The "Dead" Constitution: Crime and Punishment in Singapore

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In Yong Vui Kong v Public Prosecutor, the Singapore Court of Appeal recently reaffirmed the constitutionality of the mandatory death penalty for drug trafficking offences under the Misuse of Drugs Act. Specifically, the Singapore Court held that the judicial obligation to impose a capital sentence, once guilt for the drug offence was so established, was neither a violation of the accused's constitutional right against the deprivation of his life in accordance with law nor a denial of his right to equal protection under the law. In this article, the author argues that, whilst one may be sympathetic to their Lordships for reaching the result they did, in light of the political realities underpinning Singapore's constitutional arrangement, the legal arguments advanced by the Court of Appeal for their decision unfortunately do not withstand close scrutiny.

Introduction

Recently, in *Yong Vui Kong v Public Prosecutor*,[1] the Singapore Court of Appeal, the nation state's court of final resort, reaffirmed the constitutionality of the mandatory death penalty for drug-trafficking offences under the Misuse of Drugs Act. Specifically, the Singapore Court held that the judicial obligation to impose a capital sentence once guilt for the drug offence was so established was neither a violation of the accused's constitutional right against the deprivation of his life in accordance with law [Article 9(1)[2] of the Singapore Constitution] nor a denial of his right to equal protection under the law [Article 12(1)[3] of the Singapore Constitution]. In this article, the author argues that, whilst one may be sympathetic to their Lordships for reaching the result they did, in light of the political realities underpinning Singapore's constitutional arrangement, the legal arguments the Court of Appeal advanced for their decision unfortunately do not withstand close scrutiny.

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1 [2010] SGCA 20.

2 Art 9(1) of the Singapore Constitution reads: No person shall be deprived of his life or personal liberty save in accordance with law.

3 Art 12(1) of the Singapore Constitution reads: All persons are equal before the law and entitled to equal protection of the law.

The appellant, Yong Vui Kong, was convicted of trafficking 47.27g of diamorphine, a controlled drug, by the High Court of Singapore and was accordingly sentenced to death under the Misuse of Drugs Act. On appeal, the appellant argued against only his sentence, ie the mandatory nature of the death penalty (hereinafter MDP) as prescribed by the impugned statute infringed upon Article 9(1) and Article 12(1) of the Singapore Constitution.

The appellant's constitutional challenges rested on three main grounds: 1) the MDP legislation was not "law" for the purposes of Article 9(1), as the expression "law" excluded inhuman forms of punishment and, accordingly, the appellant could not be deprived of his life in this manner; 2) customary international law precluded the imposition of the MDP and since customary international law was part of the laws of Singapore, this practice was prohibited by Article 9(1); and 3) the imposition of the MDP on offenders who trafficked more than 15g of diamorphine caused arbitral distinctions to be drawn between offenders who trafficked in different amounts of controlled drugs and thus violated the constitutional right to equal protection under Article 12(1).

Article 9(1) and Inhuman Punishment

Responding first to what the court termed the "inhuman punishment" limb of the Article 9(1) challenge, the Chief Justice, on behalf of the Court, reaffirmed the correctness of past Singapore precedents that had upheld the constitutionality of the MDP for drug offences. In particular, back in 1981, whilst the Privy Council of Singapore in *Ong Ah Chuan v Public Prosecutor* had acknowledged that "law" for the purposes of Article 9(1) also referred to "a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution",[4] the Board nonetheless held that the MDP legislation did not breach any fundamental rules of natural justice. More recently, the Singapore Court of Appeal in *Nguyen Tuong Van v Public Prosecutor*[5] took the view that "the mandatory death sentence prescribed under the MDA is sufficiently discriminating to obviate any inhumanity in its operation"[6] and was therefore constitutional.

[4] *Ong Ah Chuan v Public Prosecutor* [1981] AC 648 at 670–671.
[5] [2005] 1 SLR 103.
[6] *Ibid*. at para 87.

