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**Reforming the Right to Legal
Counsel in Singapore**

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Reforming the Right to Legal Counsel in Singapore

Jack Tsen-Ta Lee¹

This is an opinion prepared for the Criminal Law Committee of the Law Society of Singapore on an arrested person's right to legal counsel in Singapore. Specifically, it deals with the following:

- It summarizes pertinent aspects of the law relating to the right to legal counsel in Singapore.
- It surveys a number of ASEAN and Commonwealth jurisdictions to determine how long after apprehension the right to counsel is generally accorded to arrested persons, and compares the legal position in these jurisdictions to the situation in Singapore.
- It examines two rights ancillary to the right to legal counsel, namely, the right to be informed of the right to counsel, and the right to inform third parties such as family or friends of one's arrest.

The following recommendations are made:

Recommendation 1

Public authorities which have arrested persons or are holding them in custody must, upon the arrest or custody, permit them to consult and be defended by a legal practitioner of their choice.

Recommendation 2

Subject to recommendation 3, persons under arrest or in custody should be permitted to consult legal practitioners prior to being questioned by investigating officers.

Recommendation 3

However, a court may order that the right of a person under arrest or in custody to consult legal counsel be suspended for a reasonable period to be

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specified by the court in exceptional circumstances where there is credible evidence that affording the right to the person immediately will have one or more of the following consequences:²

- It will lead to interference with, or harm to, evidence connected with an offence.
- It will lead to interference with, or physical harm to, other people.
- It will lead to serious loss of, or damage to, property;
- It will lead to alerting other people suspected of having committed an offence but not yet arrested for it.
- It will hinder the recovery of property obtained in consequence of the commission of an offence.
- It will seriously subvert the criminal process in some other manner.

The onus of adducing the credible evidence required should lie on the arresting, detaining or prosecuting authority.

Recommendation 4

After a person under arrest or in custody has instructed a legal practitioner to advise him, the person, if he or she so requests, should be permitted to have the legal practitioner present during interviews or other forms of police investigation.

Recommendation 5

Public authorities which have arrested persons or are holding them in custody must, upon the arrest or custody, inform them of their right to consult and be defended by a legal practitioner of their choice.

Recommendation 6

Public authorities which have arrested persons or are holding them in custody must, upon the arrest or custody, permit them a reasonable opportunity to consult and obtain advice from family members or other appropriate persons.

Recommendation 7

However, a court may order that the right of a person under arrest or in custody to consult and obtain advice from family members or other appropriate persons be suspended for a reasonable period to be specified by the court in exceptional circumstances where there is credible evidence that affording the right to the person immediately will have one or more of the consequences referred to in Recommendation 3.

As with Recommendation 3, the onus of adducing the credible evidence required should lie on the arresting, detaining or prosecuting authority.

Recommendation 8

Courts should be empowered to exclude evidence obtained in ways that infringe constitutional or statutory rules if, having regard to all the

² Adapted from the UK Code of Practice for the Detention, Treatment and Questioning of Persons by the Police, above, n 49, para 6.6(b).

circumstances, the admission of such evidence would bring the administration of the justice into disrepute.

I. INTRODUCTION: IMPORTANCE OF THE RIGHT TO LEGAL COUNSEL

1.1 The right to legal counsel is intimately linked to the right to a fair hearing, which itself “stems from the principle of legality, under which all States are required to respect the rule of law”.³ The right to a fair hearing is embodied in Article 10 of the Universal Declaration of Human Rights:⁴ “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” Singapore is bound in international law to respect the right to a fair hearing since it is a member state of the United Nations (UN), and since the right is said to be a rule of customary international law.⁵

1.2 Peter Leyland and Gordon Anthony have stated that

... [o]ne important aspect of a fair hearing, strongly asserted by the courts, is that each side should have an equal capacity to present its case... . It is stating the obvious to point out that there are many individuals affected by decisions who are not capable of arguing their case in the most favourable light possible.⁶

The learned authors cited the following view expressed by Lord Denning MR in *Pett v Greyhound Racing Association* (1968):⁷

It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weaknesses in the other side. He may be tongue-tied or nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: “You can ask any questions you like”; whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him. And who better than a lawyer who has been trained for the task? I should have thought, therefore, that when a man’s reputation or

³ Louise Doswell-Beck, “Fair Trial, Right to, International Protection” in Rüdiger Wolfrum (gen ed), *Max Planck Encyclopedia of Public International Law* (Heidelberg: Max Planck Institute for Comparative Public Law and International Law; Oxford: Oxford University Press, updated October 2008) <http://www.mpepil.com/sample_article?id=/epil/entries/law-9780199231690-e798> (archived at <<http://www.webcitation.org/66eezeoXF>>) at [2].

⁴ GA Res 217A (III), UN Doc A/810 at 71 (1948).

⁵ See, for instance, Curtis F J Doebbler, “Discrimination, Security of Person, Fair Trial” in *Introduction to International Human Rights Law* (Washington, DC: CD Publishing, 2006), 103–110 at 108: “The right to fair trial is also promoted in numerous declarations, resolutions and minimum standards that are themselves not binding, but which represent customary international law because of their widespread acceptance. ... Among the general fair trial protections are... the right to counsel...”.

⁶ Peter Leyland & Gordon Anthony, “Procedural Impropriety III: The Requirements of Natural Justice/Fairness” in *Textbook on Administrative Law* (6th ed) (Oxford: Oxford University Press, 2009), 361–391 at 368.

⁷ [1969] 1 QB 125, CA.

livelihood is at stake, he not only has a right to speak by his own mouth. He also has a right to speak by counsel or solicitor.⁸

- 1.3 The above remarks were made in the context of natural justice or the right to be treated fairly in administrative law, but it is clear that they apply to constitutional guarantees of the right to legal counsel as well. This was aptly expressed by the New Zealand Court of Appeal in *R v Barlow* (1995),⁹ a case that considered the right of a person charged with an offence to consult and instruct a lawyer which is confirmed by section 24(c) of the New Zealand Bill of Rights Act 1990.¹⁰ Richardson J stated:

The right to a lawyer recognises the reality that an individual charged with an offence is ordinarily at a significant disadvantage in dealing with agents of the prosecution. Recourse to a lawyer is a means of redressing that imbalance by providing access to knowledge of the criminal processes, support in preparing any defence, advice as to whether to speak about the case to the police or to others, and representation by an independent intermediary. It allows the accused to make informed decisions about the case.¹¹

II. THE RIGHT TO LEGAL COUNSEL IN SINGAPORE

- 2.1 The right to legal counsel is embodied in the Constitution of the Republic of Singapore.¹² Article 9(1) of the Constitution states that “[n]o person shall be deprived of his life or personal liberty save in accordance with law”, while Article 9(3), which can be regarded as a specific application of the general principle enunciated in Article 9(1), provides: “Where a person is arrested, he... shall be allowed to consult and be defended by a legal practitioner of his choice.” It may be noted that section 236 of the Criminal Procedure Code 2010 (‘CPC’)¹³ reads: “Every accused person before any court may of right be defended by an advocate.”¹⁴ This provision is arguably founded on the constitutional principle, but is narrower as it applies only when an accused person has been brought before a court. It says nothing about the accused person’s rights prior to any hearing.
- 2.2 This opinion focuses on three aspects of the right to legal counsel as it has been interpreted by the Singapore courts: the doctrine of legitimate restriction; and whether the right to counsel includes or implies the existence of a right to

⁸ *Pett, id* at 132, referred to in Leyland & Anthony, above, n 6 at 369.

⁹ (1995) 14 CRNZ 9, CA (NZ).

¹⁰ 1990 No 109 (reprint as at 1 February 1994).

