12-2012

A Preliminary Survey of the Right to Presumption of Innocence in Singapore

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Published in LAWASIA Journal, 2012, vol. 7, pp. 78-96.

A PRELIMINARY SURVEY OF THE RIGHT TO PRESUMPTION OF INNOCENCE IN SINGAPORE

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1 INTRODUCTION

The right to presumption of innocence is said to exist in almost all criminal justice systems, including Singapore. Curiously, however, no Singapore case has ever attempted to establish the exact source and contours of this longstanding right. This is unsatisfactory, as this diminishes the meaningfulness of what is supposed to be a fundamental right in the criminal justice process. The primary aim of this article is thus to conduct a preliminary survey of the law on the presumption of innocence in Singapore. It begins by proposing the *Woolmington* conception as a workable starting point, but posits a guiding principle to further determine the scope of the right (Part I). On that footing it surveys the various sources of law in Singapore to identify the relevant rules that could either protect or detract from the right (Part II), and concludes with some reflections on the results of the survey (Part III), including the tentative suggestion that, on the proposed conceptualisation at least, the right to presumption of innocence could be better protected in Singapore and may need to be properly reconceptualised altogether.

2 OVERVIEW

Viscount Sankey LC famously wrote in *Woolmington v DPP*:

> Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt… If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given… the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.[1]

It has been claimed that this passage refers to the presumption of innocence, a concept that 'is unchallenged in the common law world'.[2] It has also been said that the presumption of innocence is 'among the small handful of doctrines in criminal law that are ubiquitous across a very broad spectrum of legal systems',[3] and can be traced back to Babylonian times.[4] But to what extent is this highly extolled right well-entrenched in Singapore – for instance, can it be said that in the balance that has been struck between the rights of the accused and the interests of the community,[5] Singapore only has a 'weak' version of the right as compared to other so-called 'rights-conscious,' less 'communitarian' jurisdictions?[6] Indeed, apart from the occasional judicial reference to

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1 [1935] AC 462 at 481 (*Woolmington*). This passage has been cited with approval in Singapore, notably in *XP v PP* [2008] 4 SLR(R) 686, [90] and *AOF v PP* [2012] SGCA 26, [2] and [315].

2 Michael Hor, 'The Burden of Proof in Criminal Justice' (1992) 4(2) *Sac Law Journal* 267, 268–269.

3 Larry Laudan, 'The Presumption of Innocence: Material or Probatory?' (2005) 11 *Legal Theory* 333, 333.

4 Andrew Stumer, *The Presumption of Innocence: Evidential and Human Rights Perspectives* (Hart: 2010), 1.

5 However, criminal justice discourse need not necessarily be predicated upon individual-versus-society assumptions and trade-offs: see generally Melanie Chng, 'Modernising the Criminal Justice Framework – the Criminal Procedure Code 2010' (2011) 23 *SAcLJ* 23.

6 Indeed, the idea of weak/strong versions of a concept finds a striking parallel in thin/thick theories of the rule of law – the presumption of innocence of course being an essential feature of the rule of law.

Woolmington, the right to presumption of innocence only came under greater scrutiny in Singapore recently due to several developments, the genesis of which is the 2008 High Court decision of *XP v PP*, where Justice Rajah wrote:

> If the evidence is insufficient to support the Prosecution's theory of guilt… the judge must acquit the accused, and with good reason: it simply has not been proved to the satisfaction of the law that the accused is guilty, and the presumption of innocence stands unrebutted. It is not helpful… for suggestions to be subsequently raised about the accused's "factual guilt" once he has been acquitted. To do so would… stand the presumption of innocence on its head…[7]

This position is to be contrasted with the one taken by the Attorney-General's Chambers shortly before *XP v PP*, where it stated that 'not being able to prove beyond reasonable doubt that A is guilty does not mean that he is innocent. He may be guilty in fact, but innocent in law.'[8] This divergence in position sparked a political debate on the presumption of innocence,[9] but this debate only highlighted one definitional disagreement[10] surrounding the presumption of innocence, and served as an unintended distraction from the real issues at hand. As will be contended, there are other conceivable and more important points of disagreement that impact the scope of the right to presumption of innocence, such as reallocations of burden of proof, standards of proof, adverse inferences, and various pre-trial and trial rights of the accused.[11] This contention – that the presumption of innocence needs to be examined beyond the threadbare reference to the prosecution needing to prove a case beyond a reasonable doubt – certainly finds resonance in other jurisdictions.[12] Yet in Singapore, no case has ever ventured beyond perfunctory references to *Woolmington*. Indeed, no case has attempted to address *what* the presumption of innocence in Singapore actually entails (including but not limited to its justifications and concomitantly, permissible derogations) and the logically prior question of where the right is derived from.[13] This cannot be satisfactory if it is accepted that the presumption of innocence is fundamental to the criminal justice process.

Given the tentative state of affairs, this article endeavours to be a comprehensive survey of the likely constitutional, statutory, and common sources of law on the presumption of innocence in Singapore, and offers some tentative reflections on the results of the survey.[14]

See also Chin Tet Yeung, 'Remaking the Evidence Code: Search for Values', (2009) 21 *SAcLJ* 52, [16]; Chin Tet Yeung, 'CPC 2010 – Confessions and Statements by Accused Persons Revisited' (2012) 24 *SAcLJ* 60.

7 *XP v PP PP* [2008] 4 SLR(R) 686, [94].

8 KC Vijayan, 'Judge: No question of "factual guilt" after acquittal,' *The Straits Times*, 12 July 2008. See also Chan Sek Keong, 'The criminal process – The Singapore Model' [1996] *Singapore Law Review* 434, 471.

9 See eg, Ministry of Law, Oral answer by Minister of Law K Shanmugam, 25 Aug 2008, http://notesapp.internet.gov.sg/__48256DF20015A167.nsf/LookupContentDocsByKey/GOVI-7HU5N8?OpenDocument. Accessed on 30/01/2012.

10 See generally previous n 3.

11 See eg, Ian Dennis, *The Law of Evidence*, 3rd ed (Sweet & Maxwell: 2007), 509; AP Simester, JR Spencer, GR Sullivan, and GJ Virgo, *Simester and Sullivan's Criminal Law*, 4th ed (Hart: 2010), 59–65.

12 See eg, Andrew Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10(4) *E & P* 241, 243–244.

13 See also Thio Li-ann, *A Treatise on Singapore Constitutional Law* (Academy Publishing: 2012), Chapter 11.

14 The last similar attempt appears to be Michael Hor, 'The Presumption of Innocence – A Constitutional Discourse for Singapore' [1995] *SJLS* 365. However, Hor's article was written predominantly from a constitutional and comparative constitutional angle, with a particular focus on the burden of proof, and an express exclusion of pre-trial rights. Moreover, the article was written almost 20 years ago, and a

However, it is necessary to address two important preliminary points. First, this article's endeavour is seemingly short-circuited at the outset by the very aim it seeks to achieve: the determination of the scope of the right to presumption of innocence in Singapore and the strength of the right. No local cases have seen fit to define the right, and without an operative definition/conception, it seems impossible to identify the sources of law that either protect or detract from the right. However, this impediment is only partly true, as one may legitimately assume the widely conventional view that notions such as reallocations of burden of proof are, by their definition and operation, clearly at odds with *Woolmington*'s basic requirement of the prosecution proving a case beyond a reasonable doubt. So there is already a workable starting point and a rough preconception of how the right might be protected or derogated from. This leads us to the second important point to be addressed: such a starting point is not enough for a holistic appraisal of the right; what is further needed is the identification of a principle that serves as a guide when there is some doubt as to whether a legal rule or concept is relevant to the scope of the right.[15] If indeed the scope of the right is uncertain, this guiding principle will bar or justify the inclusion of anything that respectively broadens or constricts the *Woolmington* conception of presumption of innocence.[16]

The aforementioned principle adopted for present purposes is essentially built upon four ideas:

1) Unlike a civil suit which typically involves two private parties with equal access to justice and where lesser interests are at stake, an accused person, whose liberty (or life) is at stake, will always be at a distinct disadvantage when the powers and resources of a state are considered;

2) Crime control and due process are not necessarily mutually exclusive values and in any event (as explained in Part 3) there are signs that Singapore (together with many other parts of the world) has gradually shifted towards a greater emphasis on due process, paving the way for a more substantive, accused-centred conceptualisation of presumption of innocence;

3) The presumption of innocence has a hallowed status because it presupposes that wrongful convictions are simply abhorrent and cannot be justified. If this premise is true, an accused should be given as much protection as possible, if not as much help as possible, in establishing his innocence; and

4) There is a real possibility in most criminal cases that there are many different types of derogations from the right to presumption of innocence, and such derogations in their simultaneous operation can actually *combine* to whittle down the right considerably.