Instead of merely reiterating the views advanced in the prior case law, this new panel of Court of Appeal judges also harnessed new arguments previously unexamined by its predecessors in support of its conclusion that Article 9(1) did not prohibit the state imposition of inhuman punishment. Confronted with a litany of Privy Council cases from the Caribbean States[7] where the Law Lords in the United Kingdom, post-*Ong Ah Chuan*, had overturned the MDP imposed by the respective state legislations, the Court of Appeal flatly rejected their applicability on the basis that these overseas decisions involved constitutions which expressly prohibited inhuman punishments, whilst "the Singapore Constitution does not contain any express prohibition against inhuman punishment"[8] and "it would not be appropriate for (judges) to legislate new rights into the Singapore Constitution under the guise of interpreting existing constitutional provisions"[9] when such an exercise would be against the original intent of the constitutional framers. According to the Chief Justice, Singapore's Fundamental Liberties Clauses as enshrined in Part IV of Singapore Constitution was based on its equivalent in the 1963 Malaysian Federal Constitution,[10] which was likewise based on the 1957 Malayan Constitution drafted pursuant to the advice of the Federation of Malayan Constitutional Commission chaired by Lord Reid (Reid Commission). In the Chief Justice's opinion, the fact that the Reid Commission did not recommend in favour of an express prohibition against inhuman punishment, even though such a provision existed in the European Convention of Human Rights – an instrument that applied in all the British colonies (including Singapore and Malaysia) prior to independence, clearly illustrated that this omission was deliberate and not due to ignorance or oversight.[11] Herein, the Court of Appeal appeared to espouse an originalist understanding of the Singapore Constitution and would, in turn, only invalidate "legislation of so absurd or arbitrary a nature that it could not possibly have been contemplated by our (Singapore's) constitutional framers as being 'law' when they crafted the constitutional provisions protecting fundamental liberties."[12]

Specifically, originalist judges, such as Justice Antonin Scalia on the United States Supreme Court, have argued that, in interpreting the

[7] *See Reyes v The Queen* [2002] 2 AC 235, *Fox v Queen* [2002] 2 AC 284, *R v Hughes*, (2002) 1 AC 259.
[8] *See* n 1 above at para 60.
[9] *See* n 1 above at para 59.
[10] Singapore became a constituent state of Malaysia in 1963 and gained full independence as a sovereign republic in 1965.
[11] *See* n 1 above at para 62.
[12] *See* n 1 above at para 16.

Constitution, judges should "look for a sort of objectified intent – the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*."[13] In deriving this objective intent, Scalia would look to historical understandings and practices that were accepted at the time the constitutional provisions were adopted. Thus, contemporary practices, especially foreign ones, would be irrelevant during constitutional adjudication. Originalists often caution that, if judges are allowed to stray from the original understanding of the Constitution, they will be given free rein to amend the Constitution and, in the process, judges, who are non-elected officials, would be imposing norms that the people have not accepted through their democratically-elected representatives.[14]

This judicial appeal to originalism as a theory of constitutional adjudication in Singapore nevertheless is not unproblematic. First, unlike the United States Constitution or many national Constitutions, the constitutional texts of Singapore's Fundamental Liberties Clauses were not deliberated upon by the Constituent Assembly of the independent state in question. In fact, no constituent assembly was in fact convened when Singapore gained independence in 1965 from Malaysia. Instead, secession from Malaysia was so sudden that, as a matter of expedience, Singapore simply made several Fundamental Liberties provisions found in the Malaysia Federal Constitution applicable in Singapore via the Republic of Singapore Independence Act.[15] Certainly, the fact that the legislature of a newly-sovereign republic consciously adopted those provisions conferred upon these Singaporean liberties a legal life of their own. But the mere enactment of the law alone does not provide us with a clue as to the original meaning attached by the Framers to those provisions they adopted. Given the fact the Singapore did not deliberate upon the text and phraseology of its Fundamental Liberties Clauses, but merely imported them as a matter of expedience from Malaysia, one does wonder whether it is even possible to discern the original meaning the Singapore Framers attached to those provisions adopted from Malaysia. At best, one can try to discern the original intent of the Framers when Malaysia's Constitution was adopted, but it would be very odd for judges in today's Singapore to give effect to and be fettered by the original intent of another nation

[13] Antonin Scalia, "Common Law Courts in a Civil Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws", in *A Matter of Interpretation* at 17 (Amy Gutmann (ed), 1998).