¹¹ *Id* at 38, cited in Richard Mahoney, “The Right to Counsel” in Paul Rishworth [*et al*], *The New Zealand Bill of Rights* (Oxford: Oxford University Press, 2003), 524–550 at 541. See also *Ministry of Transport v Noort* [1992] 3 NZLR 260 at 286, CA (NZ) *per* Hardie Boys J: “[The right to counsel is] a necessary concomitant of those other rights which maintain the freedom and dignity of the individual against the power and authority of the state”.

¹² 1985 Rev Ed, 1999 Reprint.

¹³ No 15 of 2010.

¹⁴ This provision was formerly s 195 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed): see *Balasundaram s/o Suppiah v Public Prosecutor* [1996] 1 SLR(R) 853 at 856, [7], HC.

be informed of the right to counsel, and the right to inform other parties such as family members or friends of one's arrest.¹⁵

A. DOCTRINE OF LEGITIMATE RESTRICTION

- 2.3 In *Lee Mau Seng v Minister for Home Affairs* (1971),¹⁶ a case decided not long after Singapore's independence, the High Court held that "[t]he language of Art 5(3) [now Article 9(3)] of the Constitution is clear and simple. If a person who is arrested wishes to consult a legal practitioner of his choice, he is, beyond a shadow of doubt, entitled to have this constitutional right granted to him by the authority who has custody of him after his arrest *and this right must be granted to him within a reasonable time after his arrest*" (emphasis added).¹⁷ Though not supported by any authority in *Lee Mau Seng*, this principle – which has been termed the "doctrine of legitimate restriction"¹⁸ – was confirmed by the Court of Appeal in *Jasbir Singh v Public Prosecutor* (1994).¹⁹
- 2.4 There is a paucity of case law concerning what period of time following arrest is regarded as reasonable. In *Lee Mau Seng*, the High Court did not express an opinion on the issue.²⁰ The Court of Appeal in *Jasbir Singh* held that, on the facts of the case, it was reasonable for the appellant not to be accorded his right to counsel for a period of two weeks from the date of his arrest,²¹ even though a cautioned statement had been recorded from him during this time.²²

¹⁵ Other issues that have come before the courts for decision are whether the right to counsel is breached if an accused person's counsel fails to attend court or is unwilling or unable to act for the accused (*Balasundaram*, above, n 14; and see also *Soong Hee Sin v Public Prosecutor* [2001] 1 SLR(R) 475, HC (judge under no duty to give legal advice to an accused who voluntarily chooses not to engage counsel)), and if an accused at first declines to appoint counsel but changes his or her mind at a late stage in the trial (*Tan Chor Jin v Public Prosecutor* [2008] 4 SLR(R) 306, CA).

¹⁶ [1971–1973] SLR(R) 135, HC.

¹⁷ *Id* at 143, [12].

¹⁸ Michael Hor, "The Right to Consult a Lawyer on Arrest – Part 2" [1989] *CLASNews* (no 4), 4–11 at 4, citing *Ramli bin Salleh v Yahya bin Hashim* [1973] 1 MLJ 54 at 56, HC (Alor Star, M'sia).

¹⁹ *Jasbir Singh v Public Prosecutor* [1994] 1 SLR(R) 782 at 798–800, [44]–[49], CA.

²⁰ *Id* at 799, [48].

²¹ *Id* at 799–800, [49].

²² *Id* at 798, [45]. The Court of Appeal noted that there was no statutory basis for the contention that the appellant should have been accorded his right to counsel prior to a cautioned statement being taken from him: *id* at 799, [46]. In *Leong Siew Chor v Public Prosecutor* [2006] SGCA 38, the appellant's counsel argued that Art 9(3) had been infringed because his client had not been permitted to consult a lawyer before certain investigation statements were recorded from him by the police. The Court of Appeal declined to decide the point, saying (at [9]): "Counsel was inviting this court to make an important ruling on a constitutional point without sufficient material in law and evidence to sustain any cogent question of law. It may be that the police ought not deny a right to counsel in the narrow form of receiving advice on the right to remain silent, to the broadest form possible, but this is not the case to advance any such argument. It is too thinly supported on the facts; this is not the right case for the points of law alluded to. Perhaps counsel sensed that a major legal point needed to be expounded by this court, but unless the issues arise clearly from the evidence, and are fully argued, this court would not engage in issues of purely academic interest – that is not the function of this, or any court. The court's duty is not only to protect the rights of the accused, it has an equally strong duty to protect the rights of the public and the state."

- 2.5 Even after an arrested person has been permitted to consult a legal practitioner, the police may impose restrictions on the extent to which the legal practitioner may advise his or her client during investigations. In *Muhammad bin Kadar v Public Prosecutor* (2011),²³ the Court of Appeal noted that after an accused has engaged legal counsel, “there is no legal rule requiring the police to let counsel be present during subsequent interviews with the accused while investigations are being carried out”.²⁴

B. RIGHT TO BE INFORMED OF RIGHT TO COUNSEL

- 2.6 As presently interpreted by the High Court, Article 9 of the Constitution does not confer on arrested persons the right to be informed of one’s right to counsel. The Court held in *Rajeevan Edakalavan v Public Prosecutor* (1998)²⁵ that such an ancillary right does not exist in the Constitution because the negative phrasing *shall be allowed* in Article 9(3) means “there is no obligation imposed on the relevant authority to inform and advise the person under custody of his right to counsel”.²⁶ The Court contrasted this with an arrested person’s right to be informed of the grounds of arrest in the same provision, which is phrased in positive terms. Thus, to infer the right to be informed of the right to counsel into the Constitution would be “tantamount to judicial legislation”.²⁷ The Court then expressed the following view:

There has been criticism that to deprive one of the right to be informed will effectively amount to a negation of the right to counsel itself. In my opinion, that is pushing the case too far. The practical experiences in our judicial system bear testimony to the fact that such a conclusion is wholly speculative and unwarranted. Conversely, the safeguards in the Constitution and the criminal procedure process ensure that the rights of the accused are adequately protected. Any proposition to broaden the scope of the rights accorded to the accused should be addressed in the political and legislative arena. The Judiciary, whose duty is to ensure that the intention of Parliament as reflected in the Constitution and other legislation is adhered to, is an inappropriate forum. The Members of Parliament are freely elected by the people of Singapore. They represent the interests of the constituency who entrust them to act fairly, justly and reasonably. The right lies in the people to determine if any law passed by [by] Parliament goes against the principles of justice or otherwise. This right, the people exercise through the ballot box. The Judiciary is in no position to determine if a particular piece of legislation is fair or reasonable as what is fair or reasonable is very subjective. If anybody has the right to decide, it is the people of Singapore. The sensitive issues surrounding the scope of fundamental liberties should be raised through our representatives in Parliament who are the ones chosen by us to address our concerns. This is especially so with regards to

²³ [2011] 3 SLR 1205, CA.

²⁴ *Id* at 1240, [57].

²⁵ [1998] 1 SLR(R) 10, HC.

²⁶ *Id* at 18, [19].

²⁷ *Ibid*.

matters which concern our well-being in society, of which fundamental liberties are a part.²⁸

C. RIGHT TO CONTACT THIRD PARTIES

2.7 Building on, *inter alia*, its decision in *Rajeevan*,²⁹ in *Sun Hongyu v Public Prosecutor* (2005)³⁰ the High Court held that Article 9 of the Constitution also does not provide a fundamental “right for the accused to contact third parties to discover and enquire into his right to counsel” or a right “for an accused person to contact family and friends to enquire into the legal consequences of his arrest”.³¹

III. ASSESSMENT

A. DOCTRINE OF LEGITIMATE RESTRICTION

1. Justifications for the Doctrine

3.1 Criticisms of the doctrine of legitimate restriction have been levied in Singapore since the 1980s.³² A number of justifications for the doctrine have been suggested but, it is submitted, convincingly refuted.

