MODERNISING THE CRIMINAL JUSTICE FRAMEWORK

The Criminal Procedure Code 2010

The concept of "balancing" prevalent in criminal justice discourse is premised on a paradigm where "state" and "individual" interests are perpetually in conflict. This article outlines the key components of the new Criminal Procedure Code 2010 and discusses another dimension of the state-individual relationship. Rather than being inherently incompatible, synergistic common goals can, on occasion, be pursued between the State and an accused. The article will also consider areas in the Criminal Procedure Code 2010 where conflicts between "state" and "individual" interests have in fact arisen, and will outline the pragmatic approach that has been adopted towards their resolution.

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The criminal process is at the heart of the criminal justice system. It is not only a subject of great practical importance; it is also a reflection of our ideals and values as to the way in which we can accord justice to both the guilty and to the innocent.[1]

I. Introduction

1 The recent legislative amendments to Singapore's Criminal Procedure Code ("CPC") signify a new chapter in the continuing evolution of Singapore's criminal justice process. The new Criminal Procedure Code 2010 ("New CPC"),[2] which came into force on

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1 Chan Sek Keong, "The Criminal Process – The Singapore Model" (10th Singapore Law Review Lecture) (1996) 17 Sing LR 433.

2 Act 15 of 2010.

2 January 2011, is a further milestone in the journey where "society seeks to strike a balance between: the rights of society, to secure conviction of a person who commits an offence; and the rights of an individual, not to be wrongly convicted".[3] This article will examine the changing frontiers of this balance by discussing a number of the New CPC's amendments. Through this vantage point, this piece will also highlight the need to supplement this "balancing" analytic to reflect *other* facets of the state-individual relationship. Explicit articulation of these added dimensions will help develop a more comprehensive analytic for the rationalisation and evaluation of value choices within the criminal process.

2 This article considers the above issues in four parts.

(a) The first section explores the theoretical construct of "balancing", and explains how the concepts of "state" and "individual" are not inherently opposed absolutes. Assessments of the criminal process through the *singular* analytic of "balancing" *between* state and individual interests should therefore be avoided.

(b) The second section provides an introduction to the New CPC[4] by outlining its substantive amendments and the consultative processes leading to its enactment.

(c) The third section highlights how the policy options within the criminal process extend *beyond* a binary preference between "state" or "individual" interests. The New CPC's regimes of (i) pre-trial discovery and (ii) community-based sentencing ("CBS") illustrate how certain facets of state and individual interests *can* be synergistically aligned towards the attainment of *common* objects. Rather than always having to "balance" *between* state and individual interests, "shared spaces" can also exist.

(d) The fourth and final section examines the New CPC's approach to mediating conflicts between state and individual interests where such conflicts do in fact arise. The New CPC's rigorously pragmatic approach[5] to balancing these competing interests will be illustrated by looking at the New CPC's amendments on: (i) victim compensation, (ii) video

3 *Singapore Parliamentary Debates*, *Official Report* (19 May 2010) vol 87 (K Shanmugam, Minister for Law).

4 Criminal Procedure Code 2010 (Act 15 of 2010).

5 See also Michael Hor, "The Independence of the Criminal Justice System in Singapore" [2002] Sing JLS 497 at 512, who expresses the view that "Singapore is blessed, or some may say cursed, with an overwhelming commitment to pragmatism".

conferencing for First Mentions, and (iii) admissibility of *voir dire* evidence.

II. The dialectics of criminal justice reform – Of commonalities and divergence

> [I]t is a fine balance between the public interest in ensuring that criminal acts are punished and fairness to the accused person.[6]

3 The "ubiquitous notion"[7] of balancing between (i) the State's public order concerns and (ii) individual liberty and autonomy is a familiar refrain in criminal justice literature.[8] This section will consider the following questions ancillary to this concept of "balancing":

> (a) *The relationship between "state" and "individual" interests* – What do the respective concepts of "state" and "individual" interests comprise? Are these concepts monolithic, or made up of diverse ancillary values? Are the interests of "state" and "individual" mutually exclusive?
>
> (b) *The methodology and outcomes of "balancing"* – Are the tensions requiring "balancing" within the criminal process always between "state" and "individual" interests *inter se*? How should competing interests be reconciled to arrive at a "just" outcome?

4 The subsequent parts of the article will then apply the tentative conclusions on each of these issues to the framework of the New CPC.[9]

A. The relationship between "state" and "individual" interests

5 In a speech delivered in 1995 whilst he was the Attorney-General, the current Honourable Chief Justice remarked that:[10]

> [T]he administration of justice involves a tension between 2 fundamental needs: on the one hand, the need to ensure the security and well-being of the community and, on the other hand, the need to give expression to the interests of the individual. *At times, it is true, the*

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6 *PP v Ng Guan Hup* [2009] 4 SLR(R) 314 at [58].

7 Andrew Ashworth, *The Criminal Process: An Evaluative Study* (Oxford University Press, 2nd Ed, 1998) at p 25.

8 See, *eg*, Canada, Law Reform Commission, *Report on Our Criminal Procedure* (Report No 32, 1988) at p 28; United Kingdom, Royal Commission on Criminal Procedure, *Report* (Cmnd 8092, 1981) (Chairman: Sir Cyril Philips) at para 1.11.

9 Criminal Procedure Code 2010 (Act 15 of 2010).

10 Chan Sek Keong, "The Administration of Criminal Justice in Singapore: A Judicial Perspective", speech at the 1995 Commissioner of Police Lecture Series, cited in *Huang Zhengwei Sebastian v PP* [2002] SGDC 227 at [24].

> *2 needs meet; but it would be impractical to assume that this is invariably the case.* [emphasis added]

6 In this regard, the dominant metaphorical concept of "balancing" state against individual depicts the implicit imagery of a Justician opposition between the "scales" of state interest on the one hand, and of individual autonomy on the other. As a result, the language of "conflict" and "compromise" has become the central schemata for navigating the relationship between the two.[11] This pride of place accorded to the perception of incompatibility between state and individual interests obscures the equally real possibility that "[a]t times … the 2 needs [may] meet".[12] The learned Chief Justice's caution against assuming invariable *alignment* between these areas consequently appears to have been overshadowed by a converse (but equally reductionist) assumption that the interests of state and individual are inherently *opposed*.

7 One acclaimed example of this dialectical rubric is Herbert Packer's seminal attempt to abstract, using an opposing pair of normative models, the "two separate value systems that compete for attention in the operation of the criminal process".[13] Packer's first model, the Crime Control Model, accords "primary attention" to the system's ability to apprehend and convict offenders.[14] To discharge this function, the Crime Control Model places a "premium on speed and finality",[15] values which it seeks to achieve through heavy reliance on administrative fact-finding processes.[16] In contrast, Packer's second model, the Due Process Model, is essentially a "negative" model[17] based on "antiauthoritarian" values"[18] that "assert limits on the nature of official

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11 See, *eg*, Goldstein, "The State and the Accused: Balance of Advantage in Criminal Procedure" (1959–1960) 69 Yale LJ 1149; Jerome Hall, "Objectives of Federal Criminal Procedural Revision" (1941–1942) 51 Yale LJ 723 at 728, who observes that "the most important single generalization that can be made about … any civilized criminal procedure is that its ultimate ends are dual and conflicting".

12 Chan Sek Keong, "The Administration of Criminal Justice in Singapore: A Judicial Perspective", speech at the 1995 Commissioner of Police Lecture Series, cited in *Huang Zhengwei Sebastian v PP* [2002] SGDC 227 at [24].

13 Herbert Packer, "Two Models of the Criminal Process" (1964–1965) 113 U Pa L Rev 1 at 5.

14 Herbert Packer, "Two Models of the Criminal Process" (1964–1965) 113 U Pa L Rev 1 at 10.

15 Herbert Packer, "Two Models of the Criminal Process" (1964–1965) 113 U Pa L Rev 1 at 9.

16 Herbert Packer, "Two Models of the Criminal Process" (1964–1965) 113 U Pa L Rev 1 at 13.

17 Herbert Packer, "Two Models of the Criminal Process" (1964–1965) 113 U Pa L Rev 1 at 22.

18 Herbert Packer, "Two Models of the Criminal Process" (1964–1965) 113 U Pa L Rev 1 at 16.

power and on the modes of its exercise".[19] Unlike the Crime Control Model, which may be likened to an "assembly line", the Due Process Model resembles "an obstacle course".[20]

8 Apart from being reflective of differing *empirical* assessments of factual reliability,[21] Packer also attributes the differences between these two models to a *normative* divergence in ideology. The Crime Control Model embodies a value system that regards the repression of criminal conduct as "by far the most important function" of the criminal process".[22] In contrast, the Due Process Model's central preoccupation is with affording adequate protection to "the primacy of the individual".[23] Through the juxtaposition of these competing models, Packer professes to have encapsulated "the normative antimony at the heart of the criminal law".[24]

9 Like the "virtually universal"[25] conventional wisdom, Packer's narrative of the criminal process consequently adopts a typology comprised of two stages: (a) a "severe struggle" between the "conflicting values systems" of the State and the individual,[26] and (b) the eventual resolution of these competing tensions using balancing methodology.[27] Much of the local discourse on this area has focused on *where* Singapore's criminal justice system should situate itself between the polarities of the Crime Control and Due Process Models.[28] This part of the article is instead targeted at a more fundamental issue – the comprehensiveness of this dichotomous framework.

19 Herbert Packer, "Two Models of the Criminal Process" (1964–1965) 113 U Pa L Rev 1 at 22.

20 Herbert Packer, *The Limits of the Criminal Sanction* (Stanford University Press, 1968) at p 163.

21 Whilst the Crime Control Model is "more optimistic about the improbability of error", the Due Process Model is animated by a "distrust of fact-finding processes" and "stresses the possibility of error": Herbert Packer, *The Limits of the Criminal Sanction* (Stanford University Press, 1968) at pp 163–164.

22 Herbert Packer, "Two Models of the Criminal Process" (1964–1965) 113 U Pa L Rev 1 at 9.

23 Herbert Packer, *The Limits of the Criminal Sanction* (Stanford University Press, 1968) at p 165.

24 Herbert Packer, *The Limits of the Criminal Sanction* (Stanford University Press, 1968) at p 153.

25 John Griffiths, "Ideology in Criminal Procedure or A Third 'Model' of the Criminal Process" (1969–1970) 79 Yale LJ 359 at 369.

26 See Herbert Packer, *The Limits of the Criminal Sanction* (Stanford University Press, 1968) at p 4.

27 See Herbert Packer, *The Limits of the Criminal Sanction* (Stanford University Press, 1968) at p 158.

28 See, *eg*, Michael Hor, *Singapore's Innovations to Due Process*, paper presented at the International Society for the Reform of Criminal Law's Conference on Human Rights and the Administration of Criminal Justice, December 2000; Tey Tsun Hang, "Judicial Internalising of Singapore's Supreme Political Ideology" (2010) 40 HKLJ 293 at 301–326.

