THE PRIVILEGE AGAINST SELF-INCRIMINATION AND RIGHT OF ACCESS TO A LAWYER

A Comparative Assessment

This essay assesses the state of the law in Singapore on aspects of the right of silence and the right of access to a lawyer of a suspect who is in custody. It examines the right to be informed of the privilege against self-incrimination, the basis for and fairness of drawing adverse inferences from the non-disclosure of material facts during questioning, the right to be informed of the right to a lawyer and the time at which this right is available to be exercised. Comparisons are made with the law elsewhere, especially in the US, the UK and Europe. The general conclusion is that these rights are relatively weak in Singapore.

HO Hock Lai
LLB (NUS), BCL (Oxford), PhD (Cambridge);
Professor, Faculty of Law, National University of Singapore.

I. Introduction

1 In many countries, the suspect who is detained and questioned by law enforcement officers has a number of fundamental rights. They include the right against self-incrimination and the right to a lawyer. These rights will be examined in the specific context where a person is in custody.[1] In this context, they serve the important function of protecting the fairness and reliability of the process by which his statement is taken. In line with the theme of this issue, especial attention will be paid to the constitutional and human rights dimensions. As compared to the law elsewhere, particularly in the US, the UK and Europe, the two rights are relatively weak in Singapore.

II. The privilege against self-incrimination and adverse inference from silence

2 The right of silence has many aspects.[2] Only some of them will be considered. One aspect is the right of a person who is being questioned by the police not to answer incriminating questions. This is

1 They apply in other contexts as well. For example, the accused has a right of silence and a right to a lawyer at the trial.

2 *R v Director of Serious Fraud Office, ex parte Smith* [1993] AC 1 at 30.

also, and more commonly, referred to as the "privilege against self-incrimination". We will assess the state of this privilege, and of the right of the suspect to be informed of it, in Singapore. The local position will be assessed against international standards. Another aspect of the right of silence deals with the permissibility of drawing an adverse inference at the trial from the accused's failure to disclose facts relevant to his defence during questioning by law enforcement officers. The fairness of and legal basis for drawing such adverse inferences will be considered.

A. Law and developments elsewhere

3 In the US, the privilege against self-incrimination is a constitutional right under the Fifth Amendment to the US Constitution.[3] In the landmark case of *Miranda v Arizona*[4] ("*Miranda*"), the US Supreme Court held that the police must inform a person before the commencement of custodial interrogation of his right to remain silent (and also to have a lawyer with him during the interrogation, a topic to which we will return).[5] If the person indicates that he wishes to remain silent, the questioning must cease. Any statement that has been obtained in violation of this rule cannot be adduced at the trial as evidence of his guilt.[6]

4 The US position is not exceptional. It is well established that the privilege against self-incrimination is an implicit component of the right to a fair trial in Art 6 of the European Convention on Human Rights.[7] The privilege is also recognised in other human rights documents such as the International Covenant on Civil and Political Rights.[8] In England and Wales, as in many other countries, the police have a legal duty to inform the accused of his privilege against self-incrimination. Under the Police and Criminal Evidence Act 1984,[9] a person whom there are grounds to suspect of an offence must be

3 The relevant portion of the Constitution of the United States reads: "No person … shall be compelled in any criminal case to be a witness against himself." This Fifth Amendment right applies to the States under the due process clause of the Fourteenth Amendment to the US Constitution.

4 (1966) 384 US 436.

5 *Miranda v Arizona* (1966) 384 US 436, especially at 478–479. See generally Wayne L Lafave *et al*, *Principles of Criminal Procedure: Investigation* (West Publishing, 2nd Ed, 2009) at pp 290 *ff*.

6 James J Tomkovicz, *Constitutional Exclusion* (Oxford University Press, 2011) ch 3.

7 Ben Emmerson, Andrew Ashworth & Alison Macdonald, *Human Rights and Criminal Justice* (Sweet and Maxwell, 3rd Ed, 2012) ch 13.

8 Article 14(3)(g) of the International Covenant on Civil and Political Rights provides: "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees … (g) Not to be compelled to testify against himself or to confess guilt."

9 Police and Criminal Evidence Act 1984 (c 60) (UK).

cautioned before the police may question him.[10] He must be told that he does not have to say anything and anything he does say may be given in evidence.[11] The failure to administer this caution is a "significant and substantial" breach. Statements taken without a caution may be excluded under s 78 of the Police and Criminal Evidence Act 1984 where their admission "would have … an adverse effect on the fairness of the proceedings".[12]

5 There is increasing international emphasis on the right to be informed of the right of silence. On 22 May 2012, the European Parliament and the Council adopted a *Directive on the Right to Information in Criminal Proceedings*.[13] Under this directive, member states must ensure that suspects or accused persons are informed promptly (in a written "Letter of Rights") of a number of procedural rights, including the right to remain silent. On 20 December 2012, the United Nations General Assembly passed a resolution on *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*.[14] The principles and guidelines were purportedly drawn from "international standards and recognized good practices".[15] Under Guideline 3, states are called upon to introduce measures to "promptly inform every person detained, arrested, suspected or accused of, or charged with a criminal offence of his or her right to remain silent".[16] The person should be advised of his or her "rights and the implications of waiving them in a clear and plain manner".[17]

10 Police and Criminal Evidence Act 1984 (c 60) (UK), Code C, *Requirements for the detention, treatment and questioning of suspects not related to terrorism in police custody by police officers* (revised version 10 July 2012) at para 10: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117598/pace-code-c-2012.pdf> (accessed 7 September 2013).

11 Police and Criminal Evidence Act 1984 (c 60) (UK), Code C, at para 10.5. The caution also contains the warning "it may harm your defence if you do not mention when questioned something which you later rely on in Court".

12 See, *eg*, *R v Sparks* [1991] Crim LR 128 and *R v Bryce* (1992) 95 Cr App Rep 320.

13 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the Right to Information in Criminal Proceedings, OJ L 142/1 (1 June 2012). This directive implements one of the measures ("Measure B") mentioned in Council resolution of 30 November 2009 endorsing a "Roadmap" for strengthening procedural rights of suspected or accused persons in criminal proceedings: OJ C 295/1 (4 December 2009). See generally Jacqueline S Hodgson, "Safeguarding Suspects' Rights in Europe: A Comparative Perspective" (2011) 14 New Criminal L Rev 611 and Laurens van Puyenbroeck & Gert Vermeulen, "Towards Minimum Procedural Guarantees for the Defence in Criminal Proceedings in the EU" (2011) 60 ICLQ 1017.