3.2 First, it might be said that permitting the right to legal counsel to be exercised shortly after a person’s arrest would impede police investigations. This was an argument raised in a related context by the Prosecution in a Malaysian case, *Saul Hamid v Public Prosecutor* (1987).³³ The High Court disagreed in the following terms:

The reasoning behind the learned Deputy’s argument is, of course, based upon the presumption that all arrested persons are guilty. But it goes further and assumes a general inclination of arrested persons and, by inference, defence counsel, to suborn bribery and perjury, to intimidate witnesses, to fabricate defences, to procure perjured testimony and to indulge in other illegal activities in order to secure acquittals. Thus, accurate finding becomes less likely. Needless to say, as a general statement about the defence Bar and accused persons generally, this is a thoroughly unacceptable indictment.³⁴

It hardly needs pointing out that in Singapore it is an “undoubted fundamental rule of natural justice” that a person charged with a criminal

²⁸ *Id* at 18–19, [21].

²⁹ Above, n 25.

³⁰ [2005] 2 SLR(R) 750, HC.

³¹ *Id* at 760, [34].

³² See Hor, above, n 18.

³³ [1987] 2 MLJ 736, HC (Penang, M’sia). The Prosecution argued that an arrested person has no right to be represented by counsel during remand proceedings under s 117 of the Criminal Procedure Code (FMS Cap 6).

³⁴ *Id* at 739, cited in Hor, above, n 18 at 6.

offence is to be presumed innocent until proven guilty.³⁵ An associated point made in *Saul Hamid* was that since an arrested person would necessarily have to consult counsel out of earshot of the police (though not necessarily out of their sight), this would “afford the opportunity for distortion of the criminal process”. The judge’s response was that the arrested person might be denied from consulting his lawyer if permitting him to do so “would result in undue interference with the course of the investigation”. However, the onus lay on the police to show that there might be undue interference, and the judge did not see “how they can discharge that onus by the simple unsworn *ipse dixit* of the police officer. The police will have to produce evidence sufficient to convince a legal mind that there are substantial grounds to support their objection.”³⁶ In support, *Sundar Singh v Emperor* (1930)³⁷ was cited:

The right of a prisoner to have access to legal advice must of course be subject to such legitimate restrictions as may be necessary in the interests of justice in order to prevent any undue interference with the course of investigation. For instance a legal adviser cannot claim to have interviews with a prisoner at any time he chooses. Similarly, although ordinarily a member of the Bar may be presumed to understand his responsibility in the matter, if there are any good reasons to believe that a particular pleader has abused or is likely to abuse the privilege, that pleader may be refused an interview. But, in such cases the police must of course be prepared to support their action on substantial grounds.³⁸

3.3 Another justification for the doctrine of legitimate restriction is that the arrested person’s counsel would advise him or her of the right to remain silent,³⁹ also known as the privilege against self-incrimination, and presumably make it more difficult for a statement to be obtained from the person. The privilege against self-incrimination was one of the principles of English law received in Singapore under the Second Charter of Justice 1826,⁴⁰ and though the Court of Appeal has held that it is not a fundamental rule of natural justice protected by Article 9(1) of the Constitution,⁴¹ it is a common law evidential rule⁴² that remains in force, though modified by statute. It is placed on a statutory footing in section 22(2) of the CPC,⁴³ which provides that a person apparently acquainted with any of the facts and circumstances of a case who is orally examined by a police officer “need not say anything that might expose him to a criminal charge, penalty or forfeiture”.

³⁵ *Haw Tua Tau v Public Prosecutor* [1981–1982] SLR(R) 133 at 144, [24], PC (on appeal from Singapore).

³⁶ *Saul Hamid*, above, n 33 at 739.

³⁷ AIR 1930 Lah 945, HC (Lahore, India).

³⁸ *Id* at 947, cited with approval in *Ooi Ah Phua v Officer in Charge, Criminal Investigation Kedah/Perlis* [1975] 2 MLJ 198 at 200, FC (M’sia), and in *Saul Hamid*, above, n 33 at 739–740.

³⁹ Hor, above, n 18 at 8–9.

⁴⁰ *Riedel-de Haen AG v Liew Keng Pang* [1989] 1 SLR(R) 417 at 422, [12], HC.

⁴¹ *Public Prosecutor v Mazlan bin Maidun* [1992] 3 SLR(R) 968 at 973–975, [13]–[19], CA

⁴² *Id* at 973, [15].

⁴³ Above, n 13. The corresponding provision in the CPC (Cap 68, 1985 Rev Ed) was s 121(2).

3.4 The justification in question was given short shrift by the Law Reform Commission of Australia in a 1975 interim report on criminal investigation,⁴⁴ because it did not think that lawyers will always advise arrested persons to remain silent. In any case, even if lawyers do so, the practice only places ignorant suspects in the same position as suspects who are aware of their right to silence.⁴⁵ In *Thornhill v Attorney General of Trinidad and Tobago* (1979),⁴⁶ similar reasoning was applied by the Privy Council to section 2(c)(i) of the Constitution of Trinidad and Tobago 1962 which states: “[N]o Act of Parliament shall... deprive a person who has been arrested or detained... of the right to retain and instruct without delay a legal adviser of his own choice and to hold communication with him...” In considering whether the delay in according the appellant his right to counsel had been unreasonable, their Lordships found unconvincing the argument that if the appellant had been allowed to consult a lawyer and had learned he could refuse to answer questions, the police would have been less likely to successfully obtain self-incriminating statements from him.⁴⁷

2. Practice in Other Jurisdictions and in International Law

3.5 Since, as I have submitted, the justifications for the doctrine of legitimate restriction are not particularly convincing, the question that arises is when an arrested person should be accorded the right to legal counsel.

3.6 The table in the Appendix to this report contains a survey of the practice in a number of ASEAN and Commonwealth jurisdictions on this issue. As the second column of the table indicates, quite a number of the jurisdictions require persons to be allowed to consult counsel upon their arrest or detention or shortly thereafter, and often before any questioning by the police takes place. The jurisdictions surveyed to which this conclusion applies are Australia, Canada, Hong Kong, India, Malaysia, the Philippines, South Africa, Thailand, Vietnam and the United Kingdom. (It should be noted that despite the laws of Thailand and Vietnam stipulating that the right to counsel should be accorded at an early stage, the US Department of State’s 2010 Human Rights Reports stated that in practice arrested persons are often not permitted to consult their lawyers promptly.)

3.7 On the international law plane, there also appears to be a consensus that the right to counsel should be accorded upon arrest or shortly thereafter. In 1988, the UN General Assembly agreed on a “Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment”.⁴⁸ The following principles are relevant for present purposes:

⁴⁴ Law Reform Commission (Australia), *Criminal Investigation: An Interim Report* (Report No 2) (Canberra: Australian Government Publishing Service, 1975).

⁴⁵ *Id* at [107].

⁴⁶ [1981] AC 61, PC (on appeal from Trinidad and Tobago).

⁴⁷ *Id* at 72–73. See also *R v Lemsatef* [1977] 1 WLR 812 at 816–817, in which the Court of Appeal, interpreting the Judges’ Rules (Practice Note (Judge’s Rules) [1964] 1 WLR 152), said that “it is not a good reason for refusing to allow a suspect, under arrest or detention to see his solicitor, that he has not yet made any oral or written admission”.

⁴⁸ GA Res 43/173, annex, 43 UN GAOR Supp (No 49), 76th plen mtg, at 298, UN Doc A/43/49 (1988) <<http://www.un.org/documents/ga/res/43/a43r173.htm>> (accessed 17 April 2012);

Principle 13

Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively, with information on and an explanation of his rights and how to avail himself of such rights.

Principle 15

Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.

Principle 17

1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.

Principle 18

1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.
2. A detained or imprisoned person shall be allowed adequate time and facilities for consultations with his legal counsel.
3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

It is noteworthy that Principle 18(3) recognizes that it may be appropriate for the right to counsel to be suspended or restricted in exceptional circumstances. Reference may also be had to paragraph 6.6(b) of the United Kingdom Code of Practice for the Detention, Treatment and Questioning of Persons by the Police (Police and Criminal Evidence Act Code C),⁴⁹ which provides:

A detainee who wants legal advice may not be interviewed or continue to be interviewed until they have received such advice unless: ...