The principle that emerges from a consideration of these four ideas is the necessity for a generous interpretation of the right to presumption of innocence, and an expansive conceptualisation of the right that goes beyond mere technical, procedural and evidential

fresh update on the legal developments is in order. Nonetheless, this piece will refer to Hor's article where appropriate, especially as regards the discussion on the *Evidence Act* (Part 3.2).

15 Indeed, to use the lexicon of Harvard Professor Lewis Sargentich, the rules of law, when exhausted, have to conform to the three 'Ps': principles, policies, and purposes.

16 Taking a more normative, accused-centred approach towards the conceptualisation of the right to presumption of innocence is certainly not novel, if the experience in the UK is anything to go by. In particular, when this jurisdiction had to pass human rights legislation pursuant to their international convention human rights obligations such an approach was requried.

considerations. It also requires a resolution of any contentious claims as to whether something should feature in the determination of the scope of the right to be in the favour of the accused. In other words, an accused should be given the maximum leeway to defend himself, availed of the maximum range of defences, subject to minimum disadvantages, and presumed to have done absolutely no wrong until the prosecution has produced sufficient evidence to convict.[17] Correspondingly, a commitment to punish only the guilty requires that a conviction can only be secured using the most reliable and morally defensible evidence. With these preliminary points in mind, we begin the survey of the law.

3 A SURVEY OF THE SOURCES OF LAW IN SINGAPORE

3.1 Constitution

An obvious place to begin must be Singapore's *Constitution*,[18] since it is the supreme law of the land.[19] It has been argued that the presumption of innocence may conceivably be derived from two fundamental liberty provisions of the *Constitution*, namely Arts 9(1), 9(3) and 12(1):[20]

> **9.** (1) No person shall be deprived of his life or personal liberty save in accordance with law.
>
> …
>
> (3) 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.
>
> **12.** (1) All persons are equal before the law and entitled to the equal protection of the law.

Prima facie, none of these provisions categorically acknowledges the right of the presumption of innocence. Article 12(1) can be dealt with first insofar as *PP v Taw Cheng Kong* has already made clear that 'the concept of equality does not mean that all persons are to be treated equally, but simply that all persons in like situations will be treated alike'.[21] Thus, should Parliament pass legislation that, for instance, creates strict liability offences or imposes statutory presumptions (the reason this affects the scope of the right to presumption of innocence will be elaborated upon shortly). Such legislation *per se* will not offend the right to equal treatment guaranteed by Art 12(1).[22] Suffice to say for now, the only broad check against this is the principle that 'all legal powers… have legal limits.'[23] The judicial interpretation of Art 9(1) also confirms this. In *Ong Ah Chuan v PP*,[24] which dealt with the constitutional validity of a provision in the *Misuse of Drugs Act*,[25] Lord Diplock said that the reference to 'law' (in, *inter alia*, Arts 9 and 12 of the *Constitution*) includes 'fundamental rules of natural justice' and not simply Parliament-

17 See also Cheah Wui Ling, 'Developing a People-Centred Justice in Singapore: In Support of Pro Bono and Innocence Work' (forthcoming, *Cincinnati Law Review*); Claire Hamilton, 'Threats to the Presumption of Innocence in Irish Criminal Law: An Assessment' (2011) 15(3) *E&P* 181, 188.

18 *Constitution of the Republic of Singapore* (1999 Rev Ed).

19 *Ibid*, Art 4.

20 A Constitutional Discourse, *supra* note 14 at 368.

21 [1998] 2 SLR(R), [54]. See also *Mohamed Emran bin Mohamed Ali v PP* [2008] 4 SLR(R) 411, [26].

22 See also *Yong Vui Kong v PP* [2012] SGCA 23, [17].

23 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239, [149] (*Phyllis Tan*), citing *Chng Suan Tze v Minister for Home Affairs* [1998] 2 SLR(R) 525, [86].

24 [1980–81] SLR 48 (*Ong Ah Chuan*).

25 (Cap 185, 2008 Rev Ed) (*Misuse of Drugs Act*).

sanctioned legislation.[26] Accordingly, there are indeed limits to the types of legislation that Parliament may pass. Flowing from this, one might think that the presumption of innocence forms one of the fundamental rules of natural justice and is guaranteed by the *Constitution*.[27] However, Lord Diplock has explained that:

> One of the fundamental rules of natural justice in the field of criminal law is that a person should not be punished for an offence unless it has been established… that he committed it... To describe this fundamental rule as the 'presumption of innocence' may, however, be misleading to those familiar only with English criminal procedure....[28]

Indeed, there are also other obstacles to reading the right to presumption of innocence into the *Constitution*. First, unlike many other constitutions found in other jurisdictions, [29] the *Constitution* does not contain any express protection of the presumption of innocence. Second, no local cases have gone as far as to say the presumption of innocence is a constitutional right, and it should not be assumed that this is because the proposition is that trite – the more likely conclusion to be drawn, after decades of constitutional jurisprudence, is that the right is *not* protected by the *Constitution*.[30] Third, there appears to be no foreign cases, interpreting a similarly worded Art 9(1), which says the presumption of innocence is a constitutional right.[31] Fourth, the Court of Appeal has recently stated that rules of natural justice (in the *Ong Ah Chuan* sense) have to be construed narrowly and within limited contexts.[32] Fifth, the reference in Art 9(1) is to deprivation of 'life or personal liberty'. It is arguable that a fine (or even a probation or community order) would not amount to a deprivation of personal liberty. Therefore, if the presumption of innocence is read into Art 9(1), an anomalous situation may arise where the right to presumption of innocence (at least in terms of the constitutional reach) would not operate to protect an accused if the punishment imposed does not amount to a deprivation of liberty.

Having pointed out the various obstacles, perhaps a silver lining is found in Art 9(3) providing the right to counsel on arrest. The right to counsel is conceivably relevant, albeit admittedly indirectly, to the presumption of innocence insofar as virtually all accused persons need the help of lawyers to be informed of their rights and to establish their innocence; this is especially so in Singapore which adopts a fiercely adversarial system, where the strength (or indeed, existence) of one's defence may be decided entirely by the quality of legal representation.[33] There may be many ways in which an

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26 *Ong Ah Chuan* [1980–81] SLR 48, [26]. *Cf Jabar bin Kadermastan v PP* [1995] 1 SLR(R) 326, [53]; *Nguyen Tuong Van v PP* [2005] 1 SLR(R) 103, [82]: *Yong Vui Kong v PP* [2010] 3 SLR 489, [14]–[16].

27 See eg, AJ Harding, 'Natural Justice and the Constitution' (1981) *Mal LR* 226, 232.

28 *Ong Ah Chuan* [1980–81] SLR 48, [27] (emphasis added). Lord Diplock had the chance to, but did not, read the presumption of innocence into Art 9(1) in *Ong Ah Chuan*. Tis formed a basis for the subsequent Canadian Supreme Court decision in *R v Oakes* (1986) 26 DLR (4th) 200 to depart from *Ong Ah Chuan* regarding the constitutionality of statutory presumptions. *Cf Haw Tua Tau v PP* [1981–82] SLR(R) 133, [23]–[26].