14 A/Res/67/187 <http://www.un.org/Docs/journal/asp/ws.asp?m=A/Res/67/187> (accessed 7 September 2013).

15 A/Res/67/187 at para 6.

16 A/Res/67/187 at para 43(a).

17 A/Res/67/187 at para 43(i).

B. The position in Singapore

6 Police officers in Singapore have the power under s 22(1) of the Criminal Procedure Code[18] to compel anyone "who appears to be acquainted with any of the facts and circumstances of [a case under investigation] to appear before" them. This includes a person who is suspected of having committed the offence. The police are further empowered to question and take statements from the person. Section 22(2) provides that the person "shall be bound to state truly what he knows of the facts and circumstances of the case". But this is qualified immediately by the proviso: "except that he need not say anything that might expose him to a criminal charge, penalty or forfeiture".[19] While a suspect who is being questioned has a right to exercise the privilege against self-incrimination that is contained in this proviso, this right is weak in two respects. First, he risks incurring an evidential disadvantage at the trial if he exercises this right. Secondly, the police do not have to inform him that he has this right. Each will be elaborated in turn.

(1) Adverse inference

7 It is now accepted that the trial judge may draw an adverse inference against the accused from his failure to mention a fact in his defence when questioned under s 22 of the Criminal Procedure Code.[20] In *Kwek Seow Hock v Public Prosecutor*[21] ("*Kwek Seow Hock*"), a drug trafficking case, the Court of Appeal agreed with the trial judge that an adverse inference may be drawn from the accused's failure to mention in his s 22 statements that he had intended to keep half of the quantity of diamorphine in his possession for personal consumption.[22] (At the time of this decision and before 2010, s 22 was numbered as s 121. For

18 Cap 68, 2012 Rev Ed.

19 Some law enforcement officers are given even wider powers under other legislation. Under s 27 of the Prevention of Corruption Act (Cap 241, 1993 Rev Ed), Corrupt Practices Investigation Bureau officers have the power to require a person "to give … information" relating to corruption cases and the person so questioned is "legally bound to give that information". Failure to give the information is an offence under s 26 of the same Act. In *Taw Cheng Kong v Public Prosecutor* [1998] 1 SLR(R) 78 at [152], the Singapore High Court held that the person questioned under this section has no privilege against self-incrimination and he is "not entitled to refuse to answer incriminating questions".

20 *Govindarajulu Murali v Public Prosecutor* [1994] 2 SLR(R) 398 at [32]–[33]; *Lim Lye Huat v Public Prosecutor* [1995] 3 SLR(R) 689 at [25]; *Low Theng Gee v Public Prosecutor* [1996] 3 SLR(R) 42 at [56]; *Chou Kooi Pang v Public Prosecutor* [1998] 3 SLR(R) 205 at [29]; *Kwek Seow Hock v Public Prosecutor* [2011] 3 SLR 157.

21 [2011] 3 SLR 157.

22 The significance of this fact was that, if accepted, it would have brought the amount of diamorphine being trafficked below the 15g threshold for capital punishment: *Kwek Seow Hock v Public Prosecutor* [2011] 3 SLR 157 at [5].

convenience, all references to the provisions of the Criminal Procedure Code will be to the provisions as they have come to be renumbered since 2010.) The Court of Appeal held:[23]

> [Under s 22 of the Criminal Procedure Code, t]he person under investigation is … entitled to remain silent in so far as self-incrimination is concerned. In our view, because an accused has such a right against self-incrimination when he makes a … statement under [s 22], no adverse inference, in general, may be drawn against him for failing to state any fact or circumstance which may incriminate him in any way.
>
> If, however, the fact or circumstance that is withheld will exculpate the accused from an offence, a court may justifiably infer that it is an afterthought and untrue, unless the court is persuaded that there are good reasons for the omission to mention that exculpatory fact or circumstance. This accords with common sense – if an accused believes he is not guilty of an offence that he might be charged with, he would be expected to disclose why he has such a belief.

8 It should be noted that to attract the privilege in s 22(2), it suffices that disclosure of the fact "might expose [the accused] to *a* criminal charge". A fact might be exculpatory in relation to offence A (drug trafficking) and inculpatory in relation to offence B (possession and consumption of a controlled drug). In *Kwek Seow Hock*, the accused's revelation of the fact about keeping the diamorphine for personal consumption would seem sufficiently incriminatory to attract the privilege in s 22(2).[24]

9 There are a number of difficulties with drawing an adverse inference from non-disclosure in the context of questioning under s 22. First, there is no clear statutory basis for it. The power to draw an adverse inference is conferred by s 261(1) of the Criminal Procedure Code and is expressly confined to the situation where the accused fails to mention a matter relevant to his defence "on being charged with an offence, or informed by a police officer … that he may be prosecuted for an offence". The provision under which he may be so charged or officially informed is s 23 of the Criminal Procedure Code. If the police decide to act under this section, they must set out the charge in writing,

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23 *Kwek Seow Hock v Public Prosecutor* [2011] 3 SLR 157 at [18]–[19].

24 See also illustration (*h*) to s 116 of the Evidence Act (Cap 97, 1997 Rev Ed): "if a man refuses to answer a question which he is not compelled to answer by law, the answer if given would be unfavourable to him". Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 3rd Ed, 2010) at p 176 has argued that s 116 of the Evidence Act "does not apply to the specific circumstances of evidence obtained by the police pursuant to [the relevant provisions of the Criminal Procedure Code (Cap 68, 2012 Rev Ed)] which are comprehensive and self-contained". That s 116 was not originally intended to apply to a person being questioned while in police custody is perhaps further supported by the fact that under the former s 26 of the Evidence Act, no confession made by such a person is admissible.

read it to the accused, and warn him that the court may be less likely to believe him if he withholds any information in his defence and reveals it only at the trial. The accused is then and only then invited to make a statement.