[14] Antonin Scalia, Commentary, (1996) 40 St Louis ULJ 1119.

[15] *See* Kevin Y.L. Tan, "State and institution Building through the Singapore Constitution 1965–2005" 49 at 54 in Thio and Tan, *Evolution of a Revolution: Forty Years of the Singapore Constitution* (Routledge, 2010).

state's constitutional framers. The Chief Justice, possibly aware of the weakness in this line of reasoning, went on to shore up his argument by referencing the work of the Singapore Constitutional Commission tasked in 1966 to recommend specific constitutional amendments for the Government's consideration post-independence. In particular, the learned Chief Justice highlighted the fact that, notwithstanding the Constitutional Commission's recommendation for the inclusion of a proposed Article 13(1) that would have expressly prohibited torture and inhuman punishment, the Singapore Government unambiguously rejected this proposal in 1969. Therefore, according to the Court of Appeal, it was "not legitimate for this court to read into Art 9(1) a constitutional right which was decisively rejected by the Government in 1969, especially given the historical context in which that right was rejected."[16] Yet, one must remember that the Fundamental Liberties Clauses of the Singapore Constitution came into effect in 1965, soon after Singapore's independence. Hence, it is debatable, even on an originalist understanding of the Singapore Constitution, whether it was legitimate for the Court to discern the original intent of the constitutional framers in 1965, when they imported the applicable Fundamental Liberties Clauses from Malaysia, from a Parliamentary decision taken four years later.

Even if we assume that the intent of the constitutional framers in 1969 to reject a constitutional prohibition against torture and inhuman punishment did mirror a similar intent amongst the framers in 1965, to be consistent, this would mean that whatever recommendations the Constitutional Commission made in 1966, but were not taken up subsequently by the Government in 1969, should also not be judicially deemed a constitutional right. Taking this argument to its logical conclusion, the right to vote will also not be a constitutionally-protected fundamental liberty, as it is not expressly enshrined in the Singapore Constitution and the Constitutional Commission in the 1960s had equally failed to convince the Government to entrench this right in the same manner as other enshrined rights.[17] After all, if one takes the view that there can be no implied right against inhuman punishment under

[16] *See* n 1 above at para 72.

[17] Interestingly, the Chief Justice, when he was Attorney General, opined in an advice to the Government that the right to vote is "implied within the structure of our (Singapore's) Constitution" since Art 39 requires Parliament to be composed of elected Members of Parliament to be returned at a general election. *See* Singapore Parliamentary Reports, 16 May 2001, col 1726. Yet, one must note that on a literal (and lethal) reading of the Singapore Constitution, Parliament can still pass laws restricting the right of suffrage in general elections to only a selected segment of society and still be in technical compliance with the constitutional requirements of Art 39. One must also note that although Art 65 of the Singapore Constitution states that the lifespan of the Singapore Parliament is five years, it does not in any way guarantee who may vote in such elections.

Article 9(1) because the Singapore Government refused to entrench this right expressly in 1969, surely, to be consistent, the Courts cannot also read in any implied right to vote because the Singapore Government equally refused to entrench an express right to vote then. If so, Parliament may now pass legislation in Singapore to allow only elite segments of society to vote in general elections or abolish confidential voting at general elections. It is thus evidently clear that the consequences of this line of reasoning, if observed by future Singapore Courts, would be very grave.

