

INTERVIEW

## **Litigating against the Death Penalty for Drug Offences: An interview with Saul Lehrfreund and Parvais Jabbar**

Saul Lehrfreund MBE and Parvais Jabbar are Executive Directors of the The Death Penalty Project, which they have run since its inception.

Based at Simons Muirhead & Burton in London, The Project works to promote and protect the human rights of those facing the death penalty. Although operating in all jurisdictions where the death penalty remains an enforceable punishment, its actions are concentrated in those countries that retain the Judicial Committee of the Privy Council in London and in other Commonwealth countries, principally the Caribbean, Africa and South East Asia.

Alongside its activities representing individuals at risk of execution, The Project also provides expert support to local lawyers and human rights organisations in bringing legal challenges to the application of the death penalty, with notable success in a variety of jurisdictions.

The Project's commitment to providing free legal representation to men and women on death row has been critical in identifying and redressing a significant number of miscarriages of justice, promoting minimum fair trial guarantees, and establishing violations of domestic and international human rights.

Lehrfreund and Jabbar have been involved in litigating or assisting in a number of challenges to the mandatory death penalty for drug offences. Most recently in 2010, they assisted in the *Yong Vui Kong* challenge in Singapore. The International Journal on Human Rights and Drug Policy sat down with them to discuss their experience in these cases.

**You have initiated actions in many countries against the use of the mandatory death penalty. Does challenging the death penalty specifically for drug offences present different or more difficult obstacles, and if so could you describe them?**

Not really. Essentially, the challenge is the same – a challenge to the imposition of a mandatory death sentence. A mandatory death sentence for whatever offence is considered to be arbitrary and disproportionate because it is automatic and fails to take into account any individual mitigating circumstances. The fundamental principle is that because the death penalty is unique in its consequences, individualised sentencing is required before the death penalty can ever be imposed. In other words, sentencing a defendant to death by reference to the category of the offence rather than the individual circumstances of the offence and the offender is arbitrary, disproportionate and contrary to the basic norms of due process.

The death penalty is uniquely different from all other penalties in its finality and irreversibility and in the fact that it engages the most fundamental of all human rights, namely the right to life. If anything, there should be fewer obstacles in challenging the death penalty for drug offences as these offences may not necessarily result in the loss of life or violence against another as compared to some of the worst categories of murder.

Any enacted law that deprives a person of their life in a manner that is found to be unfair, unjust or arbitrary by the evolving standards of constitutional protection will be a violation of the right to life and the prohibition on cruel, inhuman and degrading treatment.

**The recent legal challenge to Singapore’s Misuse of Drugs Act was guided by developments against the mandatory death penalty for all crimes. What lessons can those working to abolish the death penalty for drugs learn from the jurisprudence developed by more general abolitionist actions?**

There have been some very significant developments concerning the constitutional prohibition on the mandatory death penalty around the world which have seen the judiciary adopt a dynamic interpretation to the fundamental rights provisions enshrined in the Constitution. A Court is asked to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in light of “evolving standards of decency” which mark the progress of a maturing society. The challenge to the application of the mandatory death penalty for drugs is based on the concept that the mandatory death penalty is a cruel and inhuman punishment and because it is arbitrary it also amounts to a

violation of the right to life.

There is now a whole body of case law from around the world which reflects the emerging recognition that the imposition of the mandatory death penalty is cruel and inhuman and amounts to an arbitrary deprivation of life including decisions from India, the United Kingdom, the US, Canada, the Caribbean and Africa. In Singapore, the 1981 decision *Ong Ah Chuan* rejected a challenge to a Singaporean statute which provided for the mandatory death penalty for all drug traffickers.<sup>1</sup> This has remained the law in Singapore notwithstanding the emerging case law since then which have consistently found this decision to be obsolete and incorrectly decided.

