

ORIGINAL ARTICLE

***Yong Vui Kong v. Public Prosecutor* and the Mandatory Death Penalty for Drug Offences in Singapore: A Dead End for Constitutional Challenge?**

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ABSTRACT

This article examines constitutional challenges to the mandatory death sentence in Singapore, with particular reference to the most recent case of *Yong Vui Kong v. Public Prosecutor* (2010). It discusses whether the Court of Appeal was too hasty in disregarding more recent jurisprudence of the Privy Council, which held the mandatory death sentence as a form of inhuman treatment or punishment. It also examines the customary international law prohibition of the mandatory death penalty, and the imposition of the mandatory death penalty for drug offences as a breach of the equality guarantee in Singapore's constitution. The article reveals a dismal future for a nuanced and sensible approach towards drug crime in Singapore, in that the latest case closes off many avenues for constitutional litigation.

On 14 May 2010, the Court of Appeal in the Republic of Singapore upheld the death penalty imposed on 22-year old Malaysian national Yong Vui Kong, who was 19 years of age when he was arrested in 2008. He had been convicted of trafficking not less than 42.27g of diamorphine and sentenced to death in 2009¹ under s 5(1)(a) of the Misuse of Drugs Act,² which provides for a mandatory sentence of death for trafficking in 15g or more of the substance.

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¹ *Public Prosecutor v. Yong Vui Kong* [2009] SGHC 4 [hereinafter, 'Judgment'].

² Cap 185, 2008 Rev Ed.

The appeal of the original decision related to the constitutionality of the mandatory nature of the death penalty, as provided for by the Misuse of Drugs Act. This was not the first appeal of its kind before the Singaporean courts. In 1980, an appeal against the mandatory death penalty for trafficking in drugs was dismissed in the case of *Ong Ah Chuan*,³ while the mandatory death penalty was similarly upheld in the case of *Nguyen* in 2004.⁴ Both *Ong Ah Chuan* and *Nguyen* were unsuccessful in their arguments that the mandatory death penalty violated Articles 9 and 12 of the Singaporean constitution, which cover the protection against deprivation of liberty without due process of the law and the right to equal protection of the law, respectively.

Leave to appeal the applicant's initial sentence was granted on the basis of two principal submissions made by his counsel: that the two aforementioned decisions were decided wrongly at that time, and that the circumstances had changed to such a degree that the court should now be in a position to deem the mandatory death penalty in the Misuse of Drugs Act unconstitutional.⁵ Like the preceding *Ong Ah Chuan* and *Nguyen* cases, the challenge was grounded in Article 9 and Article 12 of the constitution.

As with the court's judgment, this article does not propose to deal with the issue of the legal validity of the death penalty *per se*, but rather the continuing significance and legitimacy of the mandatory death penalty for drug offences. A downward trend in the number of countries that impose the death penalty has continued over the last four decades.⁶ As Amnesty International has noted, since 2007 alone, eight countries have formally abolished the death penalty for all crimes,⁷ leaving the number of *de jure* abolitionist states at ninety-five. The number of countries that have *de facto* abolished the death penalty, that is those retaining capital punishment in their statute books but who have not executed anyone for ten or more years, stands at forty-five.⁸ Notably, however, for those fifty-eight countries that retain the death penalty, thirty-two list drug offences as capital offences.⁹

While figures on the exact number of executions in Singapore are not freely available, concern has been raised about its high execution rates.¹⁰ Amnesty International in 2004 estimated that over 400 prisoners had been hanged in the country since 1991, which

3 *Ong Ah Chuan v. Public Prosecutor* [1981] AC 648 [hereinafter, 'Ong Ah Chuan'].

4 *Nguyen Tuong Van v. Public Prosecutor* [2004] 1 SGCA 47 [hereinafter, 'Nguyen'].

5 Judgment (n 1) para. 5.

6 See further, Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective*, Oxford University Press, Oxford, 2008, pp. 18–32.

7 These are: Albania, Cook Islands, Kyrgyzstan and Rwanda (2007); Uzbekistan and Argentina (2008), and Burundi and Togo (2009). Figures from <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries>, (accessed 1 October 2010).

8 Roger Hood, 'Abolition of the Death Penalty: China in World Perspective', 1(1) *City University of Hong Kong Law Review* 1, 2009, p. 6.

9 Patrick Gallahue and Rick Lines, *The Death Penalty for Drug Offences: Global Overview 2010*, International Harm Reduction Association, London, 2010, p. 7.

10 European Union Annual Report on Human Rights, 2002, p. 87.

rendered it the state with ‘possibly the highest execution rate in the world relative to its population.’¹¹ That being said, there has been a decrease in recent years, with reported executions averaging around seven per year over the past decade, compared to twenty-one hangings in 2000 alone.

Of the thirty-two countries that retain the death penalty for drug offences, Singapore is one of just thirteen to keep the mandatory death sentence for drug offences on its statute books, meaning that no mitigating circumstances can be taken into account when imposing the harshest possible sentence. Domestic law also reserves the mandatory death penalty for treason,¹² pre-meditated murder using arms¹³ and armed robbery,¹⁴ while misdemeanours such as spitting in public, chewing gum, and leaving the toilet seat up are criminalised.¹⁵ The harsh criminal justice system, paired with the country’s cleanliness, thriving economy and the material wealth of its inhabitants, has led one commentator to dub the small island nation a ‘theme park with the death sentence’.¹⁶

The mandatory death penalty as inhuman treatment or punishment

Article 9(1) of Singapore’s constitution provides that ‘No person shall be deprived of his life or personal liberty save in accordance with law’. In *Yong Vui Kong*, the appellant argued that the mandatory death sentence imposed contravened this provision in two respects. First, it was argued that the mandatory nature of the sentence was inhuman and, as such, it could not be considered ‘law’ for the purposes of Article 9(1) and the ‘in accordance with the law’ proviso. Second, it was submitted that the phrase ‘law’ ought to include customary international law, and a customary international law norm had emerged such to find that the mandatory death penalty was inhuman treatment, and thus in contravention to international human rights law.

