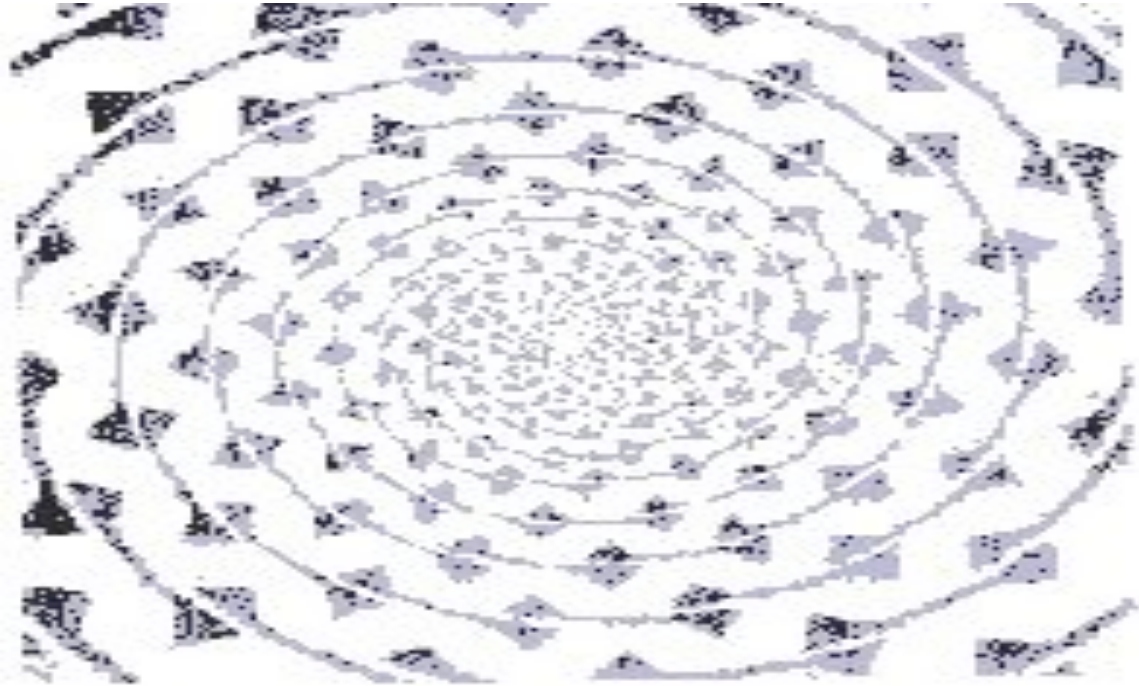


## Cellule de Recherche Interdisciplinaire en Droits de l'Homme



### **Insulating the Constitution: *Yong Vui Kong v Public Prosecutor* [2010] SGCA 20** *Aravind Ganesh*

**CRIDHO Working Paper 2010/01**



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INSULATING THE CONSTITUTION: *YONG VUI KONG V PUBLIC*  
*PROSECUTOR* [2010] SGCA 20

*Aravind Ganesh\**

*In May 2010, the Singapore Court of Appeal upheld the constitutionality of the mandatory death penalty in Yong Vui Kong v PP. This article does not deal with the propriety of mandatory death penalty laws, or of the death penalty broadly, but instead focuses on two novel pronouncements by the Court of Appeal. First, that customary international law not only has no legal validity in the domestic Singaporean legal sphere, but that it is also not to be treated as automatically incorporated into Singapore common law. Instead, a rule of customary international law can become part of Singapore law only if it has been “translated” by statute or judicial decision. Second, that the Singapore Constitution does not provide for a right against inhuman treatment or cruel punishment. The judgement thus effectively insulates the Singaporean legal sphere from developments occurring outside – by which is meant customary international law as well as Singapore’s colonial past.*

On the 14<sup>th</sup> of May 2010, Chan Sek Keong CJ., sitting with Andrew Phang and VK Rajah JJA., delivered the unanimous judgment of the Court of Appeal of Singapore in *Yong Vui Kong v PP*<sup>1</sup>. The defendant had been sentenced to death by hanging after being convicted of an offence contrary to the Misuse of Drugs Act<sup>2</sup> (MDA) by trafficking 47.27 grams of diamorphine into the country. Section 33, read in conjunction with Schedule 2 of the MDA, imposes the mandatory death sentence on persons convicted of trafficking more than 15 grams of diamorphine. The defendant appealed against his sentence on the grounds that the mandatory death penalty was an unconstitutional violation of the right to life and of the right to equal protection provided under Articles 9(1) and 12(1) respectively of the Constitution of the Republic of Singapore.

The constitutionality of the mandatory death penalty had been considered by the highest courts in Singapore on previous occasions; by the Privy Council in *Ong Ah Chuan*<sup>3</sup>, and after appeal to the Board was abolished<sup>4</sup>, by the Court of Appeal in *Nguyen*<sup>5</sup>. Despite the Court having heard *Nguyen* as recently as 2004, it gave leave to pursue the appeal on the grounds that the defendant had new arguments based on new materials to show that both *Ong Ah Chuan* and *Nguyen* were wrongly

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<sup>1</sup> [2010] SGCA 20 (SGCA).

<sup>2</sup> Cap. 185, 2005 Rev. Ed.

<sup>3</sup> [1981] AC 648 (PC).