However, fortunately for Singapore, the Court of Appeal soon proved unwilling to take its own argument to its logical conclusion. As observed by the Chief Justice, "This conclusion does not mean that, because the proposed Art 13 included a prohibition against torture, an Act of Parliament that permits torture can form part of 'law' for the purposes of Art 9(1)."[18] It appears herein that the Chief Justice was suggesting that there existed an implied prohibition against torture under Article 9(1). Whilst one should certainly applaud this judicial concession, this pronouncement is very puzzling. As a matter of logic, if the Chief Justice were reluctant to expand, via an interpretive exercise, the scope of Article 9(1) so as to include a constitutional prohibition against inhuman punishment because Parliament had deliberately refused to enact such a provision, surely this reasoning must also bar any elevation of a prohibition against torture to a constitutional right since this proposal, too, was deliberately rejected by the Government in 1969. The Court of Appeal interestingly justified this distinction on the basis that the Singapore Minister of Home Affairs in 1987 had explicitly recognised that torture was wrong[19] and that torture, in so far as it caused harm to another's body with criminal intent, was already criminalised under the Singapore Penal Code.[20] With respect, the logic of this argument eludes this author. One does wonder how a mere statement from the Home Minister during Parliamentary Debates in 1987 would license the Court, on an originalist understanding of the Singapore Constitution, to elevate a prohibition against torture into a constitutional right and the fact that bodily assault is a crime in Singapore would surely not have any bearing on this matter. Perhaps, the Chief Justice, like Justice Scalia, is a "faint-hearted originalist"[21] and Singapore's constitutional jurisprudence will

[18] *See* n 1 above at para 75.
[19] Singapore Parliamentary Debates, Official Report (29 July 1987) Vol 49 at cols 1491–1492.
[20] *See* n 1 above at para 75.
[21] Scalia, "Originalism: The Lesser Evil", 57 *UCinLRev* 849 at 864.

be better for it. Unfortunately, the Court of Appeal, whilst recognising that Article 9(1) prohibited torture, went on to state unequivocally that "currently, no domestic legislation permits torture", thereby insulating all current official state practices from a challenge on this ground, and in particular judicial caning, a common-place punishment for vandalism and rape in Singapore.

Interestingly, in addition to recognising an implicit constitutional right against torture, the Court of Appeal also opined that Article 9(1) would equally invalidate:

> "colourable legislation which purported to enact a 'law' as generally understood (i.e., a legislative rule of general application), but which in effect was a legislative judgment, that is to say, legislation directed at securing the conviction of particular known individuals (see Don John Francis Douglas Liyanage and others v The Queen [1967] 1 AC 259 at 291."

This is a laudable but very curious pronouncement, especially since the Chief Justice held that this would perhaps be what "the Privy Council (in *Ong Ah Chuan*) had in mind *vis-à-vis* the kind of legislation that would not qualify as 'law' for the purposes of Art 9(1)."[22] But one does wonder on what evidence the Chief Justice based this inference, for his Lordship did not provide any. After all, *Liyanage* was not discussed by the Privy Council in *Ong Ah Chuan* and it was decided about 15 years before *Ong Ah Chuan* by the Privy Council of Ceylon, not Singapore. *Liyanage* was probably not even brought to the attention of the Privy Council in *Ong Ah Chuan*, as the former did not concern the adjudication of a constitutional clause in *pari materia* with Singapore's Article 9(1); on the facts, the Privy Council in *Liyanage* held that the colourable legislation passed to secure the convictions of specific individuals was inconsistent with an implied "separation of powers" principle enshrined within the Constitution of Ceylon.[23] In the absence of further elaboration, one is left guessing as to the motivations behind this judicial sleight of hand, but it is certainly an unusual move from a Court that has been very wary about adopting overseas norms when the constitutional provisions under consideration are not the same.

[22] *See* n 1 above at para 16.

[23] [1967] 1 AC 259 at 291. It is also noteworthy that the Privy Council in *Liyanage* rejected the argument that the Ceylon Parliament was limited by an inability to pass legislation that was contrary to fundamental principles of justice as natural justice was too vague and unspecified a term. (at 284–285).

Customary International Law and MDP

The Court of Appeal next had to confront the alternate Article 9(1) argument that Customary International (hereinafter CIL) prohibited the imposition of the MDP and since CIL formed part of the laws of Singapore under Article 9(1), the MDP was thus unconstitutional. This argument too was rejected by the Court of Appeal on two grounds.

