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DISCLOSURE IN CRIMINAL PROCEEDINGS: DEVELOPMENTS AND ISSUES AHEAD

The last decade or so witnessed very significant changes to the disclosure regime for criminal proceedings in Singapore. These came mainly in the form of the enactment of the current Criminal Procedure Code, as well as the landmark cases of *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 and *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984. This article surveys all relevant developments since the enactment of the Criminal Procedure Code and considers some of the issues that may lie ahead, such as whether unused statements of the accused should be disclosed, whether statements of witnesses called by the Prosecution should be disclosed, and how admissibility and privilege feature. This article also briefly examines developments in several major common law jurisdictions regarding criminal disclosure as well as wider trends in our criminal justice landscape. It observes that although certain crime control elements remain, there is a discernible shift in our criminal justice system to a greater recognition of due process. Nonetheless, charting the way forward may not be as simple as placing greater weight on due process, given lingering issues concerning admissibility under the Criminal Procedure Code and the interface between litigation privilege and the Prosecution's disclosure obligations.

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I. Establishing the context

1 A freshly minted criminal law practitioner in Singapore today may not appreciate how much the local criminal justice landscape has changed in just the last decade or so,[1] particularly with regard to the Prosecution's disclosure obligations. There were no less than three milestones that contributed to this change. First, the current Criminal

1 For an account of how the landscape has shifted, see for instance Keith Jieren Thirumaran, "The Evolution of the Singapore Criminal Justice Process" (2019) 31 SAcLJ 1042.

Procedure Code[2] was enacted in 2010 to replace the previous Code. This legislation was described as a "new chapter in the continuing evolution of Singapore's criminal justice process."[3] Pertinent for present purposes are Parts IX and X of the statute, which introduced a series of provisions pertaining to disclosure obligations of the Prosecution.[4] Before the current Criminal Procedure Code was enacted, there were examples of attempts by defence counsel to obtain from the Prosecution copies of an accused's statements to the police[5] or a witness's statement to the police[6] that were rejected by our courts.[7] The reasoning was similar in such cases: there was no clear statutory basis to obligate the Prosecution to provide these statements, and there was also no clear statutory basis for the courts to make an order compelling disclosure.[8] This state of affairs was, arguably, consistent with the sentiment that Singapore was more of a crime control jurisdiction than one that prioritised due process.[9]

2 The second and third milestones in how the rules on criminal disclosure have developed were in the form of judicial decisions. In 2011, the Court of Appeal in *Muhammad bin Kadar v Public Prosecutor*[10] ("*Kadar*") declared that under the common law, the Prosecution has a duty to disclose to the accused material it does not intend to use as part of its case at trial as early as possible. Specifically, this would include material (a) likely to be admissible and that might reasonably be relevant to the guilt or innocence of the accused, and (b) material likely to be inadmissible but would provide a real chance of pursuing a line of inquiry that would

2 (Cap 68, 2012 Rev Ed).
3 Melanie Chng, "Modernising the Criminal Justice Framework" (2011) 23 SAcLJ 23 at para 1.
4 Though the accused also has obligations under the regime, it is not necessary to detail them for the purposes of this article.
5 *Kulwant v Public Prosecutor* [1985–1986] SLR(R) 663.
6 *Selvarajan James v Public Prosecutor* [2000] 2 SLR(R) 946.
7 *Cf Tay Kok Poh Ronnie v Public Prosecutor* [1995] 3 SLR(R) 545 at [45]–[48].
8 As to the prospect of invoking inherent powers in such situations, see Chen Siyuan, "Is the Invocation of Inherent Jurisdiction the Same as the Exercise of Inherent Powers?" (2013) 17(4) *International Journal of Evidence & Proof* 367.
9 See generally Chan Sek Keong, "The Criminal Process – The Singapore Model" (1996) *Singapore Law Review* 433 at 440: "The value system of the crime control model is … based on the proposition that the repression of criminal conduct is by far the most important function to be performed by the criminal process. The failure of law enforcement to bring criminal conduct under tight control is viewed as leading to the breakdown of public order, leading to law-abiding citizens being victimised by law-breakers." Having said that, another feature of the crime control model is efficiency. Coupled with our courts' recent exhortations for the Prosecution to act consistently with their role of ministers of justice (more on this below), fuller disclosure would actually serve these ends.
10 [2011] 3 SLR 1205.

lead to material in (a).[11] In *Kadar*, there were statements by a witness at the crime scene that were only disclosed by the Prosecution 18 months into the trial. The statements assumed great importance because the Prosecution's case was that both the accused persons being tried were at the crime scene, but in the statements, the witness consistently stated that he only saw one perpetrator at the crime scene. The creation of the said common law duty prompted the Prosecution to file a criminal motion to clarify the scope of the obligation. The Court of Appeal's response was that in fulfilling the *Kadar* obligation, the Prosecution need not search for additional material outside the Prosecution's knowledge.[12] It also said that where material fell within the disclosure regime under the Criminal Procedure Code, it would be disclosed within the timelines provided, as any common law duty of disclosure cannot depart from statutory law.[13]

3 In 2020, the apex court in *Muhammad Nabill bin Mohd Fuad v Public Prosecutor*[14] ("*Nabill*") expanded the scope of the common law duty of disclosure. There, there were three witnesses not called by the Prosecution even though their evidence would have had either materially confirmed or contradicted the version of events raised by the accused, who had been charged with drug trafficking. It was held that statements of these witnesses ought to have been disclosed by the Prosecution before the trial began.[15] Unlike the *Kadar* obligation, the Prosecution would not be required to carry out a prior assessment of whether the statement was *prima facie* credible and relevant to the guilt or innocence of the accused.[16] This was in part due to the fact that different prosecutors acting in good faith might arrive at different conclusions as to what and when should be disclosed.[17] However, the Court of Appeal left open the question of whether the Prosecution was also required to disclose statements of material witnesses called by the Prosecution to testify.[18] The court also held that there was no duty on the Prosecution to call material witnesses to testify, though not doing so may have ramifications in proving its case beyond a reasonable doubt.[19]

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11 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [107]–[120].

12 *Muhammad bin Kadar v Public Prosecutor* [2011] 4 SLR 791 at [14]. For instance, material not disclosed by the relevant investigating agency. In the various statutory rules in other jurisdictions surveyed below, the position is the same there – only material in the possession of the Prosecution is caught.

13 *Muhammad bin Kadar v Public Prosecutor* [2011] 4 SLR 791 at [15]–[18].

14 [2020] 1 SLR 984.

15 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [39]–[50].

16 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [41].

17 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [44]–[48].

18 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [54].

19 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [67]–[71]. While there was also a reference to evidential burden, space constraints prevent a discussion on that aspect of the judgment.

4 The purpose of this article is twofold. First, it surveys the relevant developments in criminal disclosure since the enactment of the current Criminal Procedure Code. Secondly, it considers some of the issues that may lie ahead. In so doing, it also examines developments in several major common law jurisdictions, as well as the wider trends in our criminal justice landscape. The former is important because these jurisdictions tend to formulate their rules in a way that can be said to give greater expression to due process ideals, and provide a useful point of comparison. It is also important to be apprised of the latter because if, for instance, there is an unmistakable march towards greater due process in other constituent parts of the system, it would be reasonable to assume that criminal disclosure would follow suit accordingly.