<sup>4</sup> The Constitution of the Republic of Singapore (Amendment) Act 1994 (No. 5 of 1994) repealed Article 100 of the Constitution, which provided that the President could make arrangements with H.M. the Queen for reference to the Privy Council of appeals from the Supreme Court. The Judicial Committee Act 1966 (No. 37 of 1966, later Cap. 148, 1985 Rev. Ed.), which regulated the procedure for such appeals, was repealed by the Judicial Committee (Repeal) Act 1994 (No. 2 of 1994).

<sup>5</sup> *Nguyen Tuong Van v Public Prosecutor* [2005] 1 SLR(R) 103 (SGCA).

decided<sup>7</sup>. This note shall not discuss the Article 12(1) equal protection issue<sup>8</sup>, nor will it discuss whether or not the mandatory death penalty is actually cruel, or inhuman and degrading, or otherwise illegal. Instead, it will concentrate on two issues that seem less emotive at first glance: the reception of customary international law at the municipal level in Singapore, and the interpretation of the word “law” in Article 9(1), which provides that

“No person shall be deprived of his life or personal liberty save in accordance with law<sup>9</sup>.”

It had been submitted by the appellant, firstly, that the mandatory death penalty could not be considered a deprivation of life “in accordance with law” because it was contrary to customary international law, which is “law” for the purposes of Article 9 (1)<sup>10</sup>. Secondly, he argued that the mandatory death penalty was unconstitutional because the word “law” in Article 9(1) was incapable of being construed to include inhuman punishments such as the mandatory death penalty.<sup>11</sup>

### ON CUSTOMARY INTERNATIONAL LAW

The argument put forward by the appellant was of considerable subtlety. It essentially maintained that the word “law” in Article 9(1) included customary international law, such that norms of international law should be incorporated into the right to life, which could then invalidate acts of Parliament. The Court noted that appellant raised no authority for this proposition<sup>12</sup> which, in the Court's opinion, would have turned Singapore into a monist legal system where international legal norms could trump domestic statutes. In the subsequent paragraph given the heading “*The Prosecution's response*”, the Court related how the government, represented by Attorney General Walter Woon SC, after being pressed for a clear response, *agreed* with the appellant that the expression “law” should, in principle, be interpreted to include customary international law. In the same paragraph, the Court continued:

“We [*the Court*] do not think that the AG, by this reply, was conceding that the expression “law” has been defined to include CIL, with the consequence that, once it is shown there is a rule of CIL prohibiting the MDP [*the Court's shorthand for the mandatory death penalty*] as an inhuman punishment, that CIL rule automatically becomes part of “law” for the purposes of Art 9(1). Indeed, the constitutional definition of “law” in Art 2(1) is quite different... Besides, such a concession would be contrary to the decision in *Nguyen*, where the court held at [94], citing (*inter alia*) the Privy Council case of *Chung Chi Cheung v The King* [1939]

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<sup>7</sup> *Yong* (n 1) [5]. See *Yong Vui Kong v Public Prosecutor* [2009] SGCA 64; 2 SLR 192, 204 (SGCA). (Court of Appeal holding that it had jurisdiction to consider appeal on the merits). The appellant had previously withdrawn his appeal, thinking mistakenly that in order to appeal for any reason, he would have to perjure himself by denying having trafficked the diamorphine. The Court held that this fundamental mistake vitiated his withdrawal.

<sup>8</sup> *Yong* (n 1) [111]–[119].

<sup>9</sup> Article 2(1) defines the term “law” as: “includ(ing) written law and any legislation of the United Kingdom or other enactment or instrument whatsoever which is in operation in Singapore and the common law in so far as it is in operation in Singapore and any custom or usage having the force of law in Singapore...” The same article also defines the term “written law” as: “this Constitution and all Acts and Ordinances and subsidiary legislation for the time being in force in Singapore.”

<sup>10</sup> *Yong* (n 1) [33].

<sup>11</sup> *Yong* (n 1) [33].

<sup>12</sup> *Yong* (n 1) [43].

AC 160..., that, in the event of a conflict between a rule of CIL and a domestic statute, the latter would prevail. From his other submissions, 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.”<sup>13</sup>

The court repeated this reasoning almost in its entirety later in the section setting out its own determination on the issue<sup>14</sup>. It is understood that respondent’s initial submissions on the question were unclear<sup>15</sup>, but nevertheless, this judicial reinterpretation of counsel for the prosecution to have meant the opposite of what he actually argued, must strike one as peculiar.

*Reading Chung Chi Cheung:*

The Court eventually concluded that

“In our view, a rule of CIL is not self-executing in the sense that it cannot become part of domestic law until and unless it has been applied or definitively declared to be part of domestic law by a domestic court.”<sup>16</sup>

At first glance, the above dictum might strike one as being hopelessly circular, if it is read to mean: “A Singaporean court cannot apply a rule of customary international law unless and until a Singaporean court has applied that rule of customary international law.” This is not what the Court intends. Instead, on the best possible reading of the judgement, it is evident that the Court means something like this: even though rules of customary international law do not of their own accord constitute law in Singapore, they may have some effect on Singaporean law as background rules, principles, or sources of inspiration. The Court specifically (and predictably) acknowledges a judicial duty of interpretation in conformity to international law: “We agree that domestic law, *including the Singapore Constitution*, should, as far as possible, be interpreted consistently with Singapore’s international legal obligations.”<sup>17</sup> Such conform-interpretation does not endow the specific rule of customary international law with direct legal validity within the domestic legal sphere. For that to happen, an Act of Parliament must recognise it, or a court must “translate” it into the municipal legal order by declaring a new rule of common law. The Court then cites Lord Atkin’s opinion in the Privy Council case of *Chung Chi Cheung* as authority for its position, rather helpfully setting out the relevant sections in its own judgment<sup>18</sup>.