As regards the first strand of this argument, the definition of ‘law’ under Article 2 of the Singaporean constitution must be considered. Article 2(1) defines law as encompassing written law passed by the UK Parliament and having force in Singapore, and common law and custom in so far as it is in operation in Singapore. In *Ong Ah Chuan*, the appellant submitted that the mandatory death penalty invoked a presumption of guilt and, as such,

¹¹ Amnesty International, *Singapore: The death penalty - A hidden toll of executions*, January 2004, AI Index: ASA 36/001/2004. Notably, however, Amnesty International’s *Death sentences and executions in 2009* report noted that Singapore carried out one known hanging in 2009, for the second year in a row.

¹² Singapore Penal Code (Cap 224, 2008 Rev Ed), section 121A.

¹³ Arms Offences Act (Cap 14, 2008 Rev Ed), section 4; Singapore Penal Code (Cap 224, 2008 Rev Ed), section 302.

¹⁴ Arms Offences Act, section 4(a).

¹⁵ Vinay Lal, ‘The Flogging of Michael Fay: Culture of Authoritarianism’, *Economic and Political Weekly* (1994), vol. 29, no. 23, pp. 1386–1388.

¹⁶ John Clammer, ‘Framing the Other: Criminality, Social Exclusion and Social Engineering in Developing Singapore’, *Social Policy and Administration* (1997), vol. 31, 136–53, p. 142.

was contrary to fundamental norms of due process. In response, the Prosecutor argued that as the Misuse of Drugs Act was validly passed by Parliament, it thus fell under the rubric of ‘law’ under Article 9(1). The Privy Council was not convinced by this interpretation, and held that regard must be had to ‘fundamental rules of natural justice’,¹⁷ ultimately finding no conflict between the Misuse of Drugs Act and these basic tenets of natural justice. Lord Diplock, rather unconvincingly, argued that a miscarriage of justice or unjust application of the written law could be avoided by recourse to executive clemency.¹⁸

If the protection of due process in matters concerning the deprivation of life and liberty is not to be considered a ‘fundamental rule of natural justice’, it is difficult to imagine what might be. The court in *Yong Vui Kong* attempted to answer this by stating *obiter* that a piece of legislation designed to act as a judgment against one individual might meet the standard set down in *Ong Ah Chuan*.¹⁹

However, since the decision of *Ong Ah Chuan* in 1981, the Privy Council’s position on the mandatory death penalty has changed significantly. A string of cases in the intervening time held that a violation of the convicted person’s rights had occurred and that the mandatory death penalty was a form of inhuman punishment.²⁰

Nguyen first brought this change in the Privy Council’s approach to the Court of Appeal’s attention in 2004. Therein, the court summarily dealt with this argument, surmising after a brief analysis of the relevant decisions that,

We are of the view that the mandatory death sentence prescribed...is sufficiently discriminating to obviate any inhumanity in its operation. It is therefore constitutional.²¹

This position, particularly the lack of explanation as to *why* the law was ‘sufficiently discriminating’, has been heavily criticised by several academics.²² In his statement in the

17 *Ong Ah Chuan* (n 3) pp. 670–671

18 This is one of the principal arguments put forward by ‘Chief Justice Truepenny’ in Lon L. Fuller’s *Speluncean Explorers* fable, heavily criticised by his ‘fellow judges’ as basing his reasoning on extraneous factors to the case at hand, when the role of the judge is to interpret and apply the law. Lon L. Fuller, ‘The Case of the Speluncean Explorers in the Supreme Court of Newgarth, 4300’, *Harvard Law Review* (1949), vol. 62 no.4, p.616.

19 Judgment (n 1) para. 16, referring to *Don John Francis Liyanage v. The Queen* [1967] 1 AC 259.

20 *Inter alia*, *Reyes v. The Queen* [2002] 2 AC 235; *Boyce and anor. v. The Queen* [2005] 1 AC 400; *Watson v. The Queen (Attorney General for Jamaica intervening)* [2005] 1 AC 472, and *Matthew v. State of Trinidad and Tobago* [2005] 1 AC 433; *R v Hughes* [2002] UKPC 12; *Fox v. The Queen* [2002] 2 AC 284, and *Bowe (Junior) & Anor. v. The Queen* [2006] 1 WLR 1623.

21 *Nguyen* (n 4) para. 83.

22 For an analysis, Li-ann Thio, ‘The Death Penalty as Cruel and Inhuman Punishment Before the Singapore High Court? Customary Human Rights Norms, Constitutional Formalism and the Supremacy of Domestic Law in *PP v Nguyen Tuong Van*’, *Oxford University Commonwealth Law Journal*, 2004, vol. 4, no.2, pp. 213–226.; Michael Hor, ‘The Death Penalty in Singapore and International Law’, *Singapore Yearbook of International Law*, 2004, vol. 8, pp. 105–117.; CL Lim, ‘The Constitution and the Reception of Customary International Law: *Nguyen Tuong Van v. Public Prosecutor*’, *Singapore Journal of Legal Studies*, 2005, pp. 218–233.

aftermath of the decision, the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, expressed his concern that the precedent laid down in *Boyce and Joseph v. The Queen*²³ had not been given due weight.²⁴ Therein, the majority held that the maintenance of the mandatory death penalty would ‘not be consistent with the current interpretation of various human rights treaties to which Barbados is a party’.²⁵ Moreover, the appellants had submitted that, ‘No international human rights tribunal anywhere in the world has ever found a mandatory death penalty regime compatible with international human rights norms’, and this assertion was not contradicted by the court.²⁶

In *Reyes v. The Queen*, Lord Bingham of Cornhill stated that,

To deny the offender the opportunity, before the sentence is passed, to seek to persuade the court that in all circumstances to condemn him to death would be disproportionate and inappropriate is to treat him as no human being should be treated and thus to deny his basic humanity.²⁷

We are of the view that respect for the offender’s ‘basic humanity’ must surely come under the ‘fundamental rules of natural justice’ as underlined in the earlier decision of *Ong Ah Chuan*. It may be logical to surmise, as did Lord Bingham in the case of *Bowe v. The Queen*,

[T]hat it took some time for the legal effect of entrenched human rights guarantees to be appreciated, not because the meaning of the rights changed but because the jurisprudence was... unfamiliar.²⁸

However, the submissions to this effect made by counsel for Yong Vui Kong were met with a certain degree of hysteria, with the Court of Appeal saying that it ‘borders on the fanciful’ to suggest that Lord Diplock in *Ong Ah Chuan* may have incorrectly assessed the nature of the mandatory death penalty or, in the alternative, that *Nguyen* applied the wrong interpretation of the word ‘law’.