- (b) an officer of superintendent rank or above has reasonable grounds for believing that:

archived at <<http://web.archive.org/web/20101224032825/http://www.un.org/documents/ga/res/43/a43r173.htm>>).

⁴⁹ Code of Practice for the Detention, Treatment and Questioning of Persons by the Police (Police and Criminal Evidence Act Code C) <<http://www.homeoffice.gov.uk/publications/police/operational-policing/pace-codes/pace-code-c?view=Binary>> (accessed 9 April 2012; archived at <<http://www.webcitation.org/66pJ8Qtog>>).

- (i) the consequent delay might:
- lead to interference with, or harm to, evidence connected with an offence;
 - lead to interference with, or physical harm to, other people;
 - lead to serious loss of, or damage to, property;
 - lead to alerting other people suspected of having committed an offence but not yet arrested for it;
 - hinder the recovery of property obtained in consequence of the commission of an offence.
- (ii) when a solicitor, including a duty solicitor, has been contacted and has agreed to attend, awaiting their arrival would cause unreasonable delay to the process of investigation.⁵⁰

3.8 On 7 September 1990, the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Havana, Cuba, adopted a set of “Basic Principles on the Role of Lawyers”.⁵¹ Among these principles are the following:

1. All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.
5. Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.
7. Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.
8. All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.

The UN Human Rights Committee, interpreting the right to legal assistance in criminal proceedings that is guaranteed by Article 14, paragraph 3(d), of the International Covenant on Civil and Political Rights,⁵² has taken a view

⁵⁰ See also para 6.6(a) and Annex B of the Code.

⁵¹ United Nations, *Basic Principles on the Role of Lawyers* (7 September 1990) <<http://www.unhcr.org/refworld/docid/3ddb9f034.html>> (accessed 16 April 2012).

⁵² GA resolution 2200A (XXI), 21 UN GAOR Supp (No 16) at 49, UN Doc A/6316 (1966), 993 UNTS 3, entered into force 3 January 1976. Art 14, para 3(d) reads: “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... to defend himself in person or through legal assistance of his own choosing; to be

similar to the one expressed in principle 1 above, that legal assistance should be available at all stages of criminal proceedings.⁵³

3. Recommendations

3.9 In line with the domestic and international law principles mentioned above, it is recommended that the law in Singapore be reformed in the following manner:

Recommendation 1

Public authorities which have arrested persons or are holding them in custody must, upon the arrest or custody, permit them to consult and be defended by a legal practitioner of their choice.

Recommendation 2

Subject to recommendation 3, persons under arrest or in custody should be permitted to consult legal practitioners prior to being questioned by investigating officers.

Recommendation 3

However, a court may order that the right of a person under arrest or in custody to consult legal counsel be suspended for a reasonable period to be specified by the court in exceptional circumstances where there is credible evidence that affording the right to the person immediately will have one or more of the following consequences:⁵⁴

- It will lead to interference with, or harm to, evidence connected with an offence.
- It will lead to interference with, or physical harm to, other people.
- It will lead to serious loss of, or damage to, property;
- It will lead to alerting other people suspected of having committed an offence but not yet arrested for it.

informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it".

⁵³ See, among others, *Robinson v Jamaica*, United Nations Human Rights Committee (HRC) Communication No 223/1987 (30 March 1989) <http://www.bayefsky.com/html/106_jamaica223_1987.php> (archived at <http://web.archive.org/web/20081202065219/http://www.bayefsky.com/html/106_jamaica223_1987.php>) at [10.3]; *Marshall v Jamaica*, HRC Communication No 730/1996 (3 November 1998) <http://www.bayefsky.com/html/253_jamaica042.php> (archived at <http://web.archive.org/web/20071108050638/http://www.bayefsky.com/html/253_jamaica042.php>) at [6.2] (accused unrepresented at preliminary hearing); *Brown v Jamaica*, HRC Communication No 775/1997 (23 March 1999) <http://www.bayefsky.com/html/255_jamaica002.php> (archived at <http://web.archive.org/web/2007110021000/http://www.bayefsky.com/html/255_jamaica002.php>) at [6.6]; *Aliev v Ukraine*, HRC Communication No 781/1997 (7 August 2003) <http://www.bayefsky.com/html/ukraine_t5_iccr_781_1997.php> (archived at <<http://www.webcitation.org/66edNtASF>>) at [7.2]–[7.3] (accused detained for five months after arrest without access to counsel).

⁵⁴ Adapted from the UK Code of Practice for the Detention, Treatment and Questioning of Persons by the Police, above, n 49, para 6.6(b).

- It will hinder the recovery of property obtained in consequence of the commission of an offence.
- It will seriously subvert the criminal process in some other manner.

The onus of adducing the credible evidence required should lie on the arresting, detaining or prosecuting authority.

- 3.10 The holding in *Muhammad bin Kadar* is significant for highlighting that Singapore law presently imposes no rule requiring police to permit a lawyer instructed to act for an arrested person to be present during interviews.⁵⁵ The lack of such a rule may have the consequence of undermining the right to counsel, since the police can negate the reason for the constitutional guarantee simply by preventing lawyers from advising their clients during the course of investigations. In view of this, the following is recommended:

Recommendation 4

After a person under arrest or in custody has instructed a legal practitioner to advise him, the person, if he or she so requests, should be permitted to have the legal practitioner present during interviews or other forms of police investigation.

B. RIGHT TO BE INFORMED OF RIGHT TO COUNSEL

- 3.11 As indicated in the previous section, the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment require that a detainee be informed by a competent authority of the right to consult legal counsel promptly after arrest.⁵⁶ Furthermore, there is a general principle that the authority responsible for a person's arrest, detention or imprisonment is under a duty to provide the person with information as to his or her rights and how to avail himself or herself of such rights "at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter".⁵⁷
- 3.12 Similar provision is made by the laws of Cambodia, Canada, Indonesia, Malaysia, New Zealand, the Philippines, South Africa, Vietnam and the United Kingdom, as is indicated in the third column of the table in the Appendix.
- 3.13 Since it is the view of the High Court that no right to be informed of one's right to counsel may be inferred into the Constitution,⁵⁸ it is recommended that the law be reformed to impose on the relevant public authorities the duty to do so:

⁵⁵ See the text accompanying nn 23–24, above.

⁵⁶ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, above, n 48, principle 17(1).

⁵⁷ *Id.*, principle 13.

⁵⁸ Pt II.B, above.

Recommendation 5

Public authorities which have arrested persons or are holding them in custody must, upon the arrest or custody, inform them of their right to consult and be defended by a legal practitioner of their choice.

C. RIGHT TO CONSULT THIRD PARTIES

- 3.14 When persons are arrested and detained incommunicado for police investigations, they are cut off from the assistance that their family and friends may be able to provide. This can range from giving general advice and support to engaging a lawyer on their behalf. When an arrested person is in such a vulnerable state, it may well be the case that he or she is more likely to make an inculpatory statement when questioned by the police. However, it is submitted that it is questionable whether the law should permit the police to deliberately place arrested persons in positions of helplessness to make it less likely that they will exercise legal rights undoubtedly due to them, such as the privilege against self-incrimination.⁵⁹ In this respect, the objections to the doctrine of legitimate restriction mentioned above⁶⁰ are applicable. It is pertinent to note that the Court of Appeal held in *Lim Thian Lai v Public Prosecutor* (2006)⁶¹ that the CPC places no positive obligation on the police to inform suspects or accused persons that they may decline to answer questions which may elicit potentially incriminating answers.⁶²
- 3.15 The right to consult third parties facilitates the constitutional right to counsel. This is illustrated by the judgment of the High Court of Malaya in Penang in *Saul Hamid*.⁶³ The judge held that the right to counsel guaranteed by Article 5(3) requires a person to be represented by a lawyer during remand proceedings, and thus it follows that “in all cases, the police should, upon request, co-operate by keeping relatives of the arrested person or his counsel informed of the dates, times and the name of the magistrate from whom remand is going to be sought so as to enable counsel to appear before the magistrate and apply to be heard”.⁶⁴
- 3.16 The laws of a number of jurisdictions specifically provide that detainees should be allowed to contact family members or other persons and consult them, or that the authorities have a duty to inform these third parties of the detainee’s whereabouts. Of the jurisdictions surveyed, Australia, Cambodia, India, Indonesia, Laos, Malaysia, the Philippines, Thailand and the United Kingdom have such provision in their laws, as indicated in the third column of the table in the Appendix.
- 3.17 In addition, the following principles set out in the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment are germane:

⁵⁹ See the text accompanying nn 40–47, above.