“... *so far, at any rate, as the Courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law.* There is no external power that imposes its rules upon our own code of substantive law or procedure. The Courts acknowledge the existence of a body of rules which nations accept amongst

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<sup>13</sup> *Yong* (n 1) [44].

<sup>14</sup> *Yong* (n 1) [87]–[99].

<sup>15</sup> *Yong* (n 1) [44].

<sup>16</sup> *Yong* (n 1) [91].

<sup>17</sup> *Yong* (n 1) [59].

<sup>18</sup> *Yong* (n 1) [89].

themselves.<sup>19</sup>

The above dicta would have disposed of the question, but of course, things are never quite so simple. Lord Atkin immediately goes on to say that:

On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, *they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.*<sup>20</sup> (my italics)

To be sure, the first passage asserts that customary international law is *not* law, which is the opposite of what the Attorney-General (speaking for himself) argued, but which is in line with the Court's own holding. However, the last excerpt appears to contain something more than a mere requirement of conform-interpretation, which, properly understood, is a method of textual interpretation where textual ambiguities are resolved in favour of certain background rules, principles, or executive political commitments. The best-known illustrations of this legal technique in action are to be found in the law of the European Union pertaining to the indirect effect of EU Directives. In general, EU Directives are a form of secondary legislation, which, if not translated into the legal orders of the Member States by appropriate implementing measures, lack proper direct effect<sup>21</sup>. Although the Member State is estopped from relying on its failure to implement the Directive, as against a person who has acted in reliance upon it<sup>22</sup>, an unimplemented Directive may not be relied as against another private individual<sup>23</sup>. To address this anomaly, the European Court of Justice (ECJ) developed the doctrine of indirect effect in *Von Colson*<sup>24</sup>, and in *Marleasing*, where it held that “in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive *in order to achieve the result* pursued by the latter...<sup>25</sup> Essentially, conform-interpretation is a purposive device for achieving certain desired ends, and it works by acting upon ambiguities in legal materials.

It may of course be interposed that conform-interpretation of public international law differs from the same when carried out under EU law, as the former

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<sup>19</sup> *Chung Chi Cheung v R* [1939] AC 160 at 167 – 168 (PC). The judgment also quotes *Collo Dealings Ltd v Inland Revenue Commissioners* [1962] AC 1; Ian Brownlie, *Principles of Public International Law* (2008) Oxford University Press, 7<sup>th</sup> Ed., 44; *Oppenheim's International Law, Volume 1: Peace*, Robert Jennings and Arthur Watts eds., (1992) Longman, 9<sup>th</sup> Ed., 56; and Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, (2007) Routledge, 7<sup>th</sup> Ed., 69.

<sup>20</sup> *Chung Chi Cheung* (n 18) at 168 (PC).

<sup>21</sup> Case 148/78, *Pubblico Ministero v Ratti* [1979] ECR 1629, [1980] 1 CMLR 96 (Court of Justice of the European Union) [18] – [24].

<sup>22</sup> *Ratti* (n 20) [24]. See also Case 152/84, *Marshall v Southampton Area Health Authority* [1986] ECR 723, [1986] 1 CMLR 688 (Court of Justice of the European Union). The applicability of the unimplemented Directive against public bodies has come to be known as “vertical” direct effect.

<sup>23</sup> *Duke v GEC Reliance* [1988] 2 WLR 359, [1988] 1 All ER 626. The facts of *Duke* were substantially similar to those in *Marshall*, except for the fact that whereas the employer in *Marshall* (n 21) had been a public employee, the employer in *Duke* had been a private corporation. The unimplemented Directive 76/207 on Equal Treatment of the Sexes was held to be applicable against the employer in the former, but not in the latter.

<sup>24</sup> Case 14/83, *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, [1986] 2 CMLR 430 (Court of Justice of the European Union). See [26] in particular.

<sup>25</sup> Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4135 (Court of Justice of the European Union) [8].

places greater emphasis upon the sovereignty of States than the latter. Accordingly, a judge interpreting domestic law in conformity with a rule of public international law will be more reticent than if he were interpreting to attain conformity with EU law, because of national sovereignty concerns. However, the difference is in degree rather than kind. Although there is a qualitative difference between rules of international law and those of supranational legal systems like the EU, the *process* of conform-interpretation is equally teleological in both instances. As such, there should be no qualitative difference between the ECJ's doctrine of indirect effect of Directives and the Singapore Court of Appeal's doctrine of conform-interpretation of domestic law with customary international law.