Unlike *Nguyen*, which denied the Article 9(1) submission on the reasoning (however underdeveloped) that the Misuse of Drugs Act was sufficiently discriminatory to not be inhuman, the present case went to great lengths to show that the Privy Council cases were based on the relevant national constitutions, which contain a prohibition against torture,

²³ *Boyce and anor. v. The Queen* (n 20).

²⁴ Statement by Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, regarding Singapore, 17 November 2005.

²⁵ *Boyce and anor. v. The Queen* (n 20) para. 6.

²⁶ Alston (n 24).

²⁷ *Reyes v. The Queen* (n 20) para. 43.

²⁸ *Bowe (Junior) & Anor. v. The Queen* (n 20) para. 42.

inhuman or degrading treatment, and that as the Singaporean constitution contains no such provision, the court was not bound to take them into consideration.²⁹

After Singapore seceded from Malaysia in 1965, a temporary constitution was adopted. This was primarily based on the state constitution of Singapore, which was intended to work for the state within a federation setting, with a mix of elements from the Republic of Singapore Independence Act 1965 and portions of the Malaysian Federal Constitution imported through the Republic of Singapore Independence Act.³⁰ In order to ensure that minorities were duly protected in the new constitution, Chief Justice Wee Chong Jin was asked to convene a constitutional commission to consider how such protections might be included in the new constitution.³¹ Among its recommendations, the Wee Commission proposed that three new articles be included: one on the prohibition against torture, one on the right to vote and one on the right to a judicial remedy.³² The government considered these suggestions, and noted that they would be ‘incorporated in some form in the new Constitution to be drawn up’.³³ However, no new constitution was ever developed, and the temporary constitution of December 1965 essentially remains the version in place today. In 1969, the Constitution (Amendment) Act 1969 was passed to give effect to one of the Wee Commission’s recommendations, to date the only recommendation so adopted, on the establishment of a Presidential Council for Minority Rights.³⁴

The Court of Appeal in *Yong Vui Kong* interpreted the adoption of only one of Chief Justice Wee’s recommendations as an ‘unambiguous’ rejection of the proposed Article 13 preventing torture, inhuman or degrading treatment or punishment ‘whatever the reasons for such rejection were’.³⁵ With respect, the explicit approval of the three proposed new articles by the Parliament must bear some weight, especially since the judgement just three paragraphs later relies on the fact that ‘the Government has expressed the view that torture is wrong’ in parliamentary debates to prevent the logical consequence of its reasoning, discussed below, that laws permitting torture, as well as what is widely-recognised as inhuman treatment in this case, would be regarded as ‘law’ for the purposes of Article 9(1).³⁶ In this regard, the court clearly applies double standards as regards the weight which must be given to parliamentary debates.

29 Lai J did refer to the differing constitutional traditions and human rights obligations of Belize and the United States of America, respectfully, to distinguish the cases of *Reyes and Watson* [2005] 1 AC 472 from *Nguyen*. Arun K Thiruvengadam describes this position as ‘nitpicking’, which fails to address the substantive issues underlying those decisions (‘Comparative law and constitutional interpretation: Insights from Constitutional Theory’, in Li-ann Thio and Kevin YL Tan (eds.) *Evolution of a Revolution: Forty years of the Singapore Constitution*, Routledge, London, 2009, pp. 113–152 at p. 145.

30 Kevin YL Tan, ‘State and Institution Building through the Singapore Constitution, 1965-2005’ in Thio and Tan (n 29), p. 54.

31 Li-ann Thio, ‘The passage of a generation: Revisiting the report of the 1966 Constitutional Commission’ in Thio and Tan (n 29) pp. 8–9.

32 *ibid.*, p. 16.

33 Edmund William Barker, Minister for Law and National Development, *Singapore Parliamentary Debates, Official Report*, 21 December 1966, vol. 25, cols. 1052–1053.

34 Act 19 of 1969.

35 Judgment (n 1) para. 72.

36 *ibid.*, para. 75.

Furthermore, in the intervening forty years, the Wee Report's other two suggestions have been recognised as 'unenumerated rights' in the Singaporean constitution.³⁷ The first, the right to a judicial remedy, was read into the provisions of Article 93 of the constitution (on judicial power) by the High Court in *Colin Chan v. PP*,³⁸ while the Attorney-General was asked to provide a report to the Parliament in 2002 on whether there was a right to vote entrenched in the constitution. On this, he opined that 'the right to vote at parliamentary and presidential elections is implied within the structure of our Constitution.'³⁹ In the light of this evidence that there are unenumerated rights implicit in the Singaporean constitution, the court's position that the Wee Commission only suggested a provision against torture (and for that matter, the right to vote and to a judicial remedy) 'because Article 9(1) did not deal with the same subject matter...otherwise, [it] would have been redundant',⁴⁰ must be taken with a pinch of salt.

In an attempt to copper fasten its reasoning as to why the absence of a prohibition against torture in Singapore's constitution should render the numerous Privy Council decisions on the mandatory death penalty irrelevant, the Court of Appeal invokes a cultural relativist argument in paragraph 73 of its judgment.

In this connection, we wish to highlight Lord Bingham's observation in *Reyes* at [28]...that states are not bound to give effect in their Constitutions to norms and standards accepted elsewhere, perhaps in very different societies.

In making this argument, the Court of Appeal appeared to overlook a number of judgments passed in rather different societies – Malawi,⁴¹ Uganda⁴² and most recently Kenya⁴³ – which have accepted the reasoning of the Privy Council in this regard when interpreting their own domestic constitutions.