29 See eg, *Canadian Charter of Rights and Freedoms*, *Constitution Act*, 1982, s 11(d); *South African Constitution*, s 35(3)(h); *Constitution of Russia*, Art 49; *Declaration of the Rights of Man and of the Citizen 1789*, Art 9; *The Basic Law of the Hong Kong SAR of the PRC*, Art 87; *Fifth Amendment to the United States Constitution*.

30 *Cf* Harding, previous n 27, 232.

31 *Cf* Hor, previous n 14, 370–374; Chan Wing Cheong, 'The Burden of Proof of Provocation in Murder' [1995] *SJLS* 229, 232. However, the Belize Constitution that was referred to in these two pieces (concerning the Privy Council decision of *Vasquez v R* [1994] 3 All ER 674) had a much less oblique reference to the right of presumption of innocence.

32 *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189, [103]. See also *Ramalingam Ravinthran v Attorney-General* [2012] SGCA 2, [19]–[40] (*Ramalingam*); Chen Siyuan, 'The Expanding Limits of Prosecutorial Discretion' *SLWC*, January 2012, 4.

33 See generally Wui Ling, previous n 17.

accused may be acquitted – successfully arguing a defence, pointing out procedural breaches in the evidence-gathering, showing involuntariness in the recording of statements, proving a lack of *mens rea*, challenging the validity of an co-accused's testimony – but it is not fanciful to suggest that none of these will be apparent to a layperson accused without the benefit of counsel, and even if any of it is somehow apparent, it should not be lightly assumed that an accused, without the assistance of counsel, is able to make cogent and compelling legal submissions to the court. Additionally, without the assistance of counsel, an accused may not be able to withstand the rigours of a trial (particularly when under cross-examination) and may unintentionally convey misleading signals about his demeanour and credibility to the judge. That the *Constitution* provides for a right to counsel probably goes to show the indispensability of counsel in establishing the innocence of an accused. If so, some conceivable facet of the presumption of innocence *is* captured by the *Constitution* by Art 9(3), although one has to bear in mind that this right is not absolute, need not be made known to the accused, and is not necessarily immediately available upon arrest.[34]

3.2 Statutes

3.2.1 *Evidence Act*

The (rather antiquated and static) *Evidence Act*[35] establishes the rules pertaining to burden of proof and standard of proof – two concepts most closely allied with any conception of the presumption of innocence.[36] Before proceeding further, it is apposite to note that s 2(2) of the *Evidence Act* states that: '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.'[37] That having been said, a suitable starting point of the analysis can be found in ss 103 and 104, situated in Part III (Production and Effect of Evidence) of the *Evidence Act*, which state:

> **103.** (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
>
> **104.** The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

In criminal cases, the *Evidence Act* places the burden on the prosecution to prove facts in issue. In a similar vein, s 105 generally places the burden of proving relevant facts on the prosecution:

> **105.** The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

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34 *Tan Chor Jin v PP* [2008] 4 SLR(R) 306, [52]–[54] (*Tan Chor Jin*).

35 (Cap 97, 1997 Rev Ed) (*Evidence Act*).

36 See generally Ashworth, previous n 12; Hor, previous n 14.

37 See also *Phyllis Tan* [2008] 2 SLR(R) 239, [117]: '...new [common law] rules of evidence can be given effect to only if they are not inconsistent with the provisions of the [*Evidence Act*] or their underlying rationale'; *Application of English Law Act* (Cap 7A, 1994 Rev Ed), s 3(1): 'The common law of England (including the principles and rules of equity), so far as it was part of the law of Singapore immediately before 12th November 1993, shall continue to be part of the law of Singapore.' *Cf* Tet Yueng, previous n 6, [24].

Since *Jayasena v R*[38] has interpreted all burdens in the *Evidence Act* as referring to legal (as opposed to evidential, production or tactical) burdens, the burden imposed on the prosecution by ss 103, 104 and 105 is the legal or persuasive burden. As regards the standard of proof required under the *Evidence Act*, s 3(3) states:

> A fact is said to be 'proved' when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

The *Evidence Act* applies to civil and criminal proceedings alike and the definition of 'proved' draws no distinction between facts required to be proved by the prosecution in criminal proceedings and facts required to be proved by a successful party to civil proceedings. This appears contrary to the presumption of innocence's requirement that the standard of proof which the prosecution has to meet in a criminal case must be that of proof beyond reasonable doubt. However, this seeming inconsistency was arguably reconciled in *PP v Yuvaraj*,[39] which held that the common law standard of beyond reasonable doubt is consistent with s 3 of the *Evidence Act* because a prudent man would apply that standard in a criminal case.[40] Furthermore, it could not be the case that the *Evidence Act* intended by a provision contained in what purports to be a mere definition section to abolish the historic distinction fundamental to the administration of justice under the common law.[41] Accordingly, the operation of ss 3, 103, 104 and 105 combine to place the legal burden of proving guilt beyond all reasonable doubt on the prosecution.[42] It can thus be said that the *Evidence Act does* provide for the presumption of innocence.

However, the *Evidence Act* itself contains several exceptions to this general rule, and it may well be that the exceptions erode the rule to such an extent as to significantly cripple the protection offered by the presumption of innocence. For instance, s 107 provides:

> **107.** When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code… or within any special exception or proviso… or in any law defining the offence, is upon him, and the court shall presume the absence of such circumstances.

The exceptions found in the *Penal Code*[43] provide that if an accused relies on the defence of accident, this effectively goes towards the requisite *mens rea*, so he has the burden of proving this (s 107) on a balance of probabilities, even though s 103 dictates that it is for the prosecution to prove both *actus reus* and *mens rea*. *R v Chanderasekera*[44] introduced a distinction between defences that raise so-called separate issues (*eg*, private defence, where successful invocation requires proof on balance of probabilities), and those that merely challenge the prosecution's case (eg, accident, where successful invocation only requires casting reasonable doubt).[45] However, the Court in *Jayasena* affirmed s 107 clearly imposes the burden of proof (and not merely the evidential burden) on the accused in respect of *all* general and special exceptions.[46] On its face, a significant aspect of s 107

38 [1970] AC 618 (*Jayasena*).
39 *PP v Yuvaraj* [1969] 2 MLJ 89 (*Yuvaraj*).
40 See also Jeffrey Pinsler, *Evidence, Advocacy and the Litigation Process*, 3rd ed (LexisNexis: 2010) 436. *Cf Liew Kaling v PP* [1960] MLJ 306, 311.
41 *PP v Yuvaraj* [1969] 2 MLJ 89 91. *Cf* Hor, previous n 14, 389.
42 Ibid, 374–376.
43 (Cap 224, 2008 Rev Ed).
44 (1942) 44 NLR 97, 125.
45 See also Wing Cheong, previous n 31, 234.
46 Pinsler, previous n 40, 407. See also *Juma'at bin Saad v PP* [1993] 2 SLR(R) 327, where the High Court held that s 107 of the *Evidence Act* required the accused to prove the defence (of intoxication) on a balance of probabilities if he wanted to invoke it successfully, as opposed to merely casting reasonable doubt on the prosecution's arguments on *mens rea*; *R v Chaulk* (1990) 62 CCC (3d) 193.

may not sit comfortably with *Woolmington*'s conception of the presumption of innocence.[47]

The erosion of the presumption of innocence also extends to other defences. If we revisit s 105, *illustration (b)*[48] suggests that an accused has the legal burden of proof (to prove *actus reus*) if he wishes to plead alibi. It has been argued that an alibi does not necessarily go to an element of the prosecution's case, but may raise fresh issues on its own.[49] But '[even if] fresh issues are raised, it cannot be said, generally, that it would be "impossible or disproportionate" for the prosecution to bear the burden of persuasion. What, perhaps, is difficult for the prosecution to do is to anticipate in advance (and hence disprove) every possible alibi the accused may raise.'[50] Furthermore,

> the comments… in *Jayasena* concerning the term 'proved' in s 107 (that the accused must prove the facts he relies on to the standard prescribed in s 3 of the [*Evidence Act*]) apply equally to the 'proof' is s 105 and 'proved' in [*illustration (b)*]. If it is for the prosecution to prove that the accused committed the offence, this would involve establishing the accused's presence at the scene, despite the imposition of the burden of proof by s 105 on the accused.[51]