10 While s 261(1) of the Criminal Procedure Code permits an adverse inference to be drawn against the accused from his non-disclosure of material facts when invited to give a statement under s 23, it is unclear that it permits an adverse inference to be drawn from his non-disclosure during questioning under s 22. Section 22 empowers the police to take statements in the course of their investigation. It undoubtedly applies when they have yet to come to any decision on the charge – on whether to bring one, against whom and for what offence. The heading of this section is: "Power to Examine Witnesses". Arguably, once the police charge a person with an offence, he can no longer be fittingly described as a "witness" or someone who merely "appears to be acquainted with any of the facts and circumstances" of the case for the purposes of s 22. On this reading, the police should no longer be able to question the accused under s 22 once they have charged him under s 23. But this reading is no longer available; changes made in 2010 to the wording of s 22 render it explicit that post-charge questioning is permitted. The local law is out of line with the position in other countries, including England and Wales where, with limited exceptions, the police may not interview a person about an offence once they have charged him with the offence or informed him that he may be prosecuted for it.[25]

11 It is clear from the legislative history that when Parliament introduced the power to draw adverse inferences in 1976, it decided against extending the power to the non-disclosure of pertinent facts at the initial stages of investigation when the accused has yet to be charged with an offence or officially informed that he might be prosecuted for it. A provision in the amendment bill which would have allowed an adverse inference to be drawn from the accused's non-disclosure at the pre-charge stages was deleted following strong opposition to its introduction.[26] As V S Winslow submitted in his written representation

25 Police and Criminal Evidence Act 1984 (c 60) (UK), Code C, at para 16.5; exceptions are permitted where, for example, the interview is necessary "to prevent or minimise harm or loss to some other person". See also Police and Criminal Evidence Act 1984, Code C, at para 11.6: the interviewing of a person must cease once, *inter alia*, the investigating officer "reasonably believes there is sufficient evidence to provide a realistic prospect of conviction".

26 Clause 6 of the Criminal Procedure Code (Amendment) Bill which was introduced into Parliament on 29 July 1975 contained an additional provision which would have allowed an adverse inference to be drawn from the accused's failure to mention relevant facts "at any time before he was charged, on being questioned by a police officer trying to discover whether or by whom the offence had been

(*cont'd on the next page*)

to the Select Committee on the bill, an accused who has not been served with the charge might not know what "the police are investigating" and "what they are going to use against him". The obligation which the proposed law sought to place on the accused was analogous to requiring a defendant in a civil case to reveal "what his defence was going to be to an undisclosed statement of claim and to submit to questioning upon it".[27]

12 The matter is, however, complicated by the fact that it has become common practice – which practice, as just mentioned, has now received statutory endorsement – for investigating officers to continue to take further statements from the accused under s 22 after they have already charged him with an offence under s 23. It seems premature to charge a person when there is evidently still a need for further questioning and investigation. In any event, a failure to mention relevant facts in a statement taken *days after* the accused had been "charged or … informed … that he may be prosecuted for an offence" cannot, on any natural reading, be considered a failure to mention relevant facts "*on being*" so charged or informed for the purposes of s 261(1).[28] This provision was based substantially on cl 1(1) of a bill drafted by the Criminal Law Revision Committee of England and Wales as set out in its Eleventh Report on Evidence (General) in 1972.[29] The Committee noted that under the then Judges' Rules, post-charge interrogation of the accused was allowed only in very narrow circumstances. It then went on to state that cl 1(1) (the power to draw adverse inferences) "will not apply to the limited questioning … after the accused has been charged".[30]

committed". This clause was deleted on the recommendation of the Select Committee: see *Singapore Parliamentary Debates, Official Report* (23 July 1976) vol 35 at col 994 (third reading of the Bill); *Report of the Select Committee on the Criminal Procedure Code (Amendment) Bill* (24 June 1976).

27 *Report of the Select Committee on the Criminal Procedure Code (Amendment) Bill* (24 June 1976) Appendix II, at p A16 (quoting from Lord Devlin, "Too High a Price for Conviction" *The Sunday Times* (2 July 1972).

28 When the Criminal Procedure Code was amended in 2010 (Criminal Procedure Code 2010 (Act 15 of 2010)), the word "questioned" was added in the later portion of this provision; as amended, it requires the omitted fact to be one "which in the circumstances existing at the time he could reasonably have been expected to mention when so *questioned*, charged or informed" [emphasis added]. Whatever the intention behind the insertion of "questioned" here, it remains that under the earlier clause of this provision, an adverse inference may be drawn only where the failure to mention the material fact occurred "on being charged or … informed … that he may be prosecuted for an offence". *Cf* Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 3rd Ed, 2010) at p 186.

29 Criminal Law Revision Committee, 11th Report, "Evidence (General)", (1972) (Cmnd 4991).

30 Criminal Law Revision Committee, 11th Report, "Evidence (General)", (1972) (Cmnd 4991) at para 38.

13 In all of the reported cases, the investigating officers seemed to have obtained statements from the accused under s 22 after they had already proceeded against him under s 23 and without re-cautioning him on the risk of an adverse inference. In *Public Prosecutor v Kwek Seow Hock*,[31] the trial judge decided against drawing an adverse inference from the accused's silence when cautioned under s 23 for these reasons:

> It was early in the morning and [the accused] probably did not have any rest or food at the time the [s 23] statement was recorded. He had just been arrested the night before. Also, he was probably feeling unwell due to his craving for heroin and his consequent withdrawal symptoms, some six to seven hours after his last consumption.

14 Given the circumstances the accused was in when he was cautioned, it is doubtful that he fully understood what he was being told. There is no indication that he was reminded of the risk of an adverse inference before further statements were taken from him days and even months later. Even if the correct view is that an adverse inference may be drawn from silence when questioned under s 22, it is, as Professor Pinsler has argued, unfair to draw an adverse inference without a warning – or, in the present kind of situation, a reminder – that it may be drawn.[32] The law is different in England and Wales: the suspect needs to be re-cautioned after each break in questioning.[33]

(2) Right to be informed

15 The privilege was further weakened by the decision of the Court of Appeal in *Public Prosecutor v Mazlan bin Maidun*.[34] In answering the certified points of law with which it was presented in this criminal reference, the following rulings were made:

> (a) the police do not need to inform the person whom they question under s 22 of his privilege against self-incrimination;
>
> (b) the privilege is not a constitutional right – more precisely, it is not a fundamental principle of natural justice

31 [2009] SGHC 202 at [62]. See also *Lim Lye Huat v Public Prosecutor* [1995] 3 SLR(R) 689 at [24]–[25].

32 Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 3rd Ed, 2010) at pp 175–176. A further complication is that the issuance of this warning in the context of s 22 might render the resulting statement inadmissible under s 258(3) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed). This is because the warning might be treated as an inducement for the purposes of that provision. *Cf* s 23(4) which is restricted to the notice issued under s 23(1).