First, the Court of Appeal, following the doctrine of incorporation operative in British courts, held that "CIL is incorporated into domestic law by the courts as part of the common law in so far as it is not inconsistent with domestic rules which have been enacted by statutes or finally declared by the courts."[24] Hence, even if such a CIL rule against the MDP existed, the CIL formed part of Singapore's common law and was subordinate to any domestic statute in the event of a conflict. In other words, the Court of Appeal conferred an imported CIL norm with the same status as a common law norm, which could be trumped by statute. But this was not the only legal option open to the Court. It could, as raised by counsel for appellant, state that the expression "law" in Article 9(1) included CIL, and where international law is used to interpret a constitutional standard, "it is part of the apex law … and (is) superior in status to a statutory rule."[25] After all, the expression "law" under Article 9(1) is broadly defined in Article 2(1) to include "any custom or usage having the force of law in Singapore" and surely that can be interpreted to include CIL. Nonetheless, the Court of Appeal demurred, arguing that in such an event:

> "the hierarchy of legal rules would be reversed: any rule of CIL that is received via the common law would be cloaked with constitutional status and would nullify any statute or any binding judicial precedent which is inconsistent with it."

The phrase "custom or usage" in Article 2(1) was thus read narrowly to include only *local* customs and usages that already formed part of Singapore's domestic law.[26] Whilst this is a tenable argument, it is one that does not give a generous interpretation to the Fundamental Liberties Clauses of the Singapore Constitution, a constitutional interpretive principle exhorted no other than by the Privy Council in *Ong Ah*

[24] *See* n 1 above at para 89.
[25] *See* Thio Li Ann, "Reading Rights Rightly: The UDHR and its Creeping Influence on the Development of Singapore Public Law", (2008) *Singapore Journal of Legal Studies* 264 at 289.
[26] *See* n 1 above at para 12.

Chuan,[27] a cherished precedent that the Court of Appeal had been so adamant about observing.

The second reason the Court of Appeal gave, for rejecting the argument that CIL prohibited the imposition of the MDP, was even more unfortunate. According to the Chief Justice,

> "Given that the Government (in 1969) deliberated on but consciously rejected (the) suggestion of incorporating into the Singapore Constitution an express prohibition against inhuman punishment generally, a CIL rule prohibiting such punishment – let alone a CIL rule prohibiting the MDP specifically as an inhuman punishment – cannot now be treated as 'law' for the purposes of Art 9(1). In other words, given the historical development of the Singapore Constitution, it is not possible for us to accept (counsel for the appellant's) submission on the the expression 'law' in Art 9(1) without acting as legislators in the guise of interpreters of the Singapore Constitution."

It is unclear whether the Court of Appeal was aware of the significance of the above pronouncement. What the Court of Appeal was, in effect, stating was that, since the Government in 1969 had rejected an express prohibition against inhuman punishment *in general*, any CIL norm that evolved after 1969 which might prohibit inhuman punishment *in general* or any CIL norm prohibiting a specific form of inhuman punishment would never be judicially treated as part of Singapore law for the purposes of Article 9(1). This novel stance is certainly contrary to the approach taken by the Singapore Court of Appeal in the earlier decision in *Ngyen Tuong Van*. In that decision, the Court of Appeal, *inter alia*, had to decide whether the accused's specific mode of execution, ie judicial hanging, was contrary to the prohibition under CIL against inhuman punishment and was, thus, unconstitutional as CIL norms were implicitly recognised as part of Singapore law under Article 9(1). In response, the Singapore Court of Appeal stated that, "It is quite widely accepted that the prohibition against cruel and inhuman treatment or punishment does amount to a rule in customary international law" but, on the facts, concluded that there was insufficient State practice to show that a specific CIL norm existed prohibiting hanging as a mode of execution and, in any event, such a CIL norm could be overridden in Singapore by domestic statute. Hence, whilst the Court of Appeal in *Nguyen Tuong Van*, with regard to

[27] *See* n 4 above at 670. The Privy Council held that "their Lordships would give to Part IV of the Constitution of the Republic of Singapore 'a generous interpretation' avoiding what had been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the [fundamental liberties 'referred to']".