Yet even assuming the problems of s 105 can be surmounted, there is also s 108:

> **108.** When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Indeed, *illustration (a)* to the section states that '[w]hen a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.' Section 108 has thus been described as 'an exception to the general rule contained in s 103 of the Evidence Act.'[52] The section is designed to meet certain exceptional cases in which it would be extremely difficult to establish facts which are 'especially' within the knowledge of the accused and yet which the accused could prove without real difficulty. The courts have, however, been consistent in circumscribing the scope of s 108 in favour of the accused:[53] in *PP v Abdul Naser bin Amer Hamsah*, a case involving a murder of a tourist and where the accused pleaded accident, the Court of Appeal held that s 108 could not be invoked to place the burden on the accused to prove that the injuries sustained by the victim were caused by him accidentally stepping on her face.[54] In *PP v Chee Cheong Hin Constance*, it reiterated that s 108 does not impose any burden on the accused to prove no crime was committed.[55] It seems then that under exceptional circumstances, s 108 will only place an evidential burden rather than a legal burden on the accused, though this seems questionable in the light of *Jayasena*. The judicial circumscription of s 108

47 See also Hor, previous n 2, 272–279; Hor, previous n 14, 376–378.
48 '*B* wishes the court to believe that at the time in question he was elsewhere. He must prove it.'
49 See eg, Tan Yock Lin, 'The Incomprehensible Burden of Proof' [1994] *SJLS* 29, 32–34; *Syed Abdul Aziz v PP* [1993] 3 SLR(R) 1, [35].
50 Hor, previous n 14, 388. See also *Criminal Procedure Code 2010* (Act No 15 of 2010), s 278.
51 Pinsler, previous n 40, 409. See also VR Manohar, ed, *Ratanlal & Dhirajlal's The Law of Evidence*, 24th ed (LexisNexis: 2011), 589: '...the burden entirely lies on [the accused] and the plea of *alibi* does not come within the meaning of [s 107]. Circumstances leading to *alibi* are within his knowledge and as provided under [s 108] he has to establish the same satisfactorily' (emphasis in original).
52 *Surender Singh v. Li Man Kay* [2010] 1 SLR 428, [217].
53 Pinsler, previous n 40, 415–418; *Edward Wong v Acclaim Insurance* [2010] SGHC 352, [29]–[31]. *Cf* Hor, previous n 14, 383–387.
54 [1996] 3 SLR(R) 268, [25].
55 [2006] 2 SLR(R) 24, [95]. *Cf* Hor, previous n 14, 383–387; VR Manohar , previous n 51, 593.

notwithstanding, it remains fairly obvious how various provisions in Part III of the *Evidence Act* collectively whittle down the basic core of the presumption of innocence.[56]

3.2.2 *Criminal Procedure Code 2010*

The *Criminal Procedure Code 2010*[57] essentially only contains two provisions that may impact the scope of the right to presumption of innocence. Section 261 (see also s 23) provides that where the court may draw certain adverse inferences if an accused, in establishing his defence, remains silent or relies on facts not mentioned when he was charged or informed that he will be prosecuted.[58] Insofar as these adverse inferences may operate to greatly increase the likelihood of a conviction even though the accused is arguably entitled to remain silent without detriment throughout the entire proceedings, these detract from his right to presumption of innocence.[59] However, it should be noted that a conviction of an accused cannot be secured solely on the basis of adverse inferences,[60] and if there are severe procedural breaches in the recording of long or cautioned statements from the accused, this may effectively curtail the strength of the adverse inferences drawn by the court.[61]

The second provision is s 258, which allows the court to 'take into consideration the confession' of a co-accused when considering the guilt of the accused (they must be jointly tried for the same offence). Cases that have interpreted the predecessor of this section (s 30 of the *Evidence Act*, which is essentially *in pari materia* with s 258) have not been consistent as to whether a confession of a co-accused can form the sole basis of a conviction of the accused.[62] However, the fact that there is generally no formal requirement of corroboration in Singapore,[63] supports the view that it can. The reason why s 258 affects the scope of the presumption of innocence is evident once we return to the first principles undergirding the right, *viz*, a safe conviction that punishes only the guilty is one that relies only on relevant, reliable, and sufficient evidence. The confession of a co-accused will only satisfy the first criterion but probably not the next two.[64]

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56 See footnote 35. All of this is without first mentioning that as the law stands, the only express touchstone of admissibility of evidence, insofar as the *Evidence Act* is concerned, is that of relevance. Hence, even if a piece of evidence is potentially extremely prejudicial (to an accused), it may conceivably be admitted as long as it is relevant (as defined by the relevancy provisions of the *Evidence Act*), although the judge is free to accord little or no weight to it: see Chen Siyuan, 'The Judicial Discretion to Exclude Relevant Evidence: Perspectives from an Indian Evidence Act Jurisdiction' (forthcoming, *E&P*).

57 This Act can be dealt with quickly, especially following the repeal of its predecessor. For an overview of the changes, see generally Chng, previous n 5.

58 These inferences operate against the backdrop of a broader 'right of silence'. See also Wan Wai Yee, '"Right of Silence" and Drawing of Adverse Inference on the Accused's Refusal to Testify at Trial' [1996] 17 *Singapore Law Review* 88, 93; Chan Sek Keong, 'From Justice Model to Crime Control Model' (2006) *International Conference on Criminal Justice Under Stress: Transnational Perspectives*, [13]–[16].

59 Paul Roberts and Adrian Zuckerman, *Criminal Evidence*, 2nd ed (OUP: 2010), 580.

60 Wai Yee, previous n 58, 98.

61 Pinsler, previous n 40, 184–185.

62 *Sim Ah Cheoh v PP* [1991] 2 MLJ 353, 358; *Lee Chez Kee v PP* [2008] 3 SLR(R) 447, [113]. *Cf Chin Seow Noi v PP* [1993] 3 SLR(R) 566, [84].

63 See generally Chen Siyuan, 'The Corroborative Effect of Lies' *SLWC*, November 2011. It is also noteworthy that a conviction can be secured solely on circumstantial evidence: *Tan Chor Jin v PP* [2008] 4 SLR(R) 306, [34]. However, under common law corroboration is essentially still required for certain contexts, such as sexual offences: see *eg*, *AOF v PP* [2012] SGCA 26.

64 It will be uncontroversial to suggest that, usually, a co-accused has an incentive to pin the blame on the accused.

3.2.3 *Misuse of Drugs Act*[65]

The most recurring dilemma surrounding this statute concerns the operation of the statutory presumptions when an accused is found in possession of drugs:

> [I]n the case of drug trafficking… the prosecution would need to establish that the accused was knowingly in possession of controlled drugs… The facts of possession, knowledge and intention to traffic may be particularly difficult to prove. The [*Misuse of Drugs Act*] comes to the aid of the prosecution by providing that in certain circumstances such facts may be presumed unless the contrary is proven.[66]

Indeed, the justifications for permitting derogation from the core conception of the presumption of innocence in the context of drug abuse can be both social (the effects of drug consumption) and practical (for instance, it is easy for an accused to deny knowledge of the drugs found on him). As Professors Roberts and Zuckerman lament, however:

> Alas, it turns out that *Woolmington's* fine-sounding phrases often amount to no more than a rhetorical commitment to the presumption of innocence. The celebrated golden thread is badly frayed in places – especially where a burden of proof is placed on the accused by a statutory 'reverse onus clause'. This legislative technique is utilized far more frequently than would ever be guessed, and the courts have been, one might think disturbingly, sanguine about it.[67]

Operating to alleviate the bleak reality painted above is the fact that there are cases that say the language of a statutory provision that reallocates the burden of proof may not necessarily be conclusive. In *Tan Ah Tee v PP*,[68] the Court of Appeal adopted *R v Edwards* which set out a liberal test for determining the incidence of the burden of proof in statutory provisions.[69] This test was later modified by in *R v Hunt* (which was adopted locally in *PP v Kum Chee Cheong*),[70] such that the court 'is not confined to the language of the statute. It must look at the substance and effect of the enactment'.[71] Considerations such as the relative ease or difficulty that the parties would encounter in discharging the burden of proof, the mischief at which the statute is aimed at, and the presumption that Parliament is unlikely to have intended to impose an onerous duty on the accused were also deemed relevant.[72] Putting aside the (not insignificant) objection that *Edwards* and *Hunt* may not necessarily be compatible with the *Evidence Act*,[73] it can be observed that the first consideration set out in *Hunt* has shades of s 108 of the *Evidence Act*, which has already been discussed above. The next two considerations correspond broadly to canons

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65 Although this is not the only statute that creates presumptions, it suffices for present purposes to consider just the *Misuse of Drugs Act* as the principles behind the controversies it generates are representative of and applicable to other similar statutes as well. It should further be noted that legislation such as the *Misuse of Drugs Act* is not unique to Singapore; many other jurisdictions have similar laws. Perhaps the greatest point of difference is that Singapore retains the mandatory death penalty for certain drugs offences.