5 Before proceeding, however, one overarching question is whether the Prosecution's duty of disclosure in criminal proceedings would, and should, eventually be aligned with our rules of discovery in civil proceedings.[20] During the parliamentary debates concerning the enactment of the Criminal Procedure Code, it was already envisioned that our criminal procedure rules were indeed meant to develop over time, and the disclosure rules were no exception. In introducing the bill, the Minister for Law said that the "procedure to be adopted for administration of justice is an area where there are diverse and often contentious viewpoints. This is an evolutionary process, and we will have to continue to be open to amending our criminal procedures to meet changing norms."[21] The Court of Appeal in *Public Prosecutor v Li Weiming* has similarly remarked that the statutory disclosure framework is not meant to be self-executing, and progressive development by the courts would be necessary in some instances.[22] The court added that the framework has contemplated access to information as a right that the courts ought to be able to enforce.[23] The question, therefore, is not whether the disclosure rules were meant to evolve, but whether they should evolve further from what they are now.

6 Our rules on civil discovery essentially favour maximum disclosure and minimum surprise with respect to matters such as issues,

20 See also Denise Wong, "Discovering the Right to Criminal Disclosure" (2013) 25 SAcLJ 548.

21 Singapore Parl Debates; Vol 87; Col 408; [18 May 2010]. See also Singapore Parl Debates; Vol 87; Cols 540–576; [19 March 2018], where the Senior Minister of State for Law noted that the criminal justice system was meant to be progressively adjusted over time.

22 [2014] 2 SLR 393 at [52]–[53].

23 *Public Prosecutor v Li Weiming* [2014] 2 SLR 393 at [54].

witnesses, and documents.[24] This is made clear in, *inter alia*, O 24 r 1(2) of the Rules of Court,[25] which states that documents that a party would rely on or that could adversely affect or support any party's case are subject to discovery.[26] But while the comparison with the rules of discovery in civil proceedings is a natural one, the Minister for Law did make the following point during the same parliamentary debates:[27]

> The procedure that is set out must be fair … it should not be a system that leans towards conviction regardless of innocence or guilt. But it should also not be a system which gives the offender every possible technicality to escape conviction … Disclosure is familiar to lawyers operating within the common law system. In civil proceedings, the timely disclosure of information has helped parties to prepare for trial and assess their cases more fully. Criminal cases can benefit from the same approach. However, discovery in the criminal context would need to be tailored to deal with complexities of criminal practice, such as the danger of witnesses being suborned.

7 Given the paramountcy accorded to the purposive treatment of any statutory law in Singapore,[28] this passage alone would seem to militate against any conclusion that the embracement of greater due process over crime control would ever result in an obligation of uninhibited disclosure on the part of the Prosecution.[29] However, if anything, the Court of Appeal in *Nabill*, in holding that statements of material witnesses can be ordered disclosable, has shown that starting points established in parliament do not remain static and set in stone. As would be seen, in the final analysis, whether our current rules should evolve any further – to be aligned with civil discovery or otherwise – would have to be viewed through the lens of potential prejudice, if any, occasioned on the Prosecution's conduct of cases (and the ideals of our criminal justice model for the matter).

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24 See for instance the Court of Appeal's remarks in *Teo Wai Cheong v Crédit Industriel et Commercial* [2013] 3 SLR 573 at [41]: "Discovery is a fundamental rule in our system of litigation … litigation is conducted 'cards face up on the table' … [This] is a cardinal principle of litigation."

25 (Cap 322, R 5, 2014 Rev Ed).

26 This, of course, is subject to any rules of legal professional privilege applicable. In terms of specific discovery, which uses the test of relevance and necessity, see *ARW v Comptroller of Income Tax* [2019] 1 SLR 499.

27 Singapore Parl Debates; Vol 87; Col 413; [18 May 2010]. On the potential intimidation of witnesses, see Paul Rooney & Elliot Evans, "Let's Rethink the Jencks Act and Federal Criminal Discovery" (1976) 62(1) *American Bar Association Journal* 1313.

28 Interpretation Act (Cap 1, 2002 Rev Ed) s 9A(1) states: "In the interpretation of a provision of a written law, an interpretation that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to an interpretation that would not promote that purpose or object."

29 See also Kenny Yang, "An Expansion of the Prosecution's Disclosure Obligation in *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] SGCA 25" (2021) 21(1) *Oxford University Commonwealth Law Journal* 147.

One must keep in mind too that whereas discovery in civil proceedings typically envisions an equal burden on both parties, this is not so for criminal proceedings because, as seen below, accused persons are subject to limited disclosure obligations as compared to the Prosecution. If criminal disclosure is to be aligned with civil discovery, the scope of what needs to be disclosed on the part on the accused necessarily increases *vis-à-vis* the Prosecution.

II. The framework created by the Criminal Procedure Code

8 To identify some of the issues that lie ahead in our criminal disclosure regime, it is necessary to first take stock of what the current regime entails. We begin our survey with the Criminal Procedure Code. The provisions pertaining to disclosure that were introduced in 2010 were not insubstantial. Preliminarily, it should be noted that the criminal case disclosure procedure under the Code does not apply to all offences. It only applies to offences tried in the General Division of the High Court,[30] offences set out in a written law specified in the Second Schedule of the Criminal Procedure Code and which the Public Prosecutor has designated the General Division of the High Court to try,[31] and offences that are to be tried in a District Court if they are specified in the Second Schedule of the Criminal Procedure Code.[32] In 2018, an amendment was made to broaden the range of offences caught by the Second Schedule.[33] The idea was to capture even more major criminal offences.[34] For offences not caught by the regime in the Criminal Procedure Code, the common law rules developed in cases such as *Kadar* and *Nabill* as set out above would still apply.[35] Further, a court may, at any time, conduct a pre-trial conference to settle any administrative matter in relation to a trial.[36]

30 Criminal Procedure Code s 211A(1)(*a*).

31 Criminal Procedure Code s 211A(1)(*b*).

32 Criminal Procedure Code s 159(1). Generally, offences that are caught in the Second Schedule are of the more serious variety. It is possible for the regime to apply to offences not caught by s 159(1) if all parties consent to have it apply: s 159(3).

33 Criminal Justice Reform Act 2018 (Act 19 of 2018) s 119.

34 Singapore Parl Debates; Vol 94; [19 May 2018].

35 This is subject to Criminal Procedure Code s 6, which states: "As regards matters of criminal procedure for which no special provision has been made by this Code or by any other law for the time being in force, such procedure as the justice of the case may require, and which is not inconsistent with this Code or such other law, may be adopted." The infamous counterpart to this provision is s 2(2) of the Evidence Act, which states: "All rules of evidence not contained in any written law, so far as such rules are inconsistent with any of the provisions of this Act, are repealed." For a summary of how this provision has afflicted evidence law jurisprudence, see Chen Siyuan & Lionel Leo, *The Law of Evidence in Singapore* (Sweet & Maxwell, 2nd Ed, 2018) at ch 1.