However, Lord Atkin appears to call for something quite different by the use of the word "incorporation". The rule in *Chung Chi Cheung* is not about ambiguities in texts, but about *gaps in law*; it requires not merely the resolution of ambiguities in favour of a rule of international law in an specific case, but positively "treats" that rule as part of English law, unless and until a domestic statute or judge-made rule "unincorporates" it by clearly providing otherwise. According to the rule in *Chung Chi Cheung*, a rule of international law does not need to latch onto any already existing domestic law rule for it to be "treated as incorporated". The rule in *Yong Vui Kong*, on the other hand, provides that a rule of customary international law is unincorporated into Singaporean law unless and until a statute or a judge clearly incorporates it. There is indeed a jarring dissonance between the first line of paragraph 89 of *Yong*, which reads: "Ordinarily, in common law jurisdictions, 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"<sup>26</sup>, and the very next paragraph, which reads "The rule enunciated in *Chung Chi Cheung* entails that, at common law, a CIL rule must first be accepted and adopted as part of our domestic law before it is valid in Singapore..."<sup>27</sup>

Clearly, the difficulty with the rule in *Chung Chi Cheung* is that it is incoherent. It begins, instructing that customary international law has no domestic legal validity, and ends with an admonition to treat it as legally valid anyway<sup>28</sup>. This is perhaps why it is capable of being pressed into service by both sides of the argument: Lord Bingham's speech in *R v Jones* cites *Chung Chi Cheung* as among other "old and high authority" for the *exact opposite* proposition that "(c)ustomary international law is (without the need for any domestic statute or judicial decision) part of the domestic law of England and Wales"<sup>29</sup>.

Certainly, a rule denying any effect of customary international law within the Singaporean municipal legal sphere would be perfectly plausible in the same way

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<sup>26</sup> *Yong* (n 1) [89].

<sup>27</sup> *Yong* (n 1) [90].

<sup>28</sup> The only way, to my mind, of making sense of this apparent contradiction, is to say that whereas customary rules of law are incorporated into the common law, such incorporation is carried out by domestic judges, and not by virtue of international law. Be that as it may, surely there must be rules regulating the situations where judges may incorporate customary international law, and by all appearances, *Chung Chi Cheung* says such incorporation is to be automatic, except where existing rules of statute and common law contradict.

<sup>29</sup> *R v Jones* [2006] UKHL 16, [2006] 2 WLR 772, [11] (HL). The other authorities cited for the proposition were *Triquet v Bath* (1764) 3 Burr 1478, 1481; *Blackstone's Commentaries*, Bk IV, Chap 5, p 67; *Duke of Brunswick v King of Hanover* (1844) 6 Beav 1, 51-52; *Emperor of Austria v Day* (1861) 2 Giff 628, 678; *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529, 554; and *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1989] Ch 72, 207.

the decision of the Federal Court of Australia in *Nulyarimma v Thompson*<sup>30</sup> is. A very plausible argument can be made that a dualist system of law must not give direct effect to any rule of international law, because all necessary democratic processes must take place before ordinary private relations can be controlled by a rule created by the executive arm with a view to regulate the relations between nations. Indeed, it can be argued that the English common law “treated as incorporated” customary international law only because it was safely presumed that in order for a body of State practice sufficiently “extensive and virtually uniform” to have come into being<sup>31</sup>, Britain, possessing an empire covering most of the globe, must have itself given rise to it or consented<sup>32</sup>. The Republic of Singapore on the other hand, covering an area of 625 square kilometres and fitting snugly inside the M25 ring road, cannot be so readily presumed to have done the same. Nevertheless, such a judicial development would not be uncontroversial. Singaporean constitutional scholars appear to have thought, until now at least, that while the “Singaporean Constitution contains no express provision regulating the reception of international law or establishing the hierarchical ordering of international and domestic law” the Singapore courts “generally (follow) UK practice on the domestic reception of international law.”<sup>33</sup> The House of Lords itself, in recent and empire-less times has held, in *Pinochet*<sup>34</sup> and *R v Jones*<sup>35</sup> respectively, that rules of customary international law could narrow the application of contrary legislation and common law, and that such rules formed part of the domestic *civil* law of England and Wales. As such, the first criticism of the Court’s holding on the reception of customary international law into the domestic legal order is that it is insufficiently defended.

Another criticism might be, that given Singapore’s reliance upon international commerce, such a judicial development might perhaps be imprudent, because of the practical need to adapt to emerging norms as quickly as possible; i.e.,

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<sup>30</sup> *Wadjularbinna Nulyarimma & Ors v Phillip Thompson; Buzzacott & Ors v Minister for the Environment* (1999) 96 FCR 153; (1999) 165 ALR 621; [1999] FCA 1192. (Merkel J. dissenting), per Wilcox J [20] (Federal Court of Australia). In this case, the Federal Court of Australia held that rules of customary international law prohibiting genocide could not apply in Australia unless it had been incorporated by statute. See in this regard *R v Jones* (n 28), at [23]-[29], holding that whereas customary international civil law rules would be incorporated immediately into UK law, such rules setting out *international crimes* could not. *Nulyarimma* at no point says that a judge may of her own volition incorporate a rule of customary international law into domestic law.

<sup>31</sup> See *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] ICJ 3.

<sup>32</sup> *West Rand Central Gold Mining Co. v R* [1905] 2 KB 391 (per Lord Alverstone CJ):

“It is quite true that *whatever has received the common consent of civilized nations must have received the assent of our country*, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant.”