66 Pinsler, previous n 40, 426.

67 Roberts and Zuckerman, previous n 59, 223–224. *Cf* Colin Tapper, *Cross & Tapper on Evidence*, 12th ed (OUP: 2010), 132.

68 [1980] 1 MLJ 49.

69 [1974] 3 WLR 285, 295 (*Edwards*). The test is: where a statute is construed as prohibiting acts 'save in specified circumstances or by persons of specified classes or with specified qualifications or with the license or permission of special authorities', then the burden of proof will be on the accused to prove that he falls within one of such situations.

70 [1993] 3 SLR(R) 737.

71 [1987] AC 352, 380 (*Hunt*).

72 *Hunt* [1987] AC 352, 376. See also Hor, previous n 14, 402–403.

73 See generally Chin Tet Yeung, 'Burden of Proof on the Accused: An Unacceptable Exception' 23 *Malaysia Law Review* 267.

of statutory interpretation, being the purposive approach and the strict construction approach.

As regards purposive interpretation, the *Interpretation Act*[74] takes precedence over all other canons of statutory interpretation. But the exhortation to go beyond the literal words of a statute and into its purpose does not necessarily offer any relief for the accused: if parliamentary intention is paramount, parliamentary intention may plainly support a constriction of the rights of the accused, with the requisite provision of relevant data and statistics to justify such a constriction, especially in a context like the *Misuse of Drugs*. Consider too this passage from the seminal Court of Appeal decision in *Tan Kiam Peng v PP*:

> [T]he inimical effects that would result from a frustration of the general policy of the [*Misuse of Drugs Act*] generate not only social ills and tragedy but also simultaneously violate the individual rights of those who are adversely and directly impacted by the availability… of controlled drugs on the open market (including, in many instances, innocent members of their respective families as well). These very important aspects have generally been downplayed by critics of the Act… these critics never directly address the issue as to what the reality would be if no presumptions were in… A purely theoretical discourse which tends to abstract itself from the realities and adopts a one-sided approach… tends to not only implode by its very abstraction but also ignores the fact that, in an imperfect and complex world, there is necessarily a whole compendium of rights, all of which must be balanced.[75]

Perhaps because of the harsh consequence (particularly in the context of the *Misuse of Drugs Act* where a sentence of mandatory death penalty is possible) of applying the purposive approach rigidly,[76] the courts have been unable to apply the purposive approach in a principled and consistent fashion.[77] For instance, in *Tan Kiam Peng* itself, although the Court of Appeal was clearly mindful of the purpose and policy underlying the *Misuse of Drugs Act*, it preferred to interpret one of the provisions (dealing with the presumption of knowledge of the nature of the drugs) using the literal approach, with an awareness that a literal reading of the provision would actually undermine a purposive reading of the statute.[78] Notably, *Tan Kiam Peng* is not an anomaly; subsequent cases have followed its approach.[79]

Recent authorities suggest that the strict construction approach of penal statutes will only be invoked when the purposive interpretation has been exhausted.[80] Where the legislative intent simply cannot be found in some instances, the question is when this construction should apply.[81] There is also the separate question of whether, in effect, the rule on strict construction was actually used in conjunction with the literal approach in cases[82] such as

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74 *Interpretation Act* (Cap 1, 2002 Rev Ed), s 9A(1): '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' (*Interpretation Act*).

75 *Tan Kiam Peng v PP* [2008] 1 SLR(R) 1, [75] (*Tan Kiam Peng*). *Cf* Thio Li-Ann, 'An "I" for an "I": Singapore's Communitarian Model of Constitutional Adjudication' (1997) 27 *Hong Kong Law Journal* 152, 160–163.

76 See also Hor, previous n 14, 372.

77 See Goh Yihan, 'Statutory Interpretation in Singapore: 15 Years on from Legislative Reform' [2009] 21 *SAcLJ* 97, [11].

78 *Tan Kiam Peng v PP* [2008] 1 SLR(R) 1, [83]–[95].

79 See eg, *PP v Phuthita Somchit* [2011] 3 SLR 719, [24]–[25] (*Phuthita*). See also *ADP v ADQ* [2012] SGCA, [29].

80 See eg, *PP v Low Kok Heng* [2007] 4 SLR(R) 183, [39]–[49]; *PP v Mohammad Ashik bin Aris* [2011] 4 SLR 34, [190]–[194]; *Ho Sheng Yu Garreth v PP* [2012] SGHC 19, [44] and [55].

81 Statutory Interpretation in Singapore, *supra* note 77 at [8], [18], [33].

82 *PP v Phuthita Somchit* [2011] 3 SLR 719, [24]–[30].

Tan Kiam Peng to collectively displace the purposive approach. All in all, can it be said that the judicial dilemma and inconsistency in applying the purposive approach in the *Misuse of Drugs* context stems from some judicial impulse to preserve the presumption of innocence from being disproportionately eroded by statutory presumptions?

3.3 Common Law

It is submitted that the two common law concepts most likely to impact the scope of the presumption of innocence are the judicial discretion to exclude relevant evidence, and the privilege against self-incrimination.

Insofar as the former is concerned, as highlighted previously,[83] s 2(2) of the *Evidence Act* prohibits a wholesale reception of evidence law developments in the common law world. This peculiar feature of Singapore evidence law has significant ramifications in the criminal justice process because as compared to the *Evidence Act*, the common law exclusionary rules provide greater control and flexibility over the admissibility of evidence such as those relating to hearsay, similar fact, and opinion. The common law further provides for a residual judicial discretion to exclude evidence not caught by the exclusionary rules if it either causes some form of unfairness to the accused or is found to be disproportionately prejudicial or unreliable.[84] So whereas the common law will either exclude (by way of the exclusionary rules) or give the judge the discretion to exclude say, a piece of similar fact evidence that is highly prejudicial, this is not necessarily consistent with (and therefore permitted by) the antiquated and static *Evidence Act*, which considers questions of admissibility solely on the basis of logical relevance.[85] The reason why any of this has to do with the presumption of innocence is that if one equates prejudicial effect with cognitive bias and emotivism,[86] the *Evidence Act* in permitting a piece of evidence tainted with such prejudicial effect to be admitted creates a potential danger of a judge (who, unlike a jury, does not have the benefit of a prior fact-finder to sieve out prejudicial evidence) wrongly judging the guilt of an accused based on evidence that has severely distorted evidential value. This may not be apparent from the record of the case or the judgment. As such, the commitment to punish only the guilty on the basis of the most reliable and morally defensible evidence is upended. The unavailability of the common law judicial discretion to exclude evidence also eliminates the chief alternative to the defence of entrapment (which has been held to be unavailable in Singapore).[87] Increasingly, there is reason to believe that the judicial discretion to exclude evidence can possibly be extended to exclude entrapment evidence, because the normative justifications for the discretion have now been re-identified as the need to preserve and

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83 See footnote 37 and body text accompanying footnote.