33 Police and Criminal Evidence Act 1984 (c 60) (UK), Code C, at para 10.8.

34 [1992] 3 SLR(R) 968, discussed in Michael Hor, "The Privilege against Self-Incrimination and Fairness to the Accused" [1993] Sing JLS 35. On points (a) and (c), see also *Public Prosecutor v Tan Ho Teck* [1987] SLR(R) 88 at [15] and *Public Prosecutor v Chandran a/l Gangatharan* [1989] CLASNews No 3, 11 at 14.

included in the term "law" in Art 9(1) of the Constitution of the Republic of Singapore,[35] which article states that "[n]o person shall be deprived of his life or personal liberty save in accordance with law";[36]

(c) the police are not in violation of Art 9(1) in not informing the person of the privilege against self-incrimination; and,

(d) the fact that they did not inform him of the privilege prior to taking a statement from him under s 22 does not of itself make the statement inadmissible at the trial.[37]

16 The law was different prior to the amendments introduced in 1976. Just before the amendments, r 3 of Sched E of the Criminal Procedure Code prohibited the questioning of persons in custody without first giving them the standard caution set out in r 5. Under r 5, he had to be told: "You are not obliged to say anything, but anything you say may be given in evidence." The judge had the discretion to exclude statements taken in substantial non-compliance with the rules in Schedule E.[38] Schedule E was repealed in 1976 when the power to draw

35 1985 Rev Ed.

36 *Public Prosecutor v Mazlan bin Maidun* [1992] 3 SLR(R) 968 at [15]; *cf* the view of the High Court below: *Public Prosecutor v Mazlan bin Maidun* [1992] SGHC 134 at [36]. Both the Court of Appeal and the High Court cited the decision of the Privy Council in *Haw Tua Tau v Public Prosecutor* [1981–1982] SLR(R) 133. But the Privy Council did not rule on the constitutional status of the privilege: see, *eg*, *Haw Tua Tau v Public Prosecutor* [1981–1982] SLR(R) 133 at [26].

37 In *Public Prosecutor v Mazlan bin Maidun* [1992] 3 SLR(R) 968, the first accused was told by an interpreter that he was "bound to state truly the facts and circumstances with which he was acquainted concerning the case"; but he was not told that he had the right "not say anything that might expose him to a criminal charge, penalty or forfeiture". This amounted to a positive misrepresentation of the law in s 22(2) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed). According to the court, a statement obtained under such circumstances may be considered to have been obtained by "inducement" and hence may be excluded under the "voluntariness" test set out in what is now s 258(3) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed). An attempt to rely on this line of reasoning failed in *Ong Seng Hwee v Public Prosecutor* [1999] 3 SLR(R) 1 at [40]–[41]. The accused claimed that the police had told him that he was bound to state the truth but not that he had the privilege against self-incrimination. The High Court held that even if this claim were accepted, it established only the existence of an inducement which, in any event, did not cause the accused to make the statement which he did.

38 Criminal Procedure Code (Cap 113, 1970 Ed) s 121(5). See, *eg*, *Public Prosecutor v Ibrahim bin Mastari* [1965–1967] SLR(R) 211 at [6]. The law was even stricter before 1966: see *Mohamed Bachu Miah v Public Prosecutor* [1992] 2 SLR(R) 783 at [46].

an adverse inference from silence was introduced.[39] Recently, during the consultation exercise on the draft Criminal Procedure Code Bill 2009, the Law Society called for the introduction of a legal requirement that the police inform the suspect whom they wish to question under s 22 of his privilege against self-incrimination.[40] This suggestion was far from radical and, if implemented, would have merely brought our law in line with the international standards and practices discussed above.[41] At least one Member of Parliament supported the recommendation of the Law Society during the second reading of the bill.[42] But the call for change was to no avail. The Government was content with the law as it stood.[43]

III. Right to custodial legal advice

A. Law and developments elsewhere

17 The *Miranda* warning required under the Fifth Amendment to the US Constitution includes information on the right to a lawyer. If the suspect exercises this right, the questioning must cease until a lawyer is present. Once a formal accusation is made against the suspect,[44] he acquires the status of a "defendant" and his right to counsel under the Sixth Amendment attaches automatically.[45] "If the accused does not have a lawyer and has not waived the right to assistance, the government is

39 Criminal Procedure Code (Amendment) Act 1976 (Act 10 of 1976). As V S Winslow noted in his written submission to the Select Committee, it is "puzzling" why it was thought necessary to repeal the entire Schedule E: *Report of the Select Committee on the Criminal Procedure Code (Amendment) Bill* (24 June 1976) Appendix II at p A17.

40 *Report of the Council of the Law Society on the Draft Criminal Procedure Code Bill 2009* (17 February 2009) ch 3 <http://www.lawsociety.org.sg/Portals/0/Resource Centre/FeedbackinPublicConsultations/pdf/ReportofCouncilLawSocietyDraftCPC Bill2009.pdf> (accessed 7 September 2013). The Law Society also called for the caution prescribed in s 23 to include a reference to the right of silence. This proposal was also not adopted by the Government.

41 In Malaysia, the police must inform a person of the privilege when they question him under the Malaysian equivalent of s 22 of the Singapore Criminal Procedure Code (Cap 68, 2012 Rev Ed): see Tan Yock Lin & S Chandra Mohan, *Criminal Procedure in Singapore and Malaysia* (LexisNexis, 2012) at para 454.

42 *Singapore Parliamentary Debates, Official Report* (18 May 2010) vol 87(3) at col 442.

43 *Singapore Parliamentary Debates, Official Report* (19 May 2010) vol 87(4) at col 558.

44 In *Kirby v Illinois* (1971) 406 US 682 at 689, the US Supreme Court held that the a person's Sixth and Fourteenth Amendment right to counsel attaches once "the government has committed itself to prosecute" and judicial criminal proceedings have commenced "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment".

45 The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right … to have the assistance of counsel for his defense." This right is extended to state cases under the due process clause of the Fourteenth Amendment.

not allowed to use any incriminating disclosures it obtains to prove that he committed the offense that was the subject of the charge."[46]

18 Similarly, in Europe,[47] the suspect who is detained for questioning must be informed of his fundamental right to legal advice. In *Salduz v Turkey*,[48] the applicant was interrogated by anti-terrorism security officers without being given access to a lawyer. A statement containing admissions was obtained from him. It was admitted into evidence at his trial and used as a basis for his conviction. He brought an appeal before the European Court of Human Rights alleging violation of his right to a fair trial under Art 6 of the European Convention of Human Rights. The Grand Chamber ruled in his favour, holding that:[49]

> [A]s a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right.

19 This ruling, according to the Grand Chamber, was "in line with the generally recognised international human rights standards".[50] The right to custodial legal advice will be further entrenched when a proposed directive of the European Parliament and the Council on the right of access to a lawyer in criminal proceedings is formally adopted.[51] Under Art 3 of the proposed directive, not only will the suspect have a right of access to a lawyer before he is questioned, he also has the right to have the lawyer "present and participate effectively" during the questioning.