10 In this regard, notwithstanding the perceived polarity between the Crime Control and Due Process Models,[29] Packer's analytic structure is in fact bounded by a "unifying conception"[30] of "unyielding disharmony"[31] between state and individual. As John Griffiths has insightfully commented, what Packer provides is "a single Battle Model with two possibilities of bias".[32] This dichotomous frame of reference, which presumptively necessitates a "trade-off" between state and individual interests, presents a static vision of what are, in reality, dynamic sites of conflict. By generating a singular preoccupation with the "balance of advantage" between state and individual,[33] Packer's paradigm results in a "unidimensional conception of the total range of procedural choice"[34] which overlooks other facets of the state-individual relationship.

11 Rather than being "mutually exclusive"[35] opposites (as Packer suggests), the relationship between state and individual interests is more fluid and complex.[36] To begin with, the State's public order goals are important pillars of and necessary conditions to the enjoyment of individual liberties. Restrictions on individual rights may paradoxically be needed to preserve the system's capacity to protect these very rights.[37] Conversely, the system's effectiveness in maintaining public order is dependent, in part, on public perception of the integrity of its outcomes.[38] Protection of individual (due process) values like dignity

29 See Herbert Packer, *The Limits of the Criminal Sanction* (Stanford University Press, 1968) at p 154.

30 John Griffiths, "Ideology in Criminal Procedure or A Third 'Model' of the Criminal Process" (1969–1970) 79 Yale LJ 359 at 367.

31 John Griffiths, "Ideology in Criminal Procedure or A Third 'Model' of the Criminal Process" (1969–1970) 79 Yale LJ 359 at 368.

32 John Griffiths, "Ideology in Criminal Procedure or A Third 'Model' of the Criminal Process" (1969–1970) 79 Yale LJ 359 at 367–368.

33 John Griffiths, "Ideology in Criminal Procedure or A Third 'Model' of the Criminal Process" (1969–1970) 79 Yale LJ 359 at 371.

34 John Griffiths, "Ideology in Criminal Procedure or A Third 'Model' of the Criminal Process" (1969–1970) 79 Yale LJ 359 at 366.

35 Herbert Packer, *The Limits of the Criminal Sanction* (Stanford University Press, 1968) at p 158.

36 *Contra* David Smith, "Case Construction and the Goals of Criminal Process" (1997) 37 British J of Criminology 319 at 320, who appears to adopt the view that "a central argument of [Packer's] book is that crime control and due process, although in tension, are also interdependent".

37 See, *eg*, *Horev v The Minister of Transport* [1997] Isr SC 51(4) 1 at [73] (Israel SC), where it was observed that "every democratic society, sensitive to human rights, recognizes the need to restrict them in order to preserve its capacity to protect human rights".

38 See, *eg*, Kent Roach, "Four Models of the Criminal Process" (1998–1999) 89 J Crim L & Criminology 671 at 675, who observes that "fair treatment may be necessary for effective crime control".

and fairness can consequently have a legitimating effect on the criminal sanction's moral force.[39]

12 This interconnectedness of state and individual interests highlights the fallacy behind the perceived inevitability of having to singularly trade public order goals off against libertarian interests (or *vice versa*) *in every case*. For instance, adjustments to the criminal process can sometimes have equivalent knock-on effects on *both* state and individual objects; impairments to crime control caused by due process enhancements can ultimately lead to more invasions on individual liberty through higher crime rates.[40]

13 Packer's over-simplistic binary paradigm is partly attributable to a "truncated" conception of its constitutive concepts of "state" and "individual".[41] The State's interests are reduced to the pursuit of administrative efficiency, whilst the individual's interests are entirely equated with preventing abuses of state power. Through this broad equivalence, Packer's theoretical framework obscures the multidimensional nature of these very concepts.[42] To begin with, the Due Process Model's unqualified desire to prevent official misconduct, even at the expense of efficiency,[43] overlooks the fact that "timeliness" and "finality" – values which Packer ascribes to the Crime Control Model[44] – are themselves fair process values.[45] In a similar vein, the direct correlation that the Crime Control Model draws between (a) efficient administrative *fact* finding and (b) the effective repression of crime overlooks the *qualitative* component of legal guilt.[46] The criminal process must not only make *factual* determinations (*eg*, whether the individual engaged in

39 Peter Arenella, "Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies" (1983–1984) 72 Geo LJ 185 at 219.

40 Andrew Ashworth, "Concepts of Criminal Justice" [1979] Crim LR 412 at 418.

41 Peter Arenella, "Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies" (1983–1984) 72 Geo LJ 185 at 220.

42 Whilst Packer makes cursory allusion to due process ideology comprising of "a complex of ideas", no significant effort is made to explore the components of and relationship between these "ideas". Since "an accurate tracing of the strands [of due process ideology] … is strangely difficult", Packer was content to merely attempt "an approximation" by focusing on "the concept of the primacy of the individual and the complementary concept of limitation on official power" which "symbolize although not accurately describe" the complex of values underlying due process ideology: Herbert Packer, "Two Models of the Criminal Process" (1964–1965) 113 U Pa L Rev 1 at 13–14.

43 Herbert Packer, "Two Models of the Criminal Process" (1964–1965) 113 U Pa L Rev 1 at 16.

44 See, *eg*, Herbert Packer, "Two Models of the Criminal Process" (1964–1965) 113 U Pa L Rev 1 at 53.

45 Peter Arenella, "Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies" (1983–1984) 72 Geo LJ 185 at 220.

46 Peter Arenella, "Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies" (1983–1984) 72 Geo LJ 185 at 213–214, 222.

the proscribed conduct), but must also resolve "*moral*" questions (*eg*, whether the individual undertook the said conduct *with the requisite intent, under circumstances that do not justify or excuse the conduct*).[47] The utility of administrative *fact* finding processes are limited to the former.

14 This reflexivity between crime control and libertarian dictates "punctures the simplicity of the 'individual against state' dichotomy".[48] Despite Packer's claim to have encapsulated, through his two models, the available "spectrum of choices",[49] what he effectively captured is only one part of the whole. In the words of Ashworth, whilst Packer's Crime Control and Due Process "may help us to identify *elements* of two important strands" [emphasis added], they at times overlook "other, conflicting tendencies" that arise internally, *within* the models themselves.[50] Rather than being monolithic constructs singularly advanced by the respective pursuit of administrative efficiency and procedural propriety, the banners of "state" and "individual" interests each comprise a diversity of concerns. These myriad ancillary values are neither exclusive to nor consistent within their respective state/individual domains; the same value may concurrently advance both public order and libertarian goals (*eg*, finality), whilst values which are instrumental to the pursuit of public order/libertarian objects can also internally conflict (*eg*, the conflict between finality and procedural fairness within the libertarian domain). The prevailing theoretical framework, which seeks to categorically compartmentalise instrumental values like "finality" and "reliability" into monolithic "state"/"public order" or "individual"/"due process" pigeon holes, is therefore an oversimplification of the conceptual terrain. Rather than being binary opposites, the interests of state and individual are simultaneously conflicting and compatible, with each being able to situate elements of the other within itself.

15 The present suggestion that state and individual interests can, on certain levels, be aligned, should *not*, however, be taken as advocating the converse extreme of "an ultimate reconcilability of interest between the state and the accused", as others have postulated.[51] The proposition presently being advocated is a more qualified one – namely, that instead of requiring a singular trade-off *between* the pursuit of state *or*

47 Peter Arenella, "Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies" (1983–1984) 72 Geo LJ 185 at 214.

48 Andrew Ashworth, "Concepts of Criminal Justice" [1979] Crim LR 412 at 418.

49 Herbert Packer, "Two Models of the Criminal Process" (1964–1965) 113 U Pa L Rev 1 at 2.

50 Andrew Ashworth, *The Criminal Process: An Evaluative Study* (Oxford University Press, 2nd Ed, 1998) at p 28.

51 John Griffiths, "Ideology in Criminal Procedure or A Third 'Model' of the Criminal Process" (1969–1970) 79 Yale LJ 359 at 373.

individual interests, the multifaceted nature of the landscape is such that these interests can variously be (a) in opposition, (b) aligned, or (c) co-existing in separate, distinct spheres.[52] Thus, rather than being *exclusively* a "zero-sum game",[53] the criminal process *also* encompasses within its domain instances of "win-win" or "win-no lose" permutations.

B. Reconfiguring the balancing process

16 In view of the foregoing discussion, the analytic framework for criminal procedure needs to expand beyond one-dimensional disputation over whether the State or the individual should get "the upper hand".[54] This absolutist rubric overlooks the relativist reality that (a) conflict occurs *within* the respective domains of state/individual *intra se*, and (b) coherence is possible *between* these domains *inter se*. The conceptual frame of reference accordingly needs to look beyond the interaction *between* state and individual interests and examine the relationships *within* each of these spheres; balancing is neither exclusive to nor definitive of the relationship between the state and individual domains.

17 At a methodological level, given the intensely fragmented landscape that results from this paradigm shift, discursive and conceptual precision acquire even greater importance. The question of whether any competing values, and if so *what values*, need to be balanced, should not be a foregone conclusion left unaddressed. This need for conceptual precision in balancing exercises is augmented by the lack of any *a priori* "right" outcomes in balancing processes. Balancing processes entail intensely value-laden judgments that take place in the absence of a pre-determined lexical order or a common, universally recognised metric. These processes consequently lack the objectivity and linear predictability of logical deduction and categorical absolutism. Care must therefore be taken to ensure that balancing is firmly confined to its status as a descriptive tool of the reasoning process, and not used as a "response unto itself".[55]

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52 See Ashworth's observation that one should not "assume without inquiry that every enlargement of individual rights in the criminal process *necessarily* impairs the efficiency of crime control – indeed on some points no loss to crime control has been found" [emphasis added]: Andrew Ashworth, "Concepts of Criminal Justice" [1979] Crim LR 412 at 418.

53 Darryl K Brown, "The Warren Court, Criminal Procedure Reform, and Retributive Punishment" (2002) 59 Wash. & Lee L Rev 1411 at 1419.

54 Kent Roach, "Four Models of the Criminal Process" (1998–1999) 89 J Crim L & Criminology 671 at 692.

55 Andrew Ashworth & Mike Redmayne, *The Criminal Process* (Oxford University Press, 3rd Ed, 2005) at p 40.

18 In view of the above, reasoned articulation of the balancing process is the most critical tool to understanding and meaningfully discussing its outcomes. Clear explanation of the relative ordering between competing variables is key to ensuring frank discourse about the issues. Rather than hiding behind the false determinacy derived from drawing bright-line boundaries between reductionist conceptions of "state" and "individual", the full complexity of the domain needs to be appreciated before we can truly appreciate what is at stake in these balances within the criminal process. Only then can we harness the energies of the system more effectively.