84 See also legislation such as the UK *Police and Criminal Evidence Act 1984*, s78; *Canadian Charter of Rights and Freedoms*, *Constitution Act*, 1982, s 24(2). In fact the latest 2012 amendments to the opinion evidence provisions in the *Evidence Act*, in expressly providing for the judicial discretion to exclude prejudicial opinion evidence, only serve to confirm that such discretion did not previously exist in the statute.

85 See generally Siyuan, previous n 56; Chen Siyuan and Nicholas Poon, 'Reliability and Relevance as the Touchstones for Admissibility of Evidence in Criminal Proceedings' (forthcoming, *SAcLJ*); Robert Margolis, 'The Concept of Relevance: In the Evidence Act and the Modern View' (1990) 11 *Singapore Law Review* 24.

86 See Ho Hock Lai, 'An Introduction to Similar Fact Evidence' (1998) 19 *Singapore Law Review* 166, 167–170.

87 See *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239. There is also the possibility of the court invoking its inherent powers to prevent unfairness or injustice at trial; suffice to say, however, that the exercise of such powers (understandably) has to be extremely judicious and limited to special circumstances.

uphold the moral legitimacy of adjudication in criminal proceedings,[88] as well as the need to 'prevent injustice'.[89] Both justifications appear broad enough to exclude entrapment evidence if, perhaps, the circumstances are egregious enough. But even if that is the case, what does entrapment have to do with presumption of innocence? Two hypothetical situations may be contrasted.

In the first situation, suppose there is an undercover officer who has infiltrated a criminal organisation dealing with drugs. There is evidence that the organisation dabbles in drugs, but there is nothing that will directly link the organisation's criminal activities to its leader. The undercover officer's job is to induce the leader to directly perform a transaction with a set of buyers who are actually undercover officers, so that there will be evidence to secure his conviction. Assuming the transaction materialises and the leader is subsequently convicted, there will probably be little objection (from the perspective of the moral legitimacy of the criminal justice process or otherwise) to the use and admissibility of such evidence. In the second situation, suppose a plainclothes officer stakes out in a pub and randomly attempts to induce one of the pub-goers to purchase synthetic drugs from him. He spots a pub-goer who looks particularly down-and-out. The pub-goer consistently refuses to purchase the drugs despite a long period of pestering, but eventually caves in when he is offered the drugs at a very low price. Can it not be said that such a pub-goer would never have committed the crime but for the persistent instigation of the officer? Not only is the pub-goer not presumed innocent, he is *made guilty*. If it be suggested that he would have, at some later point, purchased drugs anyway from someone else, why should it be lightly presumed that this supposition is necessarily true in the absence of compelling evidence, and indeed why should it be lightly presumed that he was even ever going to visit a pub again? Indeed, Professor Ho's characterisation of the criminal justice process is worth reflection:

> It is for the police to search for *the truth*… If the executive does not think it has found the truth, it *should not* be bringing a prosecution. By the time of the trial… the executive must produce the evidential basis for, and *publicly justify*, its assertion that the citizen is guilty as charged and thus *deserving of the punishment* that it is seeking to inflict on him or her. It is not enough that the executive believes or asserts that the citizen is guilty, *nor is it enough that he or she is in fact guilty*; the court must deliver an acquittal, and let the citizen go free, unless the executive succeeds in *demonstrating his or her guilt in a proper manner*... ustice must not only be done… but must *also be seen to be done*...[90]

Turning then to the privilege against self-incrimination (which is related to the concept of drawing adverse inferences), common law dictates that if an accused is, for instance, improperly coerced to provide an incriminating document, the court has the discretion to exclude such evidence.[91] However, whereas the *Evidence Act* is only arguably incompatible with the exclusionary discretion doctrine as discussed above, the *Evidence Act* is expressly at odds with the common law privilege against self-incrimination. The Act does not generally excuse witnesses from answering incriminating questions at trial, and in fact expressly admits evidence obtained from the accused after the commission of the offence.[92] It was therefore no surprise that Court of Appeal in *PP v Mazlan* denied

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88 See generally Andrew Ashworth, 'What is Wrong with Entrapment?' [1999] *SJLS* 293; Edwin Tong, 'Illegally Obtained Evidence and the Concept of Abuse of Process: a Possible Reconciliation?' (1994) 15 *Singapore Law Review* 97.

89 See *eg*, *Muhammad bin Kadar v PP* [2011] 3 SLR 1205, [112] (*Kadar*).

90 Ho Hock Lai, 'Liberalism and the Criminal Trial' (2010) *SJLS* 87, 89 (emphasis added).

91 Jeffrey Pinsler, 'Whether a Singapore Court has a Discretion to Exclude Evidence Admissible in Criminal Proceedings', (2010) 22 *SAcLJ* 335, [8]–[11].

92 Ibid, [40]. He was referring to ss 29 and 134 of the *Evidence Act*.

that the privilege enjoyed constitutional status (it was described as just another evidentiary rule).[93]

Additionally, although s 22 of the *Criminal Procedure Code 2010* states that an accused 'need not say anything that might expose him to a criminal charge', there is no obligation to inform him of this (and there is no consequence for not informing him).[94] Arguably, this completely defeats the purpose of having the provision in the first place. Having said that, it has been claimed that the privilege against self-incrimination has lost much of its force (and justification) in various parts of the common law world,[95] and if that is so, unlike the exclusionary discretion doctrine, the erosion of this privilege will have a lesser impact on the contours of the right of presumption of innocence. On another view, however, a fundamental link may be drawn between the privilege and the presumption of innocence:

> Interrogations [in Singapore] proceed on the basis of a strong presumption of guilt, where interrogators rely on psychological pressures to force a confession… This is compounded by the interest of the police in quick crime-solving that may lead to a wrongful conviction. The argument based on the presumption of innocence is as follows: the inherent nature of police interrogation imposes great pressure on the accused to confess. The secrecy of these proceedings leaves the court with no reliable evidence regarding the circumstances in which the confession was made. In accordance with the presumption of innocence, the court should hold that there is reasonable doubt regarding the confession's reliability and give the accused the benefit of the doubt.[96]

3.4 International Law

The final source of law to be considered is international law. International law is relevant insofar as it can potentially affect municipal law.[97] Singapore subscribes to the 'dualist' approach in the reception of international law. Thereby, its international legal obligations are only given effect when domestic laws reflecting the incorporation of those obligations are passed. Moreover, international law 'is not concerned with how customary international norms are *implemented* by the various states', and 'while international law is binding on states, and states are obligated to give effect to their international legal obligations, international law does not *replace* or *supersede* the domestic law of state'.[98]

The presumption of innocence can be found expressly in the *Universal Declaration of Human Rights*,[99] the *International Covenant on Civil and Political Rights*,[100] and the *European Convention on Human Rights*.[101] Certainly, a strong case can be made that the right has the status of international custom, or even a general principle of law. The main problem is that the right, although common to all of the major international instruments, is stated in such bare terms such that its contents are vague. Quite apart from the fact that states like Singapore can ignore their international obligations, they are still given free rein to dictate how much the right to the presumption of innocence can be whittled down on domestic implementation.

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93 [1992] 3 SLR(R) 968, [13]–[37].
94 See also *Haw Tua Tau v PP* [1981] 2 MLJ 49, [26].
95 Tapper, previous n 67, 417–418; Roberts and Zuckerman, previous n 59, 511, 577–580.
96 Gregory Gan, 'The Crippled Accused: *Miranda* Rights in Singapore' (2010) 28 *Singapore Law Review* 123, 137.
97 *Statute of the International Court of Justice*, TS 993, Art 38(1).
98 Chen Siyuan, 'The Relationship Between International Law and Domestic Law,' (2011) 23 *SAcLJ* 350, [7]–[10] (emphasis in original).
99 GA Res 217A (III), UN Doc A/810 at 71 (1948), Art 11(1).
100 999 UNTS 171, Art 14(2).
101 ETS 5, Art 6(2) (*ECHR*). See also Hor, previous n 14, 369.