⁶⁰ Pt III.A.1, above.

⁶¹ [2006] 1 SLR(R) 319, CA.

⁶² *Id* at 326–328, [17]–[18].

⁶³ Above, n 33.

⁶⁴ *Id* at 740, noted in Hor, above, n 18 at 7.

Principle 15

Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.

Principle 16

1. Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody. ...
4. Any notification referred to in the present principle shall be made or permitted to be made without delay. The competent authority may however delay a notification for a reasonable period where exceptional needs of the investigation so require.

3.18 In view of the foregoing, and the High Court's opinion that arrested persons possess no constitutional right to consult third parties, the following recommendation is proposed:

Recommendation 6

Public authorities which have arrested persons or are holding them in custody must, upon the arrest or custody, permit them a reasonable opportunity to consult and obtain advice from family members or other appropriate persons.

Recommendation 7

However, a court may order that the right of a person under arrest or in custody to consult and obtain advice from family members or other appropriate persons be suspended for a reasonable period to be specified by the court in exceptional circumstances where there is credible evidence that affording the right to the person immediately will have one or more of the consequences referred to in Recommendation 3.

As with Recommendation 3, the onus of adducing the credible evidence required should lie on the arresting, detaining or prosecuting authority.

D. ENFORCEMENT AND IMPLEMENTATION OF RECOMMENDATIONS

3.19 In Singapore, a court currently possesses no discretion to exclude evidence that has been obtained through means that are unfair to an accused person, even if some legal rule has been breached, due to provisions of the Evidence Act.⁶⁵ The court may only exclude evidence that has greater prejudicial effect than probative value, but this will only be the case where the reliability of the

⁶⁵ Cap 97, 1997 Rev Ed.

evidence is in question.⁶⁶ It is possible that a failure on the part of the police to accord an arrested person his or her right to consult legal counsel may result in the person feeling pressured into, for example, agreeing to give a statement along lines suggested by the police officer questioning him. In this case, a court may be justified in excluding the statement since its prejudicial effect exceeds its probative value.

- 3.20 However, the court has no discretion to exclude evidence having probative value simply because it has been obtained unfairly in breach of some rule of law that enures to the accused person's benefit. For instance, let us assume that the law has been reformed along the lines suggested in Recommendations 1 to 7 above, and in breach of the law an arrested person is not accorded his or her right to counsel prior to being questioned. As a consequence, the person is unaware that he or she has the legal right not to respond to questions the answers to which might be incriminating, and makes an inculpatory statement. Under the present law, if the statement is otherwise reliable, the court trying the accused person would not be able to exclude the evidence.
- 3.21 In support of the existing rule, it may be argued that the function of a criminal trial is to determine whether an accused person is guilty of the charges levied against him or her, and towards this end any reliable evidence should be considered by the court regardless of its provenance. Breaches of constitutional rights and legal procedures should be redressed through alternative means. However, in English law damages are not awarded for a breach of a constitutional or administrative law rule – some cause of action in private law such as the commission of a tort must be established.⁶⁷ This issue has not yet been the subject of any Singapore case, but if the same rule applies locally the implication is that there are limited means for bringing the police to book. Disciplinary proceedings against police officers would appear to be the only available method. Conversely, it is submitted that it does not lie well in the mouth of the court to convict an accused person on the basis of evidence tainted by police wrongdoing, as this acts as an implicit sanction for the police to ignore constitutional and procedural safeguards.
- 3.22 A number of jurisdictions have enacted provisions requiring the exclusion of unlawfully obtained evidence. For example, section 24 of the Canadian Charter of Rights and Freedoms⁶⁸ states:

Enforcement of guaranteed rights and freedoms

24.— (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

⁶⁶ *Muhammad bin Kadar*, above, n 23 at 1238–1240, [51]–[56], citing *Wong Keng Leong Rayney v Law Society of Singapore* [2007] 4 SLR(R) 377 at 390, [27], CA; and *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239, HC.

⁶⁷ Peter Cane, *An Introduction to Administrative Law* (4th ed) (Oxford: Clarendon Press, 2004) at 94–95.

⁶⁸ Pt I of the Constitution Act 1982 (Can), which was itself enacted as Sch B to the Canada Act 1982 (c 11) (UK).

Exclusion of evidence bringing administration of justice into disrepute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Section 24(2) has been applied to exclude confessions obtained before arrested persons were warned of their right to counsel,⁶⁹ and after an arrested person had requested to speak to a lawyer but before effect was given to the request.⁷⁰

- 3.23 Reference may also be had to section 78(1) of the UK Police and Criminal Evidence Act 1984:⁷¹

Exclusion of unfair evidence

78.— (1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

In *R v Samuel* (1987),⁷² the Court of Appeal of England and Wales excluded evidence obtained from an accused person who had been wrongfully prevented from consulting a lawyer on arrest as he “had been denied improperly of one of the most important and fundamental rights of a citizen”.⁷³

- 3.24 On the international law level, the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides:

Principle 27

Non-compliance with these principles in obtaining evidence shall be taken into account in determining the admissibility of such evidence against a detained or imprisoned person.

- 3.25 It is therefore recommended that Singapore law should be reformed to empower the courts to exclude evidence obtained in breach of constitutional and statutory rules:

⁶⁹ *R v Evans* [1991] 1 SCR 869, SC (Can); *R v Elshaw* [1991] 3 SCR 24, SC (Can).

⁷⁰ *R v Manninen* [1987] 1 SCR 1233, SC (Can); *R v Black* [1989] 2 SCR 138, SC (Can).

⁷¹ 1984 c 60.

⁷² [1988] 1 QB 615, CA.

⁷³ *Id* at 630; see Hor, above, n 18 at 11.

Recommendation 8

Courts should be empowered to exclude evidence obtained in ways that infringe constitutional or statutory rules if, having regard to all the circumstances, the admission of such evidence would bring the administration of the justice into disrepute.

- 3.26 Finally, it is submitted that the above recommendations should be implemented through an amendment to Article 9 of the Constitution, as well as by inserting appropriate provisions into the CPC and, as regards Recommendation 8, the Evidence Act.
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APPENDIX