36 Criminal Procedure Code ss 171 and 220A.

9 Under the Criminal Procedure Code, the first main stage of the criminal case disclosure procedure is when the Prosecution and Defence attend a criminal case disclosure conference before a judge or registrar[37] to settle matters such as the filing of the Case for the Prosecution and the Case for the Defence, issues of fact or law to be tried, list of witnesses to be called by parties to the trial, statements, and documents, or exhibits that are intended by the parties to be admitted at trial.[38] The first conference is, unless there are good reasons, to be held no earlier than eight weeks from the date the accused is asked by the court how he wishes to plead, and the accused does not plead or claims trial.[39] The court may at any time fix further criminal case disclosure conferences.[40]

10 The Case for the Prosecution must contain the charge(s) the Prosecution intends to proceed with at trial, a summary of facts in support of each charge, a list of the names of the witnesses for the Prosecution, a list of exhibits intended by the Prosecution to be admitted at trial, and any written statement (or transcript if recorded in audiovisual form) made by the accused at any time and that the Prosecution intends to adduce in evidence as part of its case.[41] The Case for the Prosecution is to be served no later than two weeks from the date of the first criminal disclosure conference.[42]

11 If the accused serves the Case for the Defence,[43] the Prosecution must, within two weeks, serve what is widely referred to as the supplementary bundle[44] comprising every other written statement given by the accused in relation to the charge(s) the Prosecution intends to proceed with at trial, documentary exhibits mentioned in the Case for Prosecution, and criminal records (if any).[45] As noted in parliament, the fact that the Prosecution has to initiate the exchange of documents is a consequence of upholding the presumption of innocence, and the fact that the supplementary bundle can be withheld by the Prosecution

37 Criminal Procedure Code ss 160(2) and 212(2).
38 Criminal Procedure Code ss 160(1) and 212(1).
39 Criminal Procedure Code s 161(1). For cases originating in the High Court, it would be held no earlier than four weeks from the date of transmission of the case: s 212(1).
40 Criminal Procedure Code ss 161(4) and 213(3). This should not be done earlier than seven days from the date the Case for the Prosecution is to be filed.
41 Criminal Procedure Code ss 162(1) and 214(1).
42 Criminal Procedure Code ss 161(2) and 213(1).
43 The Case for the Defence is governed by Criminal Procedure Code ss 165 and 217.
44 See Benny Tan, "The Role of Prosecutors as Ministers of Justice" *Law Gazette* (February 2021).
45 Criminal Procedure Code ss 166(1) and 218(1). A failure to serve the Case for Defence does not preclude the Prosecution from using the supplementary materials at trial: ss 166(3)(*c*) and 218(3)(*c*).

until the Case for the Defence is served is essentially a consequence of preserving some degree of the crime control model for criminal justice.[46]

12 The Criminal Procedure Code sets out two consequences when the Prosecution breaches its disclosure obligations under the statute. First, the court may draw such inference as it thinks fit if the Prosecution fails to serve the Case for the Prosecution, the Case for the Prosecution or supplementary bundle is incomplete, or if the Prosecution puts forward a case at trial that differs from or is inconsistent with the Case for the Prosecution.[47] Secondly, for District Court cases, a court may order a discharge not amounting to an acquittal in relation to the charge(s) the Prosecution intends to proceed with a trial if the Prosecution fails to serve the Case for the Prosecution in time, or if the Case for the Prosecution or supplementary bundle is incomplete.[48]

III. Subsequent jurisprudential developments

13 The disclosure regime in the Criminal Procedure Code was thus a marked departure from what it replaced. Apart from the common law duties created by *Kadar* and *Nabill*, our courts have also provided several imperative clarifications about the disclosure rules under either the Criminal Procedure Code or the common law. Perhaps the first notable case was *Li Weiming v Public Prosecutor*[49] ("*Li Weiming*"), wherein the petitioners faced multiple charges relating to the falsification of accounts. The issue was whether the Prosecution could simply replicate what was already stated in the charges when producing the summary of facts, which is one of the components of the Case for the Prosecution under the Criminal Procedure Code.[50] The petitioners were of the view that more details were required in the summary, such as that concerning the parties allegedly defrauded and the allegedly fictitious documents. The High Court held that because the aim of the disclosure regime was to promote transparency and parity, the summary of facts should not just contain bare facts as that would leave accused persons vulnerable to being taken by surprise at trial, and might also affect their privilege against self-incrimination if they are forced to speculate on their defence.[51] Another

46 Singapore Parl Debates; Vol 87; Col 413; [18 May 2010].
47 Criminal Procedure Code ss 169(1) and 221(1). Similar duties are imposed on the Defence regarding the service of and contents of the Case for the Defence.
48 Criminal Procedure Code s 169(2).
49 [2013] 2 SLR 1227.
50 In 2018, illustrations were added. For instance: "*A* is charged with conspiracy to cheat together with a known person and an unknown person. The summary of facts should state – (i) when and where the conspiracy took place; and (ii) who the known conspirators were and what they did."
51 *Li Weiming v Public Prosecutor* [2013] 2 SLR 1227 at [17]–[20].

issue that arose in this case was whether the consequences for non-compliance with the disclosure rules in the Criminal Procedure Code were exhaustively listed in the statute. The court held that they were not exhaustive,[52] and while the Court of Appeal drew a distinction between the imposition of sanctions not provided for and directions on measures taken for compliance with the statutory provisions, ultimately, it held that the High Court was entitled to order the Prosecution to make the necessary changes to the summary of facts.[53]

14 The next significant jurisprudential development was *Lee Siew Boon Winston v Public Prosecutor*.[54] The accused was a doctor alleged to have used criminal force on his patient with the intention to outrage her modesty while conducting a medical examination. One of the issues was whether the Prosecution should have disclosed the statements made by the complainant to the police; the accused believed that the statements contained significant self-contradictions. This was one of the blind-spots of *Kadar*: How does one ensure that the Prosecution has abided by its *Kadar* obligations? To this, the High Court held that when the trial begins, the Prosecution is presumed to have complied with its *Kadar* obligations, unless the accused can show the court that there were reasonable grounds to believe otherwise.[55] If the accused can do this, the Prosecution is then required to re-evaluate its position and if it continues to resist disclosure, the court may examine material and evidence tendered by the Prosecution to prove its compliance.[56] If the court is still unsure, it would lean in favour of disclosure.[57] When this matter was brought before the Court of Appeal, the apex court stated that the High Court's holding "[struck] the appropriate balance in enabling disclosure to be sought in suitable cases without transforming the current system of disclosure".[58]

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52 *Li Weiming v Public Prosecutor* [2013] 2 SLR 1227 at [27]–[29]. Essentially, the court opined that a narrow reading of s 169 would unduly constrict the revisionary jurisdiction of the High Court, which was widely framed under s 404(3) of the Code.

53 *Public Prosecutor v Li Weiming* [2014] 2 SLR 393 at [46]–[58].

54 [2015] 4 SLR 1184.

55 *Lee Siew Boon Winston v Public Prosecutor* [2015] 4 SLR 1184 at [184]. This was in furtherance of the idea established in earlier cases such as *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 that, as a constitutional co-equal, the Attorney-General is presumed to be acting legally and in good faith when conducting prosecution. This notion has subsequently been affirmed in recent cases such as *Syed Suhail bin Syed Zin v Attorney-General* [20201] 1 SLR 809.

56 *Lee Siew Boon Winston v Public Prosecutor* [2015] 4 SLR 1184 at [184].

57 *Lee Siew Boon Winston v Public Prosecutor* [2015] 4 SLR 1184 at [184].