Article 9(1), would be amenable to incorporating any specific CIL norm against inhuman punishment when there is no domestic statute in conflict with it, the Court of Appeal after *Yong* would now reject the applicability of all such CIL norms as the Constitutional Framers (arguably) had deliberately rejected the inclusion of a constitutional clause prohibiting inhuman punishment in general. Whilst the Court of Appeal in *Yong* was probably right on the facts to conclude that a CIL norm had yet to develop against the use of the MDP for drug trafficking offences,[28] it is another thing altogether to reject outright the notion that a general CIL norm prohibiting inhuman punishments forms part of the law of Singapore under Article 9(1). After *Yong*, it also remains an open question in Singapore how the Court of Appeal would view a *jus cogens* norm if that conflicts with any pre-existing domestic statute. Certainly, any judicial deference to domestic legislation in this regard would be highly inappropriate as *jus cogens* norms embody peremptory fundamental international values from which no state derogation is allowed.[29]

Equal Protection and the MDP

Turning finally to the appellant's Article 12(1) challenge, his counsel in essence argued that the imposition of the death penalty on offenders who trafficked more than 15g of diamorphine was arbitrary and violated the appellant's right to equal protection under the law. In response, the Court of Appeal applied the "rational relation" test to decide whether this legislative differentiation, between offenders who trafficked more than 15g of diamorphine and those who trafficked below that amount, passed constitutional muster under the equal protection clause:

> "A differentiating measure ... is valid if (a) the classification is founded on an intelligible differentia; and (b) the differentia bears a rational relation to the object sought to be achieved by the law in question."[30]

Therefore, according to the Court of Appeal, so long as the legislative classification had a rational connection with the legislative policy

[28] *See* n 1 above at para 95. 14 states retain the MDP for drug related offences and 31 states impose the MDP for drug related or serious offences like murder. Unfortunately, it would appear that there is a lack of "extensive and virtually uniform state practice" [*North Sea Continental Shelf Cases* (1969) ICJ 3 at para 74] to support the argument that CIL prohibits the MDP as an inhuman punishment. *See* also Roger Hood and Carolyn Holye, *The Death Penalty: A Worldwide Perspective*, (OUP: 2008) at 137–138.

[29] *See* Art 53 of the Vienna Convention on the Law of Treaties, (1969). *See* also Thio, *see* n 25 above at 289–290.

[30] *See* n 1 above at para 109.

in question and the legislative classes furthered the social object of the law, the legislative provision in question would be constitutionally valid. This touchstone test had its origins in American constitutional jurisprudence, but was adopted into Singapore law by the Privy Council in *Ong Ah Chuan*. On the facts, the Court of Appeal in *Yong* held that that a rational nexus was established since there was a reasonable relationship between the 15g differentia at issue and the legislature's desire to impose stricter punishment on illicit dealers who traffic in larger quantities of addictive drugs. More significantly, the Court of Appeal, echoing *Ong Ah Chuan*, pronounced that the courts should not question the reasonableness of the legislative policy of choosing 15g as the differentia as this "lies within the province of the Legislature, not the Judiciary."[31]

This "rational connection" test is unfortunately not unproblematic. First, it can be subjected to legislative manipulation. By framing the purpose of the law narrowly, the legislature would always be able to establish a logical nexus between the legislative class and the purpose. For instance, if the Singapore Parliament decides to pass a piece of legislation with the purpose of "exempting all Ministers' sons from military service", the legislative classifications (ie, ministers' sons and non-ministers' sons) would thus invariably bear a rational nexus to the object sought to be achieved. As S.M. Thio indicated, "[i]n this way, discriminatory provisions can be validly enacted so long as the purpose of the law is formulated in narrow terms."[32]

Secondly, "[i]t is always possible to define the legislative purpose of a statute in such a way that the statutory classification is rationally related to it" because "the reach of the purpose has been derived from the classifications themselves."[33] Seen in this light, the definition of the legislative purpose would be a tautology, because the classification would always coincide with the object of the law. In every case in which the courts have struck down a legislative provision for failing the rational nexus test, it would have been equally possible for the courts to define the purpose so that the court could have deemed the statute rational.[34] In other words, the courts can often either sustain or reject the rationality of the legislation by manipulating the level of abstraction of the legislative object. By way of illustration, one can examine the Singapore case of *Taw Cheng Kong*,[35] wherein the Singaporean accused argued that an extraterritorial penal sanction against corruption that applied only to Singapore citizens violated Article 12(1) of the Singapore Constitution. At trial, the High Court