Unsurprisingly, the United Nations Human Rights Committee has warned that 'the presumption of innocence, which is fundamental to the protection of human rights, is expressed in very ambiguous terms or entails conditions which render it ineffective'.[102] Similarly, the European Court of Human Rights has said that the *ECHR* 'must be interpreted in such a way as to guarantee rights which are practical as opposed to theoretical or illusory.'[103] While it is true that existing international law permits the state the sovereign prerogative to limit the right of presumption of innocence as it sees fit, it may not be long before the ever-progressive development of international human rights law places a more concrete obligation on all states to take into greater account the rights of individuals, and accordingly, to avoid as far as possible any derogation from the presumption of innocence.

4 SOME PRELIMINARY REFLECTIONS ON THE SURVEY

It is apposite to recapitulate the results of the survey of the law thus far:

1) The preponderance of authorities and a literal interpretation suggest that the right to presumption of innocence is not guaranteed by the *Constitution*, although a limited aspect of it, *viz*, the right to counsel, is arguably captured. The right to counsel, however, is subject to various limitations.

2) The *Evidence Act* potentially erodes the right to presumption of innocence via ss 105, 107 and 108. The rather antiquated and static *Evidence Act* also conceptualises relevance and admissibility more broadly than the common law, as as to affect the scope of the right to presumption of innocence if one accepts that the right demands that only the most reliable and morally defensible evidence are admitted.

3) The *Criminal Procedure Code 2010* potentially erodes the right to presumption of innocence via ss 23, 261 and (possibly) 258.

4) The *Misuse of Drugs Act* is an example of a penal statute that potentially erodes the right to presumption of innocence. It does so by creating certain presumptions of fact regarding possession, knowledge, and intention.

5) Though not canvassed in the survey, it may be thought that the possibility of preventive detention without trial (pursuant to legislation such as the *Internal Security Act*[104] and the *Criminal Law (Temporary Provisions) Act*[105]) also detracts from the right to presumption of innocence. However, insofar as such persons are not detained pursuant to conventional criminal justice processes, and insofar as preventive detention is typically justified on what are often characterised as *sui generis* grounds of national security, they will not be considered in this article.

6) While there is probably a rule of international custom protecting the right to presumption of innocence, it does not automatically translate into municipal law; at any rate, the content of such a right has seldom been explicated, and states are given free rein to define it, at least not until international human rights law develops something more concrete.

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102 Office of the High Commissioner for Human Rights, *General Comment No 13*, 21st session (1984), [7].

103 *Allenet de Ribemont v France* [1995] ECHR 5, [35]; *cf Salabiaku v France* (1991) 13 EHRR 379, [27]. See also Roberts and Zuckerman, previous n 59, 86.

104 (Cap 143A, 1985 Rev Ed).

105 (Cap 67, 1998 Rev Ed).

At this point, what can we make of the results of this preliminary survey? Some reflections, also preliminary in nature, may be offered.[106]

Under the *Woolmington* conception of the presumption of innocence, an accused may in theory simply opt to say or do nothing at all until the prosecution has produced sufficient evidence to establish a case against him. There are no reversals of proof, presumptions of fact, removal of privileges, or inferences operating against him that will be entertained under the purist, *Woolmington* conception, of the presumption of innocence. This is, however, not the reality today, not just in Singapore but in many other jurisdictions– the purist conception of the presumption of innocence is no longer seen as tenable (even if constantly invoked by the courts). This is, perhaps more so in the context of legislative attempts to control serious crimes or crimes that can cause widespread damage to society.[107] But in the same way that the right to presumption of innocence is not absolute, the legislative-judicial prerogative to whittle down the right *should also not be* without limits, and such limits should be explained, even if the curtailment of the right is claimed to be confined to the most serious crimes.[108]

Indeed, even if we accept that the presumption of innocence is a balance, the actual ambit of this right has to be seen in the light of *all* the existing laws in their cumulative effect. On the basis of the results of the survey in this article, the holistic picture is not one that can be said to be more favourable than not to accused persons in Singapore. The theoretical potential for the cumulative erosion of presumption of innocence in Singapore is perhaps the grimmest for a person accused of drugs offences. Accordingly, the strength of the right to presumption of innocence in Singapore may be considered weak in light of the various ways in which the right may be eroded.[109]

Quite separately, one has to question too if certain longstanding assumptions and characteristics of the Singapore criminal justice system are necessarily true. That is, in contrast to jurors, judges can be effective fact-finders and deciders of the law simultaneously;[110] the adversarial system, especially in criminal proceedings, necessarily promotes the pursuit of truth and justice;[111] harsh punishments, including the mandatory death penalty, successfully serve their deterrent functions;[112] and wrongful convictions have largely been avoided.[113] If these assumptions can be said to be largely unproven or untested (and this is quite different from saying the assumptions are untrue), this also undermines the commitment to punish only the guilty. Perhaps a solution to counteract

106 They are preliminary because the primary purpose of this piece is to establish the extent of the protection of the right in Singapore.

107 See also *Attorney-General of Hong Kong v Lee Kwong-kut* [1993] 3 WLR 329, 346; GL Peiris, 'The Burden of Proof and Standards of Proof in Criminal Proceedings' (1980) *Malaysia Law Review* 66, 103–106. Indeed, in *Woolmington* itself, the court acknowledged various possible exceptions to the presumption of innocence.

108 See also Sek Keong, previous n 58, [20].

109 However, can a case be made that the various laws actually do (short of expressly providing for the presumption of innocence) promote the pursuit of the truth, fairness, and justice, and accordingly, protect the rights of the accused?

110 See Tet Yeung, previous n 6, [6].

111 First, for a criminal justice system using the adversarial process to operate well, what is required is a constant supply of good prosecutors and defence lawyers. Second, unlike the civil law inquisitorial system, the common law adversarial system prevents a judge from being interventionist.

112 See eg, Parliament of Singapore, *Misuse of Drugs (Amendment Bill)* (30 November 1989) Parliament No 7 Session No 1 Volume No 54 Sitting No 9. Most criminal law exponents would know, of course, that the function of criminal law goes beyond deterrence but also includes aims relating to retribution, rehabilitation, and incapacitation.

113 See generally Chen Siyuan and Eunice Chua, 'Wrongful Convictions in Singapore: A General Survey of Risk Factors' [2010] 28 *Singapore Law Review* 98.

this is to give greater expression to the right of presumption of innocence, or at the very least, to be aware of how the right may be whittled down.

There is no doubt that preserving some form of the right to the presumption of innocence is instrumental to preserving the integrity and credibility of a criminal justice system.[114] To this end, the foremost problem in Singapore at this point is that up till now, no one authoritative guide has been articulated as to where the right can be found, and what it entails. What Singapore has, instead, are largely perfunctory references to *Woolmington* or its equivalent rhetoric, unresolved contradictions and blind spots in the law, and bits and pieces of legal principles waiting to be marshalled into a coherent thread of interconnected rules. Perhaps, as argued at the outset, what is needed is a reboot in the conceptualisation of the right, beginning with the identifying of a conceptual starting point. For instance, as Ashworth puts it:

> [T]he presumption of innocence is justified, not by its relationship to any basic facts about evidence, but by reference to the context of a criminal trial – with fundamental liberties at stake for the defendant – and more widely the context of a criminal justice system in which enormous powers over individuals may be wielded by the State… the presumption is inherent in a proper relationship between State and citizen, because there is a considerable imbalance of resources… because the trial system is known to be fallible… because conviction and punishment constitute official censure… and respect for individual dignity and autonomy requires that proper measures be taken to ensure that such censure does not fall on the innocent.[115]

Likewise, Roberts and Zuckerman opine that:

> A 'presumption of innocence' is only truly valuable if it carries robust implications for criminal procedure generally… [it] must be reasonably extensive and not too easily defeated… The presumption… would hardly be much to boast about unless, at the least, it required the state to prove every element of a criminal offence to an appropriately exacting standard… [this is also bound up with the idea of] the right of the innocent not to suffer criminal conviction and punishment… From a broader, political theory or philosophical perspective, one might expect the presumption of innocence to say something important about the relationship between the state and the individual…[116]

It seems that the basic idea here is since the state has far more resources than an accused, the right to presumption of innocence has to be strong and not easily displaced for it to be meaningful. Accordingly, the limits to the derogation of the right should be properly articulated, as should the justifications for such derogation. Moreover, the scope of the right should be construed expansively, rather than constrictively, and with a view to securing the safest and most morally defensible conviction possible.[117] Two broad patterns of recent vintage also confirm that Singapore is experiencing a paradigm shift in how the rights of an accused and the communitarian rights of society should be weighed and balanced against each other, with increasing emphasis being placed on reinforcing the integrity of the criminal justice process generally and protecting the rights of an accused specifically. Going forward, perhaps something can be learned from these two broad patterns insofar as reconceptualising the right to presumption of innocence is concerned.