<sup>33</sup> Thio Li-ann, “The Death Penalty as Cruel and Unusual Punishment Before the Singapore High Court? Customary Human Rights Norms, Constitutional Formalism and the Supremacy of Domestic Law in *PP v. Nguyen Van Tuong*” (2004) 4 Oxford Commonwealth Law Journal 1, 10 – 11. Also see C. L. Lim “The Constitution and the Reception of Customary International Law: *Nguyen Tuong Van v. Public Prosecutor*” (2005) Singapore Journal of Legal Studies 218, 228: citing Thio’s view as being the “one thing” commentators are agreed on.

<sup>34</sup> *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet (No.3) Pinochet* [1999] 2 All ER 97 (HL).

<sup>35</sup> It must be observed that Lord Bingham in *R v Jones* (n 28) only accepted automatic domestic legal validity of customary international law because it was not necessary to dispose of the question, and actually expressed considerable reservation about the substance of the doctrine. At [11], Lord Bingham states that there “seems to be truth in Brierly’s contention (“International Law in England” (1935) 51 LQR 24, 31)... that international law is not a part, but is one of the sources, of English Law”.



without having to pass a statute which in any case cannot be applied retroactively. Instead, it might be more prudent to say that rules of customary international law are automatically part of domestic Singaporean law unless they contradict statutes, constitutional rules, important and fundamental rules of common law<sup>36</sup>, or strong public policy needs (whatever that means). In fact, one expects something of the kind to be the real description of how the law will develop subsequent to this decision. Consider a future civil litigation between two private parties coming before the court, with one litigant invoking a widely-followed rule of customary international law not yet translated into the domestic law by statute or previous judicial decision. Failure to follow the new rule of customary law would disturb the expectations of very many commercial actors. One imagines that a Singaporean judge would most probably apply that rule. It would be a misuse of language to say, when she finds a rule where previously there was none, that the judge is merely engaging in conform-interpretation. Either we must say that the judge is making law (which the Court of Appeal rejects as illegitimate in other parts of the judgment<sup>37</sup>), or we must say that customary international law has *some* legal validity in the domestic sphere. It may be very low on the hierarchy of norms, being easily displaced by contrary statutes or even rules of common law, but it nevertheless has *some* legal validity.

The above description of customary international law as sitting within a hierarchy of norms would accordingly be a more accurate description of the status of customary international law in Singapore, and would also have allowed the Court to avoid a situation where rules of customary international law trump acts of Parliament. The appellant arguably went too far by submitting that that international law could be “constitutionalised” so as to trump domestic statutes. But the Court conversely did nowhere near enough in terms of explaining its reasoning. It is not sufficient for the Court to rest its entire reasoning on *Chung Chi Cheung*: that case simply does not settle the question one way or the other. Thus, the Court failed to justify its decision.

#### ON THE MEANING OF “LAW”: THE MATTER OF INHUMAN OR CRUEL PUNISHMENT

The Court rejected the argument that rules establishing inhuman punishments were not “law” for the purposes of Article 9(1), and gave three reasons for its position. First, the Singapore Constitution lacks an express provision prohibiting inhuman punishments in the manner of the Eighth Amendment to the U.S. Constitution<sup>38</sup>. Accordingly, there is no explicit textual authority for the Court to invalidate the mandatory death penalty. Second, very early in its history, the Singapore government declined to adopt precisely such a constitutional provision, even though it had been recommended by a commission headed by Wee Chong Jin CJ.<sup>39</sup> in 1966. The duty of deference owed to the legislature precluded Singapore

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<sup>36</sup> See *Nulyarimma* (n 29), where Wilcox J. opined at [26], that at a minimum, rules of international law creating international crimes could not translate directly into the domestic legal sphere because of the fundamental constitutional rule of *nullum crimen sine lege*. Approved by Lord Bingham in *R v Jones* (n 28), at ¶ 23. See also Martin Dixon, *Textbook on International Law* (2007) Oxford University Press, 104 – 105:

“Thus it may be more accurate to say that incorporation can occur automatically only if it is of a type that can be made justiciable in the national legal system and is of a kind where automatic implementation would not offend a basic constitutional precept of that system.”

<sup>37</sup> *Yong* (n 1) [72] (holding that the Court may not read a right against inhuman punishment into the right to life in Article 9(1)), and [113] (holding that Courts may not question Parliament’s determination of 15g as the threshold after which the mandatory imposition of the death penalty is merited).

<sup>38</sup> *Yong* (n 1) [61].

<sup>39</sup> *Yong* (n 1) [62].

judges from reading into the right to life in Article 9(1) a right against inhuman punishment. The third plank of the Court's reasoning concerned the judgement in *Mithu v State of Punjab*<sup>40</sup>, where the Indian Supreme Court held that the Indian Constitution, which similarly lacks a clear textual prohibition against inhuman punishments, nevertheless includes a prohibition in the right to life enshrined in Article 21 thereof, which was then relied upon to find the mandatory death penalty unconstitutional.