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46 James J Tomkovicz, *Constitutional Exclusion* (Oxford University Press, 2011) at p 157.

47 More accurately, the 47 member states of the Council of Europe.

48 (2009) 49 EHRR 19.

49 *Salduz v Turkey* (2009) 49 EHRR 19 at [55]. This ruling rests on the court's interpretation of Art 6(1) (on the right to a fair hearing) read with Art 6(3)(c) (on the right to defend oneself through legal assistance) of the European Convention of Human Rights.

50 *Salduz v Turkey* (2009) 49 EHRR 19 at [53]. In addition to the relevant international law materials mentioned in [32]–[44] of the judgment, see also Art 55, para 2(d) of the Rome Statute of the International Criminal Court (which gives a person under investigation the right, and the right to be informed of the right, "to be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel": <http://untreaty.un.org/cod/icc/statute/romefra.htm> (accessed 7 September 2013).

51 See *Report on the Proposal for a Directive of the European Parliament and of the Council on the Right of Access to a Lawyer in Criminal Proceedings and on the Right to Communicate Upon Arrest* (COM(2011)0326 – C7-0157/2011–2011/0154 (COD), 24 June 2013) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2013-0228+0+DOC+PDF+V0//EN> (accessed 7 September 2013).

20 Convention rights are given effect in the UK under the Human Rights Act 1998.[52] Section 2 of this Act directs the courts in the UK to "take into account" judgments of the European Court in determining issues pertaining to a Convention right. *Salduz v Turkey* was applied by the UK Supreme Court hearing an appeal from Scotland in *Cadder v HM Advocate*[53] ("*Cadder*"). In *Cadder*, the accused was detained and questioned by the police under a statute which did not give him any right of access to legal advice before or during the questioning. He made a number of admissions on which the Crown subsequently relied in obtaining his conviction. On appeal, the Supreme Court held that his right to a fair trial under Art 6 of the Convention had been violated.[54] It did not matter that a range of "safeguards" existed under Scots law; they included the recording of police interviews, the corroboration requirement (which meant that no accused could be convicted on his admission alone), a legal duty on the police to inform the suspect that he was under no obligation to answer any question,[55] and the prohibition against the drawing of an adverse inference from his silence.[56] Furthermore, under Scots law, "anything of the nature of interrogation or cross-examination would make the [police] questioning unfair, rendering the answers inadmissible in evidence".[57]

21 The Supreme Court found the safeguards insufficient to compensate for the lack of access to a solicitor. As is seen in the earlier quotation, the Grand Chamber in *Salduz v Turkey* accepted that the right to custodial legal advice may be restricted in exceptional circumstances. In *Cadder*, the Supreme Court held that this qualification did not license "systematic departure" from the right – which was what the Scots statutory regime sought to do.[58] Lord Hope took the view that restriction of the right was permissible "only if there [were] compelling reasons in the light of the particular circumstances of the case which [made] the presence of a solicitor impracticable."[59] The strong vindication of the right to custodial legal advice by the Supreme Court rested on its recognition of the "particularly vulnerable position" of the accused "at the investigation stage of the proceedings". According to

52 Human Rights Act 1998 (c 42) (UK).

53 [2010] 1 WLR 2601.

54 In response to this decision, the Scottish Parliament passed the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 to allow detainees the right to consult a solicitor prior to and during questioning: see generally Dimitrios Giannoulopoulos, "'North of the Border and Across the Channel': Custodial Legal Assistance Reforms in Scotland and France" [2013] Crim L R 369.

55 Other than questions eliciting personal details such as name, address and date of birth. See ss 14(9) and 14(10) of the Criminal Procedure (Scotland) Act 1995.

56 *Cadder v HM Advocate* [2010] 1 WLR 2601 at [27], *per* Lord Hope.

57 Drummond Young, "Scotland and the Supreme Court" (2013) 2 Cam J of Int'l and Comp Law 67 at 68.

58 *Cadder v HM Advocate* [2010] 1 WLR 2601 at [41].

59 *Cadder v HM Advocate* [2010] 1 WLR 2601 at [50].

Lord Hope, "this vulnerability can only be adequately compensated for by the presence of a lawyer whose task it is … to help to ensure that the right of an accused not to incriminate himself is respected."[60] As Lord Rodger noted, the Scots procedure which denied the suspect access to legal advice prior to questioning was intended to increase the chances of him incriminating himself; hence, it was "the very converse of what the Grand Chamber [in *Salduz v Turkey* held was] required by article 6(1)(3)(c) of the Convention". (This article provides for the right to defend oneself through legal assistance.)[61]

22 The Supreme Court was fully aware of but undeterred by the costs of excluding admissions made by suspects without access to legal advice. Lord Hope acknowledged that the court's ruling would have "profound consequences", not least because it affected many cases that were awaiting trial. Nevertheless, in a ringing endorsement of the strong nature of the right at stake (and more generally of "rights as trumps"), Lord Hope declared that there was "no room" in the situation which confronted the court "for a decision that favours the status quo simply on grounds of expediency". The issue was one of law and had to "be faced up to, whatever the consequences".[62] Lord Brown acknowledged that the court's ruling would incur potential loss "in the way of convicting the guilty". But, in his view, this was "more than compensated for by the reinforcement thereby given to the principle against self-incrimination and the guarantees this principle provides against any inadequacies of police investigation or any exploitation of vulnerable suspects".[63]

B. The position in Singapore

23 In Singapore, the position is starkly different. While Art 9(3) of the Constitution states that "[w]here a person is arrested, he … shall be allowed to consult and be defended by a legal practitioner of his choice", this right has in two respects failed to receive as strong a vindication as one might have hoped from the Judiciary. The first is the right to be informed of this right; the second is the time at which the right is available to be exercised.

(1) Right to be informed

24 It has been decided that the suspect does not have a right to be informed of his constitutional right to counsel in Singapore. The High

60 *Cadder v HM Advocate* [2010] 1 WLR 2601 at [33].
61 *Cadder v HM Advocate* [2010] 1 WLR 2601 at [93].
62 *Cadder v HM Advocate* [2010] 1 WLR 2601 at [4].
63 *Cadder v HM Advocate* [2010] 1 WLR 2601 at [108].