The first broad pattern emanates from a trio of recent Court of Appeal decisions. In *Kadar*, two brothers had been sentenced to death by the trial judge for the murder of an

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114 See eg, Hor, previous n 14, 366.
115 Ashworth, previous n 12, 251. See also Ashworth, 'Concepts of Criminal Justice' [1979] *Criminal Law Review* 412, 418.
116 Roberts and Zuckerman, previous n 59, 223.
117 See also Stummer, previous n 4, p 51.

old woman, but one of the brothers was completely acquitted of all charges on appeal due to unreliable evidence. The Court of Appeal established ground-breaking guidelines concerning the prosecution's duty to disclose material unused for the trial,[118] but in so doing, it condemned certain practices of the police and the prosecution in unprecedentedly strong language.[119] Then, in *Thong Ah Fat v PP*, the trial judge found the accused guilty of trafficking drugs and sentenced him to death; on appeal, the Court of Appeal remitted the matter, criticised the brief, five-paragraph judgment as 'unclear', and held that the 'judicial duty to give reasoned decisions' was not discharged.[120] This decision was also unprecedented in the way in which the trial judgment was criticised and for the establishment of guidelines for reasoned fact-finding.[121] Finally, in *Ramalingam*, although the Court of Appeal stated in *obiter dicta* that prosecutorial decisions need not be explained (mainly because the Attorney-General's right of prosecutorial discretion is a constitutional right), it nevertheless felt compelled to offer some explanations as to why the accused in that case was charged with an offence that attracted the mandatory death penalty while the co-accused was not despite committing the same criminal transaction.[122] At the very least, this trio of recent Court of Appeal cases would suggest that justice and fairness to the accused must not only be done, but must also be seen to be done.

Indeed, temporally proximate to these cases is also a raft of other local cases that clearly reveal courts' growing inclination towards a higher degree of accountability by the various law enforcement agencies when seeking convictions. In *Yunani bin Abdul Hamid v PP*,[123] the court exercised its powers of revision to order a retrial as it treated the accused's plea of guilt as very doubtful. In *Lim Boon Keong v PP*,[124] the court remarked that the Health Sciences Authority had a duty to ensure rigid compliance with its internal procedures to avoid wrongful convictions. In *Ong Pang Siew v PP*,[125] the court readily criticised the prosecution's expert for falling short of professional standards. In *Mathavakannan s/o Kalimuthu v Attorney-General*,[126] the court resolved the phrase "imprisoned for life" in a presidentially commuted sentence (the original sentence was mandatory death) in the accused's favour to mean 20 years' imprisonment. In *Azman bin Mohamed Sanwan v PP*,[127] the court closely scrutinised the events surrounding the recording of two self-inculpatory statements and found them to be unreliable in many ways. In *AOF v PP*, the court exonerated the accused from a 29-year and 24-stroke sentence (for allegedly raping his then 16-year-old daughter) after another extremely granular scrutiny of the evidential gaps.[128] Finally, in *Mas Swan bin Adnan v PP*, the court held that a 'trial judge should not shut his mind to any alternative defence that is

118 See also Chen Siyuan, 'The Prosecution's Duty of Disclosure in Singapore' (2012) *OUCLJ* 207.
119 *Muhammad bin Kadar v PP* [2011] 3 SLR 1205, [194]–[206]. *Kadar* was subsequently applied in *AOF v PP* [2012] SGCA 26, [149]–[152].
120 [2011] SGCA 65, [13].
121 See also Chen Siyuan and Nicholas Poon, 'The Judicial Duty to Give Reasons', *SLWC*, December 2011.
122 *Ramalingam Ravinthran v Attorney-General* [2012] SGCA 2, [77]–[78]. See also *Quek Hock Lye v PP* [2012] SGCA 25, [22]–[25].
123 [2008] 3 SLR(R) 383.
124 [2010] SGHC 179.
125 [2011] 1 SLR 606. See also *Eu Lim Hoklai v PP* [2011] 3 SLR 167.
126 [2012] SGHC 39.
127 [2012] SGCA 19.
128 The Court of Appeal also went one step further in terms of extending protection to the accused: instead of ordering a re-trial after new crucial evidence had emerged after the trial, it took the view that given the evidence at the original trial was insufficient to justify a conviction and that the length of time before the putative retrial was disproportionate to the accused's sentence, the fairer outcome was an acquittal.

reasonably available on the evidence even though it may be inconsistent with the accused's primary defence… or even if the Prosecution and Defence have agreed not to raise it.'[129] Of course, one way to look at all of these cases is to characterise them as an judicial attempt to compensate for the many doctrinal uncertainties and unsatisfactorily rigid rules that plague criminal evidence law in general and the right to presumption of innocence specifically. On the one hand, there is some validity in criticising a (perceived or otherwise) lack of principle and internal consistency in the application of the law; on the other hand, to take such a view may create unnecessary, invisible impediments that detract from the courts' ultimate purpose: to safeguard the rights of every member in society.

Suppositions and speculations aside, the second broad pattern is perhaps best reflected by recent academic observations. The last two years have been littered with *ad hoc* attempts to amend various parts of the *Evidence Act*, such as expanding the scope of the hearsay and opinion exceptions and repealing the computer output provisions. Just before these developments, however, Professor Chin argued that the *Evidence Act* was in timely need of a major remake. He concluded that maximum individualisation, procedural fairness, and legitimacy in adjudication are the key contemporary values that are largely missing from the antiquated *Evidence Act*, and should be used to guide any attempt to rewrite the code.[130] Then in 2011, following the introduction of the *Criminal Procedure Code 2010*, Chng opined that 'a new chapter in the continuing evolution of Singapore's criminal justice process' had been written, and described the new legislation as 'a further milestone in the journey where "society seeks to strike a balance between: the rights of society, to secure conviction of a person who commits an offence; and the rights of an individual, not to be wrongly convicted"'.[131] She further opined that it can no longer,

> fairly be said that an unthinking preference for crime control values is all that the Singapore system is about… Singapore's reformative approach to criminal procedure is commendable, if nothing else, for its commitment to leaving no stone unturned and no avenue unconsidered.[132]

These two academic viewpoints, with the judicial trends sketched above, show that perhaps the time is indeed ripe to take a fresh look at the right to presumption of innocence in Singapore. It is with humble hope that this article has served its purpose: setting out the basic operative legal framework to kick-start that process. It may also serve as a platform for further discourse on the issues raised.[133]

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129 [2012] SGCA 29, [68] and [74].

130 Tet Yeung, previous n 6, [58].

131 Chng, previous n 5, [1]. See also Chng, previous n 13, 604–616.

132 Chng, previous n 5, [65]–[66]. See also Wui Ling, previous n 17.

133 See also *AOF v PP* [2012] SGCA 26, [27], where the court cited Lord Woolf in *R v B* [2003] 2 Cr App R 13: 'At the heart of our criminal justice system is the principle that while it is important that justice is done… in the final analysis… it is even more important that an injustice is not done to a defendant. It is central to the way we administer justice in this country that although it may mean that some guilty people go unpunished, it is more important that the innocent are not wrongly convicted.'