Moreover, in the case of *Mithu v. State of Punjab*,⁴⁴ the Indian Supreme Court was asked to rule on the constitutionality of Section 303 of the Indian Penal Code, which provided for the mandatory death sentence for persons serving a life sentence who committed murder while serving that sentence. Whether or not one considers India and Singapore to be 'very different societies', the fact remains that Articles 14 and 21 of the Indian constitution are

³⁷ On this point, see Li-ann Thio, 'Protecting Rights' in Thio and Tan (n 29), pp. 202–204.

³⁸ [1994] 3 SLR 662, p. 681

³⁹ Thio (n 37) citing 73 *Singapore Parliamentary Reports*, 16 May 2001, col. 1720, at 1726.

⁴⁰ Judgment (n 1) para. 72.

⁴¹ *Kajantayeni and Others v Attorney General*, Constitutional Case No. 12 of 2005 [2007] MWHC 1, 27 April 2007, pp. 6, 10.

⁴² *Attorney General v Susan Kigula & 417 Others*, Constitutional Appeal No. 3 OF 2006 [2009] UGSC 6, 21 January 2009.

⁴³ *Godfrey Ngotho Mutiso v Republic*, Criminal Appeal 17 of 2008 [2010] eKLR, 30 July 2010, para. 32.

⁴⁴ AIR 1983 SC473 [hereinafter, 'Mithu'].

almost identical to Articles 9 and 12 of the Singaporean model. Importantly, like Singapore, India's constitution contains no express prohibition on torture, inhuman or degrading treatment or punishment. The Indian Supreme Court struck down Section 303 as being 'arbitrary and oppressive', stating that 'it must go the way of all bad laws.'⁴⁵ The court stated that a 'provision of law which deprives the Court of its wise and beneficent discretion in a matter of life and death, without regard to the circumstance in which the offence was committed...cannot but be regarded as harsh, unjust and unfair.'⁴⁶

In *Nguyen, Liu J* differentiated *Mithu* on the basis that, apparently, it was clear in that case that there was no 'rational justification' for imposing sentence against those serving life sentences, as opposed to others convicted of murder, whereas it was not as apparent that there was no rational justification for the 15g differentia.⁴⁷ He did not elaborate on that point, nor on why the rational justification was more apparent in the case of trafficking of a specific amount of a controlled substance.⁴⁸

The Court of Appeal in *Yui Vui Kong* also rejected the precedent of *Mithu* but gave a more detailed reasoning for doing so. First, it opined, *Mithu* was decided on the grounds of the Indian constitution which uses the phrase 'according to procedure established by law'. The Indian Supreme Court stated that taking autonomy away from judges 'in a matter of life and death' was not fair, just or reasonable. Instead of the phrase 'according to procedure established by law', Article 9(1) uses the wording 'in accordance with the law'. Thus, the Court of Appeal argued, the Court need not concern itself with procedural safeguards, as the Indian courts must.⁴⁹ To draw a distinction between the phrases 'in accordance with the law' and 'according to procedure established by law' is nitpicking at best, and disingenuous at worst.

The Court further followed *Ong Ah Chuan* in holding that applying the *Mithu* test 'requires the Court to intrude into the legislative sphere of Parliament as well as engage in policy making'.⁵⁰ However, the court's reasoning here displays an excessive and unreasonable deference to the executive and legislative branches of government. Article 93 of Singapore's constitution grants judicial power onto the judiciary and confers on the judges the right of judicial review of any official power. The court's reasoning throughout, as exemplified in this rejection of the *Mithu* case, shows a worrying subservience to the legislative and executive branches.

⁴⁵ *ibid.*, para. 25.

⁴⁶ *ibid.*, para. 12.

⁴⁷ *Nguyen* (n 4) para. 74.

⁴⁸ *Thiruvengadam* (n 29) p. 146.

⁴⁹ *Judgment* (n 1) para. 80.

⁵⁰ *ibid.*

Further, the court took issue with what it saw as an almost renegade Indian Supreme Court which, since the ‘extreme position’ taken in *Mithu*, has ‘expanded the scope of Article 21 even further to include...the right to education, the right to health and medical care and the right to freedom from noise pollution.’⁵¹ Perhaps the court was concerned with the possibility that the elusive ‘floodgates’, often referred to in constitutional jurisprudence, would open, but each further case based on Article 21’s equivalent, Article 9, would have to be decided on its individual merits. Later, unrelated jurisprudence ought to have no bearing on the weight of a case with the same facts based on almost identical constitutional provisions.

By the same token, the fact that *Mithu* was based on denying the judiciary the power to decide an appropriate sentence would, according to the Singaporean court, have the effect of declaring *all* fixed sentences proscribed by the legislature unconstitutional.⁵² In fact, as in the U.S. case of *Woodson*,⁵³ the Indian court distinguished the finality and severity of the punishment concerned as necessitating a different, procedurally safer, position.

Thus, in comparison to its blanket rejection of Privy Council decisions post-*Ong Ah Chuan*, the Court of Appeal was forced to proffer some very specific and somewhat far-fetched reasons for rejecting the *Mithu* standard. In spite of their specific differences, there is an argument to be made that the sum of these constituent cases should add to a whole that casts doubt on the appropriateness of the mandatory death penalty as a sentence, in spite of the lack of an explicit prohibition on torture/inhuman or degrading treatment in the Singaporean constitution. This line of reasoning was put forward by the appellant in arguing that term ‘law’ must include customary international law, which prohibits inhuman punishment generally and proscribes the mandatory death penalty as a form of inhuman punishment specifically.

The customary international law prohibition of the mandatory death penalty

Counsel for *Yong Vui Kong* had proposed that the word ‘law’ in Article 9(1) be interpreted so as to include customary international law. As mentioned above, the term ‘law’ as defined by Article 2(1) of the constitution is to include ‘any custom or usage having the force of law in Singapore’. The Court of Appeal was not convinced that sufficient reason had been given by the appellant as to why customary international law should be considered to be part of ‘law’ for the purposes of Article 9(1). However, even the Attorney General had conceded that ‘law’

⁵¹ *ibid*, para. 83.

⁵² *ibid*, para. 81.