Court has declined to read this "further right" into Art 9(3).[64] It is different in the US. As we saw, the mandatory *Miranda* warning includes a reference to the right to counsel. In Europe, the previously mentioned directive on the right to information in criminal proceedings requires member states to put into force (if they are not already in place) laws, regulations and administrative provisions by 2 June 2014 to ensure that suspects or accused persons are informed promptly of, *inter alia*, their right of access to a lawyer.[65] Similarly, Guideline 3 of the United Nations General Assembly resolution on *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*[66] calls upon member states to introduce measures to "promptly inform every person detained, arrested, suspected or accused of, or charged with a criminal offence of … his or her right to consult with counsel …, especially before being interviewed by the authorities; and his or her right to be assisted by an independent counsel… while being interviewed"[67] and to "prohibit, in the absence of any compelling circumstances, any interviewing of a person by the police in the absence of a lawyer"[68] and to "ensure that persons meet with a lawyer … promptly after their arrest in full confidentiality".[69] States must ensure that the person is advised of his "rights and the implications of waiving them in a clear and plain manner".[70]

(2) Time of access

25 As the authorities stand in Singapore, the police do not have to give the accused access to legal advice immediately upon arrest. Neither do they need to do this before they take statements from him under s 22 or 23. Article 9(3) is satisfied so long as he is allowed to consult a lawyer "within a reasonable time after his arrest".[71] A delay of two weeks was found to be reasonable in *Jasbir Singh v Public Prosecutor*.[72] The same

64 *Rajeevan Edakalavan v Public Prosecutor* [1998] 1 SLR(R) 10; *Sun Hongyu v Public Prosecutor* [2005] 2 SLR(R) 750 at [34] (the High Court held that there was also "no right for the accused to contact third parties to discover and enquire into his right to counsel" or "to contact family and friends to enquire into the legal consequences of his arrest").

65 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the Right to Information in Criminal Proceedings, OJ L 142/1 (1 June 2012) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:142:0001:0010:EN:PDF> (accessed 7 September 2013).

66 A/Res/67/187 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/489/82/PDF/N1248982.pdf?OpenElement> (accessed 7 September 2013).

67 A/Res/67/187 at para 43(a).

68 A/Res/67/187 at para 43(b).

69 A/Res/67/187 at para 43(d).

70 A/Res/67/187 at para 43(i).

71 *Lee Mau Seng v Minister for Home Affairs* [1971–1973] SLR(R) 135 at [12].

72 [1994] 1 SLR(R) 782 at [49].

conclusion was reached in *Public Prosecutor v Leong Siew Chor*[73] where the period of delay was 19 days. In both cases, incriminating statements had been taken, and in *Public Prosecutor v Leong Siew Chor*, the case had apparently been mentioned three times in the Subordinate Courts[74] by the time the accused got to see his lawyer. In both instances, the incriminating statements were introduced into evidence and the accused was convicted.

26 In explaining or justifying the delay in granting access to legal advice, there is typically reliance on the general assertion that allowing a detained suspect to consult a lawyer will likely obstruct police investigation. There is no convincing explanation of how this is so. In *Public Prosecutor v Leong Siew Chor*, the defence counsel – in what seems like a desperate bid to see his client – was prepared to forego confidentiality and offered to meet his client "in the presence of the deputy public prosecutor and the investigating officer" so as to "advise him of his rights".[75] Even with so great a concession, the proposal was rejected by the police on the ground that they did not want to take the risk of "external parties impeding the investigations and resulting in the accused shutting up".[76] The trial court accepted that the police had acted reasonably in denying the request.[77] It is near impossible to imagine how letting the defence counsel meet his client under the proposed arrangement could result in "external parties impeding the investigations" or lead to the "disappearance" or "destruction" of evidence.[78]

27 Fear of "the accused shutting up" was the other – and likely the main – reason for denying access to custodial legal advice. It would be wrong to prevent the accused from seeing his lawyer so as to reduce the chances of him getting to know of and claiming the privilege against self-incrimination. The denial of access for this reason was, as earlier discussed, condemned by the Supreme Court in *Cadder* as running counter to a basic requirement of a fair trial. It should also go without saying that it is not a good reason to delay access to a lawyer that the accused has yet to make an admission or confession.[79]

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73 [2006] 3 SLR(R) 290 at [87]. An attempt to re-argue on the issue of the right to counsel was rejected by the Court of Appeal: *Leong Siew Chor v Public Prosecutor* [2006] SGCA 38 at [9].

74 *Public Prosecutor v Leong Siew Chor* [2006] 3 SLR(R) 290 at [68].

75 During the second mention of a different case, the same counsel requested "to talk to [his client] in front of the investigating officer and the deputy public prosecutor to let her know her rights". The request was turned down by the District Judge: "Murder Accused Remanded for Another Week" *The Straits Times* (20 July 2011).

76 *Public Prosecutor v Leong Siew Chor* [2006] 3 SLR(R) 290 at [61].

77 *Public Prosecutor v Leong Siew Chor* [2006] 3 SLR(R) 290 at [87].

78 *Public Prosecutor v Leong Siew Chor* [2006] 3 SLR(R) 290 at [87].

79 See *Thornhill v Attorney-General of Trinidad and Tobago* [1981] 1 AC 61 at 72–73:

(*cont'd on the next page*)

28 The Strasbourg Court has rightly recognised that "unfairness at the pretrial stage may render the trial proceedings unfair".[80] In Singapore, statements that law enforcement officers managed to get out of the accused are often given decisive weight at the trial. Judges are apparently quite willing to draw adverse inferences from the accused's non-disclosure of material facts at the investigatory stage.[81] Trials are won or lost in large part by what the accused had told or failed to tell his interrogating officers. Allowing suspects in custody to have access to legal advice will help to ensure that the accused's statement is taken fairly, accurately, in accordance with law, and in a manner that respects his legal rights, including the right against self-incrimination. The slew of "safeguards" (the recording of police interviews, the corroboration requirement, the prohibition against the drawing of an adverse inference from silence and so forth) which exist in Scotland and which were highlighted by the Crown in *Cadder* are absent in Singapore. There is therefore an even stronger case in Singapore for allowing the suspect early access to a lawyer.[82] As the European Court has noted on a number of occasions, to delay access until after the accused has given his statements may well result in a situation where his defence is already "irretrievably prejudiced" by the time he gets to see his lawyer.[83]

29 It is true that a person who is kept ignorant of a right will not claim it. Apprising the suspect of his right against self-incrimination will increase the chances that he will exercise this right. It is also true that his exercise of this right (by "shutting up") may in a sense "impede" police investigation. But surely it is not enough to point out that the State may be hindered in getting a criminal conviction. After all, the law contains

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> Since the only hindrance to the processes of investigation which it was suggested by the police officers might be occasioned by the appellant's being allowed to consult a lawyer at the time the requests were made was that they would be less likely to succeed in obtaining self-criminating statements from him if he were advised about his legal right to decline to answer questions, any delay for which this was the only reason was clearly an unreasonable delay.