RIGHT TO LEGAL COUNSEL IN SELECTED ASEAN AND COMMONWEALTH JURISDICTIONS

Jurisdiction	Time and Place after Arrest when Right to Consult Legal Counsel must be Permitted	Whether Arrested Person must be Informed of Right to Consult Legal Counsel, and Given Right to Consult Third Parties	Remarks	References
Jurisdictions in which right must be permitted immediately				
Australia	As soon as practicable; no questioning until right exercised (ss 23G(1) and (2) – for federal crimes)	<ul style="list-style-type: none"> Investigating officer must, as soon as practicable, person under arrest or protected suspect who wishes to contact friend or relative reasonable facilities to do so: s 23G(2). 	<ul style="list-style-type: none"> Person can be prevented from communicating with lawyer if there are reasonable grounds for believing that accomplice may avoid arrest, evidence may be tampered with, or for safety reasons. This step can only be taken in exceptional circumstances and requires approval of a superintendent: s 23L. 	Crimes Act 1914 (Act No 12 of 1914) (Cth) (Similar provisions exist in state legislation) ⁷⁴
Canada	Upon arrest or detention (s 10(b))	<ul style="list-style-type: none"> Arrested or detained person must be informed of right to be informed of the right to counsel without delay, as this is the only interpretation that would make the right to counsel effective.⁷⁵ 	<ul style="list-style-type: none"> If accused wishes to exercise right to counsel, he or she must be provided with “reasonable opportunity to retain and instruct counsel without delay”. Peace officers must cease questioning accused persons until they have had this reasonable opportunity to retain and instruct counsel: <i>R v Manninen</i> [1987] 1 SCR 1233 at 1241, SC (Can). 	Canadian Charter of Rights and Freedoms ⁷⁶
Hong Kong	Not stated in the law, but effect of executive order is that right arises upon arrest ⁷⁷		<ul style="list-style-type: none"> Hong Kong residents have the right to confidential legal advice (Hong Kong Basic Law, Art 35) and the right to communicate with counsel of their own choosing (Bill of Rights Ordinance, Art 11(2)(b)). 	The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (adopted 4 April

⁷⁴ For example, the Law Enforcement (Powers and Responsibilities) Act 2002 (Act 103 of 2002) (NSW), s 123; Criminal Law (Detention and Interrogation) Act 1995 (Act 72 of 1995) (Tas), s 6; Crimes Act 1958 (No 6231 of 1958) (Vic), s 464C.

⁷⁵ *R v Schmutz* [1990] 1 SCR 398 at 416, SC (Can), interpreting the Canadian Charter of Rights and Freedoms, above, n 68, s 10(b).

⁷⁶ *Ibid.*

⁷⁷ Rules and Directions for Questioning Suspects and Taking of Statements issued by the Secretary of Security requires detainees to be given a list of solicitors, to have a solicitor or barrister present during a police interview, and to communicate privately with such a legal representative claiming to have been instructed by a third person on their behalf: Patricia E Alva, “Legal Assistance at Police Stations: An Illusory Option”, *Hong Kong Lawyer: The Official Journal of the Law Society of Hong Kong* (October 2010) <http://www.hk-lawyer.com/InnerPages_features/0/3282/2010/10> (accessed 9 April 2012; archived at <<http://www.webcitation.org/66pGew9rm>>).

Jurisdiction	Time and Place after Arrest when Right to Consult Legal Counsel must be Permitted	Whether Arrested Person must be Informed of Right to Consult Legal Counsel, and Given Right to Consult Third Parties	Remarks	References
			<ul style="list-style-type: none"> If providing arrested person with entitlements to be given list of solicitors, to have lawyer present during interviews, and to communicate privately with lawyer claiming to have been instructed by a third party causes reasonable delay or hindrance to investigation, investigating authorities can deprive arrested person of entitlements giving him or her a written notice.⁷⁸ 	1990) Bill of Rights Ordinance (Cap 383)
India	When arrested person is being interrogated by the police ⁷⁹	<ul style="list-style-type: none"> Arrested person in custody entitled upon request to have a friend, relative or other person to be told as far as practicable of the arrest and place of detention, and arrested person must be informed of this right.⁸⁰ 	<ul style="list-style-type: none"> In <i>Nandini Satpathy v P L Dani</i> (1978),⁸¹ the Supreme Court held that the principle stated in the second column could be inferred from the Constitution, Arts 20(3) (“No person accused of any offence shall be compelled to be a witness against himself”) and 22(1) (“No person who is arrested... shall be denied the right to consult, and to be defended by, a legal practitioner of his choice”). Code of Criminal Procedure 1973 (Act No 2 of 1974) (India), s 303: “Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code, may of right be defended by a pleader of his choice.” 	Constitution of India ⁸² Code of Criminal Procedure 1973 (Act No 2 of 1974)
Malaysia	Before arrested person questioned or any statement recorded;	<ul style="list-style-type: none"> Before commencing any form of questioning or recording of statement from arrested person, police officer must inform him or her that he may: 	<ul style="list-style-type: none"> An arrested person is allowed to consult and be defended by a legal practitioner of his or her choice: Constitution, Art 5(3). 	Criminal Procedure Code (Act 593, 2006 Reprint), as amended by the Criminal Procedure

⁷⁸ Alva, *ibid.*

⁷⁹ *Nandini Satpathy v P L Dani* (1978) 2 SCC 424 at 455–456, [62]–[64], SC (India) (right held to be implicit in Arts 20(3) and 22(1) of the Indian Constitution); *D K Basu v State of West Bengal* (1997) 1 SCC 416 at 436, [35], SC (India) (arrested person must be permitted to meet lawyer during, though not throughout, interrogation).

⁸⁰ *Joginder Kumar v State of Uttar Pradesh* (1994) 4 SCC 260 at 266, [21], SC (India) (right held to be implicit in the Constitution, Arts 21 and 22(1)).

⁸¹ *Ibid.*

⁸² Constitution of India (as of 1 December 2011).

Jurisdiction	Time and Place after Arrest when Right to Consult Legal Counsel must be Permitted	Whether Arrested Person must be Informed of Right to Consult Legal Counsel, and Given Right to Consult Third Parties	Remarks	References
	at place of detention (s 28A)	(a) communicate or attempt to communicate with a relative or friend to inform of his or her whereabouts; and (b) communicate or attempt to communicate and consult with a legal practitioner. (s 28A(2)) Police officer must allow arrested person to do the above “as soon as may be”, and questioning or recording of any statement may only take place “a reasonable time” after the above communications or attempted communications have been made: ss 28A(3) and (6).		(Amendment) Act 2006 (Act 1274 of 2006) ⁸³
Philippines	From first moment of questioning; presumably at place where questioning is conducted ⁸⁴	<ul style="list-style-type: none"> • People under investigation for the commission of offences have the right to be informed of their right to counsel: Constitution, Art III, s 12(1).⁸⁵ • At request of arrested person or someone acting on his or her behalf, attorneys and relatives of the arrested person have the right to visit and confer privately with him or her at the place of custody: Rule 113, s 14. 	<ul style="list-style-type: none"> • In criminal prosecutions, accused persons have the right to be heard personally and by counsel: Constitution, Art III, s 14(2). 	1987 Constitution of the Republic of the Philippines Revised Rules of Criminal Procedure as Amended (Rules 110–127, Rules Of Court) ⁸⁶
South Africa	From time of arrest (s 73(1))	<ul style="list-style-type: none"> • At the time of arrest, an accused must be informed of the right to be represented at his or her own expense by a legal adviser of his or her own choice, and, if he or she cannot afford legal representation, that he or she 	<ul style="list-style-type: none"> • The Constitution, s 35(2)(b), states that everyone who is detained has the right “to choose, and to consult with, a legal practitioner, and to be informed of this right promptly”. However, there is apparently no 	Constitution of the Republic of South Africa (No 108 of 1996) Criminal Procedure Act

⁸³ See Salim Ali Farrar, “The ‘New’ Malaysian Criminal Procedure: Criminal Procedure (Amendment) Act 2006” (2009) 4(2) Asian J Criminology 129–144 at 136–138 <<http://www.springerlink.com/content/173u68558830n001/>>.

⁸⁴ *People v Lucero* GR No 97936 (29 May 1995), cited in Joaquin G Bernas, *The 1987 Constitution of the Republic of the Philippines: A Commentary* (2009 ed) (Manila: Rex Book Store, 2009) at 475.

⁸⁵ *People v Rojas* 147 SCRA 169 (1987); see also *People v Nicandro* 141 SCRA 289; *People v Pinlac* 165 SCRA 674 (1988); *People v Mahinay* GR No 122485 (1 February 1999): Bernas, *id* at 475–476.