19 At a more substantive level, this call for conceptual clarity raises the attendant question of how competing variables should then be ordered and evaluated *inter se* in any given case. In this regard, the suggestion that "justice" should be the polestar of the process rings hollow, as it begs the question of *whose* paradigm of "justice" should be employed.[56] In the words of the learned Chief Justice, the tensions arising within the criminal process result *not* from variance in "the degree to which [these values] accord with 'justice'", but in "the perspective of 'justice' that is advocated" – whether of the accused, victims of crime, or even of society at large.[57]

20 In this regard, the absence of an accepted universal metric renders it futile to evaluate the outcomes of the process through vague absolutist conceptions of "right" or "wrong". Instead, as the Chief Justice has observed, "there can only be more or less appropriate models, not better or worse ones".[58] Thus, rather than engaging in *abstract* disputation about the desirability of a given balancing outcome, discourse about the criminal process would be more fruitfully advanced by *contextualising* the system and considering how effectively its rules serve "the expectations of the people it is designed to serve".[59]

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56 See Andrew Ashworth, "Concepts of Criminal Justice" [1979] Crim LR 412 at 418–419.

57 Chan Sek Keong, The Honourable Chief Justice, "From Justice Model to Crime Control Model", speech at International Conference on Criminal Justice Under Stress: Transnational Perspectives in New Delhi, India (24 November 2006) at para 4.

58 Chan Sek Keong, The Honourable Chief Justice, "From Justice Model to Crime Control Model", speech at International Conference on Criminal Justice Under Stress: Transnational Perspectives in New Delhi, India (24 November 2006) at para 23.

59 Chan Sek Keong, The Honourable Chief Justice, "From Justice Model to Crime Control Model", speech at International Conference on Criminal Justice Under Stress: Transnational Perspectives in New Delhi, India (24 November 2006) at para 23.

III. An overview of the New CPC: Charting the reformative process

21 Before applying this reconfigured analytic to the New CPC,[60] this section will first contextualise the New CPC by providing an overview of its substantive amendments and procedural history.

A. Opening discursive spaces – Lessons from the Working Group

22 The New CPC[61] represents the culmination of an extensive (and inclusive) consultative process that co-opted views from a wide range of public and private stakeholders. The process began with a Public Consultation, which started in December 2008. The results of this Public Consultation, which ended in February 2009, were then collated and considered through a series of Working Group Meetings attended by (a) relevant government agencies, (b) industry stakeholders (such as legal practitioners, the Law Society and the Association of Criminal Lawyers Singapore), as well as (c) faculty members from various tertiary institutions (namely, the National University of Singapore and the Singapore Management University). The feedback and recommendations obtained through these avenues were then reviewed and studied in further detail by the Ministry of Law and its partner agencies, before being distilled and revised to produce the New CPC in the form in which it was tabled before Parliament.

23 These consultations illustrate the multi-textured nature of the state-individual paradigm. The multipartite dialogues at the Working Group level demonstrate the impossibility of reducing "state" and "individual" into monolithic, opposing concepts. Rather than proceeding along the clichéd dividing line of "state institutions" versus "private groups", there was collective agreement within the Working Group on issues such as community based sentencing. In addition, the "government bloc" was not a monolithic entity which only had oversight of a singular set of concerns. Instead, the Working Group discussions provided a valuable opportunity for the various government agencies and stakeholders to debate and balance their diverse sets of concerns *inter se*.

24 The consultative dialogue which took place through the auspices of the Working Group was consequently central to (a) identifying areas of concordance between state and individual interests, whilst concurrently (b) helping to navigate and arrive at compromise in areas of discordance. In the former respect, the Working

60 Criminal Procedure Code 2010 (Act 15 of 2010).
61 Criminal Procedure Code 2010 (Act 15 of 2010).

Group discussions played a critical role in helping to create "shared spaces" between state and individual goals. By providing an open and collaborative platform for multi-stakeholder policy dialogue, the Working Group helped to highlight the synergies that could be achieved between concordant "state" and "individual" interests. In the latter respect, the Working Group discussions keenly demonstrate the importance of having clearly articulated and reasoned compromises in areas of conflict. Even though the Group did not achieve consensus on all aspects of the Bill, it provided an important forum for candid dialogue by bringing all the relevant parties to the table. Where there was disagreement, each group had the opportunity to articulate their respective concerns and clarify and question each others' underlying assumptions. By enhancing the mutual understanding between the various interest groups and stakeholders, these exchanges have created a shared framework for future engagement and dialogue.[62]

B. A summary of the reforms – Surveying the old and the new

25 A significant number of the amendments in the New CPC[63] were to improve system efficiencies and correct conceptual anomalies within the statutory framework. One such example is s 258, which streamlines the piecemeal regimes for admissibility previously set out in the CPC[64] and Evidence Act.[65] Whilst the previous CPC applied the test of "inducement, threat or promise" to *all statements* of an accused recorded by *police officers*,[66] accused persons' *confessions* made to *non-police officers* were subject to the same test under the Evidence Act.[67] Section 258 rationalises this statutory framework by extending the test of "inducement, threat or promise" to *all* statements made by an accused person to *any* "person in authority".

26 Despite essentially being a consolidatory measure, this provision was the subject of considerable debate during both the consultation process and the parliamentary debates. The discussion centred primarily

62 See also the Honourable the Chief Justice's remarks on the "new spirit of collaboration in discussing and finding solutions to common problems through face-to-face discussions": Chan Sek Keong, The Honourable the Chief Justice, Response Address at Opening of the Legal Year 2011 (7 January 2011) at para 8.

63 Criminal Procedure Code 2010 (Act 15 of 2010).

64 Criminal Procedure Code (Cap 68, 1985 Rev Ed).

65 Cap 97, 1997 Rev Ed.

66 See Criminal Procedure Code (Cap 68, 1985 Rev Ed) s 122(5).

67 See Evidence Act (Cap 97, 1997 Rev Ed) ("EA") s 24. Whilst EA s 24 uses the language of "relevance" (unlike s 122(5) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("Old CPC"), which uses the language of "admissibility"), case law has traditionally treated this provision as an admissibility-governing provision that is the counterpart to s 122(5) of the Old CPC: see, *eg*, *Cheng Siah Johnson v PP* [2002] 1 SLR(R) 839 at [18]; *Nguyen Tuong Van v PP* [2005] 1 SLR(R) 103 at [35].

on Explanation 2 to s 258,[68] which clarifies that an *otherwise admissible* statement will not be rendered inadmissible simply by virtue of the fact, *inter alia*, that it was made under a promise of secrecy, in consequence of deception, or in a state of intoxication. All but one of the enumerated examples in this Explanation were from the Evidence Act.[69] The controversy arose, in significant part, from the concern that the Explanation would provide a back door route to admit statements that were not voluntary.[70] However, as the Minister for Law reiterated various times during the second reading of the Bill,[71] the intention behind this Explanation was *not* to allow the wholesale admission of *all* statements procured in the enumerated circumstances. Rather, the Explanation was simply intended to underscore the centrality of the "inducement, threat or promise" touchstone by clarifying that this test, rather than the scenarios specified in the Explanation, will govern a statement's admissibility. A promise of secrecy therefore will not serve to render a statement inadmissible, *unless it is sufficient to constitute an inducement*.

27 Another amendment of a similar nature is the procedural revision to allow either party to apply for leave of court to state a question of law directly from the Subordinate Courts to the Court of Appeal.[72] The provision was introduced to streamline the criminal process and save time and costs by allowing parties to "leapfrog" directly to the Court of Appeal where (a) the High Court is already bound by a prior Court of Appeal decision on the issue of law in question, or (b) there are two conflicting High Court decisions on the issue of law in question.[73]

28 In a similar vein, the New CPC[74] seeks to improve the "conceptual clarity"[75] of the composition regime by shifting the power

68 Criminal Procedure Code 2010 (Act 15 of 2010).

69 See Evidence Act (Cap 97, 1997 Rev Ed) ("EA") s 29. The only example in Explanation 2 that is not from the EA is cl (e), *ie*, where the recording officer or the interpreter of an accused's statement recorded under s 22 or s 23 did not fully comply with that section.

70 As one Member of Parliament put it, "a statement that is made under a promise of secrecy or in consequence of a deception is just *another way of extracting a statement from an accused by way of inducement, threat or promise*" [emphasis added]: see *Singapore Parliamentary Debates*, *Official Report* (18 May 2010) vol 87 (Michael Palmer, Pasir Ris-Punggol).

71 See *Singapore Parliamentary Debates*, *Official Report* (18 May 2010) vol 87 (K Shanmugam, Minister for Law); *Singapore Parliamentary Debates*, *Official Report* (19 May 2010) vol 87 (K Shanmugam, Minister for Law).

72 See Criminal Procedure Code 2010 (Act 15 of 2010) s 396.

73 See *Singapore Parliamentary Debates*, *Official Report* (18 May 2010) vol 87 (K Shanmugam, Minister for Law).

74 Criminal Procedure Code 2010 (Act 15 of 2010).

75 See *Singapore Parliamentary Debates*, *Official Report* (19 May 2010) vol 87 (K Shanmugam, Minister for Law).

of composition from the courts to the Public Prosecutor.[76] Prior to the New CPC, issues of composition between victims and offenders fell within the courts' purview,[77] and offences could be compounded even in the face of the Prosecution's objection.[78] These alterations to the composition regime were *not* intended to normatively redefine the judicial-prosecutorial relationship.[79] Rather, the legislative object was simply to align this regime with the broader received conceptual divisions between judicial and prosecutorial competence. The amendment was premised on the understanding that the decision to compound (and consequently terminate a prosecution) is, like the decision to charge, a matter that relates to the conduct of criminal prosecutions and should consequently be reserved for the Public Prosecutor. Whilst there was concern from some fronts that this change would unjustifiably sacrifice the "transparency and clarity" derived from judicial articulations of the discretion to compound,[80] this perceived loss in "transparency" is a non-starter once one accepts the starting premise that composition falls more appropriately within the sphere of prosecutorial, rather than judicial, discretion.[81]

29 In contrast to the above amendments, other aspects of the New CPC[82] have more fundamentally redefined the rights and duties of the Prosecution and the accused in certain areas. It is with these amendments that the rest of the article is concerned. The following sections will consider a number of these substantive amendments in the context of the theoretical analytic discussed above. On the issue of whether (and if so how) state and individual interests can be aligned to create "shared spaces", the article will look into the areas of pre-trial discovery and CBS. On the issue of how new balances have been struck where instances of state-individual conflict do arise, the article will discuss the amendments in the areas of admissibility of *voir dire* evidence and video conferencing for First Mentions hearings.

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76 See Criminal Procedure Code 2010 (Act 15 of 2010) ss 241(2) and 242.

77 See *PP v Norzian bin Bintat* [1995] 3 SLR(R) 105 at [44]. See also Criminal Procedure Code (Cap 68, 1985 Rev Ed) s 199(1).