See also *R v Lemsatef* [1977] 1 WLR 812 at 816–817 (English Court of Appeal): "This court wishes to stress 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."

80 Jacqueline S Hodgson, "Safeguarding Suspects' Rights in Europe: A Comparative Perspective" (2011) 14 *New Criminal Law Review* 611 at 648.

81 Alan Khee-Jin Tan, "Adverse Inferences and the Right of Silence: Re-examining the Singapore Experience" [1997] Crim LR 471.

82 See *Report of the Council of the Law Society on the Draft Criminal Procedure Code Bill 2009* (17 February 2009) at para 2.36 <http://www.lawsociety.org.sg/Portals/0/ResourceCentre/FeedbackinPublicConsultations/pdf/ReportofCouncilLawSocietyDraftCPCBill2009.pdf> (accessed on 7 September 2013), recommending "that the investigative authorities should only start interviewing the accused *after* the accused has consulted with counsel".

83 *Murray v United Kingdom* (1966) 22 EHRR 29 at [66]; *Averill v United Kingdom* (2000) 31 EHRR 36 at [60].

many "hindrances" that serve the interest of justice and in protecting the innocent from conviction. What has to be guarded against is the *unlawful* or *improper* impediment of police investigation. It would be perverse to treat the "impediment" posed by the exercise of the legal right against self-incrimination as unlawful or improper.

30 It is conceivable, though surely rare, that allowing a detained suspect to consult a lawyer might result in unlawful or improper interference with criminal investigation. But the remote possibility of this happening cannot justify withholding access as a general rule. It can at best warrant a delay of access in unusual circumstances. In England, a "person arrested and held in custody" is entitled under s 58(1) of the Police and Criminal Evidence Act 1984 "to consult a solicitor privately at any time".[84] It is only where exceptional circumstances exist in cases involving "serious arrestable offences" that access may be delayed up to 36 hours.[85] In *R v Samuel*,[86] the accused was not permitted to consult a solicitor until after a number of incriminating statements had been obtained from him. The police relied on two of the exceptional grounds set out in s 58 that allowed delay of access: these were that allowing access might alert other suspects or hinder the recovery of property that was the subject of the crime being investigated.[87]

31 The Court of Appeal held that the accused had been "denied improperly one of the most important and fundamental rights of a citizen".[88] There was no justification for the delay in granting custodial legal advice. The police had no basis for forming a reasonable belief that the lawyer, if allowed to see his client, would inadvertently or unwittingly, much less deliberately, do something that would alert other suspects or hinder the recovery of criminal property. The grounds on which the police rely must be specific to the solicitor concerned and the solicitor in *R v Samuel* was "highly respected" and a "very experienced professional lawyer". Surely no less "respected" or "experienced" or

84 See also Police and Criminal Evidence Act 1984 (c 60) (UK), Code C, para 3.1(ii).

85 Police and Criminal Evidence Act 1984 (c 60) (UK) s 58(5) and Code C Annex B, para 6.

86 [1988] 1 QB 615.

87 As provided for in ss 58(8)(b) and 58(8)(c) of the Police and Criminal Evidence Act 1984 (c 60) (UK) respectively. Under Art 3 of the aforementioned proposed directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings, temporary derogation of the right to custodial legal advice may be allowed only in two situations: (a) where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person and (b) immediate action by the investigating authorities is imperative to prevent a substantial jeopardy to criminal proceedings: <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/p7_am178cons_antonescu_/p7_am178cons_antonescu_en.pdf> (accessed 7 September 2013).

88 *R v Samuel* [1988] 1 QB 615 at 630.

"professional" was the defence counsel in *Public Prosecutor v Leong Siew Chor*.[89]

(3) Adverse inference and right to a lawyer

32 There are a few inconsistencies in the judicial attitude to adverse inferences and the right to a lawyer. In *Yap Giau Beng Terence v Public Prosecutor*,[90] the trial judge drew "an adverse inference from [the accused's] failure to raise the material aspects of his defence in his [s 23] cautioned statements". It was argued on appeal that the accused's silence should not have been taken against him as "he had wished to consult a lawyer first and did not want to say the 'wrong things'".[91] The High Court rejected this explanation as "completely unacceptable". It added:[92]

> The whole purpose of [s 23] is to compel the accused to outline the main aspects of his defence immediately upon being charged so as to guard against the accused raising defences at trial which are merely afterthoughts. If the accused is allowed to escape the consequences of [s 261(1)] simply by explaining that he had wished to consult a lawyer first before saying anything, [s 23] would be rendered otiose.

33 It is unfortunate that the term "compelled" was used in this passage. The constitutionality of the provision that allows the drawing of an adverse inference was previously upheld by the Privy Council on the premise that the inducement it offered the accused to speak did not amount to compulsion.[93] Furthermore, contrary to what the High Court

89 [2006] 3 SLR(R) 290 at [87]: according to the trial judge, his finding that the delay of access to counsel was reasonable should not be read as "an indictment against the integrity of counsel, generally or specifically". But see *Report of the Council of the Law Society of Singapore on the Draft Criminal Procedure Code Bill 2009* (17 February 2009) at para 2.6 <http://www.lawsociety.org.sg/Portals/0/ResourceCentre/FeedbackinPublicConsultations/pdf/ReportofCouncilLawSocietyDraftCPCBill2009.pdf> (accessed on 7 September 2013).

90 [1998] 2 SLR(R) 855.

91 *Yap Giau Beng Terence v Public Prosecutor* [1998] 2 SLR(R) 855 at [38].

92 *Yap Giau Beng Terence v Public Prosecutor* [1998] 2 SLR(R) 855 at [38]. Approved by the Court of Appeal in *Goh Choon Meng v Public Prosecutor* [1999] SGCA 46 at [26] and applied by the High Court in *Public Prosecutor v Kwek Seow Hock* [2009] SGHC 202 at [58]. See also *Muhammad bin Kadar v Public Prosecutor* [2011] SLR 1205 at [57].