In essence, the Court rehearsed its argument in *Nguyen*, where it dismissed as irrelevant the post-*Ong Ah Chuan* Privy Council cases of *Reyes*<sup>41</sup> and *Watson*<sup>42</sup>, which held the mandatory death penalty unconstitutional, on the grounds that the Board in those cases relied upon roughly identical *express* constitutional prohibitions on inhuman or degrading punishments: i.e. sections 7 and 17(1) of the Belize and Jamaican Constitutions respectively<sup>43</sup>. This position, intellectually indefensible as it may ultimately be (for reasons that will soon become clear<sup>44</sup>), has a veneer of plausibility about it, given that the Privy Council itself distinguished *Ong Ah Chuan* on this basis in *Bowe*<sup>45</sup>, and moreover failed to find similarly unconstitutional the mandatory death penalty in *Boyce*<sup>46</sup>, *Matthew*<sup>47</sup> on the grounds that the constitutional texts under consideration there were phrased slightly differently. Less understandable, however, is the Court's attempt to distinguish *Reyes* and *Watson* on the grounds that they concerned mandatory death sentences for murder, rather than for trafficking<sup>48</sup>. The real nub of the case therefore, was whether the right to life in Article 9(1) could be interpreted to include a prohibition of inhuman punishments, by means of finding that inhuman and cruel laws were not valid "law".

The question had been canvassed before the Privy Council in *Ong Ah Chuan*, where the prosecution had argued that Article 9(1) sanctioned any deprivation of life and liberty according to "any Act passed by the Parliament of Singapore, *however arbitrary or contrary to fundamental rules of natural justice...*"<sup>49</sup> Lord Diplock rejected this submission, observing that

"In a Constitution founded on the Westminster model, and particularly in that part of it that purports to assure all individual citizens the continued enjoyment of fundamental liberties or rights, references to "law" in such contexts as "in accordance with law," "equality before the law," "protection of the law" and the like, in their Lordships' view, refer 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 Singapore constitution. It

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<sup>40</sup> *Mithu v State of Punjab* AIR 1983 SC 473 (Indian Supreme Court).

<sup>41</sup> *Reyes v The Queen* [2002] 2 AC 235 (PC).

<sup>42</sup> *Watson v The Queen* (Attorney General for Jamaica intervening) [2005] 1 AC 472 (PC).

<sup>43</sup> *Nguyen* (n 5) at [84].

<sup>44</sup> See text pertaining to notes 66 – 71.

<sup>45</sup> *Bowe and another v The Queen* [2006] 1 WLR 1623, at [41] (PC).

<sup>46</sup> *Boyce and another v The Queen* [2005] 1 AC 400 (PC). (Lord Bingham, Lord Nicholls of Birkenhead, Lord Steyn and Lord Walker of Gestingthorpe dissenting).

<sup>47</sup> *Matthew v State of Trinidad and Tobago* [2005] 1 AC 433 (PC).

<sup>48</sup> *Yong* (n 1) [49].

<sup>49</sup> *Ong Ah Chuan* (n 3) 670.

would have been *taken for granted by the makers of the [Singapore] Constitution that the “law” to which citizens could have recourse for the protection of fundamental liberties assured to them by the [Singapore] Constitution would be a system of law that did not flout those fundamental rules*. If it were otherwise it would be [a] misuse of language to speak of law as something which affords “protection” for the individual in the enjoyment of his fundamental liberties, and the purported entrenchment (by Article 5) of Articles 9(1) and 12(1) would be little better than a mockery.”<sup>50</sup> (emphasis added)

The Court of Appeal, after quoting this passage, went on to mention that Lord Diplock did not describe precisely what kinds of laws would be invalidated under this standard, and limited his judgment to the case at hand, which, as it turned out, upheld the mandatory death penalty. It speculated that Lord Diplock perhaps had in mind laws that were intended “at securing the conviction of particular known individuals”, or legislation that was so unreasonable that it could not have been imagined by the framers as being constitutional<sup>51</sup>.

Two international treaty provisions were raised in support of incorporating the right against inhuman punishment into Article 9(1): Article 5 of the Universal Declaration of Human Rights (UDHR)<sup>52</sup> and Article 3 of the European Convention on Human Rights (ECHR)<sup>53</sup>. The Court disposed of this argument by holding that although Singaporean courts are under a duty to interpret Singaporean law consistently with Singapore’s international legal obligations<sup>54</sup> such as those arising under the UDHR, such conform-interpretation could not avail where “the express wording of the Singapore Constitution is not amenable... or where Singapore’s *constitutional history* is such as to militate against the incorporation of those international norms”<sup>55</sup>. The Court then held that such incorporation into Article 9(1) was impossible, first, because “unlike the Constitutions of the Caribbean States, the Singapore Constitution does not contain any express prohibition against inhuman punishment”<sup>56</sup>, and because of differences in their constitutional history<sup>57</sup>. The second reason the Court gave for its position, as adverted to earlier, was the failure by the government to act on the recommendations of the Wee Commission 1966 to amend the Constitution to include just such a provision.

#### *The argument from history*

The paragraphs of the judgement that discuss the history and formation of the Singapore Constitution are truly fascinating. They relate, for the first time in a judicial setting, the “little known legal fact that the ECHR was made applicable to

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<sup>50</sup> *Ong Ah Chuan* (n 3) 670 – 671.

<sup>51</sup> *Yong* (n 1) [16].

<sup>52</sup> Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR). Singapore is a party to the UDHR, but not to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), or the International Covenant on Economic, Social and Cultural Rights (ICESCR), which render justiciable the rights contained in the UDHR.

<sup>53</sup> Singapore is not party to the ECHR, but was covered by it in the past. *See* the text pertaining to footnotes 53 and 54.