⁵³ *Woodson et al v. North California* (1976) 428 US 280.

should indeed include customary international law.⁵⁴ The court interpreted this concession to mean that the Attorney General did not intend to aver that any customary norm should become domestic law immediately, stating,

It seems clear enough to us that what the AG meant when he said that the expression ‘law’ should be interpreted to include CIL was that this expression would include a CIL rule which had already been recognised and applied by a domestic court as part of Singapore law.⁵⁵

In this sense, it was held that rules of customary international law cannot become part of domestic law ‘until and unless it has been applied as or definitively declared to be part of domestic law by a domestic court.’⁵⁶

This reasoning is rather flimsy as regards the customary international prohibition on torture, inhuman or degrading treatment or punishment for two reasons. First, the need for a declaration or application of the customary rule by a domestic court does not logically stand as a reason why *this* domestic court could not apply a customary rule. Second, following the court’s reasoning, it would mean that as long as there was no positive law or judicial pronouncement to the contrary, there could be no customary international law against torture, for example, applied in the domestic context. To counter this lacuna of logic, the court noted the fact that the Government has ‘expressed the view that torture is wrong’ in parliamentary debates.⁵⁷ This is a direct contradiction to its own reasoning on the need for a domestic *court* to apply a customary rule before it becomes part of domestic law and also the little weight given to parliamentary debates following the Wee Report, as mentioned above.

The court went on to deny that international legal norms or Singapore’s international legal obligations could be used to read provisions into the constitution that were not expressly provided for therein, stating instead that they had a duty to interpret international obligations consistently with domestic law only insofar as is possible.⁵⁸ This strictly textualist approach in interpreting the constitution is a far cry from the decision in *Ong Ah Chuan*, which made reference to the ‘fundamental rules of natural justice’ and recognised that if the constitution was not interpreted as protecting certain fundamental liberties, it ‘would be little better than a mockery’. It is also at odds with the court’s reasoning in *Nguyen*, which,

54 Judgment (n 1) para. 44.

55 *ibid.*, para. 44.

56 *ibid.*, para. 91.

57 *ibid.*, para. 75.

58 *ibid.*, para. 59.

despite holding that it had not been firmly established that death by hanging fell under the accepted customary international law prohibition against cruel and unusual punishment, appeared open to using international law in domestic courts, explicitly accepting that Article 5 of the Universal Declaration of Human Rights constituted customary international law.⁵⁹

The appellant, presumably expecting the Court of Appeal to show a similar openness to customary international law as it did in *Nguyen*, argued that the mandatory death penalty fell under this customary international law prohibition on torture, cruel, inhuman or degrading treatment or punishment. Justification for this position was given with reference to the numerous Privy Council decisions, as stated above, and other decisions like the case of *Woodson et al. v. North California*,⁶⁰ which ruled that the mandatory nature of the sentence was inhuman because it dehumanised individual offenders and treated them not as human beings but as a 'faceless, undifferentiated mass'.⁶¹

There is generally an overall trend outlawing the mandatory death sentence in the past twenty years, with the most recent Asian case being the Bangladeshi High Court's decision in *BLAST and another vs. Bangladesh and others* ['Shukur Ali' Case] of 2 March 2010,⁶² which held that Section 6(2) of the Nari-O-Shishu Nirjatan (Bidesh Bidhan) Act, 1995 was unconstitutional. The court said judges should be given the opportunity to examine the circumstantial conditions and credibility of evidences and witnesses when awarding punishment. Other notable developments include a decision of the Inter-American Court of Human Rights in 2009 denouncing the mandatory death penalty,⁶³ a Ugandan Supreme Court ruling outlawing the practice in January of that year⁶⁴ and a similar decision of the Kenyan Court of Appeal in Mombasa in July 2010.⁶⁵

The Attorney General of Singapore justified the continued use of the mandatory death sentence by pointing out that thirty-one states retain the mandatory death penalty for 'drug-related and other serious offences',⁶⁶ while counsel for the appellant argued that only fourteen countries apply the mandatory sentence for drug-related offences. The court followed the Attorney General's reasoning and held that there was insufficient *opinio juris* to justify a finding that a customary prohibition existed.⁶⁷ This was in spite of the fact that 93%

59 *Nguyen* (n 4) para 85.

60 *Woodson et al v. North California* (n 54).

61 *ibid*, pp. 303—305.

62 *BLAST and another v. Bangladesh and others* ['Shukur Ali' Case], Writ Petition No. 8283 of 2005, High Court Division of the Supreme Court of Bangladesh, 2 March 2010.

63 *DaCosta Cadogan v. Barbados*, Judgment of September 24 2009, Inter-American Court of Human Rights.

64 *Attorney General v. Susan Kigula and 417 Others*, No. 03 of 2006, Ugandan Supreme Court, 21 January 2009.

65 *Godfrey Ngotho Mutiso v. Republic* (n 43).

66 Judgment (n 1) para. 94.

67 *ibid*, para. 99.

of the states in the world do not have laws which impose the mandatory death penalty for drug offences.⁶⁸

In practice, however, only six of these states practice executions for drug offences to such a degree that they could be regarded as ‘highly committed’ to the practice: China, Iran, Saudi Arabia, Viet Nam, Singapore and Malaysia.⁶⁹ In fact, some of the states which retain the mandatory death penalty on their statute books are considered *de facto* abolitionist states. For example, Brunei-Darussalam, which adopted such legislation in 2001,⁷⁰ has not executed anyone since 1959, and India is thought to have never carried out an execution under its Narcotics and Psychotropic Substances Act, as amended in 1989.⁷¹

The mandatory death penalty as a breach of the equality provisions of Singapore’s constitution

The appellant’s final argument was that the differentia under which the mandatory death penalty was imposed was arbitrary, and thus incompatible with the equality provision in Article 12(1) of the Singaporean constitution. This argument (also raised in *Ong Ah Chuan*) centred on the proposition that the ‘15g differentia’ under the Misuse of Drugs Act was arbitrary insofar as it ruled that once an individual was found to be in possession of more than 15g of diamorphine, he or she was presumed to be trafficking in that substance, and no mitigating factors could be taken into account.⁷²