⁸⁶ Revised Rules of Criminal Procedure as Amended (Rules 110–127, Rules of Court; AM No 00-5-03-SC) (Philippines) <<http://elibrary.judiciary.gov.ph/index6.php?doctype=Rules%20of%20Court&docid=a45475a11ec72b843d74959b60fd7bd64558fd5007a16>> (accessed 9 April 2012).

Jurisdiction	Time and Place after Arrest when Right to Consult Legal Counsel must be Permitted	Whether Arrested Person must be Informed of Right to Consult Legal Counsel, and Given Right to Consult Third Parties	Remarks	References
		may apply for legal aid, and the institutions which he or she may approach for legal assistance: s 73(2A).	constitutional right to legal counsel for persons who have been arrested but not yet detained, as the Constitution, s 35(1), which deals with rights arising upon arrest is silent on the issue.	1977 (No 51 of 1977) (South Africa)
Thailand	At the earliest occasion after arrest; presumably at the place of detention (§ 7/1)	<ul style="list-style-type: none"> Arrested or accused person entitled to meet privately with and take advice from the person who will be his counsel, and to have that person attend any interrogation: § 7/1. Arrested or accused person entitled to have relative or other person informed of the fact of the arrest and the place of detention, and to have that person visit him: § 7/1. 	<ul style="list-style-type: none"> Alleged offenders and accused persons have the right to defend themselves through counsel: Constitution, s 40(7). US Department of State's 2010 Human Rights Report noted that "in practice there was no assurance of prompt access to legal counsel or family members".⁸⁷ 	Constitution of the Kingdom of Thailand 2007 ⁸⁸ Criminal Procedure Code of Thailand ⁸⁹
Vietnam	<ul style="list-style-type: none"> In arrests made in urgent cases (Art 81), arrests of offenders caught red-handed or arrests of wanted persons, from time decision made to hold accused persons in 	<ul style="list-style-type: none"> Persons held in custody, accused persons and defendants have the right to have their rights and obligations explained to them: Arts 48(2)(b), 49(2)(b) and 50(2)(c). 	<ul style="list-style-type: none"> Persons held in custody, accused persons and defendants have the right to ask other persons to defend them: Arts 48(2)(d), 49(2)(f) and 50(2)(f). Defence counsels have the right, among other things, "[t]o be present when testimonies are taken from the persons in custody, when the accused are interrogated, and, ask questions to the persons in custody or the accused if so consented by 	Criminal Procedure Code (No 19/2003/QH11 of 26 November 2003) ⁹¹

⁸⁷ Bureau of Democracy, Human Rights, and Labor, US Department of State, *2010 Human Rights Reports: Thailand* (8 April 2011) <<http://www.state.gov/j/drl/rls/hrrpt/2010/eap/154403.htm>> (accessed 9 April 2012; archived at <<http://www.webcitation.org/66pLk7vNy>>).

⁸⁸ Constitution of the Kingdom of Thailand, BE 2550 (2007) <<http://www.asianlii.org/th/legis/const/2007/1.html>> (accessed 9 April 2012; archived at <<http://web.archive.org/web/20110722134826/http://www.asianlii.org/th/legis/const/2007/1.html>>).

⁸⁹ Criminal Procedure Code of Thailand brought into force by the Act Promulgating the Criminal Procedure Code, BE 2477 (1934) (Thailand), as amended by the Act Amending the Criminal Procedure Code (No. 22), BE 2547 (2004) (Thailand) <http://www.humanrights.asia/countries/thailand/laws/Criminal%20Procedure%20Code%20I.pdf/at_download/file> (accessed 9 April 2012; archived at <<http://www.webcitation.org/66pLrKkNH>>) (a clearer translation is available at <http://en.wikisource.org/wiki/Criminal_Procedure_Code_of_Thailand/Provisions>).

⁹⁰ Bureau of Democracy, Human Rights, and Labor, US Department of State, *2010 Human Rights Reports: Vietnam* (8 April 2011) <<http://www.state.gov/j/drl/rls/hrrpt/2010/eap/154408.htm>> (accessed 9 April 2012; archived at <<http://www.webcitation.org/66pM4P96H>>).

⁹¹ Criminal Procedure Code (No 19/2003/QH11 of 26 November 2003) (Vietnam) <[http://www.noip.gov.vn/noip/resource.nsf/vwResourceList/3457A7711572E0534725767200203DDA/\\$FILE/CRIMINAL%20PROCEDURE%20CODE.pdf](http://www.noip.gov.vn/noip/resource.nsf/vwResourceList/3457A7711572E0534725767200203DDA/$FILE/CRIMINAL%20PROCEDURE%20CODE.pdf)> (accessed 9 April 2012; archived at <[http://liveweb.archive.org/http://www.noip.gov.vn/noip/resource.nsf/vwResourceList/3457A7711572E0534725767200203DDA/\\$FILE/CRIMINAL%20PROCEDURE%20CODE.pdf](http://liveweb.archive.org/http://www.noip.gov.vn/noip/resource.nsf/vwResourceList/3457A7711572E0534725767200203DDA/$FILE/CRIMINAL%20PROCEDURE%20CODE.pdf)>).

Jurisdiction	Time and Place after Arrest when Right to Consult Legal Counsel must be Permitted	Whether Arrested Person must be Informed of Right to Consult Legal Counsel, and Given Right to Consult Third Parties	Remarks	References
	<p>custody.</p> <ul style="list-style-type: none"> In cases of crimes infringing national security, after end of investigation. In other cases, from start of criminal proceedings. (Art 58(1)) 		<p>investigators; and to be present in other investigating activities; to read the minutes of the proceedings in which they have participated, and procedural decisions related to the persons whom they defend”, and “[t]o meet the persons kept in custody; to meet the accused or defendants being under temporary detention”: Arts 58(2)(a) and (f).</p> <ul style="list-style-type: none"> US Department of State’s 2010 Human Rights Report claimed that authorities used “bureaucratic delays” to deny accused persons’ access to legal counsel. Furthermore, an accused person must request the presence of an attorney before one is allowed to attend an interrogation, but it is unclear whether the authorities always inform accused persons of this right.⁹⁰ 	
United Kingdom	<ul style="list-style-type: none"> In general, at any time when person is arrested and held in custody: s 58(1). Fulfilment of request to see solicitor may be delayed for up to 36 hours for indictable offences, if authorized by superintendent: s 58(5). (Not applicable to terrorism offences: 	<ul style="list-style-type: none"> Custody officer must inform arrested person of right to have someone informed of arrest, and right to consult privately with solicitor and that free independent legal advice is available.⁹² 	<ul style="list-style-type: none"> Right of access to lawyer at police station one of the “fundamental rights of a citizen”: <i>R v Samuel</i>.⁹³ As right to fair trial protected by European Convention on Human Rights, Art 6, extends to investigative phase, arrested person must be given advice and assistance at police station (though not necessarily to have a lawyer present during police interview) (<i>Murray v UK</i> (1996) 22 EHRR 29) from the time of the first police interview (<i>Howarth v UK</i> (2000) 31 EHRR 861). Detainee who wants legal advice cannot be questioned or continued to be questioned by police except in specific situations, for example, if an officer of superintendent rank or above believes the delay will lead to 	Police and Criminal Evidence Act 1984 (1984 c 60)

⁹² Code of Practice for the Detention, Treatment and Questioning of Persons by the Police (Police and Criminal Evidence Act Code C), above, n 49 at ss 3.1 and 6.1.

⁹³ Above, n 72 at 630.