58 *Lee Siew Boon Winston v Public Prosecutor* [2015] SGCA 67 at [12]. Seen in this light, the case might not have moved the needle too much in terms of greater due process being introduced, but can simply be characterised as a working example of how *Kadar* ought to operate.

15 The notion of what is essentially a presumption in favour of compliance was reaffirmed in *Soh Guan Cheow Anthony v Public Prosecutor*,[59] albeit in a different context. The accused was alleged to have committed insider trading, and during the trial, it emerged that the Commercial Affairs Department had enlisted the help of the Securities Commission of Malaysia to record statements from certain individuals. These individuals appeared to have knowledge about transactions that might have a bearing on the case against the accused. Although the High Court held that these statements fell within the scope of the Prosecution's duty of disclosure under *Kadar*, this breach did not invite any inference that there were reasonable grounds for believing that the Prosecution had fallen short of its duty in respect of disclosing other disclosable materials.[60]

16 On the other hand, cases such as *Public Prosecutor v Wee Teong Boo*[61] ("*Wee Teong Boo*") demonstrate the persistent problems that may arise out of leaving matters to prosecutorial self-regulation. There, the accused was charged with outrage of modesty and rape of a patient via penile penetration during an examination at his clinic. In his cautioned statement, he claimed that he had erectile dysfunction. He then underwent three medical examinations. In the first doppler ultrasonography report, the conclusion was that the accused had only a mild condition of erectile dysfunction at most. But the second doppler ultrasonography report concluded that the accused could not achieve a full erection, and that his penile shaft was flexible at his best-achieved erection. Despite this, the Prosecution delayed in disclosing the second report to the accused. The Court of Appeal held that this prejudiced the accused as it led him to assume that the findings in the second report were consistent with the first report.[62] The Prosecution would have been, pursuant to *Kadar* and *Nabill*, obligated to disclose the second report in a timelier fashion as the accused could only develop a defence strategy after being apprised of all relevant information.[63] The court also pointed out that prosecutors are ministers of justice assisting in the administration of justice; their duty is not to secure a conviction at all costs or to timorously discontinue proceedings the instant some weakness is found, but to assist the court to arrive at the correct decision.[64]

17 Here, we pause to note that a consequence of liberalising any regime is the increase in *de facto* challenges, which in this context

59 [2017] 3 SLR 147.
60 *Soh Guan Cheow Anthony v Public Prosecutor* [2017] 3 SLR 147 at [104].
61 [2020] 2 SLR 533.
62 *Public Prosecutor v Wee Teong Boo* [2020] 2 SLR 533 at [131]–[132].
63 *Public Prosecutor v Wee Teong Boo* [2020] 2 SLR 533 at [131]–[132].
64 *Public Prosecutor v Wee Teong Boo* [2020] 2 SLR 533 at [136].

would be against prosecutorial decisions on disclosure.[65] Our courts have been quite firm in counteracting this. For instance, in *Moad Fadzir bin Mustaffa v Public Prosecutor*,[66] the accused tried to argue that the Prosecution's failure to call two material witnesses was a breach of the *Nabill* obligation. However, the Court of Appeal rebuffed this, stating that the identities of the two witnesses could not even be ascertained to begin with, and in any event, *Nabill* had already made it clear that the failure to call a material witness would not result in a breach of any prosecutorial duty.[67] Likewise in *BQG v Public Prosecutor*, the applicant sought leave pursuant to s 397 of the Criminal Procedure Code to refer a question of law of public interest to the Court of Appeal.[68] The charges were for serious sexual offences and the trial judge had dismissed an interlocutory application for the Prosecution to disclose statements of witnesses it was going to call at trial. As the trial had not even commenced, the Court of Appeal held that s 397(1) – which required a criminal matter to have been determined by the High Court in the exercise of its appellate or revisionary jurisdiction – was not even met in the first place.[69] As the applicant was aware that the trial judge, in dismissing the disclosure application, was only exercising original jurisdiction, this reinforced the conclusion that the invocation of s 397 was an abuse of the court's process.[70]

18 Turning back to the substantive developments, a pair of recent High Court decisions on criminal disclosure have provided somewhat of a preview of what might be to come. In *Lim Hong Liang v Public Prosecutor*[71] ("*Lim Hong Liang*"), the accused was charged with conspiring to voluntarily cause grievous hurt with a knife. After the trial, the accused applied to have a statement by an individual, who was not a witness at trial, placed before the court; one of the conspirators had said in his statement that this individual would support his testimony that the accused was involved in the conspiracy. The Prosecution eventually accepted that failing to disclose the requested statement was an unintentional breach of *Kadar* and *Nabill*, but pointed to s 259(1) of the Criminal Procedure Code to argue that the statement was inadmissible.[72] Under this provision, any

65 Another consequence is attempting to stay criminal proceedings on the basis that the Prosecution's conduct (including non-disclosure) has prejudiced the accused: see for instance *Public Prosecutor v Soh Chee Wen* [2021] 3 SLR 641.
66 [2020] 2 SLR 1364.
67 *Moad Fadzir bin Mustaffa v Public Prosecutor* [2020] 2 SLR 1364 at [14]–[16].
68 [2021] 2 SLR 713.
69 *BQG v Public Prosecutor* [2021] 2 SLR 713 at [3].
70 *BQG v Public Prosecutor* [2021] 2 SLR 713 at [4].
71 [2020] 5 SLR 1015.
72 See also *Public Prosecutor v BNO* [2018] SGHC 243; *Tay Wee Kiat v Public Prosecutor* [2018] 4 SLR 1315.

statement made by a person other than the accused in the course of an investigation is inadmissible in evidence unless it is admitted under s 147 of the Evidence Act[73] (cross-examination as to previous statements in writing), used to impeach credit in the manner provided in s 157 of the Evidence Act, is made admissible as evidence by virtue of any written law, is made in the course of an identification parade, or falls within s 32(1)(*a*) of the Evidence Act (hearsay that relates to the cause of death).

19 However, the High Court held that admissibility would not be an issue if the accused was merely relying on the fact of non-disclosure to show prosecutorial misconduct such as to cast doubt on the integrity of the prosecution process.[74] Admissibility would also not be an issue if the court was invited to draw an adverse inference against the Prosecution, because the court would simply be looking at the non-disclosed document without treating it as evidence of its contents.[75] The court was also minded to underscore the point that if there was any doubt about the potential relevance or impact of material, it should be disclosed.[76] It was sympathetic to the longstanding prosecutorial practice of withholding certain evidence, but stated that litigation strategy had to give way to the responsibilities assumed by ministers of justice.[77]

20 The final case in our round-up in this section is *Xu Yuanchen v Public Prosecutor*[78] ("*Xu Yuanchen*"). The appellants were charged with criminal defamation and sought production of all investigation statements recorded from them in earlier police investigations. The High Court first noted that in principle, statements from an accused that the Prosecution did not intend to rely on at trial might be caught by *Kadar*'s ambit of

73 (Cap 97, 1997 Rev Ed).

74 *Lim Hong Liang v Public Prosecutor* [2020] 5 SLR 1015 at [24]. If the consequence is showing that the case was not proven beyond a reasonable doubt, the requirements in *Ladd v Marshall* [1954] 1 WLR 1489 would apply.

75 *Lim Hong Liang v Public Prosecutor* [2020] 5 SLR 1015 at [28].

76 *Lim Hong Liang v Public Prosecutor* [2020] 5 SLR 1015 at [30].