78 See, *eg*, *PP v Norzian bin Bintat* [1995] 3 SLR(R) 105.

79 See *Singapore Parliamentary Debates*, *Official Report* (19 May 2010) vol 87 (K Shanmugam, Minister for Law).

80 See *Singapore Parliamentary Debates*, *Official Report* (18 May 2010) vol 87 (Sylvia Lim, Non-Constituency Member of Parliament). See also *Singapore Parliamentary Debates*, *Official Report* (19 May 2010) vol 87 (Sylvia Lim, Non-Constituency Member of Parliament).

81 See *Singapore Parliamentary Debates*, *Official Report* (19 May 2010) vol 87 (K Shanmugam, Minister for Law).

82 Criminal Procedure Code 2010 (Act 15 of 2010).

IV. Rethinking the unthought – Creating "shared spaces"

30 As alluded to above, one key contribution of the New CPC[83] is the creation of "shared spaces", where public order and libertarian values can find (some degree of) alignment and harmonisation. Rather than being defined by their adversarial positions *within* the trial process, the respective interests of state and individual extend *beyond* the immediate outcome of the trial. This is highlighted by the two representative examples from the New CPC considered below. As the discussion on pre-trial discovery illustrates, the *State's* objective in advancing a prosecution is *not* to secure a conviction "by any expedient means, however odious", but "to establish the truth".[84] The section on CBS in turn illustrates the converse proposition – that *individual* interests need not be confined to the avoidance of conviction; in the context of community sentencing, the criminal sanction can ultimately advance the interests of a guilty accused person as a result of its predominantly rehabilitative focus.

31 The current scope of these "shared spaces" are undoubtedly "work[s] in progress" which will be subject to continued refinement, and open to further debate.[85] Rather than attempting to revolutionise the criminal process overnight, the approach has been to use measured, gradual steps.[86] This stepwise approach will allow these new processes to be developed in a manner that best accords with Singapore's local context, with minimal adjustment costs. Such *quantitative* questions as to the adequacy of these new "spaces" should not, however, detract from the *qualitative* significance of their very existence to begin with. These "shared spaces" serve as timely reminders that the trumping of public order values with libertarian dictates (or *vice versa*) is not the only way out of the quagmire. Nor are the tensions between public order and libertarian values the only tensions that arise in the system; rather, the competing arguments regarding the appropriate parameters of pre-trial discovery and community sentences are indicative of the fact that public order and liberty can themselves conflict *inter se*. The debate should

83 Criminal Procedure Code 2010 (Act 15 of 2010).

84 *Powell v Supreme Court* 312 P 2d 698 at 708 (1957).

85 *Singapore Parliamentary Debates*, *Official Report* (11 March 2010) vol 86 at col 4068 (Assoc Prof Ho Peng Kee, Senior Minister of State for Law), in relation to CBS.

86 Both pre-trial discovery and CBS are, to varying extents, extensions and formalisations of existing practices which are already in place: see *Singapore Parliamentary Debates*, *Official Report* (2 March 2007) vol 82 at col 2365 (Assoc Prof Ho Peng Kee, Senior Minister of State for Home Affairs), in relation to pre-trial discovery; cols 4066–4067 (Assoc Prof Ho Peng Kee, Senior Minister of State for Home Affairs), in relation to CBS. The scope of these new processes have also been shaped incrementally – the pre-trial discovery obligations apply only to selected categories of cases (see paras 32–40 of this article), whilst CBS is an option that is only available in limited and clearly defined circumstances (see paras 41–46 of this article).

accordingly be reframed to appreciate first, that state and individual objects can, and do, overlap, and second, that endogenous tensions that require "balancing" can also arise *within* the respective realms of state and individual rather than existing exogenously *between* them exclusively.

A. Pre-trial discovery: Enhancing the criminal process' effectiveness and reliability

32 Prior to the New CPC,[87] there was no general statutory framework for the reciprocal exchange of evidence in criminal cases.[88] In contrast to civil cases, where the process of discovery is encapsulated by a comprehensive network of procedural rules, the primary mechanism for pre-trial disclosure existed only in respect of criminal cases triable in the High Court.[89] This state of affairs was the subject of significant critique from various quarters – academic, judicial and legislative – particularly as it related to the lack of comprehensive rules governing prosecutorial disclosure.[90]

33 The New CPC responds to these calls for reform by introducing a formalised system of reciprocal disclosure. This new system of pre-trial discovery applies to all cases tried[91] before the High Court[92] and to the majority of offences tried[93] in the District Court,[94] save (in the case of

87 Criminal Procedure Code 2010 (Act 15 of 2010).

88 See generally Valentine S Winslow, "Discovery in Criminal Cases: Disclosure by the Prosecution in Singapore and Malaysia" (1989) 31 Mal LR 1; *Selvarajan James v PP* [2000] 2 SLR (R) 946 at [18]–[19].

89 See Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("Old CPC") s 150. Section 158 of the Old CPC (Criminal Procedure Code 2010 (Act 15 of 2010) s 235(1)) also empowered a trial court to order the production of relevant documents: see, *eg*, *Kulwant v PP* [1985–1986] SLR(R) 663.

90 See, *eg*, Amarjeet Singh, "Equality of Arms – The Need for Prosecutorial Discovery" *Singapore Law Gazette* (September 2005); K S Rajah, "The Right to Discovery in Criminal Proceedings" *Singapore Law Gazette* (September 2005); *DT v PP* [2001] 2 SLR(R) 583 at [52].

91 Where an accused person indicates that he wishes to plead guilty to an offence tried in the High Court (other than an offence punishable with death), the Case for the Prosecution and the Case for the Defence need not be filed/served: see Criminal Procedure Code 2010 (Act 15 of 2010) s 176(2) read with s 178 (for committal cases) and s 212(3) (for transmission cases). Where an accused person indicates that he wishes to plead guilty to an offence triable in the High Court and punishable with death, the Case for the Prosecution must still be filed, but not the Case for the Defence: see Criminal Procedure Code 2010 s 176(3)(*b*).

92 See Criminal Procedure Code 2010 (Act 15 of 2010) s 175(1).

93 Where an accused person indicates that he wishes to plead guilty to an offence tried before a District Court that is subject to the criminal case disclosure procedures under the Criminal Procedure Code 2010 (Act 15 of 2010), the Case for the Prosecution and the Case for the Defence need not be filed/served: see Criminal Procedure Code 2010 s 158(*c*)(i).

94 See Criminal Procedure Code 2010 (Act 15 of 2010) s 159(1) read with the Second Schedule, where the list of relevant offences is set out.

trials before the District Court) where the accused opts out of the process.[95] These disclosure procedures will also apply to cases tried[96] before the Magistrates' Courts provided that all parties consent.[97]

34 Briefly, this new scheme of pre-trial disclosure generally involves three stages, which are administered and monitored judicially by way of criminal case disclosure conferences ("CCDCs"):[98]

> (a) At the first stage, the Prosecution must furnish its "Case for the Prosecution"[99] by filing it in court and serving it on the accused and every co-accused claiming trial with him.[100] This Case must contain, at a minimum, the following information:[101]
>
> > (i) the charge which the Prosecution intends to proceed with at trial;
> >
> > (ii) a summary of facts supporting the charge (for Subordinate Court cases)/the conditioned statements of the Prosecution's witnesses (with accompanying documentary exhibits)[102] (for High Court cases);[103]
> >
> > (iii) a list of the prosecution witnesses' names;
> >
> > (iv) a list of the exhibits that the Prosecution intends to admit at trial; and

95 See Criminal Procedure Code 2010 (Act 15 of 2010) s 159(2).

96 Where an accused person indicates that he wishes to plead guilty to an offence tried before a Magistrate's Court and that is subject to the criminal case disclosure procedures under the Criminal Procedure Code 2010 (Act 15 of 2010), the Case for the Prosecution and the Case for the Defence need not be filed/served (see Criminal Procedure Code 2010 s 158(*c*)(i)).

97 See Criminal Procedure Code 2010 (Act 15 of 2010) s 159(3).

98 See generally Criminal Procedure Code 2010 (Act 15 of 2010) s 160(1). Where an accused is unrepresented, the CCDC court is required to explain certain requirements and consequences of this regime to the accused: see Criminal Procedure Code 2010 (Act 15 of 2010) ss 164 and 216.

99 See Criminal Procedure Code 2010 (Act 15 of 2010) s 157.

100 See Criminal Procedure Code 2010 (Act 15 of 2010) s 161(2) (Subordinate Court cases), s 176(3)(*b*) (High Court committal cases), s 213(1) (High Court transmission cases).

101 See Criminal Procedure Code 2010 (Act 15 of 2010) s 162 (Subordinate Court cases), s 176(4) (High Court committal cases), s 214 (High Court transmission cases).

102 See Criminal Procedure Code 2010 (Act 15 of 2010) s 176(4)(*d*) read with s 179(2)(*c*) (committal cases), s 214(d) read with s 264(2)(*c*) (transmission cases).

103 As explained during the second reading of the Bill, conditioned witness statements are furnished to the Defence as part of the Case for the Prosecution in High Court, but not Subordinate Court, cases because such statements will be needed for the ensuing committal hearings which precede the High Court trial: see *Singapore Parliamentary Debates*, *Official Report* (19 May 2010) vol 87 (K Shanmugam, Minister for Law).

(v) any statements made by the accused and recorded by law enforcement officer(s), which the Prosecution intends to adduce as part of its case.

(b) Following the Prosecution's filing of the Case for the Prosecution (and, for committal cases, in the event that the case is committed to stand trial in the High Court), the accused is to file in court and serve on the Prosecution and every co-accused claiming trial with him a "Case for the Defence".[104] This Case must generally contain, at a minimum, the following information:[105]

(i) a summary of the accused's defence to the charge and the facts in support thereof;

(ii) a list of the defence witnesses' names;

(iii) a list of the exhibits that the Defence intends to admit at trial; and

(iv) where the accused takes objection to any issue of fact or law,[106] (A) a statement of the nature of the accused person's objection, (B) the issue of fact on which evidence will be produced (if objection is made to an issue of fact), and (C) the points of law in support of such objection (if objection is made to an issue of law).

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104 See Criminal Procedure Code 2010 (Act 15 of 2010) s 163(1) (Subordinate Court cases), s 193(1) (High Court committal cases), s 215(1) (High Court transmission cases). Whilst the filing of the Case for the Defence is mandatory for Subordinate Court cases, an accused person can, in cases before the High Court, elect whether or not to file a Case for the Defence: see Criminal Procedure Code 2010 s 193(2) (committal cases), s 215(1)(*b*) (transmission cases). This distinction arises because in High Court cases, the Prosecution would, under the old Criminal Procedure Code (Cap 68, 1985 Rev Ed), *already* have had to provide the information currently set out in the Case for the Prosecution as part of the preliminary inquiry proceedings. Subjecting the Defence's entitlement to this information to a new requirement of reciprocity (in the form of the Case for the Defence) would consequently have the undesired effect of narrowing, rather than broadening, the erstwhile scope of prosecutorial production of evidence.