In the intervening years, there have been cases from Belize,<sup>2</sup> Jamaica,<sup>3</sup> Bahamas,<sup>4</sup> Malawi,<sup>5</sup> Uganda<sup>6</sup> and more recently Kenya<sup>7</sup> clearly confirming that the mandatory imposition of the death penalty is no longer consistent with the right to life and the prohibition on cruel and inhuman punishment. These cases challenge the mandatory death penalty for murder, but there is no logical reason why this body of jurisprudence cannot be extended and applied to drug offences. Moreover, the weight of international legal opinion clearly suggests that the death penalty is never appropriate for drug offences.

**Singapore has not ratified the International Covenant on Civil and Political Rights and the country's Court of Appeal has rejected the applicability of customary international law. Does this expose a weakness in arguing the 'most serious crimes' provision under the Covenant?**

The fact that Singapore has not ratified the Covenant should not necessarily hinder a successful argument on the 'most serious crimes provision' under the Covenant, as the argument can equally be made under customary international law.

Whether drug offences can qualify as being among the most serious of crimes for which the death penalty may be imposed is a question which has to be assessed by reference to the relevant norms of international law. Under international law, drug offences cannot be considered among the 'most serious of crimes' given that the United Nations Commission

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1 *Ong Ah Chuan v. Public Prosecutor* [1981] AC 648.

2 *Reyes v. The Queen*, [2002] 2 WLR 1034 (PC).

3 *Lambert Watson v. The Queen*, [2004] UKPC 34.

4 (1) *Forrester Bowe (Junior) (2) Trono Davis v. The Queen*, [2006] UKPC 10.

5 *Kafantayeni v. Attorney General*, [2007] 40ILM 564.

6 *Attorney General v. Susan Kigula and 417 Others*, No. 03 of 2006, Uganda: S. Ct (21 January 2009).

7 *Godfrey Ngotho Mutiso v. Republic*, Criminal Appeal No.17 of 2008 Court of Appeal of Mombasa.

on Human Rights<sup>8</sup> and the UN Human Rights Committee<sup>9</sup> have determined that drug related offences fall outside the scope of the ‘most serious crimes’ for which the death penalty may be imposed. In fact, the Committee and the Commission have rejected nearly every imaginable category of offence other than murder as falling outside the ambit of the most serious of crimes.

The concept that the mandatory imposition of the death penalty violates the prohibition on ‘cruel and unusual punishment’ or ‘inhuman punishment’ is now universally accepted. No international human rights court in the last quarter of a century has held that the mandatory imposition of the death penalty is not ‘cruel and unusual punishment’ or ‘inhuman punishment’. On the contrary, the mandatory imposition of the death penalty has been held to constitute inhuman punishment by the Indian Supreme Court in the cases of *Bachan Singh* and *Mithu*, the US Supreme Court from *Woodson v North Carolina*, the Eastern Caribbean Court of Appeal in *Spence v Hughes*, the Privy Council in a succession of cases from *Reyes, Hughes* and *Fox* to *Watson* and *Bowe*, the Inter-American Court of Human Rights in the successive cases of *Boyce* and *Cadogan*, the Ugandan Supreme Court in *Kigula*, the High Court of Malawi in *Kafantayeni*, the Court of Appeal of Kenya in *Mutiso* and the United Nations in *Kennedy v Trinidad and Tobago*.

It is clearly established that the prohibition on cruel and inhuman treatment or punishment is a rule of customary international law. It is also now generally recognised that the mandatory death penalty violates the prohibition on cruel and inhuman treatment or punishment. In our view, the relevant provisions of the Misuse of Drugs Act as applied in Singapore result in grossly disproportionate penalties for the prescribed offences, and in the circumstances, it follows that the mandatory death penalty under the MDA violates the customary international law prohibition on cruel and inhuman treatment or punishment. There is an evolving and dynamic consensus that the mandatory death penalty is unlawful. The UN Economic and Social Council’s Safeguards Guaranteeing the Protection of the Rights of those Facing the Death Penalty, stipulates that the scope of the most serious crimes should not go beyond international crimes with lethal or extremely grave consequences.<sup>10</sup>

In 1996, Mr Bacre Waly Ndiaye, the then-Special Rapporteur on Extrajudicial Summary or

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8 UN Commission on Human Rights, ‘Extrajudicial, summary or arbitrary executions: Report by the Special Rapporteur’ (24 December 1996) UN Doc. No. E/CN.4/1997/60.