77 *Lim Hong Liang v Public Prosecutor* [2020] 5 SLR 1015 at [30]. In a subsequent tranche of the hearing (*Lim Hong Liang v Public Prosecutor* [2021] SGHC 106), the High Court ordered a retrial even though it found that the accused had been hampered in his decision on whether to call the individual as a witness. The court noted that a retrial was fair as that would restore to the accused the opportunity to properly consider the contents of the previously undisclosed statement and reshape his trial strategy accordingly. Moreover, it was in the interests of society and victims to ensure those who are indeed guilty are not pardoned due to *Kadar* breaches if there is an avenue to redress prejudice to the accused without inflicting further prejudice.

78 [2021] 4 SLR 719.

unused material.[79] The court also said that disclosure should be proactive and not reactive, and any interest in maintaining a litigation strategy must be seen in the light of the fact that statements that are disclosed can still be used in cross-examination or to impeach credibility, and balanced against an accused's interest in having access to his earlier statements.[80] Notably, in the *coda* of the judgment, the court had some reservations as to whether *Kadar* was meant to include statements of the accused. In the court's view, *Kadar* was concerned with withholding evidence that the accused might not be aware of.[81] When it comes to the accused's own statements, he:

> … would almost invariably have known of his earlier statements and would have known of the underlying facts that were or could have been covered in those statements, and there would almost never be a situation of such evidence being overlooked by the Defence despite its relevance as to the innocence of the accused person. I have not set this out as an absolute position since it is theoretically possible that the accused person might have suffered some loss of memory … which might give rise to a real prejudice if the material could not be accessed. However, these would be exceptional circumstances that could be dealt with by a suitable adjustment of the rule.[82]

IV. Analysis of the issues that may lie ahead

21 Now that we have navigated the ins and outs of the current disclosure regime, what are some of the issues that may lie ahead? Perhaps the most convenient matter to address first is the *coda* in *Xu Yuanchen* just extracted above. The court was of the view that *Kadar* should not be read so expansively to include (unused) statements of the accused, because the danger that *Kadar* is meant to guard against is taking the accused by surprise, and statements emanating from the accused would not be easily forgotten by the accused. That is a logical assumption to make, but apart from how the literal text of the *Kadar* test would include statements of the accused, one must keep in mind the circumstances in which statements are taken in our criminal justice system – crime control characteristics continue to feature quite prominently at various points,

79 *Xu Yuanchen v Public Prosecutor* [2021] 4 SLR 719 at [28]–[29]. The court also highlighted (at [26]) that "the Prosecution's *Kadar* disclosure obligations extend only to material that tends to strengthen the Defence's case or weaken the Prosecution's".

80 *Xu Yuanchen v Public Prosecutor* [2021] 4 SLR 719 at [30]–[34]. The court also explained that treating material as unused simply because the Prosecution could have used it during trial for impeachment or cross-examination would tilt the balance in favour of the Prosecution's interest in retaining the potential to use such evidence and away from the interest of affording the accused actual access to evidence that might be potentially relevant to establishing innocence.

81 *Xu Yuanchen v Public Prosecutor* [2021] 4 SLR 719 at [42].

82 *Xu Yuanchen v Public Prosecutor* [2021] 4 SLR 719 at [43].

from arrest to trial, and this may have an impact on assuming what an accused might actually recollect in what was provided in the statements.

22 To begin with, even though an accused has a constitutional right to counsel,[83] this is not a right that arises immediately upon arrest as the investigating authorities must be given a reasonable amount of time to conduct their investigations.[84] This means that an accused would quite likely be giving statements without the benefit or assurances of legal counsel. Yet, there is considerable stress placed on an accused when his statements are taken, and pitfalls that he would need to be mindful. When an accused is giving a cautioned statement, he is warned that if he withholds any exculpatory information and only reveals this at trial, an adverse inference may be drawn against him.[85] The rationale for this modification of the right to silence is to compel an accused to outline his defence at an early stage so that no surprises – *vis-à-vis* the Prosecution – emerge at trial.[86] Arguably, this modification is made possible because the right to silence in Singapore has been held not to be a constitutional right or principle of natural justice – it is simply a rule of evidence for which various derogations are more easily permitted.[87]

23 As regards long statements – for which multiple ones may be taken in the course of investigations – while an accused is only "bound to state truly what he knows of the facts and circumstances of the case, except he need not say anything that might expose him to a criminal charge",[88] adverse inferences may also be drawn against him if material facts are not disclosed in the long statements.[89] All things considered, it is not inconceivable that an accused might, under the various pressures faced and without the benefit of legal counsel, give self-contradictory

83 Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) Art 9(3) states: "Where a person is arrested, he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice."

84 See for instance *James Raj s/o Arokiasamy v Public Prosecutor* [2014] 3 SLR 750 at [29]–[38]. In a more extreme case, a denial of access for weeks was upheld to be valid: see *Leong Siew Chor v Public Prosecutor* [2006] SGCA 38.

85 Criminal Procedure Code s 23(1). The Code also provides for other circumstances in which adverse inferences may be drawn against the accused, such as silence after being called to give his defence (s 230(1)) and silence during cross-examination (s 291(3)).

86 *Yap Giau Beng Terence v Public Prosecutor* [1998] 2 SLR(R) 855 at [38]. See also Criminal Procedure Code s 278, in which the accused must give sufficient notice and particulars if he is to invoke an alibi.

87 *Public Prosecutor v Mazlan bin Maidun* [1992] 3 SLR(R) 968 at [15]–[20].

88 Criminal Procedure Code s 22(2).

89 *Kwek Seow Hock v Public Prosecutor* [2011] 3 SLR 157 at [13]–[17]. See also Ho Hock Lai, "The Privilege Against Self-Incrimination and Right of Access to a Lawyer" (2013) 25 SAcLJ 826.

evidence in his statements without realising it in the moment or failing to recall it with great certainty at a later point in time.[90] The fact that a statement given when an accused is under the influence of drugs or alcohol does not render it inadmissible[91] increases this possibility. The fact that for an accused to prove a defence successfully, he has to do so by proving it on a balance of probabilities (as opposed to raising a reasonable doubt, which is the universal standard outside Indian Evidence Act jurisdictions)[92] strengthens the case that he should be given as much information as possible.[93]

24 Indeed, what exactly is it that will be ceded if the Prosecution is obligated to disclose the unused statements of an accused in a timely manner, apart from the prospect of discrediting the accused by demonstrating to the court incriminating contradictions in his statements (which, as noted in *Xu Yuanchen*, can still be done even if the statements have been disclosed)? What is the prejudice that may be caused to the Prosecution?[94] Whatever considerations that may apply in answering this would likely apply to the other question left open in *Nabill* as well – namely, whether unused statements of material witnesses who are called to testify for the Prosecution should be disclosed. If anything, the *coda* in *Xu Yuanchen* might suggest that such statements should be disclosable, since the accused in this scenario would likely not be privy to what material witnesses are going to say; moreover, if the underlying idea of disclosure is to permit the accused to mount a defence with as much relevant information as possible, such statements should, in principle, be disclosable.[95] It is therefore of little surprise that even the court in *Nabill*,

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90 See also Chen Siyuan, "A Preliminary Survey of the Right to Presumption of Innocence in Singapore" (2012) 7 *LAWASIA Journal* 78 and Chen Siyuan, "The Discretionary Death Penalty for Drug Couriers in Singapore: Four Challenges" (2016) 20(1) *International Journal of Evidence & Proof* 49.