Jurisdiction	Time and Place after Arrest when Right to Consult Legal Counsel must be Permitted	Whether Arrested Person must be Informed of Right to Consult Legal Counsel, and Given Right to Consult Third Parties	Remarks	References
	s 58(12).)		interference with, or physical harm to, other people. ⁹⁴	
Jurisdictions in which delay in permitting right is allowed, or in which right is not given				
Cambodia	24 hours; in cell where arrested person is detained (Art 98)	<ul style="list-style-type: none"> Arrested person must be informed of right to consult lawyer upon detention: Art 97. Arrested person is also entitled to consult some other person who is not a lawyer, provided that the person is not involved in the offence: Art 98. 	<ul style="list-style-type: none"> Arrested person may only consult lawyer or other person for 30 minutes: Art 98. Once arrested person has been handed over to an investigating judge, he or she may freely consult a lawyer (Art 149) and is generally not to be interviewed by the judge except in the lawyer's presence (Art 145). US Department of State's 2010 Human Rights Report claimed that prisoners routinely held for several days before gaining access to lawyer, apparently due to limited capacity of the court system.⁹⁵ 	Criminal Procedure Code of the Kingdom of Cambodia ⁹⁶
Indonesia	[unclear]; in place of detention? (Art 57(1))	<ul style="list-style-type: none"> A person suspected of an offence must be notified of his right to obtain legal assistance by an investigator prior to the investigator beginning an examination: Art 114. A suspect or an accused has the right to contact and to receive visits from family members and other persons with whom he or she has relationships to, <i>inter alia</i>, obtain legal assistance (Art 60); and, for that purpose, such family members or other persons must be kept notified of the person's detention at all stages of the criminal process (Art 59). 	<ul style="list-style-type: none"> Art 57(1) states: "A suspect or an accused who is subject to detention shall have the right to contact his legal counsel in accordance with the provisions of this law." However, it does not state when the right has to be accorded to the suspect or accused. Art 54 gives a suspect or an accused "the right to obtain legal assistance... during the period of and at every stage of examination". In May 2008 a working group appointed by the Ministry of Law and Human Rights submitted its final draft of a revised criminal procedure law to the Ministry (see Robert R Strang, "More Adversarial, but not 	Kitab Undang-Undang Hukum Acara Pidana (Law of Criminal Procedure of Indonesia) (No 8 Year 1981) ⁹⁷

⁹⁴ *Id* at s 6.6.

⁹⁵ Bureau of Democracy, Human Rights, and Labor, US Department of State, *2010 Human Rights Reports: Cambodia* (8 April 2011) <<http://www.state.gov/j/drl/rls/hrrpt/2010/eap/154381.htm>> (accessed 9 April 2012; archived at <<http://www.webcitation.org/66pMDdJf0>>).

⁹⁶ Criminal Procedure Code of the Kingdom of Cambodia 2007 <<http://www.oecd.org/dataoecd/15/46/46814242.pdf>> (accessed 9 April 2012; archived at <<http://www.webcitation.org/66nqlhca>>).

⁹⁷ Kitab Undang-Undang Hukum Acara Pidana (Law of Criminal Procedure of Indonesia) (No 8 Year 1981) <http://defensewiki.ibj.org/images/6/62/Indonesia_Law_of_Criminal_Procedure.pdf> (accessed 9 April; archived at <<http://www.webcitation.org/66ntPbhFn>>).

Jurisdiction	Time and Place after Arrest when Right to Consult Legal Counsel must be Permitted	Whether Arrested Person must be Informed of Right to Consult Legal Counsel, and Given Right to Consult Third Parties	Remarks	References
			<p>Completely Adversarial: Reformasi of the Indonesian Criminal Procedure Code” (2008) 32 Fordham Int’l LJ 188–231 at 212 <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2191&context=ilj>), but the law does not appear to have been adopted yet. Amnesty International has expressed concern that though the revised law allows a suspect who has been arrested or detained to have legal counsel present from the moment of arrest or detention and at all stages of the proceedings (ss 64 and 65(1)), lawyers are only permitted to contact and speak to suspects on working days (s 65(1)) and may only observe interrogations without intervening (s 107): <i>Indonesia: Comments on the draft revised Criminal Procedure Code</i> (Amnesty International, 2006) <http://www.unhcr.org/refworld/docid/4517a1fa4.html> at 7, [3.4].</p>	
Laos	<p>From the date when an order to open an investigation is made (Art 35); location unspecified.</p> <p>(See Arts 36 and 37 as to when an investigation may be opened. Not clear whether person can be arrested or questioned prior to</p>	<ul style="list-style-type: none"> • A person’s arrest must be notified to his or her family and to the office, organization or enterprise to which the person is attached within 24 hours. The place of detention must also be notified to them unless this hinders the proceedings: Art 62. 	<ul style="list-style-type: none"> • Lawyers have the right to provide legal assistance to defendants: Constitution, Art 83. • An accused person has the general right to consult a lawyer for legal assistance: Art 7. 	<p>Constitution of the Lao People’s Democratic Republic (No 25/NA) dated 6 May 2003⁹⁸</p> <p>Law of Criminal Procedure (Laos) (No 01/NA) dated 15 May 2004⁹⁹</p>

⁹⁸ Constitution of the Lao People’s Democratic Republic (No 25/NA) dated 6 May 2003 <http://defensewiki.ibj.org/images/b/bc/Constitution_of_the_Lao_People%27s_Democratic_Republic.pdf> (accessed 9 April 2012; archived at <<http://www.webcitation.org/66pMLH1hg>>).

⁹⁹ Law on Criminal Procedure (No 01/NA) dated 15 May 2004 (Laos) <http://defensewiki.ibj.org/images/7/78/Laos_Law_of_Criminal_Procedure.pdf> (accessed 9 April 2012; archived at <<http://www.webcitation.org/66pMRTTuP>>).

Jurisdiction	Time and Place after Arrest when Right to Consult Legal Counsel must be Permitted	Whether Arrested Person must be Informed of Right to Consult Legal Counsel, and Given Right to Consult Third Parties	Remarks	References
	that.)			
Myanmar	Only when the arrested person has been put on trial. ¹⁰⁰	<ul style="list-style-type: none"> Arrested persons apparently held incommunicado in detention prior to trial.¹⁰¹ 	<ul style="list-style-type: none"> According to a 1991 report, defendants rarely represented by legal counsel during trials, and are expected to admit guilt or face a more severe sentence.¹⁰² US Department of State's 2010 Human Rights Report stated that the government regularly refused detainees the right to consult a lawyer, and occasionally imprisoned or detained lawyers.¹⁰³ 	
New Zealand	Without unreasonable delay (s 23(b)), but does not have to be immediate ¹⁰⁴	<ul style="list-style-type: none"> Arrested or detained person must be informed of the right to consult and instruct a lawyer without delay: s 23(b). 	<ul style="list-style-type: none"> Person charged with offence also has a right to consult and instruct a lawyer: s 24(c). 	New Zealand Bill of Rights Act 1990 (1990 No 109)

¹⁰⁰ Burma Lawyers' Council, "A Brief Analysis on the Judiciary of Burma", *Legal Issues on Burma Journal* (No 18, August 2004), 2–32 at 26 <http://www.burmalibrary.org/docs08/LIOB_18.pdf> (accessed 9 April 2012; archived at <<http://www.webcitation.org/66pMwM819>>).

¹⁰¹ *Id* at 25; Bureau of Democracy, Human Rights, and Labor, US Department of Justice, *2010 Human Rights Reports: Burma* (8 April 2011) <<http://www.state.gov/j/drl/rls/hrrpt/2010/eap/154380.htm>> (accessed 9 April 2012; archived at <<http://www.webcitation.org/66pMipR9q>>).

¹⁰² John Christopher Anderson, "Respecting Human Rights: Multinational Corporations Strike Out" (2000) 2(3) *U Pa J Labor & Employment L* 463–506 at 464 <<http://www.law.upenn.edu/journals/jbl/articles/volume2/issue3/Anderson2U.Pa.J.Lab.%26Emp.L.463%282000%29.pdf>>, citing Lawyers Committee for Human Rights, *Summary Injustice: Military Tribunals in Burma (Myanmar)* (New York, NY: The Committee, 1991) at 1.

¹⁰³ *2010 Human Rights Reports: Burma*, above, n 101.

¹⁰⁴ *R v Mallinson* [1993] 1 NZLR 528 at 530, CA (NZ).