The 15g differentia as the benchmark for imposing the death penalty was introduced by the Misuse of Drugs (Amendment) Act, 1975. The then Minister for Home Affairs and Education, stating that the law was ‘not intended to sentence petty morphine and heroin peddlers to death’ declared that it was ‘necessary to specify the quantity by weight, exceeding which the death penalty will be imposed.’⁷³ No legal or scientific justification was put forward, aside from the relative leniency apparently shown by this approach in comparison to Iran, where trafficking in 10g or more attracts a sentence of death.⁷⁴ Since the passage of this Act, Brunei’s relevant legislation followed suit with the 15g differentia, while Bangladesh’s Narcotics Control Act 1990 makes it possible to sentence people to death if caught with more than 25g of heroin.⁷⁵

68 That is, UN member states, of which there are 192.

69 Gallahue and Lines (n 9).

70 Misuse of Drugs Act, 2001.

71 Gallahue and Lines (n 9) p. 41, citing US Department of State, 2009 International Narcotics Control Strategy Report, Volume I, 27 February 2009.

72 Judgment (n 1) paras. 101–104.

73 *Singapore Parliamentary Debates, Official Report* (20 November 1975) at col 1382.

74 *ibid.*

75 Gallahue and Lines (n 9) p. 36.

It is difficult to determine what makes trafficking in 15g of a controlled substance so much worse than 14.99g, yet *Ong Ah Chuan* held that the 15g differentia ‘bears a reasonable relation to the social object of the law’. As counsel for the appellant Yong Vui Kong pointed out, an offender can be caught multiple times with 14.99g but he who is caught once with 15 g or over will be sentenced to hanging.⁷⁶ By the same token, someone who traffics in 15g and someone who traffics in 1,500g would face the same sentence.⁷⁷ Moreover, the mandatory nature of the offence means that mitigating circumstances, such as whether there was a voluntary assumption of risk, information on the individual and their likelihood of reoffending cannot be taken into account.⁷⁸

As Amnesty International’s 2004 report points out, Clause 18 of the Misuse of Drugs Act states that if someone is caught with the keys to a vehicle or building found to contain drugs, there is a rebuttable presumption that he or she is personally in possession of that quantity of drug.⁷⁹ This means, potentially, that if a number of drug users are sharing accommodation, and one is caught with the key to the building in which they are staying which contains an accumulated amount of heroin exceeding 15g, he will be sentenced to the death penalty. This is perhaps an extreme example, but it shows the nonsensical cumulative effect of the mandatory fixed penalty based on the 15g differentia.

Ong Ah Chuan and *Nguyen* both rejected the arguments before them based on the principle of equality before the law, finding that if the dissimilarity applied bore a ‘reasonable relation’⁸⁰ to the object of the law, there could be no inconsistency with the constitution. *Nguyen* declared that a differentiating measure is valid if the classification is founded on an ‘intelligible’ criterion.

On this question, the Court of Appeal in *Yong Vui Kong* held, unsurprisingly given the amount of autonomy it allowed the legislature in earlier findings, that it was the legislature’s prerogative to determine where on the scale between large-scale traffickers and small-time users a given amount would fall. This decision to be based on the information at hand, and bearing in mind the desire to punish those whose position rests nearer to the apex of the distribution pyramid. While it can be argued whether quantity alone is an appropriate policy to differentiate between categories of persons found in possession of drugs, the court found it a ‘question of social policy’, and so long as it bears a rational relation to the social object, its hands are tied.⁸¹

76 Judgment (n 1) paras. 103–104.

77 *ibid.*, para. 108.

78 *ibid.*, paras. 105–108.

79 Amnesty International Report on Singapore (n 11) p. 13.

80 Or, as in the case of *Nguyen*, a ‘rational relation’.

81 Judgment (n 1) paras. 112–113.

It is deference to the legislature's apparent prerogative in deciding the appropriate threshold for imposing the penalty as a policy issue, the court appears to have neglected the fact that sentencing generally falls within the remit of professional judges. Indeed, under Article 93 of the Singaporean constitution, 'The judicial power of Singapore shall be vested in a Supreme Court and in such subordinate courts as may be provided by any written law for the time being in force'. This article clearly grants judicial power to judges. The Singaporean constitution has a traditional 'separation of powers' function, yet the last three decades has seen a marked increase in 'executive sentencing', whereby the judicial function of sentencing is diluted by a number of legislative acts containing mandatory sentences for given offences.⁸² This decision, showing an unquestioning approach towards legislative sentencing, paves a worrying path for the future of judicial independence in Singapore.

Deterrent Effect

Counsel for Yong Vui Kong raised a final argument in the form of an affidavit with testimony from Prof Jeremy Fagan on the minimal deterrent effect that the death penalty has on drug use and trafficking into Singapore.⁸³ In response, the Attorney General filed statistics from the UN Office on Drugs and Crime (UNODC) to show that Singapore has one of the lowest drug addiction rates internationally, which the court accepted.⁸⁴

The court's reliance on this UNODC report, insofar as it relates to Singapore, is disingenuous at best. The same report clearly warns that, 'Data from Singapore are registry data and thus not directly comparably with data from other countries'.⁸⁵ This 'registry data' comes from people who are in contact with the treatment system or the judicial system of the country, and UNODC itself notes that there is often 'considerable divergence' between it and survey data.⁸⁶

The same report provides statistical analysis of drug prices worldwide. The wholesale price of heroin in Singapore in 2006 was \$5,365/kg, significantly cheaper than in neighbouring Malaysia, where the price was reported at \$7,100/kg.⁸⁷ This undermines the claim of any deterrent effect of the mandatory death penalty. If less heroin had entered the country

82 *Inter alia*, the Immigration Act, Vandalism Act, Miscellaneous Offences (Public Order and Nuisance) Act, Undesirable Publications Act, Internal Security Act, the Banishment Act, the Maintenance of Religious Harmony Act, the Environmental Public Health Act, the Singapore Broadcasting Authority Act, and the Telecommunications Authority of Singapore Act, *per* Ross Worthington, 'Between Hermes and Themis: An Empirical Study of the Contemporary Judiciary in Singapore' *Journal of Law and Society* (2002), 28(4) 490–519, p. 510. Worthington also mentions some interesting statistics on judicial salaries, which are determined solely by the Minister for Finance and increased more than threefold between 1995 and 1998, p. 512.

