United Kingdom: Oxford University Press, 2012) 135 at 136.

101 As Minister for Foreign Affairs and Law has rightly stressed: Mr K Shanmugam, "The Rule of Law in Singapore" [2012] SJLS 357 at 361.

102 Mr K Shanmugam, "Speech by Minister for Foreign Affairs and Law, Mr K Shanmugam, at the Criminal Law Conference 2014" (Speech delivered at the Supreme Court of Singapore, 16 January 2014), online: <https://www.mlaw.gov.sg/content/minlaw/en/news/speeches/speech-by-min-at-criminal-law-conference-2014.html>.

done well on the first front;[103] but more can be done on the second with respect to the right to counsel.

The worry is that the lawyer, if allowed to see his client, will tell him that he has the privilege against self-incrimination.[104] And this might discourage the client from making a confession. If he does not confess, the police will be deprived of a vital piece of evidence. In this sense, allowing legal access would impede investigation. This sounds logical. But the argument is flawed.[105] It is not merely that allowing access will give us greater assurance of the reliability of confession evidence[106] or reduce instances of confessions being retracted or allegations of involuntariness being made, thus incurring court resources. A matter of principle is implicated: the accused has a legal right *not* to confess. Under the law, he has a right of silence. And he is legally entitled to exercise that right, though this may come at the cost of an adverse inference.[107] Now, you may think that it is wrong-headed to give him this right. Whether you are right or wrong to think so, it remains that he has that right under the law. Should the police abide by the law? Should the court uphold the law? These are rhetorical questions. The answers are obvious. They are obvious if you believe—believe truly—in the rule of law.

This point is pressed, entertainingly, by two authors of a satirical paper published in 1972. They were writing tongue-in-cheek against the then-recent recommendations made by by the Criminal Law Revision Committee in their Eleventh Report:

> [T]he justice of a trial involves something deeper than procedures designed to procure… accurate results…. [E]ven a man who in fact committed a serious crime… ought only to be convicted in a certain (fair) way, where fairness means not just an accurate finding of all the facts. It means that the trial meet a number of other standards, not meeting which the authorities are a set of top bullies who, for the time being, are especially interested in the punishment of criminals…. That is, "court of justice" is not the same thing as "committee for nailing criminals". Similarly, 'convicting' means more than a group in power being satisfied on good evidence of the guilt of somebody, and using the powers of the state to clobber him.[108]

There is a serious point in this amusing passage. The police deserve our respect as a professional force because we do not expect them to behave like a "set of [lawless] top bullies". They have to live up to certain legal standards and respect the law in their pursuit of criminals. And what separates a "court of justice" from a "committee

[103] See *eg*, the statistics cited by the Minister for Foreign Affairs and Law, Mr K Shanmugam, in his speech delivered at the Criminal Law Conference 2014, *ibid.* Singapore is ranked second under the category of criminal justice in The World Justice Project, "World Justice Project Rule of Law Index 2014", online: <http://worldjusticeproject.org/sites/default/files/files/wjp_rule_of_law_index_2014_report.pdf>. See also KC Vijayan, "Republic also rises to No. 2 spot for its criminal justice system" *The Straits Times* (6 March 2014).

[104] *CPC, supra* note 5, s 22(2).

[105] See *R v Lemsatef* [1977] 1 WLR 812 at 816, 817 (CA). The English Court of Appeal "stress[ed] that it is not a good reason for refusing to allow a suspect, under arrest or detention to see his solicitor, that he has not yet made any oral or written admission".

[106] See Gabe Tan Si Han *supra* note 68

[107] *CPC, supra* note 5, s 261(1).

[108] GEM Anscombe and J Feldman, "On the Nature of Justice in a Trial" (1972) 33 Analysis 33 at 35.

for nailing criminals" is the will and the determination to hold the police to those legal standards and restrictions.