[31] *See* n 1 above at para 113.
[32] S.M. Thio, "Equal Protection and Rational Classification", (1963) *Public Law* 412 at 428.
[33] Note, "Legislative Purpose, Rationality and Equal Protection", 82 *Yale LJ* 123 at 128 (1973).
[34] *Ibid.* at 132.
[35] *Taw Cheng Kong v Public Prosecutor* [1998] 1 SLR 943.

of Singapore held that the objective of the extraterritorial legislative provision in question was "to address acts of corruption taking place outside Singapore but affecting events within it".[36] The High Court's definition of the legislative objective thus allowed the judge to observe that the legislative provision caught a class of people not contemplated by the legislative objective (ie, Singaporean citizens who lived and worked abroad, and who committed corrupt acts abroad that had no impact on Singapore). Thus, the High Court concluded that citizenship was "not a useful criteria for determining guilt"[37] because the "strength of the nexus between the objective and the classification is not sufficiently strong to justify the derogation"[38] from the constitutional mandate of equality. On appeal, the Court of Appeal disagreed, holding that the intent of the Singapore Parliament was to increase the effectiveness of corruption prevention while observing international comity,[39] and thus a differentiation along the lines of citizenship was rationally connected to the furtherance of the legislative aim. Therefore, how a court defines or formulates the legislative purpose invariably allows it to decide the rationality of the statutory classifications.

Finally, by focusing only on the relationship between the purpose of the law and the legislative classification, this "rational connection" test fails to consider whether the purpose or policy is in itself legitimate and fair. For instance, assume that Parliament passes a statute that bars females from seeking public office. If the object of the law were framed as such, any gender classifications pursuant to this objective would still bear a rational nexus to the purpose at hand and would be sustained as constitutionally valid under this model of equality. For the equality jurisprudence in Singapore to truly flourish, the Singapore Courts must instead recognise that the general equal protection clause as enshrined in the Constitution imports a moral precept that limits the type of legislative classifications that may be legally made.[40] Pursuant to this "substantive equality" framework, the judiciary is tasked to determine which legislative classifications are relevant when the state seeks to differentiate between categories of persons and what differences amongst persons are to be normally ignored in the legislative allocation of benefits and burdens.[41] The "rational connection" test as

[36] *Ibid.* at 964.
[37] *Ibid.* at 967.
[38] *Ibid.*
[39] *Public Prosecutor v Taw Cheng Kong* (1998) 2 SLR 410 at 436.
[40] The Singapore Constitution only expressly prohibits any state "discrimination against citizens of Singapore on the ground only of religion, race, descent or place of birth." [Art 12(2) of the Singapore Constitution].
[41] *See* the Supreme Court of Canada's decisions in *Eldridge v British Columbia* [1997] 3 SCR 624 and *Vriend v Alberta* [1998] 1 SCR 493.

applicable in Singapore now is unfortunately not a tool for testing the constitutional validity of a statute, but merely a method for justifying its legality.

Conclusion

Notwithstanding the flawed arguments the Court of Appeal advanced in support of its decision to uphold the constitutionality of the MDP for drug trafficking in Singapore, one may however be sympathetic to the judges for reaching the result they did, in view of the political realities within Singapore's constitutional system.

After all, the incumbent government, the People's Action Party controls 82 out of 84 of the elected seats in Parliament and it can and will certainly reverse the Court's decision with a constitutional amendment if the Court of Appeal had invalidated the MDP legislation.[42] The Government had swiftly sought a constitutional amendment when the Court of Appeal had ruled against them in 1989, for the first and last time, on constitutional grounds. In that seminal decision of *Chng Suan Tze v Minister of Home Affairs*,[43] the Court of Appeal, after surveying a litany of Commonwealth precedents, quashed a preventive detention order issued under the Internal Security Act (ISA) against an alleged Marxist conspirator and concluded that the Ministerial discretion to detain personnel under the ISA would be subject to an "objective" test of review by the courts as constitutionally required under Articles 9 and 12 of the Singapore Constitution.[44] This decision proved to be sufficiently disquieting to the Executive and the Government quickly overturned this decision via a series of constitutional and statutory amendments within a month of the judgment, and henceforth restricted judicial review in ISA cases to only narrow procedural grounds.[45]