9 UN Human Rights Committee, ‘Concluding Observations: Thailand’ (8 July 2005) UN Doc. No. CCPR/CO/84/THA, para. 14.; UN Human Rights Committee, ‘Concluding Observations: Sudan’ (29 August 2007) UN Doc. No. CCPR/C/SDN/CO/3, para. 19.

10 Economic and Social Council of the United Nations, ‘Implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty’ (25 May 1984) res. 1984/50.; UN General Assembly, ‘Human rights in the administration of justice’ (14 December 1984) UN Doc. No. A/RES/39/118.

Arbitrary Executions, submitted his report to the Commission on Human Rights in which he surveyed the above restrictions on the death penalty stating that ‘the death penalty should be eliminated for crimes such as economic crimes and drug-related offences’.<sup>11</sup>

Two recent cases (*Boyce et al* and *Cadogan*) from the Inter-American court of Human Rights indicate that the mandatory death penalty contravenes Articles 4(1) and 4(2) of the American Convention on Human Rights.

In 2004, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions found that the mandatory death penalty was incompatible with the prohibition of cruel, inhuman and degrading treatment or punishment.<sup>12</sup>

On 23 April 2009, Justice Richard Goldstone and Martin Šolc, the Co-Chairs of the International Bar Association’s Human Rights Institute wrote to Singapore’s Prime Minister Lee Hsien Loong on behalf of the Institute. In their letter, the Co-Chairs encourage Singapore ‘to ensure that the death penalty is not applied in contravention of international law, specifically that it is only applied for the most serious of crimes and is never a mandatory sentence.’<sup>13</sup>

Accordingly, in our view it has now become clearly and firmly established that the mandatory death penalty is unlawful and violates customary international law. In the circumstances, it is entirely appropriate and open for a Court to find that the mandatory imposition of the death penalty for an offence committed under the *Misuse of Drugs Act* is inconsistent with customary international law.

### **What other pressure points for opposing the death penalty for drugs are ripe to be explored or utilised?**

It must be assumed that the objective of having the mandatory death penalty in the *Misuse of Drugs Act* is to prevent drug trafficking through incapacitation of the specific offender and general deterrence of the public. In our view, there is something illogical in a scheme which imposes a mandatory death penalty for trafficking in excess of 15 grams of certain drugs, but not make available the death penalty for trafficking 14.99 grams of the same drug, even if it could be contended that there is a quantitative and incremental increase in guilt or

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<sup>11</sup> UN Commission on Human Rights, ‘Extrajudicial, summary or arbitrary executions – Report by the Special Rapporteur, Mr. Bacre Waly Ndiaye’ (26 December 1996) UN Doc. No. E/CN.4/1997/60, para. 91.

<sup>12</sup> Human Rights Council, ‘Extrajudicial, summary or arbitrary executions – Report of the Special Rapporteur, Philip Alston’ (22 December 2004) UN Doc. No. E/CN.4/2005/7, para. 80.

<sup>13</sup> International Bar Association Human Rights Institute, ‘Singapore: call for abolition of the death penalty’, 23 April 2009.

social mischief associated with trafficking in the 15 gram level.

In relation to deterrence, there is no evidence to support the proposition that the mandatory death penalty for drug trafficking is an effective deterrent. There has been much international research on this issue and the deterrent effect of a mandatory death penalty for drug trafficking has not been established. As found by Zimring, Fagan and Johnson in their study 'Executions, Deterrence, and Homicide: A Tale of Two Cities',<sup>14</sup> Singapore has not reduced its crime rate when compared to the position in the comparable state of Hong Kong, which does not have the death penalty.