<sup>54</sup> *Yong* (n 1) [59].

<sup>55</sup> *Ibid.*

<sup>56</sup> *Yong* (n 1) [61].

<sup>57</sup> *Yong* (n 1) [61]–[63].

Singapore and the Federation of Malaya in 1953 just as it was made applicable to Belize and several other British colonies by virtue of the UK's declaration under Art 63 of the ECHR<sup>58</sup>, and of how the ECHR ceased to apply in the colonies upon independence from Britain<sup>59</sup>. As Lord Bingham noted in *Reyes*<sup>60</sup>, the later Belize and other Caribbean constitutions were modelled on the ECHR to provide for prohibitions against inhuman punishments. On the other hand, in the Court's judgment, the Malayan Constitution of 1957, whose provisions on fundamental rights Singapore eventually inherited upon independence from Malaysia in 1965, were not modelled on the ECHR. The Court based this determination solely on the fact that the Malayan Constitutional Commission chaired by Lord Reid in 1957 omitted to recommend the incorporation of such a provision in its report<sup>61</sup>. Particularly conclusive in the Court's eyes was the fact that the report was published in 1957, four years after the ECHR had come into existence<sup>62</sup>, which meant, in its view, that the Reid Commission must have intended to exclude rights against inhuman treatment or punishment.

With respect to the argument relating to the events surrounding the Wee Commission, the Court held that

“The Government's rejection of the proposed Art 13 [*the right against inhuman punishment recommended by the Wee Commission*] was unambiguous, whatever the reasons for such rejection were. This development, in our view, forecloses Mr. Ravi's argument that it is open to this court to interpret Art 9(1)... as incorporating a prohibition against inhuman punishment... It is 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.”<sup>63</sup> (*my italics*)

The Court then proceeded to read Lord Nicholls remarks in *Matthew*, which hold that “If departure from fundamental rights is desired, that is the way it should be done. The Constitution should be amended *explicitly*...”<sup>64</sup>. The Court of Appeal then found that “(t)here is, in substance, no difference between *repealing* an existing constitutional provision prohibiting inhuman punishment and *deliberately deciding not to enact* such a constitutional provision in the first place.”<sup>65</sup> Accordingly, there is no constitutional protection against greatly disproportionate punishments (except possibly those that are so grossly disproportionate that no rational legislator could have enacted them), or even against inhuman, degrading or cruel treatment by the State.

#### *The requirement of clear words*

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<sup>58</sup> 56 Karel Vasak ‘The European Convention of Human Rights Beyond the Frontiers of Europe’ (1963) 12 ICLQ 1206, 1210. Referred to in *Yong* (n 1) at [61].

<sup>59</sup> In Singapore's case, the cessation occurred when Singapore became a constituent State of Malaysia in 1963.

<sup>60</sup> *Reyes* (n 40) at [28].

<sup>61</sup> Report of the Federation of Malaya Constitutional Commission (11 February 1957).

<sup>62</sup> *Yong* (n 1) [62].

<sup>63</sup> *Yong* (n 1) [72].

<sup>64</sup> *Matthew* (n 46) [74].

<sup>65</sup> *Yong* (n 1) [74].

The premise of the first reason for the holding is evidently absurd: if there was already an express constitutional provision against inhuman punishment, there would be no need to interpret another constitutional provision to contain one. As a matter of constitutional interpretation, the Court has completely misconstrued Lord Nicholls' statements in *Matthews*. The Court interpreted those dicta to emphasise the widely accepted<sup>66</sup> ability of the legislature to amend the constitution to remove constitutional rights. But, by doing so, it modified the requirement that such a thing be done "explicitly": any departure from a fundamental right has to be made *clearly* and *openly*, so that the electorate know exactly what is being done. The legislature or the constitutional convention must have the courage of its convictions. Of course, this principle is neither new nor controversial – we find it being enunciated throughout the history of the common law, and in cases no less important than *Somerset's Case*<sup>67</sup>, in which Lord Mansfield considered whether slavery was permitted under English law. He held, famously, that

"The state of slavery is of such a nature, that it is incapable of being introduced on any reasons... but only (by) positive law... (It is) so odious, that nothing can be suffered to support it, *but positive law*."<sup>68</sup>

As Waldron notes, "Lord Mansfield was not denying that there could be a valid law in England establishing slavery... his position was not the classic natural law doctrine of *lex iniustitia non est lex*— ... If Parliament established slavery, then slavery would be the law... any attempt to bring it – or its effects, so far as liberty is concerned – in *by the back door*... would have to be resisted."<sup>69</sup>

Lord Mansfield spoke against a constitutional background of parliamentary sovereignty, and it may be argued that different principles may apply where there is a written, entrenched constitution. For example, we may argue that written constitutions intended as the supreme law in their legal systems must have been drafted extremely carefully, such that if the drafters left out some explicit textual reference to some right or other thing, they must have meant to do so. If such an argument were correct, we would find that constitutions must go into extremely fine detail in enumerating rights and other legal concepts. Instead, we find that they are expressed at very high levels of abstraction, leaving scope for interpretation. As a practical matter, such a strict constructionist method of constitutional drafting would make constitutions *brittle*: i.e. mere lists of rules either unwieldy and unreadable, or entirely devoid of content<sup>70</sup>. As Lord Bingham notes in *Reyes*, courts interpreting written constitutions should not treat "the language of the Constitution as if it were found in a will or a deed or a charterparty. A generous and purposive interpretation is to be given to constitutional provisions protecting human rights."<sup>71</sup> There is no reason why the requirement of clear words for derogation from fundamental rights under a system of parliamentary sovereignty should not apply with equal force in a