91 Criminal Procedure Code s 258(3), Explanation 2(*b*). Section 258(3) provides that statements given involuntarily would be inadmissible. As it were, however, the threshold for successfully proving involuntariness (whether in the form of threat, inducement, promise, or oppression) is also a rather high one: see for instance *Tey Tsun Hang v Public Prosecutor* [2014] 2 SLR 1189.

92 See generally Michael Hor, "The Burden of Proof in Criminal Justice" (1992) 4 SAcLJ 267.

93 A counterargument may be that it is hardly an inevitability that courts would draw adverse inferences against accused persons if there are missing or inconsistent information – much depends on the explanation given by the accused for the omission or inconsistency, as well as the surrounding circumstances: see for instance *Ilechukwu Uchechukwu Chukwudi v Public Prosecutor* [2021] 1 SLR 67.

94 It is somewhat ironic to frame the question this way, as it has been far more customary in our criminal justice system to consider prejudice occasioned to the accused.

95 However, if the underlying rationale is minimal surprise and maximum transparency (like in civil litigation), we have to confront the prospect that it would not only be the Prosecution that is expected to show its hand.

while preferring to only pronounce definitively on the matter at the appropriate stage, expressed the tentative view that all witness statements would probably be caught by *Kadar*.[96] At this point, perhaps it may be instructive to look beyond the local framework as the court in *Kadar* had done and reconsider how some of the other major common law jurisdictions address these two categories of unused material.

25 In the UK,[97] s 3(1) of the Criminal Procedure and Investigations Act 1996[98] provides that the prosecutor "must … disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused".[99] The House of Lords has also stated that "fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed … miscarriages of justice may occur where such material it withheld".[100] Taken together, it seems clear that unused statements – whether that of the accused or the Prosecution's witnesses – would be disclosable under the UK rules.[101] Disclosure is also generally expected to be done in a timely manner.[102]

26 The rules are quite similar in some Australian states.[103] In Western Australia, for instance, after an accused is committed for trial, he must be served with, *inter alia*, "any confessional material of the accused that is

96 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [54]–[55].

97 The UK, of course, would be bound to ensure that its laws comply with its human rights obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950), Eur TS No 5, Art 6(3) (entered into force 3 September 1953). In particular, Art 6(3) provides that an accused person has to the right to have adequate time and facilities for the preparation of his defence.

98 c 25.

99 Section 3(2) clarifies that this only refers to material that is in the prosecutor's possession. Sections 3(6) and 3(7) also provide for the public interest and interception exceptions to what needs to be disclosed.

100 *R v H and C* [2004] 2 AC 134 at 137. In this light, little separates the UK position from the Canadian position established in *R v Stinchcombe* [1991] 3 SCR 326, which pretty much requires all relevant evidence to be disclosed. One has to note though that in Canada, an accused has a constitutional right to be protected by principles of natural justice.

101 See also *Attorney-General's Guidelines on Disclosure* (Attorney-General's Office, 2020) at pp 16–18.

102 Criminal Procedure and Investigations Act 1996 (c 25) s 7A.

103 While the laws of other common law jurisdictions were also examined in *Kadar*, it does not mean that the position *Kadar* landed on was a fossilised one, having taken into consideration such laws. The fact that *Nabill* is itself an evolution of *Kadar* is further proof that these laws can be reappraised through fresh perspectives.

relevant to the charge" and "any evidentiary material that is relevant to the charge".[104] Such material would include all statements made by the accused as well as all statements made by any person who may be able to give evidence.[105] There appears to be no discretion afforded to the Prosecution to determine if a statement is relevant or not.[106] In Victoria, the Prosecution must include in its brief to the accused[107] a copy of "any other evidentiary material … relating to a confession or admission made by the accused relevant to the charge" and "a list of the persons the prosecution intends to call as witnesses … together with a copy of each of the statements made by those persons".[108] The position in Tasmania[109] and South Australia[110] do not contain significant differences from Western Australia and Victoria on these matters. Ditto New Zealand[111] and Hong Kong, a jurisdiction closer to home.[112]

27 But even if the ambiguity of the scope of *Kadar* is thus resolved in favour of including unused statements from the accused, per *Lim Hong Liang*, s 259 of the Criminal Procedure Code stands in the way of disclosing statements from witnesses, unless admissibility can be independently satisfied. This, of course, presupposes that under Singapore law, unless something is admissible, it is not disclosable. The problem is that even without reference to our idiosyncratic Evidence Act, this is a questionable presupposition. One need not look further than *Nabill* to recall that the Prosecution's obligation to disclose material caught by *Nabill* subsists regardless of the relevance of the evidence; the Prosecution cannot resist disclosure on the basis of inadmissibility, and the court was deliberate in this regard in expanding *Kadar*. Once the Evidence Act comes into the picture – and it has to, since it governs all matters of evidence in court proceedings[113] – admissibility is determined solely by its relevancy provisions, which are premised entirely on epistemic considerations, or logical, probative value.[114] In this light, s 259 becomes a red herring, in

104 Criminal Procedure Act 2004 (Act 71 of 2004) (WA) s 95(6).
105 Criminal Procedure Act 2004 (Act 71 of 2004) (WA) s 42(1).
106 *Cf* Criminal Procedure Act 1986 (Act 209 of 1986) (NSW) s 62.
107 This is served before trial begins: Criminal Procedure Act 2009 (Act 7 of 2009) (Vic) s 39.
108 Criminal Procedure Act 2009 (Act 7 of 2009) (Vic) s 41(d).
109 The Justices Act 1959 (Tas) s 56(3).
110 Criminal Procedure Act 1921 (SA) s 111(1).
111 Criminal Disclosure Act 2008 (Act 38 of 2008) (NZ) s 13(3).
112 *Prosecution Code* (Department of Justice, Hong Kong Special Administrative Region) at paras 12.1–12.3.
113 Evidence Act s 2(1).
114 See Law Reform Committee, Singapore Academy of Law, *Report of the Law Reform Committee on Opinion Evidence* (October 2011) at para 17: "The Evidence Act was drafted on Stephen's idiosyncratic view that there should be no distinction between the concepts of relevance and admissibility. Therefore, the Act attempts to define

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that its reference to admissibility is not in the sense of relevance, keeping in mind too that the legislative purpose of introducing s 259 was not to reduce the scope of disclosable material, but to limit what the Prosecution can use when it comes to statements of witnesses.[115] If, on the other hand, s 259 is not a red herring, one is left with the workarounds suggested by the court in *Lim Hong Liang*, which is to seek disclosure of the evidence only to show prosecutorial misconduct, rather than cast reasonable doubt on the accused's guilt.