Furthermore, as Professor Jeffrey Fagan has testified in a number of cases, drug prices are higher in Indonesia compared to Singapore, despite the higher risk facing drug traffickers in Singapore. In his view, if execution was an effective deterrent for drug trafficking, then the necessity of executions should decline over time, yet Singapore continues to execute drug traffickers at high rates.

In addition, given the type of offender who is often persuaded to act as a courier in drug trafficking cases, there is a limited deterrent effect of the mandatory death penalty on such offenders who are young and poor. In fact, many academics have stated that there is no evidence of a statistical kind which has been forthcoming to support the contention that capital punishment deters drug crime in any of those jurisdictions that retain the death penalty on the books for drug offences. Comparisons of Indonesia, Malaysia and Singapore show that the rate of execution has no effect on the prices of drugs nor on the relative rates of drug preference. In reality, the threat of execution is a futile strategy to deter drug trafficking.<sup>15</sup>

**There was an identified tension in the *Yong Vui Kong* decision between the roles of the legislature and the judiciary – with the latter ultimately claiming that it was unwilling to influence the legislature. Is there a realistic concern that changes in the courts could inspire a legislative backlash?**

A common argument is that it is for legislature and not the courts to determine the appropriate penalty to be imposed for drug trafficking offences. But the essence of all constitutional protection is that, where fundamental human rights are engaged, the courts have a vital role to play in determining on a contemporary basis and in accordance with

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<sup>14</sup> Franklin E Zimring, Jeffrey Fagan & David T Johnson, 'Executions, Deterrence, and Homicide: A Tale of Two Cities', *Journal of Empirical Legal Studies*, vol. 7, issue 1, March 2010.

<sup>15</sup> *Yong Vui Kong v. Public Prosecutor*, Affidavit of Jeffrey Fagan (3 March 2010).

the “evolving standards of decency” doctrine, whether the laws passed by a parliamentary majority accord with the fundamental principles enshrined in the constitution.

The Courts have to operate as the ultimate protectors of fundamental human rights whilst showing respect for the decisions of the legislature. Legislative decisions are entitled to deference, however, the legislature should not be supreme when it comes to the application of penalties which conflict with fundamental human rights.

From our experience, there are concerns that judicial activism may create a legislative response particularly in countries that actively seek to retain and implement the death penalty. Our primary position is that the death penalty for drug offences is incompatible with international law as it does not meet the criteria of the “most serious crimes”. To retain the mandatory death penalty for such offences is pernicious and even more impermissible and the judiciary should intervene in this regard. The will of the legislature (if this is the issue) that drug-trafficking offences be severely punished and deterred can still be amply respected by a law that makes the possession of more than 15 grammes of diamorphine a death-eligible offence. The introduction of a judicial discretion to disapply the death penalty in the interests of justice in an individual case would constitute a limited safeguard against the obvious potential injustices of a wholly mandatory sentencing system. This would also recognise that the legislature has singled out offences of significant drug-trafficking involving 15 grammes or more of diamorphine as of sufficient gravity to merit the potential imposition of the death penalty.

**It is often suggested that Eurocentric principles developed by the Judicial Committee of the Privy Council in the landmark cases condemning the mandatory death penalty reflect a particular viewpoint that is inconsistent with the values of other countries throughout the world. How would you respond to this criticism?**

The first court to find that the mandatory imposition of the death penalty in the Caribbean was unconstitutional was in fact the Eastern Caribbean Court of Appeal, presided over by Sir Dennis Byron sitting with two Caribbean Judges. That court declined to follow the Privy Council’s earlier decisions in *Ong Ah Chuan* and *Runyowa* on the basis that ‘in the intervening twenty years between then and now [i.e. since *Ong*] the internationally accepted norms of humanity have evolved’. Most recently, the Government of Barbados has undertaken to abolish the mandatory death penalty on the basis that it breaches its international human rights obligations, and this year Guyana has gone one step further and passed legislation introducing discretion in capital cases.