105 See Criminal Procedure Code 2010 (Act 15 of 2010) s 165(1)(*a*)–(*c*) (Subordinate Court cases), s 195(1)(*a*)–(*c*) (High Court committal cases), s 217(1)(*a*)–(*c*) (High Court transmission cases).

106 See Criminal Procedure Code 2010 (Act 15 of 2010) s 165(1)(*d*) (Subordinate Court cases), s 195(1)(*d*) (High Court committal cases), s 217(1)(*d*) (High Court transmission cases). However, where an accused person is not represented, his Case for the Defence need not state any objection to any issue of law relating to the Case for the Prosecution or point of law in support of such an objection (see Criminal Procedure Code 2010 s 165(2) (Subordinate Court cases), s 195(2) (High Court committal cases), s 217(2) (High Court transmission cases)).

(c) Finally, once the Case for the Defence is served, the Prosecution must then furnish secondary service by serving on the accused copies of:[107]

(i) all the accused's other statements recorded by law enforcement officer(s) that relate to the charge(s) to be proceeded with at trial;

(ii) the accused's criminal records, if any (upon payment of the prescribed fee); and

(iii) the documentary exhibits previously identified in the Prosecution's Case.[108]

35 This new regime, which has been lauded the "most significant change" in the New CPC,[109] marks the start of "a new era … [of] greater transparency" in the administration of criminal justice.[110] The system of reciprocal disclosure fortifies the integrity and transparency of criminal justice by facilitating the early crystallisation of the key issues in contention.[111] Prior to the New CPC, prosecution and defence could often be left speculating about each other's case until the day of trial. This was liable to generate an atmosphere of suspicion, and opened the door for tactics of surprise and manoeuvre to play a determinative role in the outcome of criminal trials.[112] The New CPC ameliorates these deficiencies, consequently ensuring that the criminal process remains "a serious inquiry … [as to] guilt and innocence" and not a "game or sporting contest"[113] in which "players enjoy an absolute right … to conceal their cards until played".[114] The new system of pre-trial discovery advances the "search for truth" by increasing the information made

107 See Criminal Procedure Code 2010 (Act 15 of 2010) s 166(1) (Subordinate Court cases), s 196(1) (High Court committal cases), s 218(1) (High Court transmission cases).

108 This requirement does not apply to cases tried before the High Court. In such cases, the Prosecution would already have provided its witnesses' conditioned statements (including accompanying documentary exhibits) as part of the Case for the Prosecution: see Criminal Procedure Code 2010 (Act 15 of 2010) s 176(4)(*d*) read with s 179(2)(*c*) (committal cases), s 214(*d*) read with s 264(2)(*c*) (transmission cases).

109 Criminal Procedure Code 2010 (Act 15 of 2010). See Chan Sek Keong, The Honourable the Chief Justice, Response Address at Opening of the Legal Year 2011 (7 January 2011) at para 5.

110 Sundaresh Menon SC, Attorney-General, Address at Opening of the Legal Year 2011 (7 January 2011) at para 4.

111 *Singapore Parliamentary Debates*, *Official Report* (27 February 2008) vol 84 at col 1090 (Assoc Prof Ho Peng Kee, Senior Minister of State for Law).

112 See, *eg*, *Singapore Parliamentary Debates*, *Official Report* (27 February 2008) vol 84 at col 1059 (Mr Alvin Yeo, Member of Parliament for Hong Kah).

113 Glanville Williams, "Advance Notice of the Defence" [1958] Crim L Rev 548 at 554.

114 *Williams v Florida* 399 US 78 at 82 (1970).

available to both parties, and improves "judicial economy" by sharpening the issues at an early stage and reducing the number of adjournments caused by unexpected developments.[115]

36 These enhancements to the efficiency and reliability of the criminal process concurrently further the interests of both the State and an individual accused person. At first blush, the suggestion of concurrent benefit may appear counter-intuitive given traditional characterisations of prosecutorial and defence disclosure as *opposing*, rather than complementary, instruments that shift the balance of advantage in favour of one or the other party.[116] Prosecutorial disclosure is seen to benefit an accused by correcting "inequality in resources",[117] whilst defence disclosure protects the Prosecution by neutralising the "unfair disadvantage" otherwise suffered from "ambush defences" mounted by the accused.[118]

37 With respect, these dialectical characterisations of prosecutorial/defence disclosure overlook the broader – and mutually beneficial – effects which pre-trial disclosure can have on the overall standards of criminal justice. First, timely disclosure of information advances the State's and accused's shared interest in efficient case disposal by facilitating a keener appreciation of the relative merits of their respective cases. Thus, rather than exclusively advancing the accused person's interests, prosecutorial disclosure of information can also benefit the State by increasing the timely entering of guilty pleas where unmeritorious defences are involved.[119] Similarly, pre-trial disclosure of defence evidence can benefit an accused by allowing the Prosecution to make more appropriate and better informed plea offers,[120] or even dropping the prosecution entirely.[121] As one Member of Parliament pointed out during the second reading of the Bill, "this sharing of information will result in a fairer, more efficient trial where

115 See Milton C Lee Jr, "Criminal Discovery: What Truth Do We Seek?" (1998) 4 DCL Rev 7 at 20, 25; Gareth Griffith, "Pre-Trial Defence Disclosure: Background to the Criminal Procedure Amendment (Pre-trial Disclosure) Bill 2000" NSW Parliamentary Library Research Service (Briefing Paper No 12/2000) at p 30.

116 See, *eg*, *US v Garsson* 291 F 646 at 649 (1923); *State v Tune* 98 A 2d 881 (1954).

117 See *R v McIlkenny* [1992] 2 All ER 417 at 426.

118 See, *eg*, Gareth Griffith, "Pre-Trial Defence Disclosure: Background to the Criminal Procedure Amendment (Pre-trial Disclosure) Bill 2000" NSW Parliamentary Library Research Service (Briefing Paper No 12/2000) at p 13.

119 See William J Brennan Jr, "The Criminal Prosecution: Sporting Event or Quest for Truth?" [1963] Wash ULQ 279 at 287.

120 See Milton C Lee Jr, "Criminal Discovery: What Truth Do We Seek?" (1998) 4 DCL Rev 7 at 19.

121 See United Kingdom, Royal Commission on Criminal Justice, *Report* (Cmnd 2263, 1993) (Chairman: Viscount Runciman of Doxford) at para 59.

both parties … engage each other on a reasoned and common platform".[122]

38 Second, reciprocal disclosure also enhances the ability of the criminal process to "search for truth"[123] by reducing the likelihood that shock tactics will distort its outcomes; as Justice Traynor once wrote, "[t]he truth is most likely to emerge when each side seeks to take the other by reason rather than by surprise".[124] As one scholar has observed, such overall improvements to truth-finding functions do not involve "a tradeoff between mistaken convictions and mistaken acquittals" because these measures "*simultaneously* enhance our ability to convict the guilty and prevent convictions of the innocent" [emphasis added].[125] Rather than being inherently opposed objects, these aggregate improvements to reliability transform the crime control and due process objects of convicting the guilty and acquitting the innocent into "two sides of the same coin".[126]

39 This concurrent fulfilment of state and individual objectives demonstrates the fallacy of the conventional perception that pursuit of one is inherently constrained by the other. Contrary to received wisdom, the New CPC's[127] rules of discovery represent a balancing exercise *within*, rather than between, the respective domains of state and individual *intra se*.

> (a) The scope of *defence* disclosure reflects a balance struck between (i) an accused's shared interest with the State in enhancing the reliability and expedience of the criminal process, and (ii) the accused's concurrent (but competing) interest against self-incrimination.[128] Thus, whilst the Prosecutor is required to disclose *all* statements made by the accused (inculpatory or otherwise) in relation to the charge(s), the accused is only required to disclose information beneficial and relevant to his/her case.

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122 See *Singapore Parliamentary Debates*, *Official Report* (18 May 2010) vol 87 (Christopher de Souza, Holland-Bukit Timah).

123 Albert C Garber, "The Growth of Criminal Discovery" (1962–1963) 1 Crim LQ 3 at 6.

124 Roger J Traynor, "Ground Lost and Found in Criminal Discovery" (1964) 39 NYU L Rev 228 at 249.

125 Keith A Findley, "Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process" (2008–2009) 41 Tex Tech L Rev 133 at 139.

126 Keith A Findley, "Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process" (2008–2009) 41 Tex Tech L Rev 133 at 141.

127 Criminal Procedure Code 2010 (Act 15 of 2010).

128 See, *eg*, Brian Edward Maude, "Reciprocal Disclosure in Criminal Trials: Stacking the Deck against the Accused, or Calling Defence Counsel's Bluff?" (1999) 37 Alta L Rev 715 at 717.

(b) The scope of *prosecutorial* disclosure represents a balance struck between (i) the State's shared interest with an accused in enhancing the reliability and efficiency of the criminal process, and (ii) the State's concurrent (but competing) interest in ensuring that witnesses (*eg*, informants) are not disinclined to "come forward"[129] because their involvement in the case may be disclosed to the accused. These competing values are balanced by exempting from prosecutorial disclosure witness statements provided to the police.

40 Ultimately, the effective functioning of this new reciprocal system will depend on the integrity of its players and their ability to work together based on mutual trust. It is hoped that just as the civil discovery process has become a system beneficial to both plaintiff and defendant, the system of reciprocal discovery in the New CPC[130] will come to serve (aspects of) both the State's and an accused person's interests. The changing shape and sphere of this "shared space" will in turn depend on how competing tensions *within* the state and individual domains are resolved. The jury is still out on whether pre-trial discovery within the criminal process may, in the future, be capable of being extended to mirror the extent and comprehensiveness of the civil discovery process.