According to Professor Tamanaha, the oldest understanding of the rule of law is that "the state and its officials are limited by the law" and "officials must operate within a limiting framework of law".[109] The law, for various reasons, imposes all sorts of restrictions on the police in their investigation of crimes. Even if the prohibition of torture impedes effective police investigation, no one would suggest that the police should apply torture. Even if the use of 'inducement, threat or promise' is an effective way of extracting true confessions, no one would suggest that the police should resort to the use of inducements, threats or promises during the interrogation process. The law prohibits torture, and any confession obtained by any inducement, threat or promise is legally inadmissible.[110] It is the duty of the court to enforce the law; it is a dereliction of this duty to close one eye.

Similarly for the right to counsel. It would not do to argue that the lawyer should not be allowed to see his client because he might otherwise inform the client of his privilege against self-incrimination.[111] In *Public Prosecutor v Mazlan bin Maidun*,[112] the Court of Appeal held that the police do not need to inform the suspect of the privilege. If the lawyer does not tell him that he has this right, the client will in all probabilities not know that he has it. No sensible lawyer who is given access to his client will stop at telling him of his right against self-incrimination because the legal position is not that simple. He will also advise the client that an adverse inference may be drawn against him at the trial should he exercise that right at any time after he has been cautioned under s 23 of the *CPC*[113] and to explore with him his options. It is, therefore, not clear that allowing the lawyer to see his client will result in the client clamming up. However, what is clear is that allowing the lawyer to meet his client is a step towards ensuring fairness of the process. The police are unlikely to lose much in terms of reliable evidence; but the system of *justice* will be a step closer to living up to its name.

IV. Conclusion

Nothing has been offered in the way of concrete prescriptions of reforms.[114] Hopefully, the reason for this is clear. If the thinking is that the law is good as it is, there is not much point entering into the details of what the law should be. There must first be a shift in mind-set—the mind-set of those tasked with charting our legal destiny—before there can be openness to meaningful change.

Rights are not pretty things that decorate our statute books; they are solemn promises and commitments we make to our fellow citizens. These promises and

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[109] Brian Z Tamanaha, "The History and Elements of the Rule of Law" [2012] SJLS 232 at 236, 237.

[110] *CPC, supra* note 5, s 258(3).

[111] *CPC, supra* note 5, s 22(2). The Privy Council has held that it is unreasonable to delay access on this ground: *Thornhill v Attorney-General of Trinidad and Tobago* [1981] AC 61 at 72, 73 (PC).

[112] [1992] 3 SLR(R) 968 (CA).

[113] *CPC, supra* note 5, s 261(1); *Kwek Seow Hock v Public Prosecutor* [2011] 3 SLR 157. In England and Wales, an adverse inference may not be drawn from silence where the accused had not been allowed an opportunity to consult a solicitor: *Criminal Justice and Public Order Act 1994* (UK), c 33, s 34(2A).

[114] Others have done so. See *eg*, Lee, *supra* note 76; Law Society Report, *supra* note 44 at 24, 25.

commitments must be kept if we are honestly to claim fidelity to the rule of law. The right to counsel, the right against self-incrimination, the right to confidentiality in lawyer-client communication—these and other rights the law guarantees to the suspect are not mere technicalities to be brushed aside whenever it makes the nailing of criminals easier. Of these rights, constitutionalised fundamental protections must surely be even more jealously guarded. Due respect for the accused's legal rights, especially those that are in the *Constitution*, is essential to the legitimacy of any criminal conviction. Defence lawyers have the grave responsibility of seeing to it that those rights are honoured. In discharging this responsibility, they are not agents of obstruction. They are acting as faithful servants of justice, ensuring that those who seem least deserving of our sympathy are not simply cast outside of legal protection. An unhindered criminal bar, true to its professional mission, is good for our collective soul. As Sir Winston Churchill, with great political wisdom, puts it:

> The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country. A calm and dispassionate recognition of the rights of the accused… [is one of the] symbols which… mark and measure the stored-up strength of a nation, and are the sign and proof of the living virtue in it.[115]

[115] UK, HC, *Parliamentary Debates,* vol 19, col 1354 (20 July 1910) (Sir Winston Churchill), online: <http://hansard.millbanksystems.com/commons/1910/jul/20/class-iii#column_1354>.