In light of the political realities in Singapore, where the ruling party jealously guards its prerogative to determine the constitutionality of the

[42] Under Art 5(2) of the Singapore Constitution, constitutional amendments to the Fundamental Liberties Clauses can be passed by a two-thirds majority of all the elected Members of Parliament.

[43] (1988) 1 MLJ 133.

[44] For a fuller discussion of this case, *see* Li-ann Thio, "Beyond the 'Four Walls' in an age of Transnational Judicial Conversations: Civil liberties, Rights Theories, and Constitutional Adjudication in Malaysia and Singapore" (2006) 19 *Columbia Journal of Asian Law* 429.

[45] Art 149 of the Singapore Constitution was amended and now provides that any law passed against subversion is valid notwithstanding that it is inconsistent with Art 9, 11, 12, 13 or 14 of the Constitution. Section 8B of the Internal Security Act, an ouster clause was added, and now provides that "there shall be no judicial review in any court of any act done or decision made by the President or the Minister under the provisions of this Act save in regard to any question relating to compliance with any procedural requirement of this Act governing such act or decision."

penal sanctions it imposes, any judicial attempt to invalidate such legislations would be a mere Pyrrhic victory for the courts, as this would only lead to a governmental reversal of the Court's decision. If the Court of Appeal had invalidated the MDP legislation, this perceived act of judicial immodesty would only trigger a constitutional amendment that would not only re-instate the MDP but also permanently oust future judicial review over its legality.

Certainly, whilst the Court of Appeal might have been prudent to avoid a turf war with the Executive which it could not win, the judiciary had unfortunately ceded more ground than it needed to. After all, the Court of Appeal could have accepted that Article 9(1) implicitly prohibited the imposition of inhuman punishments in general but decided that on the facts, the MDP was not one such practice. In the same vein, the judges could have recognised that CIL formed part of the laws of Singapore for the purposes of Article 9(1) but, on the facts, recognise that a CIL norm had yet to develop against the use of the MDP. Finally, with regard to the Article 12(1) challenge, the Court of Appeal should have jettisoned the highly flawed "rational connection" test in favour of a "substantive equality" framework adopted by the Canadian Courts that directly examined the propriety of the legislative basis for differentiating between categories of persons. Ergo, the Court of Appeal could on the facts have concluded that the 15g differentia did not violate the constitutional right to equality as the impugned legislative differentiation was not made on "the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity". [46]

Nevertheless, credit must be given to the Court of Appeal for making some efforts to distance itself from the rhetoric of the former Singapore Chief Justice, Yong Pung How, who had expressed his judicial unconcern with international law[47] and preference for interpreting the Singapore Constitution "within its four walls and not in the light of analogies drawn from other countries, such as Great Britain, the United States of America or Australia".[48] This new panel of Singapore Court of Appeal judges is certainly more sophisticated and nuanced in its engagement with foreign constitutional norms, but by upholding originalism as its preferred mode of constitutional interpretation, the learned judges had unfortunately

[46] *See Corbiere v Canada (Minister of Indian and Northern Affairs* [1999] 2 SCR 203, at para 13.
[47] Chief Justice Yong Pung How was so quoted by the local daily, *Straits Times* on 1 Oct 2003: I am not concerned with international law. I am a poor humble servant of the law in Singapore.
[48] *Colin Chan v Public Prosecutor* (1994) 3 SLR 662 at 681.

forgotten the central interpretive principle taught by the Privy Council in *Ong Ah Chuan*:

> "The way to interpret a constitution on the Westminster model is to treat it not as it were an Act of Parliament but 'as sui generis, calling for principles of interpretation of its own, suitable to its character … without necessary acceptance of all the presumptions that are relevant to legislation of private law.'"[49]

[49] *See* n 4 above at 669–670.