93 *Jaykumal v Public Prosecutor* [1981–1982] SLR(R) 147. The Privy Council adopted, *mutatis mutandis*, the reasoning in *Haw Tua Tau v Public Prosecutor* [1981–1982] SLR(R) 133 at [22]–[29]. In the latter case, the Privy Council upheld the constitutionality of the law that permits an adverse inference to be drawn from the accused's silence at the trial. It was held that even if the privilege against self-incrimination had constitutional status (an issue which was left open), the prescribed warning on the possibility of an adverse inference amounted only to an inducement to speak that fell short of a compulsion. A point worth noting is that the accused is told that he has a right not to testify before he is asked to elect whether or not to take the stand. In contrast, the accused who is cautioned under s 23 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) is not told that he has

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suggested, allowing the accused access to a lawyer would not have rendered s 23 "otiose". In *Ramakrishnan s/o Ramayan v Public Prosecutor*,[94] it was argued that an adverse inference should not be drawn from the accused's election to remain silent at the trial as his election was made on legal advice. This elicited the following response from the High Court:[95]

> My riposte would be that the appellant must be presumed to have been properly advised by his counsel of the consequences of keeping silent. Despite this, he had on his own free will elected not to testify. Hence, there were no grounds for complaint now that adverse inferences were drawn.

34 If, as is all too clear from this passage, the court is not going to be deterred from drawing an adverse inference by the accused's claim that his silence was maintained on legal advice,[96] why should it be feared that allowing access to legal advice will render otiose the power to draw an adverse inference?

35 There is another inconsistency. According to the High Court in *Yap Giau Beng Terence v Public Prosecutor*,[97] the accused is expected to "outline the main aspects of his defence immediately" upon being charged and cautioned under s 23. It is one thing to invite the accused to mention "any fact or matter in [his] defence" (as is stated in the prescribed caution) and quite another to turn this into a call on him to outline his defence. Without the assistance of a lawyer, few suspects would have the legal knowledge or be in the state of mind to do well in recalling and identifying "immediately" facts that might be of legal relevance, much less in working out his defence. To deny him access to a lawyer is to place him in the position where he cannot reasonably be expected to do well what we are calling upon him to do. It seems

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a legal right not to say anything. In their feedback on the draft Criminal Procedure Code Bill 2009, the Law Society had recommended that the wording of the caution be amended to include an explicit reference to the accused's right of silence (*Report of the Council of the Law Society on the Draft Criminal Procedure Code Bill 2009* (17 February 2009) at para 3.18(iv) <http://www.lawsociety.org.sg/Portals/0/ResourceCentre/FeedbackinPublicConsultations/pdf/ReportofCouncilLawSocietyDraftCPCBill2009.pdf> (accessed on 7 September 2013)). This suggestion of the Law Society was not adopted by the Government. In England and Wales, the sentence "You do not have to say anything" is included in the caution that is given to a person who is charged or informed that he may be prosecuted for an offence: Police and Criminal Evidence Act 1984 (c 60) (UK), Code C, at para 16.2.

94 [1998] 3 SLR(R) 161.

95 *Ramakrishnan s/o Ramayan v Public Prosecutor* [1998] 3 SLR(R) 161 at [37].

96 In England, the jury is instructed to consider whether "the defendant genuinely and reasonably relied on the legal advice to remain silent" in deciding on an adverse inference: *R v Beckles* [2005] 1 WLR 2829 at [47].

97 [1998] 2 SLR(R) 855 at [38].

contradictory to deny the accused access to legal advice at this stage.[98] An arguably fairer law would be the one in England and Wales; there, the power to draw an adverse inference from the accused's non-disclosure of material facts during questioning does not apply where "the accused had not been allowed an opportunity to consult a solicitor prior to being questioned, charged or informed" that he might be prosecuted for an offence.[99]

IV. Conclusion

36 Whereas the privilege against self-incrimination is a constitutional right or recognised as a human right elsewhere, it has not gained constitutional status in Singapore. In the US and in England and Wales, the police are required to inform the suspect of the privilege before questioning him and the failure to do so will or may result in the exclusion of his statement. In contrast, there is no legal requirement in Singapore to inform the suspect of the privilege before taking a statement from him, and the fact that he was not so informed does not of itself provide a basis for excluding his statement. Adverse inferences may be drawn against the accused from his failure to mention facts in his defence when questioned during criminal investigation. This power is not confined to silence when invited to make a cautioned statement under s 23; it has in practice been applied to omissions in (non-cautioned) statements obtained from him under s 22.

37 In Singapore, the right to a lawyer is constitutionally entrenched. But, as the constitutional provision has come to be interpreted, the accused need not be informed of this right and he has no right to exercise it immediately upon his arrest. Access to a lawyer may be delayed for "a reasonable time after his arrest". In determining what counts as a "reasonable" period, the protection of the accused, his need for legal advice and the importance of the right against self-incrimination are not ranked as highly as they should be and as they are under internationally respected standards. Calls for change in the

98 In his written representation to the Select Committee in 1976 when the bill containing the present law was introduced, Mr H E Cashin commented:

> [I]t would seem that upon being served with a written notice that person must inform the police … of all the facts that are relevant to his defence. This presupposes that such a person understands and is aware of the nature of the offence he is charged with, that he knows the elements which make up the charge and that he can perform the task of an experienced criminal lawyer in deciding what are relevant facts and what are not. One would have thought that this imposes an almost insuperable burden on most of the population in Singapore.

Report of the Select Committee on the Criminal Procedure Code (Amendment) Bill (24 June 1976) Appendix II, at p A9.

99 Criminal Justice and Public Order Act 1994 (c 33) (UK) s 34(2A).

areas considered in this essay have been made over the years, both in and outside of Parliament.[100] They have thus far met with little success.[101] But the door to reform is apparently not closed.[102]

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100 See, *eg*, *Singapore Parliamentary Debates, Official Report* (18 October 2005) vol 80 at cols 1654–1659; (2 March 2007) vol 82 at cols 2390–2392 and 2409–2411; (18 May 2010) vol 87 at cols 430–431, 441–442, 444–445 and 456; (19 May 2010) vol 87 at cols 544–545 and 558–560.

101 The Minister for Law mentioned in Parliament during the debate on the Criminal Procedure Code Bill on 19 May 2010 that "[s]ince 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. The scheme was formed in August 2007 and has been in place since then": *Singapore Parliamentary Debates, Official Report* (1 May 2010) vol 87 at col 559.

102 In a Straits Times article dated 3 September 2013 ("Defamation laws 'not there to stop political discussion'"), the Law Minister is reported to have said in a dialogue with law students at the National University of Singapore:

> The Bar has come up with some suggestions of what accused persons need to be told. The police are looking at that, they're working with the courts on that and in terms of access within the first 48 hours, police had some concerns as to how that might pan out … All that I can say is this is not static. It's been the subject of very intensive discussions.