28 What is probably not a red herring would be a potential exception to the Prosecution's disclosure obligation: legal professional privilege. For example, the Western Australian regime cited above specifically states that the operation of the Prosecution's disclosure requirements is subject to the law on privilege, though within the statute itself, the scope of the privilege is not explicated.[116] For present purposes one such privilege may be litigation privilege, which is one of the two constituent parts of legal professional privilege. Though our antiquated Evidence Act does not explicitly provide for this privilege and had only contemplated legal advice privilege, the Court of Appeal has confirmed that the common law rules on litigation privilege are not inconsistent with the statute, and therefore part of Singapore evidence law.[117]

29 With respect to criminal proceedings specifically, the High Court in *Public Prosecutor v Soh Chee Wen*[118] ("*Soh Chee Wen*") has only recently held that the Prosecution can assert litigation privilege. Prior to this decision, it was not obvious how legal professional privilege featured in criminal proceedings in the first place, since this privilege traces its origins to the paradigmatic solicitor–client relationship, in which communications to and from the client are protected from

relevance as an intrinsic, ever-present connection between two facts rather than accepting that it is a process leading to a conclusion."

115 Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 7th Ed, 2021) at paras 6.070–6.073. In addition, such statements were traditionally thought to be presumptively hearsay and inherently afflicted with unreliability unless otherwise shown. Whichever the case, the purpose of s 259 would have more aligned with moving away from crime control rather than towards it. Ditto s 258, which also speaks of admissibility in name but is in reality concerned solely with the reliability of statements obtained and says nothing about relevance.

116 Criminal Procedure Act 2004 (Act 71 of 2004) (WA) s 137A. See also Criminal Procedure Act 1921 (SA) s 111(1).

117 *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] 2 SLR(R) 367 at [27]–[31].

118 [2020] 3 SLR 1435.

disclosure so as to promote candour in the relationship.[119] Within the prosecution framework, who would the "client" be, and can the "lawyer" in this relationship include not just prosecutors but investigators as well as the court suggested? Further, any "communications" made – say, in the form of statements – would not be to the Prosecution either, not directly anyway. Other jurisdictions have also struggled with these conceptual incongruences.[120] With this latest development from the High Court, however, there is now potentially an additional bar to disclosure of material in the possession of the Prosecution.

30 How then did the High Court reach the conclusion that litigation privilege can be invoked by the Prosecution? Its starting point was that unlike legal advice privilege, litigation privilege was not so much about protecting the solicitor-client relationship, but ensuring the efficacy of the adversarial process – and the Prosecution is a party to this process in any given prosecution.[121] This circumvented, somewhat, the aforementioned problems of identifying the client and solicitor in the context of criminal proceedings. Unintendedly, it also obviated the need to engage s 2(2) of the Evidence Act to determine its compatibility with the statute, considering that the Evidence Act adopts a fairly pro-privilege position in terms of what may be covered and when privilege is lifted.

31 Notably, despite the Prosecution submitting that its disclosure obligations would prevail over any claim to litigation privilege – this probably being borne out of an obligation to project a sense of fairness and fidelity to its disclosure duties – the court went on to hold that the conditions for the invocation of privilege would be the same as that in civil proceedings: that is, if a communication (or document) is made at a time when there was a reasonable prospect of litigation and made for the dominant purpose of litigation, litigation privilege can be invoked.[122]

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119 It almost sounds hyperbolic now, but the House of Lords in *R v Derby Magistrate's Court* [1996] AC 487 described privilege as "a fundamental condition on which the administration of justice as a whole rests". The assumption was that in adversarial systems, lawyers were essential to guide clients through the labyrinth of rules in and out of court.

120 *Public Prosecutor v Soh Chee Wen* [2020] 3 SLR 1435 at [5] and [11].

121 *Public Prosecutor v Soh Chee Wen* [2020] 3 SLR 1435 at [10]. *Cf* Colin Liew, *Legal Professional Privilege* (Academy Publishing, 2020) at paras 5.379– 5.381.

122 *Public Prosecutor v Soh Chee Wen* [2020] 3 SLR 1435 at [14]–[15]. A narrow interpretation of this case would be to confine the applicability of the privilege to what the Prosecution was objecting to, that is, oral communications between the prosecutors or investigators and witnesses relating to the preparation of their conditioned statements and preparation of witnesses who are to give evidence in court. However, the eventual test adopted was of broader application than that. If the narrow interpretation is preferred, the test should be modified accordingly. Another sub-issue that may need greater clarity pertains to one feature that separates litigation

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What is even more striking is that the court created a further exception to when litigation privilege can be defeated (the two existing grounds being fraud and waiver): If there is a competing interest of importance, such as the need of an accused person to rely on evidence for his defence, litigation privilege must give way to this competing interest.[123] The court termed this "the necessity exception".[124]

32 If the court in *Soh Chee Wen* is right, a broad range of evidence could, in theory at least, be cloaked with litigation privilege. One imagines that in many cases, by the time accused persons and witnesses have actually been identified as such, the Prosecution would already have formed a view, on the evidence gathered, to prosecuting the case. Any statements that follow – whether from the accused or witnesses, used or unused, called or uncalled – would not face great difficulty in fulfilling the thresholds of reasonable prospect of litigation and dominant purpose of litigation.[125] Yet in the same way that litigation privilege can be invoked quite easily, with this newly created necessity exception, litigation privilege can be lifted quite easily too since the balancing test is merely pitched at the level of showing a competing interest that outweighs the Prosecution's interest. Even in the limited number of jurisdictions that have contemplated something similar in a departure from long-established orthodoxy of maintaining privilege as absolute, the test is essentially that of showing that an exonerating piece of evidence exists, or that the evidence sought to be disclosed is likely to raise a reasonable doubt concerning guilt.[126] Within this scheme, privilege becomes both difficult to invoke and remove. Seen in this light, *Soh Chee Wen*'s introduction of litigation privilege into our disclosure framework in the terms described may have created an intractable problem,[127] and this is

privilege from legal advice privilege: coverage of third-party communications. How would that operate in the context of criminal proceedings? See also Aaron Lim, "The Extension of Legal Privilege to Communications between the Prosecution and Witnesses for the Prosecution" (2020–2021) 38 *Singapore Law Review* 106.

123 *Public Prosecutor v Soh Chee Wen* [2020] 3 SLR 1435 at [16]–[20].

124 *Public Prosecutor v Soh Chee Wen* [2020] 3 SLR 1435 at [20].

125 It can quite reasonably be assumed, however, that it was unlikely the court intended for privilege to be invoked this way. Again, the problem is importing a doctrine without modifying its threshold despite the change in context.

126 Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 7th Ed, 2021) at paras 14.075–14.079. The cases in question were the UK's *R v Ataou* [1988] 2 All ER 321 (which was effectively superseded by the House of Lords in *R v Derby Magistrate's Court* [1996] AC 487 and the Privy Council in *B v Auckland District Law Society* [2003] 2 AC 736) and Canada's *R v McClure* [2001] 1 SCR 445.