83 Judgment (n 1) para. 116.

84 *ibid.*, para. 117.

85 UN Office on Drugs and Crime, *World Drug Report 2008*, p. 214.

86 *ibid.*, p. 295. For a further discussion of this critique, see Gallagher and Lines (n 9) pp. 26–27.

87 UN Office on Drugs and Crime (n 85) p. 257.

in 2006, it can be assumed that this would have had the effect of pushing up the cost per wholesale kilo. Yet according to the UNODC report relied upon by the court, this was not the case. In fact, in the East and South-East Asia region, the price per kilo was cheapest in Singapore, and most expensive in the Philippines, where the wholesale price is over \$100,000/kg. Interestingly, the Philippines ceased executing people for drug-related and other offences in 2001.⁸⁸ The court's reasoning on the purported 'deterrent effect' of the punishment is therefore highly suspect.

Conclusion

Against the backdrop of an international culture tending towards abolitionism, the decision of the Court of Appeals reflects the fact that Singapore remains a country clinging tightly to its 'right' to not only execute drug offenders, but to impose a mandatory death sentence on those found to be in possession of a given quantity of a drug, with no scope for considering mitigating factors in sentencing.

The UN Human Rights Committee has criticised those states which retain the death penalty for drug offences, noting such legislation as being contrary to the threshold laid down in Article 6(2) of the International Covenant on Civil and Political Rights, which states that the sentence of death can only be applied for 'most serious crimes',⁸⁹ that is intentional crimes with lethal or other extremely grave consequences. As wryly noted in a 2007 report on this issue, although drug use can sometimes have lethal consequences, it is difficult to argue that this outcome is the intention of drug traffickers, as killing one's own customers is generally not seen as a good business model.⁹⁰

Whilst government officials may credit a purported deterrent effect of the mandatory death penalty with saving thousands of lives,⁹¹ no concerted effort has been made to empirically substantiate this claim. Indeed, no compelling evidence has been found in such studies, conducted elsewhere, to support the deterrent effect of either the death penalty⁹² or mandatory sentencing generally.⁹³ In arguing against clemency, Law Minister Mr. K. Shanmugam asserted that,

88 David T. Johnson and Franklin E. Zimring, *The Next Frontier: National Development, Political Change and the Death Penalty in Asia*, Oxford University Press, Oxford, 2009, p. 104.

89 See for example, UN Human Rights Committee, *Concluding observations of the Human Rights Committee: Thailand* (8 July 8 2005) UN Doc No. CCPR/CO/84/THA, para. 14.; UN Human Rights Committee, *Concluding observations of the Human Rights Committee: The Sudan* (29 August 2007) UN Doc No. CCPR/C/SDN/CO/3, para. 19.

90 Rick Lines, *The Death Penalty for Drug Offences: A Violation of International Human Rights Law*, International Harm Reduction Association, London, 2007, p. 12.

91 Zakir Hussain, 'Tough stance on serious crimes saves lives: Minister', *The Straits Times*, 10 May 2010.

92 For example, Hugo Adam Bedau, 'Abolishing the Death Penalty even for the Worst Murderers' in *The Killing State: Capital Punishment in Law, Politics and Culture*, ed. A Sarat, Oxford University Press, Oxford, 1999, pp. 40–59.; Roger Hood, *The Death Penalty: A Worldwide Perspective 3rd edn.*, Oxford University Press, Oxford, 2003, pp. 208–232.

93 For example, David McDowall, Colin Loftin and Brian Wiersema, 'A Comparative Study of the Preventive Effects of Mandatory Sentencing Laws for Gun Crimes', *The Journal of Criminal Law and Criminology* (1992), vol. 83(2), pp. 378–394.

Yong Vui Kong is young, but if we say, ‘We let you go’, what is the signal we are sending? We are sending a signal to all the drug barons out there: just make sure you choose a victim who is young, or a mother of a young child, and use them as the people to carry the drugs into Singapore.⁹⁴

This line of reasoning proceeds from the rather dubious assumption that drug barons are more concerned for the wellbeing of their couriers than they are the integrity of their supply lines. Furthermore, its presumption that the imposition of a lengthy term of imprisonment in lieu of hanging would patently be less potent in its deterrent and incapacitatory effects must be treated with due circumspection.

For those whose primary concern is the economic development of Singapore, the most serious consequence of drug crime is really its potential economic fallout. Oehlers and Tarulevicz note that, ‘What is usually identified as gravest...is the escapism that is associated with drug consumption, which if left unchecked, could potentially undermine the strength of human resources in the country, compromising the pursuit of economic development.’⁹⁵

In Singapore, still in a state of nation-building after centuries of subjugation to foreign empire followed by a period of internal tensions, sociologists have opined that the strict criminal law acts as a tool of social control.⁹⁶ It is useful to paint Singapore and its citizens as a law-abiding and controlled. To this end, comments such as those of the then Minister for Home Affairs, speaking on the sentencing of US teenager Michael Fay to the punishment of caning for vandalism, are typical of the government’s mindset.

Unlike some other societies which may tolerate acts of vandalism, Singapore has its own standards of social order as reflected in our laws...It is because of our tough laws against anti-social crimes that we are able to keep Singapore orderly and relatively crime free. We do not have a situation where acts of vandalism are commonplace as in cities like New York, where even police cars are not spared the acts of vandals.⁹⁷

As in the case of Yong Vui Kong, who is Malaysian, a very significant proportion of those executed for trafficking offences are nationals of other countries.⁹⁸ In this sense, harsh

94 Hussain (n 91).

95 Alfred Oehlers and Nicole Tarulevicz, ‘Capital Punishment and the Culture of Developmentalism in Singapore’, in Sarat (n 92) pp. 298–299.