B. Community-based sentencing: Building on an offender's ties with his community

41 The commonalities between state and individual interests are further illustrated by the New CPC's[131] provision for community-based sentencing (or "CBS"). This addition to the sentencing regime represents the latest in a series of efforts to improve the rehabilitative and re-integrative functions of the criminal justice system.[132] To this end, the New CPC provides for five types of community orders:[133]

(a) *Mandatory treatment orders*, which require an offender to undergo psychiatric treatment for not exceeding 24 months.[134] Before making this order, the court must call for a report by a psychiatrist appointed by the Director of Medical Services.[135] The treatment order can only be imposed if the psychiatrist

129 *Singapore Parliamentary Debates*, *Official Report* (19 May 2010) vol 87 (K Shanmugam, Minister for Law).
130 Criminal Procedure Code 2010 (Act 15 of 2010).
131 Criminal Procedure Code 2010 (Act 15 of 2010).
132 See *Singapore Parliamentary Debates*, *Official Report* (27 August 2007) vol 83 at col 1328 (Assoc Prof Ho Peng Kee, Senior Minister of State for Law).
133 See Criminal Procedure Code 2010 (Act 15 of 2010) s 336(1).
134 See Criminal Procedure Code 2010 (Act 15 of 2010) s 339(1).
135 See Criminal Procedure Code 2010 (Act 15 of 2010) s 339(2) read with s 339(13).

reports to the court that: (i) the offender is suffering from a psychiatric condition that is *susceptible to treatment*, (ii) the offender is *suitable for treatment*, and (iii) the offender's psychiatric condition is *one of the contributing factors for his commission of the offence*.[136]

(b) *Day reporting orders*, which require an offender to regularly report to a day reporting centre for between three to 12 months[137] and undergo such counselling and rehabilitation programmes as his day reporting officer may require.[138] This may include requirements as to the electronic monitoring of the offender's whereabouts during the period of the order.[139] Such orders may be imposed where the court is satisfied, having regard to the circumstances, including the offender's character and the nature of his offence, that it is expedient to do so.[140] Before making this order, the court must request for a day reporting officer to submit a report on the offender's susceptibility to counselling and rehabilitation.[141] However, the court retains the discretion to make the order notwithstanding any recommendations this report may make.[142]

(c) *Community work orders*, which are modelled after the current system of "Corrective Work Orders", require an offender to perform unpaid community work which has some nexus to the offence committed[143] in order to promote the offender's sense of responsibility for, and acknowledgment of, the harm that he has caused through his offence.[144] This order can be made where a court is satisfied that it would be expedient, with a view to the offender's reformation.[145] Each type of community work order is tied to specific offence(s).[146] This decentralised approach strengthens the efficacy of each genre of community work order by giving its parent agency sufficient discretion and flexibility to creatively shape the contours of the order to suit the unique policy considerations underlying the given offence.

(d) *Community service orders*, which require an offender to make amends to the community for his offence by performing

136 See Criminal Procedure Code 2010 (Act 15 of 2010) s 339(3), (4) and (9).
137 See Criminal Procedure Code 2010 (Act 15 of 2010) s 341(4).
138 See Criminal Procedure Code 2010 (Act 15 of 2010) s 343.
139 See Criminal Procedure Code 2010 (Act 15 of 2010) s 342(1).
140 See Criminal Procedure Code 2010 (Act 15 of 2010) s 341(1).
141 See Criminal Procedure Code 2010 (Act 15 of 2010) s 341(2).
142 See Criminal Procedure Code 2010 (Act 15 of 2010) s 341(3).
143 See *Singapore Parliamentary Debates*, *Official Report* (18 May 2010) vol 87 (K Shanmugam, Minister for Law).
144 See Criminal Procedure Code 2010 (Act 15 of 2010) s 344(3) and (4).
145 See Criminal Procedure Code 2010 (Act 15 of 2010) s 344(3).
146 See Criminal Procedure Code 2010 (Act 15 of 2010) s 344(2).

acts of service of the type specified in the Fifth Schedule of the New CPC.[147] This order can be made where a court is satisfied that it would be expedient, with a view to the offender's reformation.[148] A community service order cannot be made, *inter alia*, if the court is not satisfied that the offender is a *suitable person* to perform community service based on his mental and physical condition.[149] To this end, before making a community service order, the court *must* request for a community service officer to submit a report on the offender's *suitability* to perform community service.[150] However, the court retains the discretion to make the order notwithstanding any recommendations this report may make.[151]

(e) *Short detention orders*, which require an offender to be detained in prison for a period not exceeding 14 days.[152] The order is directed at abating an offender's criminal tendencies and reducing his risk of recidivism by giving him a "short sharp shock" in the form of a taste of what incarceration would entail. At the same time, the limited duration of short detention orders minimises the disruption and stigma that could otherwise result from a longer period of imprisonment.[153]

42 These community orders provide an "additional menu"[154] of intermediate sentencing options between the polarities of fine and imprisonment,[155] and can be imposed singly, or in combination, in lieu[156] of traditional sentences like imprisonment, caning and fines.[157] By diversifying the spectrum of sentencing tools at a court's disposal, the New CPC enhances the efficacy of the penal regime by recognising that "[n]ot every offender should be put in prison".[158]

147 See Criminal Procedure Code 2010 (Act 15 of 2010) s 346(1) read with the Fifth Schedule.
148 See Criminal Procedure Code 2010 (Act 15 of 2010) s 346(1).
149 See Criminal Procedure Code 2010 (Act 15 of 2010) s 346(2).
150 See Criminal Procedure Code 2010 (Act 15 of 2010) s 346(3).
151 See Criminal Procedure Code 2010 (Act 15 of 2010) s 346(4).
152 See Criminal Procedure Code 2010 (Act 15 of 2010) s 348(1).
153 See *Singapore Parliamentary Debates*, *Official Report* (18 May 2010) vol 87 (K Shanmugam, Minister for Law).
154 *Singapore Parliamentary Debates*, *Official Report* (10 March 2010) vol 86 at col 3845 (Dr Vivian Balakrishnan, Minister for Community Development, Youth and Sports).
155 Other intermediate sentencing options include probation.
156 In the case of community work orders, the relevant legislation may also make provision for a sentence of fine to be additionally imposed: see Criminal Procedure Code 2010 (Act 15 of 2010) s 344(11)(*b*).
157 See Criminal Procedure Code 2010 (Act 15 of 2010) s 337(5).
158 *Singapore Parliamentary Debates*, *Official Report* (18 May 2010) vol 87 (K Shanmugam, Minister for Law).

43 This host of community-based sentences represents an additional area of "shared space" between libertarian (individual) interests and public order (state) goals; as alluded to above, CBS was an area on which there was general consensus within the Working Group during the New CPC's[159] drafting process. To begin with, CBS gives credence to individualist precepts through its emphasis on individualised justice. CBS is based on a "problem-solving approach"[160] that addresses the root causes of an offender's criminal conduct through a variety of orders tailored to his unique circumstances and rehabilitative needs. This offender-focused approach is demonstrated by the New CPC's requirements for "suitability" reports,[161] and through its provision for variation of community orders to meet subsequent changes in offenders' circumstances.[162] The availability of these non-custodial forms of punishment additionally gives effect to the libertarian exhortation to use incarcerative sanctions selectively, only where necessary.[163] As one scholar has wittily observed, the offender sentenced to a community sentence is the "ultimate winner".[164]

44 At the same time, the corrective value of these rehabilitative orders also serves public order goals by reducing recidivism; the re-integrative foundation of CBS underscores the community's continuing relationship with the offender and its consequent vested interest in securing his reform as an upright member of society. The predominantly non-custodial nature of community orders also serves a crime control function[165] by insulating first-time offenders from the hardening criminogenic influences of prison life.[166] Their tendency to reoffend is also reduced by avoiding disruptions to their familial support systems and employment income.[167]

159 Criminal Procedure Code 2010 (Act 15 of 2010).

160 *Singapore Parliamentary Debates*, *Official Report* (27 August 2010) vol 83 at col 1328 (Assoc Prof Ho Peng Kee, Senior Minister of State for Law).

161 See Criminal Procedure Code 2010 (Act 15 of 2010) s 339(2) (mandatory treatment orders); s 341(2) (day reporting order); s 346(3) (community service order).

162 See Criminal Procedure Code 2010 (Act 15 of 2010) s 351(8)(*a*) and (9).

163 This follows from the basic libertarian precept that "every assertion of state power that encroaches on this basic value requires a convincing justification": see George P Fletcher, "Political Theory and Criminal Law" (2006) 25 Crim Just Ethics 18 at 20.

164 Linda G Morrissey & Vickie S Brandt, "Community Sentencing in Oklahoma: Offenders get a Second Chance to Make a First Impression" (2001) 36 Tulsa LJ 767.

165 See Lynn S Branham, "A Federal Comprehensive Community-Corrections Act: Its Time has Come" (1995) 12 TM Cooley L Rev 399 at 403–407.

166 See also *PP v Muhammad Nuzaihan bin Kamal Luddin* [1999] 3 SLR(R) 653 at [16].

167 See *Singapore Parliamentary Debates*, *Official Report* (19 May 2010) vol 87 (K Shanmugam, Minister for Law).

45 The pursuit of these shared objectives through the CBS regime is, however, constrained by competing considerations on the part of both the State and the accused.

(a) Within the sphere of "state" interests, rehabilitative goals are constrained by the competing need to maintain the deterrent effect of the criminal sanction. To ensure that the deterrent function of the criminal law is not unduly hampered, the New CPC's eligibility criteria[168] consequently disallow CBS where the offence is a serious one,[169] or where the offender is a habitual criminal.[170]

(b) Within the sphere of "individual" interests, rehabilitative goals are constrained by the competing concern that the CBS regime may have a "net-widening effect".[171] The exclusion of CBS from offences punishable only by fine[172] may be seen as a means of protecting offenders from more severe punishments than they would otherwise have received.[173]

46 Through its advancement of the "shared" objects outlined above, the new CBS framework represents a unique and valuable mechanism to concurrently satisfy both the accused person's and society's needs. As with pre-trial discovery, the complexion and parameters of this regime represent the product of balances struck between these "shared" objects and other conflicting public order/individualist concerns. It remains to be seen whether further broadening of the CBS regime can, in future, be navigated within the constraints of these competing objects.

V. Accommodating competing values: Forging new balances

> Our system is … an eminently credible, pragmatic and effective one that tempers idealism with a healthy dose of realism.[174]

168 See Criminal Procedure Code 2010 (Act 15 of 2010) s 337(1).

169 Such as where the offence is punishable by imprisonment exceeding three years, is subject to a mandatory minimum sentence, or cannot be rendered "spent" under the Registration of Criminals Act (Cap 268, 1985 Rev Ed).

170 Such as where the offender had previously been detained or subjected to police supervision under the Criminal Law (Temporary Provisions) Act (Cap 67, 2000 Rev Ed), or sentenced to imprisonment, corrective training, reformative training or preventive detention.

171 See, *eg*, Irish Penal Reform Trust, *Position Paper 8: Community Sanctions* (January 2010) at pp 2–3, which cautions against the danger that community-based sanctions can result in the imposition of more severe sanctions on individuals simply because these sanctions are available, and not because they "fit the crime".

172 See Criminal Procedure Code 2010 (Act 15 of 2010) s 337(1)(*h*).

173 See also *Singapore Parliamentary Debates*, *Official Report* (19 May 2010) vol 87 (K Shanmugam, Minister for Law).

174 *XP v PP* [2008] 4 SLR(R) 686 at [98].

47 This final section will analyse the operational mechanics of "balancing" in view of the recalibrated paradigm outlined above. As a preliminary note, it bears reiteration that this article does *not* advocate a vision of the criminal process that is devoid of conflict between state and individual values; to the contrary, this author recognises that depictions of conflict between public order and libertarian goals can, and *do* have a rightful place in accounts of the criminal justice system. This is particularly so in hotly contested areas such as the right to silence, which "inexorably" carry a "latent tension" between individual liberty and public order concerns.[175] Rather than propounding the radicalist exclusion of such sites of conflict in their entirety, the thesis of this article is simply that these narratives of tension do not *fully* encapsulate the interplay between state and individual objects; instead, competition is but one *part* of the whole complex of relations constitutive of the state-individual dynamic. The concept of "balancing" between state interests and individual rights consequently remains an essential – albeit not the only – component of the organising analytic advocated by this article.