127 Public interest immunity – also mentioned in *Soh Chee Wen* – may thus be the final barricade raised against further expansions of what is to be disclosed. Conceptually, it already sounds broad; disclosure can be resisted if it would be damaging to the public interest (see also *Mah Kiat Seng v Attorney-General* [2021] SGHC 202 at [80]–[82]). There does not appear to be any significant jurisprudence locally on how public

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without first mentioning that privilege overrides questions of relevance and materiality[128] – indispensable features of the *Kadar* inquiry, which requires an assessment of admissibility. In civil proceedings, privilege and admissibility are navigated without collision because privilege is rationalised primarily on the basis of protecting legal advice and litigation strategy, and not suppressing probative evidence (in other words, it must always be shown that the privileged information was for the purpose of legal advice or litigation strategy since the court is being deprived of potentially relevant evidence). For so long as the Prosecution is entitled to withhold certain evidence in our system, the reason for this must be similarly rationalised on both a conceptual and normative level.[129]

33 In this connection, it is apposite to briefly examine how our criminal justice system has developed in the last decade or so from a bird's eye, uncompartmentalised perspective. What we see may be described as a constant process of judicial correction whenever the rules seem to tilt too much in favour of crime control. We see this in the substantive law, for instance regarding the reining in of the scope of common intention to catch multiple confederates involved in the same criminal enterprise.[130] We see this in evidence law, for instance when Prosecution expert witnesses who either act overzealously[131] or fail to abide by professional standards[132] to make a case are admonished. We see this in procedural law, for instance when accused persons were confirmed to have a common law right of access to documents over which they have ownership or legal custody.[133] We see this in the creation of duties for judges, be it the obligation to provide proper grounds of decisions[134] or the obligation to consider alternative defences even if they

interest would operate, though ironically enough, public interest is also what the Attorney-General's Chambers cites as one of the key considerations when making prosecutorial decisions: see generally Lucien Wong, "Prosecution in the Public Interest" (2017) 35 *Singapore Law Review* 31. An educated guess in the context of disclosure would be information surrounding informants, in which case one reverts to the default position of assuming good faith on the part of the Prosecution.

128 See the Court of Appeal's elucidations in *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94.

129 See also Chin Tet Yung, "Remaking the Evidence Code: Search for Values" (2009) 21 SAcLJ 52.

130 *Daniel Vijay s/o Katherasan v Public Prosecutor* [2010] 4 SLR 1119. In 2018, the criminal laws were also amended to give the courts sentencing discretion for what were previously mandatory death penalty offences.

131 *Eu Lim Hoklai v Public Prosecutor* [2011] 3 SLR 167.

132 *Ong Pang Siew v Public Prosecutor* [2011] 1 SLR 606. Other examples in the realm of evidence law would be interpreting ss 105 (burden of proof for proving alibi) and 108 (burden of proof for matters within especial knowledge) of the Evidence Act narrowly and not literally.

133 *Public Prosecutor v Goldring Timothy Nicholas* [2014] 1 SLR 586.

134 *Thong Ah Fat v Public Prosecutor* [2012] 1 SLR 676.

are inconsistent with the primary defences of the accused.[135] Finally, we see this in the court's invocation of its powers, be it the use of inherent powers to exclude relevant evidence (as it did in *Kadar*)[136] or the quashing of a conviction over the ordering of a retrial despite the emergence of evidential gaps at trial.[137]

34 There are two possible ways to characterise these developments in the past decade or so. One view is that this is compelling proof of a unified march by other parts of our criminal justice system towards greater due process, and our rules on criminal disclosure should follow suit. After all, even within the realm of criminal disclosure, cases such as *Kadar*, *Nabill*, *Li Weiming*, and *Wee Teong Boo* are already pointing in that direction, and surveys of developments in other jurisdictions have not revealed any insurmountable problem that came about because of greater disclosure.[138] Moreover, it bears reiterating that parliament had expected the introduction of the Criminal Procedure Code to herald progressive changes to the criminal justice process.

35 The other view is that the courts in all of those cases only decided the way they did because the unfairness in the factual matrices that confronted them was just too egregious to ignore, and there has been no attempt, coordinated or otherwise, to inject greater due process across the board. To the dispassionate observer, this may be so in *Kadar*, *Nabill*, *Li Weiming*, and *Wee Teong Boo* as well. In *Kadar*, the evidence of the husband clearly had the potential to change, fundamentally, the complexion of the case: if only one perpetrator was seen to be present, how could there be two perpetrators who had murdered the victim? In *Nabill*, the very witnesses who could clarify whether the accused indeed knew the contents of the bag that was found in his house were somehow not called to testify. In *Li Weiming*, the court was not asking the Prosecution to provide particulars on the level of the rules required in civil pleadings and discovery, but to simply avoid regurgitating broad facts

135 *Public Prosecutor v Mas Swan bin Adnan* [2012] 3 SLR 527.

136 See also *Sulaiman bin Jumari v Public Prosecutor* [2021] 1 SLR 557, which conceived of the court's exclusionary discretion (of certain types of evidence) to encompass non-epistemic considerations.

137 *AOF v Public Prosecutor* [2012] 3 SLR 34. See also Goh Yihan, "The Inherent Jurisdiction and Inherent Powers of the Singapore Courts" (2011) SJLS 178.

138 See also Benny Tan, "The Role of Prosecutors as Ministers of Justice" *Law Gazette* (February 2021): "the Prosecution is probably ultimately less burdened in terms of time and resources if it were simply required to disclose all unused material, without having to assess anything about the unused material … fuller disclosure at the end of the day may in fact save time and reduce delays by leading to more guilty pleas and withdrawal of charges … if the Prosecution discloses all its unused material to the Defence … that would significantly further boost the legitimacy of the outcome of a criminal trial".

already found in the charge, especially for a factually complex offence. In *Wee Teong Boo*, withholding the second doppler report was undeniably prejudicial to the accused since it had produced a different conclusion about whether the accused had erectile dysfunction. The upshot is that the due process–crime control paradigm has limited dialectical traction in charting the course forward for our criminal disclosure regime,[139] and whatever issues that remain to be unresolved have to be looked at on a case-by-case basis.[140] Invoking due process to expand the Prosecution's duties, without more, is simply too blunt an approach to take. If anything, there was never meant to be a full alignment between criminal disclosure and civil discovery.

36 Whichever view one adopts, the aforementioned issues of admissibility and litigation privilege ought to be properly reconceptualised as a matter of priority; they would not be resolved one way or the other merely by weighing and balancing due process and crime control considerations. If s 259 of the Criminal Procedure Code is indeed meant to be invoked in the way the Prosecution argued in *Lim Hong Liang* and litigation privilege can indeed be invoked by the Prosecution, the limits and scope of *Kadar* and *Nabill* may need to be re-assessed. To be more precise, if litigation privilege is invokable over statements and not merely over communications (between prosecutors or investigators and witnesses), notwithstanding the less onerous test of demonstrating an important competing interest, how would accused even go about doing so? Further, despite the court accepting the Prosecution's concession that litigation privilege would not trump the Prosecution's disclosure obligations, it is far from clear why this is so, especially if the disclosure duty stems from common law and the privilege can be accommodated by the Evidence Act. As to the other issue, if the grounds for admissibility in s 259 were designed with prosecutorial reliance in mind, how would that operate from the standpoint of the accused? There are no easy answers not really because these are conceptually complex questions, but because the ramifications of introducing litigation privilege and s 259 admissibility into the criminal disclosure framework may not have been fully thought through in terms of the differences in context those doctrines were meant to operate in. Judicial clarification would be welcome, or perhaps even more comprehensive legislation (which can take into account the various competing policy considerations as a whole, as well as various trickle-down issues such as inadvertent disclosures). This way, what has now been termed as an accused's right to information by the Court of Appeal

139 See generally Melanie Chng, "Modernising the Criminal Justice Framework" (2011) 23 SAcLJ 23.

140 See also Denise Wong, "Discovering the Right to Criminal Disclosure" (2013) 25 SAcLJ 548 at paras 4–7.

in *Li Weiming* would be clearer as to its precise limits and contours, and the criminal disclosure regime in Singapore would have a clearer path forward.