The Inter-American Court of Human Rights has also condemned the mandatory imposition of the death penalty.<sup>16</sup> The court is composed of judges from North, South and Central America and the Caribbean who have condemned the mandatory imposition of the death penalty even in the worst cases of murder. In addition, the UN Human Rights Committee has found that the mandatory death penalty breaches the Covenant on Civil and Political Rights.<sup>17</sup>

In Commonwealth Africa too, courts in recent years have increasingly struck down the mandatory death penalty as unconstitutional. In so doing, they have relied on the growing global consensus that such a penalty is arbitrary and disproportionate, and have drawn support from decisions of the Indian Supreme Court, the US Supreme Court, the Human Rights Committee, the Inter-American Court, the Inter-American Commission and the Privy Council. It is notable that the governments of Uganda, Malawi and Kenya have accepted the decisions of their respective constitutional courts on the basis that they reflect the evolving standards of decency and constitutional imperatives for the protection of human rights.

Moreover, Constitutional courts in the Caribbean were not the first to condemn the mandatory death penalty as it was the Indian Supreme Court and the US Supreme Court, that led the way. Nor is the Privy Council the last court to have approved this fundamental principle. See for example the Ugandan Supreme Court, the Malawi High Court, the Court of Appeal of Kenya and the Mauritian Supreme Court whose decisions have recognised and reflected a massive development throughout the Commonwealth and the world. Far from being based on Eurocentric principles of justice, this development flows from the increasing recognition that the mandatory imposition of the death penalty for any offences, let alone for drug-trafficking, fails to accord a defendant the precious right to put forward mitigation to a judge before the death sentence is imposed. Even in China, Taiwan and Indonesia, the death penalty is discretionary.

**The Singapore Constitution it is said allows for flexibility by the operation of clemency, giving the opportunity for a mandatory sentence to be reduced by the executive. Is this a sufficient safeguard?**

The pardon process is no substitute for the existence of a judicial discretion as to whether

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<sup>16</sup> *Hilaire, Constantine, Benjamin et al. v. Trinidad and Tobago*, Inter-American Court of Human Rights Series C No. 94, 21 June 2002. ; Boyce [2003] 1 AC 400 *Cadogan v. Baldo* judgement of the Inter-American Court of Human Rights, 24 September 2009.

<sup>17</sup> UN Human Rights Committee, *Kennedy v. Trinidad and Tobago* (26 March 2002) UN Doc. No. CCPR/C/74/D/845/1998, para. 7-3; UN Human Rights Committee, *Thompson v. Saint Vincent and the Grenadines* (18 October 2000) UN Doc. No. CCPR/C/70/D/806/1998, para. 8; UN Human Rights Committee, *Lubuto v. Zambia* Communication (1995) UN Doc. No. CCPR/C/55/D/390/1990/Rev.1.

to impose the death penalty. The decision as to whether the death penalty is appropriate should be taken by judges before the death penalty is imposed and not by the executive afterwards. That is a fundamental matter of due process and it is a necessary corollary of the principle of the separation of powers.

Due process and natural justice require that no penalty should be imposed without the opportunity to put forward mitigation. Even a shoplifter facing a short sentence of imprisonment is afforded an opportunity to put forward mitigation before the judge sentences him or her to a term of imprisonment. It is illogical and unjust that the most severe penalty of death can be imposed on a drug trafficker without any opportunity at all for him or her to put forward mitigation to the judge who is to pass sentence.

Surely, the greater the penalty, the greater the need for due process and fairness. This is acutely so, where the penalty to be imposed, unlike any other penalty, is final and irreversible.