96 Christopher Tremewon, *The Political Economy of Social Control in Singapore 2nd edn.*, Macmillan, London, 1996.

97 Philip Shenon, ‘Singapore, the Tiger Whose Teeth are not Universally Scorned’, *New York Times*, 10 April 1994.

98 Oehlers and Tarulevicz (n 95) p. 303, citing Amnesty International, *Amnesty International Report 2003- Singapore* which indicates that out of 174 executions recorded by Amnesty International from press reports between 1993 and 2003, the number of foreign nationals totals 93, which is more than half.

drug penalties may be seen as necessary to protect the state from ‘the dark forces waiting just outside the charmed circle of Singapore’s boundaries’.⁹⁹ For example, in 2007, Nigerian Iwuchukwu Amara Tochi and stateless African Nelson Malachy were hanged for drug trafficking offences.¹⁰⁰

In the cultural politics of the ‘war on drugs’, traffickers are assigned the role of ‘folk devils’.¹⁰¹ They are framed by the primary definers¹⁰² within Singaporean society, and by the mass media, as entirely ‘other’ and malevolent, threatening to undermine the hard-won economic vibrancy of the state. In *Yong Vui Kong*, the court implicitly suggested that drug offences were of a more serious nature than murder, referring to the Privy Council decisions on the mandatory death penalty, all of which focussed on the sentence for murder.¹⁰³ Relying on Lord Diplock’s *dicta* in *Ong Ah Chuan*, the Court of Appeal distinguished between murderers and drug traffickers insofar as the latter are motivated by ‘cold calculated greed’, while murder can be committed in the heat of the moment.¹⁰⁴

However, the realities of individuals such as Yong Vui Kong and Nguyen crucially undermine this narrative by exposing the brutal reality of the mandatory death penalty and muddying the crisp demarcation between a pure, virtuous society and the monstrous trafficker that is a *sine qua non* to the ascendancy of a harsh, punitive ‘criminology of the other’.¹⁰⁵

Their stories are heavy with pathos: Both came from poor backgrounds, struggled with family problems and received the death sentence while still painfully young. It could be said they were small fry, mere mules acting under the direction of shadier, more powerful drug lords who hovered out of reach of the law.¹⁰⁶

In this context, it is difficult to avoid the conclusion that the significance of the mandatory death penalty resides not so much in its efficacy as a practical tool in the suppression of drug trafficking, as in its cultural and symbolic resonance. A harsh policy on drug trafficking may warrant a particular place in Singapore’s developmentalist schema. However, just as the

99 Clammer (n 16) p. 143.

100 *Iwuchukwu Amara Tochi and Another v Public Prosecutor* [2006] 2 SLR 503.

101 Stanley Cohen, *Folk Devils and Moral Panics 3rd edn.*, Routledge, London, 2002.

102 Defined by Hall et. al. as ‘accredited’ sources, generally possessed of a representative status, such as politicians or organised interest groups, or particular expertise, on whose “objective and “authoritative” statements news organisations are dependent. Stuart Hall et. al., *Policing the Crisis*, MacMillan, London, 1978, p. 57.

103 Judgment (n 1) para. 48.

104 *Ong Ah Chuan* (n 3) p. 674.

105 ‘[the] criminology of the other, of the threatening outcast, the fearsome stranger, the excluded and the embittered ... functions to demonize the criminal, to act out popular fears and resentments, and to promote support for state punishment’. David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society*, Oxford University Press, Oxford, 2001, p. 131 et seq.

106 Rachel Lin, ‘Why so little data on hanging?’, *The Straits Times*, 18 September 2010.

imposition of exemplary punishment bears ‘surplus meanings’¹⁰⁷ beyond the expediencies of the particular case, so these meanings are ‘always contingent, never certain’ and may serve to undermine the intended purpose.¹⁰⁸ The problematisation of the “evil criminal” status, in particular, ‘exert[s] the most leverage against...structures of legitimacy and feeling.’¹⁰⁹

It is noteworthy that despite the low level of press freedom in Singapore,¹¹⁰ an island where newspapers have been described as ‘essentially organs of the state...instruments of only the most desirable propagation’,¹¹¹ the *Yong Vui Kong* case has prompted calls for the re-introduction of judicial discretion in the imposition of the death penalty,¹¹² and greater transparency in its administration.¹¹³

Yong Vui Kong has been given leave to appeal a separate ruling from the High Court of Singapore concerning the dismissal of his appeal for judicial review of the authority to grant presidential clemency. This hearing will commence in early 2011.¹¹⁴ While this development may bring some flicker of optimism on an individual level, the fact remains that there are no further avenues for him to pursue on the mandatory death penalty issue following the Court of Appeal’s 14 May decision. The Court of Appeal’s judgment does not bode well for advocates of due process and judicial impartiality in Singapore. Its frankly dubious ruling on several accounts not only upholds the constitutionality of the mandatory death sentence, a penalty quashed by countless decisions worldwide, it also shows a worrying reverence to the executive branch of government. It demonstrates an unwillingness to engage with international law on a domestic level, and an “eyes shut” approach to the sheer futility of the harshest punishment in deterring potential drug traffickers. By continuing to target vulnerable young drug mules like Yong Vui Kong, the legislature in complicity with the judiciary sends a message to those in the highest positions of the Singaporean drug trade can rest assured that their position remains safe for some time to come.

107 David Garland, ‘Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America’, *Law & Society Review*, 2009, vol. 39 (4), pp. 793–833.

108 *ibid.*, p. 827

109 Philip Smith, *Punishment and Culture*, University of Chicago Press, Chicago, 2008, p. 55.

110 Singapore was ranked as 133rd in Reporters Without Borders’ Press Freedom Index for 2009.

111 William Gibson, ‘Disneyland with the Death Penalty’, *Wired*, September/October 1993.

112 KC Vijayan, ‘Keep death penalty but allow leeway’, *The Straits Times*, 11 October 2009.

113 Lin (n 106).

114 ‘Vui Kong’s appeal set for Jan 2011’, *The Online Citizen*, 31 August 2010, <http://theonlinecitizen.com/2010/08/breaking-news-vui-kongs-appeal-set-for-jan-2011> (accessed 1 October 2010).