48 Having studied instances of *alignment* between state and individual objectives in the previous section, it is therefore befitting for this final section to complete the discussion by considering the instances of *conflict* between state and individual objectives that arise within the New CPC.[176] In this regard, the relativity and multi-variability of balancing outcomes inherently defies their categorical resolution through absolutist preferences for either communitarian or individualist norms. Instead, the striking of balances is eminently "a matter of measure and degree".[177] Given their inherent subjectivity, balancing exercises must therefore be conducted in a context-specific manner; as the Supreme Court of Canada recognised in *R v Harrier*,[178] "different balances may be achieved in different countries, all of which are fair".[179] The task incumbent on every country is therefore to find "the right balance" appropriate to its circumstances.[180]

49 Singapore's response to the potential indeterminacies of "balancing" has been an abiding fidelity to a metric of "pragmatism". Doctrinaire formalism is eschewed in favour of reasoned realism. This ethos is manifested through the various historical amendments that recalibrated Singapore's inherited framework of criminal procedure. For

175 *Chee Shiok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 at [96].
176 Criminal Procedure Code 2010 (Act 15 of 2010).
177 *Baruch v Tel-Aviv District Central Traffic Supervisor* [1977] Isr SC 32(2) 160 at 165 (Israel SC).
178 [1995] 3 SCR 562.
179 *R v Harrier* [1995] 3 SCR 562 at 573.
180 *Singapore Parliamentary Debates*, *Official Report* (18 October 2005) vol 80 at col 1654 (Wong Kan Seng, Deputy Prime Minister and Minister for Home Affairs).

instance, in 1969, the Legislature abolished the jury system when confronted by their propensity to reduce murder trials to "a game of chance".[181] Due to the relatively low standard of English proficiency at the time, anecdotal evidence was given of how one juror who appeared before the Select Committee could not even pronounce the term "culpable homicide", and referred to it mistakenly as "cumable suicide" instead![182] The "extravagantly romantic"[183] ideals of trial by one's peers were consequently firmly rejected in favour of a criminal trial process that was better placed to produce fair and accurate outcomes.

50 To similar effect is the system's approach to the admissibility of accused persons' statements.[184] The established threshold of "inducement, threat or promise" is premised on a "reliability" touchstone[185] that is catered to optimising the accuracy of the trial process's outcomes. Where an accused's free will has been sapped to the extent of causing him to make a statement he would not otherwise have made, the reliability of his statement is called into question and should therefore be excluded.[186] Conversely, as explained above, the existence of deception or intoxication will not *per se* suffice to render a statement inadmissible unless the reliability of the statement is impugned through the existence of "inducement, threat or promise".[187]

51 As will be seen below, this pragmatic approach finds continued expression in the New CPC[188] through the new balances that have been struck in the areas of *voir dire* evidence and video conferencing.

A. Victim compensation: The "third party" in the state-individual relationship

52 As a proviso to the ensuing discussion on the new state-individual balances struck in the New CPC,[189] this section highlights the inexhaustiveness of this bipartisan representation by illustrating how

181 *Singapore Parliamentary Debates*, *Official Report* (22 December 1969) vol 29 at col 198 (Low Yong Nguan, Member of Parliament for Crawford).

182 *Singapore Parliamentary Debates*, *Official Report* (22 December 1969) vol 29 at col 208 (Inche Mohd Ghazali bin Ismail, Member of Parliament for Aljunied).

183 *Singapore Parliamentary Debates*, *Official Report* (22 December 1969) vol 29 at col 207 (P Selvadurai, Member of Parliament for Bukit Panjang).

184 See Criminal Procedure Code 2010 (Act 15 of 2010) s 258; Criminal Procedure Code (Cap 68, 1985 Rev Ed) s 122(5); Evidence Act (Cap 97, 1997 Rev Ed) s 24.

185 See *Poh Kay Keong v PP* [1995] 3 SLR(R) 887 at [42].

186 See generally *Yen May Woen v PP* [2003] SGCA 29 at [20]–[25]; *Chai Chien Wei Kelvin v PP* [1998] 3 SLR(R) 619 at [48]–[50]. See also Criminal Procedure Code 2010 (Act 15 of 2010) s 258, Explanation 1.

187 See Evidence Act (Cap 97, 1997 Rev Ed) s 29; Criminal Procedure Code 2010 (Act 15 of 2010) s 258, Explanation 2.

188 Criminal Procedure Code 2010 (Act 15 of 2010).

189 Criminal Procedure Code 2010 (Act 15 of 2010).

third parties like crime victims are also stakeholders in the criminal process.[190] Under the New CPC, the court hearing a criminal offence now has an affirmative duty to consider, if it convicts the accused, whether or not to additionally make a compensation order in favour of the victim of the crime.[191] In deciding the quantum of a compensation order, the court can take into account the need to compensate a victim for any injury done to his person, character and/or property, not only by the actual offence(s) in respect of which sentence is passed, but also as a result of any other offence(s) taken into consideration for the purposes of sentencing.[192]

53 The statutory imposition of this positive duty to consider the appropriateness of victim compensation performs an important signalling effect, and safeguards the interests of victims by ensuring their visibility within the criminal justice process. By removing the extant "vagueness as to who [namely, the Prosecutor or the court] should raise the issue of compensation",[193] this new provision mitigates underutilisation of the compensatory mechanism and ensures that the legislative policies underlying this mechanism are reliably carried through to its implementation.

54 Quite apart from the criticisms of Packer's paradigm discussed above, this domain of victims' rights provides further cause to question the exhaustiveness of his "two-model universe".[194] This added facet of the criminal process highlights how the bipartite balancing process between the State and an accused can sometimes expand to become a multipartite "juggling" exercise between the interests of the State, an accused and his/her victim. The appropriate sphere that the criminal process should accord to such victims' interests is also an area open to further consideration and development.

B. Updating old balances – The admissibility of evidence adduced during voir dire *proceedings*

55 Having highlighted the balancing process's ability to, on occasion, expand its horizons beyond the values of the State and the accused, the following two sections will now turn to focus on the

190 See also *Singapore Parliamentary Debates*, *Official Report* (18 May 2010) vol 87 (Sylvia Lim, Non-Constituency Member).

191 See Criminal Procedure Code 2010 (Act 15 of 2010) s 359(1).

192 See Criminal Procedure Code 2010 (Act 15 of 2010) s 359(1).

193 Stanley Yeo, "Compensating Victims of Crime in Singapore" (1984) 26 Mal LR 219 at 224.

194 Douglas Evan Beloof, "The Third Model of Criminal Process: The Victim Participation Model" (1999) Utah L Rev 289 at 290.

discrete instances in the New CPC[195] where fresh balances between competing state and accused interests have in fact been struck.

56 In the first of these areas, *ie*, the segregability of *voir dire* proceedings, the New CPC alters the erstwhile position by permitting relevant evidence adduced in a *voir dire* to be admitted at the main trial without having to recall the witnesses.[196] Prior to the enactment of the New CPC, Singapore law erected rigid evidential barriers between *voir dire* hearings and the main criminal trial;[197] testimony adduced in *voir dire* hearings was generally inadmissible[198] as evidence in the main trial.[199] This rule of segregation originated from the UK, where the system of jury trials necessitated separate *voir dire* hearings to minimise the prejudicial effect which inadmissible evidence could otherwise have on laymen jurors.[200] Evidential questions of voluntariness were brought within the exclusive province of the trial judge, who would determine these issues of admissibility by way of "a trial within a trial", in the absence of the jury. The evidential barriers between *voir dire* and main trial proceedings were simply instruments used to fulfil this broader policy of ring-fencing issues of admissibility from substantive issues of guilt.

57 In the Singapore context, these justifications came to assume reduced relevance following our abolition of jury trials. The *same* judge would preside over *both* sets of proceedings and decide the issues on *both* admissibility and guilt. The absolutist division between *voir dire*

195 Criminal Procedure Code 2010 (Act 15 of 2010).

196 Criminal Procedure Code 2010 (Act 15 of 2010) s 279(5).

197 See *Lim Seng Chuan v PP* [1974–1976] SLR(R) 499 at [14]. A similar rule extended to the admissibility of evidence between *voir dires* for co-accused persons: see *Goh Joon Tong v PP* [1995] 3 SLR(R) 90 at [33].

198 One exception to this rule arose where a confession was ruled admissible after a *voir dire* and the accused, during the subsequent part of the main trial, gave evidence regarding the reliability of this confession that departed materially from his evidence at the *voir dire*. In such cases, cross-examination on these discrepancies in the accused's evidence would be allowed: see, *eg*, *Teo Yeow Chuah v PP* [2004] 2 SLR(R) 563 at [23]–[24].

199 See, *eg*, *Chua Poh Kiat Anthony v PP* [1998] 2 SLR(R) 342 at [12]. Under the old Criminal Procedure Code (Cap 68, 1985 Rev Ed), it was, however, possible for prosecution and defence counsel to agree, on an *ad hoc* basis, to admit evidence from a *voir dire* directly at the main trial.

200 See *Chalmers v HM Advocate* (1954) SLR 177 at 185–186. See also *SJF (an infant) v Chief Constable of Kent* (*The Times*, 17 June 1982), where it was held that the reason for a trial within a trial was that "it is no good conducting the matter in front of the jury, because if the evidence is held to be inadmissible, the jury will then have heard all sorts of matters which they have no business to hear"; *R v Craig* [2003] NICC 19 at [7], where it was observed that "the function of a *voir dire* is to allow the tribunal of law to decide a point of law in the absence of a tribunal of fact". See also Hong Kong, Law Reform Commission, *Report on Confession Statements and their Admissibility in Criminal Proceedings* (Topic 8, 14 December 1984) at para 2.03.

and main trial hearings consequently became highly artificial; requiring the same judge to hear the same set of evidence twice over just to preserve this veneer of segregation served no tangible "isolating" function.[201] As the Supreme Court of Hong Kong recognised, "where the trial is by a judge alone … [i]t makes no difference whether the judge … holds a *voir dire* or deals with the question of admissibility [as part of the trial process]".[202] This practice resulted in significant wastage of time and resources because the same witness often had to be called twice.[203] Evidence adduced during a *voir dire* could often be relevant to the issues at trial as the same evidence could often be concurrently relevant to issues of voluntariness (determined by way of the *voir dire*) and issues of credibility or weight (which would be addressed at the main trial).

58 The revised schematic introduced by the New CPC[204] responds to these deficiencies by recalibrating the balance between procedural expedience and individual fairness. Traditionally, fear of prejudicial juror influence warranted greater protection of the accused through the (almost) complete exclusion of all *voir dire* evidence. The abolition of jury trials opened the door for this balance to be shifted by allowing *some* degree of evidential transferability between *voir dire* and main trial proceedings. All the same, however, pursuit of efficiency and efficacy has not proceeded unqualified. These goals have been circumscribed by accused persons' continued (albeit reduced) interest in maintaining the functional separation between determinations of admissibility and of guilt.

59 In this regard, an accused's continued interest in maintaining this functional separation arises primarily from two key considerations. First, the *complete* removal of all evidential barriers between a *voir dire* and the main trial could prejudicially permit the indiscriminate cross-adduction of evidence; evidence relevant for the *voir dire* need not always be relevant to the main trial.[205] Second, and more fundamentally, allowing the transferability of *voir dire* evidence could have a dilutive effect on an accused person's right of silence.[206] As Lord Fraser opined in *R v Brophy*:[207]

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201 See also Chan Sek Keong, "The Criminal Process – The Singapore Model" (10th Singapore Law Review Lecture) (1996) 17 Sing LR 433 at 456.

202 *Ho Yiu Fai v The Queen* [1970] HKLR 415 at [18].

203 See Hong Kong, Law Reform Commission, *Consultation Paper on the Procedure Governing the Admissibility of Confession Statements in Criminal Proceedings* (November 1998) at para 1.21.

204 Criminal Procedure Code 2010 (Act 15 of 2010).

205 *Lim Seng Chuan v PP* [1974–1976] SLR(R) 499 at [14].

206 See, *eg*, Hong Kong, Law Reform Commission, *Report on the Procedure Governing the Admissibility of Confession Statements in Criminal Proceedings* (July 2000) at paras 4.22–4.23; *Wong Kam Ming v The Queen* [1980] AC 247 at 258–260.

207 [1982] AC 476 at 482.

> It is of the first importance for the administration of justice that an accused person should feel completely free to give evidence at the *voir dire* of any improper methods by which a confession or admission has been extracted from him, for he can almost never make an effective challenge of its admissibility without giving evidence himself. He is thus virtually compelled to give evidence at the *voir dire*, and if his evidence were admissible at the substantive trial, the result might be a significant impairment of his so-called 'right to silence' at the trial.

60 The New CPC[208] attempts to balance these competing considerations by providing a *semi-permeable* barrier between what otherwise remain *distinct* sets of proceedings. At a basic level, the retention of *voir dire* hearings despite their attendant administrative costs gives credence to an accused person's interests in preserving this functional separation. The "relevance" threshold for the transference of evidence also ensures that an accused is not prejudiced through the cross-adduction of evidence that would otherwise be inadmissible at the main trial. However, upon proof of relevance, considerations of institutional efficacy and efficiency assume foreground; the modern day identity in forum between the *voir dire* and main trial proceedings renders the preservation of a distinction artificial in these circumstances. Viewed as a whole, the resultant "balance" in the New CPC thus reflects the pragmatic weighing of communitarian and individual goals situated against both their *historical* rationales and their *current* contexts.

C. Technological innovations – Video conferencing for First Mention hearings

61 The second aspect of the New CPC that illustrates balancing between traditional Packerian ideals is the use of two-way video conferencing for an arrested person's First Mentions hearing. The New CPC allows a remandee's production for First Mentions under Art 9(4) of the Constitution[209] to take place by way of "a live video or live television link".[210] This provision was directed towards achieving two objects. First, reducing the movement of arrested persons eliminates transportation and security risks[211] and consequently lowers the potential for security breaches. This streamlining of the management

208 Criminal Procedure Code 2010 (Act 15 of 2010).

209 Article 9(4) of the Constitution of the Republic of Singapore (1999 Rev Ed) was also amended vide s 2 of the Constitution of the Republic of Singapore (Amendment) Act 2010 (Act 9 of 2010) to allow for an arrested person to be produced for First Mentions either physically or by way of video-conferencing link (or other similar technology).

210 See Criminal Procedure Code 2010 (Act 15 of 2010) s 281(4).

211 See Richard Magnus, "The Confluence of Law and Policy in Leveraging Technology: Singapore Judiciary's Experience" (2004) 12 William & Mary Bill of Rights Journal 661 at 664.

and security of the accused person facilitates more efficient utilisation of manpower resources. Second, and more peripherally, the use of video conferencing serves a public health function as it facilitates containment procedures in the event of any pandemic or contagious disease outbreak such as SARS or H1N1. Minimising the categories of persons (*eg*, court clerks and interpreters) who have in-person contact with an arrested person will help to arrest the spread of any such diseases.

62 During the parliamentary debates on the Bill, concerns were raised that video conferencing would compromise a court's ability to assess an accused person's condition;[212] if a picture paints a thousand words, the fear was that video conferencing would distort the message. Video conferencing was consequently seen as removing an important safeguard against potential police misconduct and physical ill treatment of detainees. However, as the Deputy Prime Minister, Mr Wong Kan Seng, took pains to emphasise, a number of contemporaneous safeguards have been implemented in an attempt to ensure that the adoption of this new procedure does not unduly undermine the fundamental liberties of persons who are arrested.[213] First, and most importantly, the essence of the legal terrain remains unchanged – simply put, it remains the case that an individual cannot be detained for more than 48 hours without a judicial order authorising his further detention. Second, constraints have been placed on the availability of video-conferencing procedures. Video conferencing in lieu of in-person appearance is limited to First Mentions hearings, and cannot (at least presently)[214] be used for the subsequent purposes of accepting pleas or in sentencing an accused person. The categories of arrested persons in respect of whom video conferencing can be used have also been limited to exclude juveniles,[215] who, by virtue of their age, may be in greater need of the assurances derived from in-person judicial oversight. Third, even where First Mentions video conferencing is available, the New CPC empowers the court to, if it considers necessary, require an accused to be produced in person before it. Such an order for in-person production can be made either by the court, of its own motion, or even as a result of an application made by the remandee.[216]

212 *Singapore Parliamentary Debates*, *Official Report* (18 May 2010) vol 87 (Sylvia Lim, Non-Constituency Member).

213 See *Singapore Parliamentary Debates*, *Official Report* (26 April 2010) vol 87 (Wong Kan Seng, Deputy Prime Minister).

214 The Deputy Prime Minister, Mr Wong Kan Seng, observed during his second reading speech on the Constitution of the Republic of Singapore (Amendment) Bill 2010 that he did not rule out the possibility that video conferencing would be expanded to include hearings such as plea making or sentencing in the future: see *Singapore Parliamentary Debates*, *Official Report* (26 April 2010) vol 87.

215 See Criminal Procedure Code 2010 (Act 15 of 2010) s 281(4).

216 See Criminal Procedure Code 2010 (Act 15 of 2010) s 281(5), which allows a court to, if it considers necessary, "either on its own motion or on the application of an accused", require the accused to be produced in person before it.

63 In addition to the above safeguards, technologies within the current system of video conferencing *themselves* have in-built features which ensure that a remandee's condition is accurately depicted to the First Mentions court. To begin with, the video-conferencing facilities have high-definition image and sound quality and are projected onto a 103 inch plasma display in the court room. The court, and all relevant parties and counsel will consequently have a clear view of the remandee's physical appearance, condition and demeanour. In addition, the court can choose between full or half-body views of the remandee, and zoom in and out from these images as it so wishes. The judge presiding over the First Mentions hearing can also see the full view of the video-conferencing room so as to ensure that the remandee is not subject to undue influence of other persons within the room.

64 This deployment of video-conferencing technologies is part of a broader international movement to modernise the historical contours of "participation" and "presence".[217] The New CPC's[218] provisions reflect attempts to manage the latent tensions between the efficiencies of video conferencing, and the potential incursions on individual protection which may unintentionally be caused. As Singapore's former Senior District Judge had extra-judicially observed, "[t]he Singapore judiciary's experience demonstrates that finding the right balance is not impossible".[219] Once again, the legislative balance is a pragmatic one. The New CPC reconciles the tensions between the speed and quality of justice through a pragmatic focus on the *substantive* object underlying the 48-hour requirement (*ie*, supervision of police powers of detention), rather than through a literalist adherence to its original *form* (*ie*, *physical* production before a Magistrate). The legislative object of harnessing the benefits of new technologies is consequently attained whilst concurrently preserving a measure of protection against the potential misuse of administrative power. It remains to be seen whether additional administrative or technological innovations may be available as further safeguards against the latter danger.

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217 See, *eg*, New Zealand Ministry of Justice, *Report on Audio Links and Audio Visual Links in Proceedings* (28 November 2008) at para 178. See also Courts (Remote Participation) Act 2010 (NZ) s 8, Crime and Disorder Act 1998 (c 37) (UK) s 57C (as amended by Coroners and Justice Act 2009 (c 25) (UK) s 106(3)), VA Code Ann §19.2-3.1 (Michie Supp 1994), Evidence (Audio and Audio Visual Links) Act 1998 (NSW) s 5BB; Evidence Act 1958 (Vic) s 42K (as amended by the Evidence (Audio Visual and Audio Linking) Act 1997 (Vic) s 3).

218 Criminal Procedure Code 2010 (Act 15 of 2010).

219 Richard Magnus, "The Confluence of Law and Policy in Leveraging Technology: Singapore Judiciary's Experience" (2004) 12 William & Mary Bill of Rights Journal 661 at 680.

VI. Conclusion

65 The foregoing analysis advocates a partial re-rationalisation of criminal justice narratives. As the preceding discussion has sought to show, summary references to amorphous concepts of "state"/"public order" on the one hand, and "individual rights"/"liberty" on the other, are apt to obscure the inherent complexities and multiplicity of objects which occupy this area of law. Consideration of the New CPC[220] through this nuanced vantage point highlights the rigorously pragmatic approach characteristic of the Singapore dynamic. Where possible, common spaces and synergies have been created incrementally. Conversely, where conflict is unavoidable, attempts have been made to strike realistic and accommodative balances rather than dogmatically insisting on a doctrinaire approach. Whilst a singular deference to libertarian goals clearly is not the spirit of the Singapore approach, it cannot fairly be said that an unthinking preference for crime control values is all that the Singapore system is about. Rather, genuine and sustained attempts have been made to arrive at workable balances that meet the needs of local society.

66 As one scholar has insightfully noted, "to navigate the criminal process, one must cast aside the blinders and look at the rest of the sky".[221] Singapore's reformative approach to criminal procedure is commendable, if nothing else, for its commitment to leaving no stone unturned and no avenue unconsidered. The final form of the New CPC[222] is the product of a sustained and intense dialogue which entailed the study and discussion of numerous other possible options. Thus, whilst debate on the appropriateness of individual CPC rules will undoubtedly continue, what one can be assured of is that these rules represent the uniquely Singaporean outcome of a considered and inclusive dialogical process.

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220 Criminal Procedure Code 2010 (Act 15 of 2010).

221 Douglas Evan Beloof, "The Third Model of Criminal Process: The Victim Participation Model" (1999) Utah L Rev 289 at 289.

222 Criminal Procedure Code 2010 (Act 15 of 2010).