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<sup>66</sup> This position is widely, but not universally accepted by all Commonwealth Supreme Courts. The Indian Supreme Court has famously held that a constitutional amendment made in perfect accordance with all the onerous procedural and voting requirements set down by the Constitution may nevertheless be unconstitutional as a violation of the "basic structure" of the Constitution: *H.H. Keshavananda Bharati v. State of Kerala and others* (AIR 1973 SC 1461).

<sup>67</sup> *Somerset v Stewart* (1772) 98 Eng. Rep. 499 (KB).

<sup>68</sup> *Somerset* (n 66) 500.

<sup>69</sup> Jeremy Waldron 'Torture and Positive Law' (2005) *Columbia Law Review* 1681, 1718 – 1719.

<sup>70</sup> Ronald Dworkin, *Law's Empire*, (Belknap Harvard, 1986) at 355 – 369.

<sup>71</sup> *Reyes* (n 40) [26]. See also *Minister of Home Affairs v Fisher* [1980] AC 319, at 329 (Lord Wilberforce stating that Constitutions are to be read "with less rigidity and more generosity than any other Acts.").

Westminster constitutional system. As per Lord Hoffmann in *ex parte Simms*<sup>72</sup>:

“The constraints upon [*the exercise of legislative power contrary to the Human Rights Act 1998*] by Parliament are ultimately political, not legal. But *the principle of legality* means that *Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words*. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.”<sup>73</sup>

The same can be said of the Reid Commission and the Singapore Parliament regarding the creation and amendment of the Constitution: the limits were and are purely political<sup>74</sup>. However, the question of whether those limits were breached is eminently a legal question, governed by the same principle of legality in *Simms*. Accordingly, if Reid Commission and the Singapore government are both to be found to have drafted the constitution such as to exclude the protection against inhuman punishment afforded by the ECHR and (as I will argue shortly) by the English common law, then clear and unambiguous words or actions must be adduced. The Court of Appeal makes no reference to any such statements, let alone public ones, by the Reid Commission concerning the removal of that right. Moreover, its analysis of the Singapore government’s reception of the Wee Commission’s recommendation is clearly flawed: the rejection of the proposed right against inhuman punishment was not “unambiguous”<sup>75</sup>. To be sure, it would be excessive to require an Act of Parliament in order to justify interpreting a failure to amend the Constitution as a derogation from fundamental rights, but it is not good enough to rely upon the government’s *omission* to mention protections against inhuman treatment in its reception of the Wee Commission report<sup>76</sup>. Such an omission can be understood in two possible ways: it may mean, as the Court of Appeal thinks, that the government opposed the idea of a right against inhuman and degrading treatment, *or*, it may be that the government thought an express provision to that end would be superfluous, since the right was already contained in another constitutional provision. At a minimum, there should be an open and notorious statement by the government that a constitutional right against inhuman treatment would be undesirable; an omission to mention the subject cannot qualify as a good faith attempt to meet the political consequences of a deprivation of so fundamental a right<sup>77</sup>. Instead, it must be presumed that the government was of the opinion that an explicit statement of the right was unnecessary, and that it was implicit in the right to

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<sup>72</sup> *R v Home Secretary ex parte Simms* [2000] 2 AC 115.

<sup>73</sup> 70 *Simms* (n 71) 131.

<sup>74</sup> Li-Ann Thio, ‘Protecting Rights’, in Li-Ann Thio & Kevin Y. L. Tan (eds), *Evolution: 40 years of the Singapore Constitution* (Routledge-Cavendish, 2009) at 211: “...there is no practical difference between how a UK and a constitutional court applies principles of constitutionality.”

<sup>75</sup> *Yong* (n 1) [72].

<sup>76</sup> *Yong* (n 1) [71], quoting Singapore Parliamentary Debates, Official Report (21 December 1966) volume 25 at columns 1052 – 1053, Mr. E.W. Barker, Minister for Law and National Development.

<sup>77</sup> I am open to, and would welcome the suggestion that a mere statement made in Parliamentary debates should not suffice in law: *ex parte Simms* requires clear *statutory* language. However, Singapore has a stance perhaps unique in the common law world with respect to the use of non-statutory materials in statutory and constitutional interpretation. Section 9A, Interpretation Act (Cap 1), permits the use of parliamentary speeches and other documents even in the absence of ambiguity or inconsistency.

life contained in Article 9(1)<sup>78</sup>.

Curiously, the Court attempts to reassure us that while there is no right against inhuman punishment, Article 9(1) *might* possibly contain a right against torture<sup>79</sup> as a result of *Ong Ah Chuan*, which interprets it as not “justify(ing) all legislation”. The reasoning the Court then provides for this is truly extraordinary. The Court notes that the constitutional amendment proposed by the Wee Commission contained a prohibition on torture alongside a prohibition against inhuman punishment. The rejection of that proposal therefore must mean there is no right against inhuman treatment. However, there may be a right against torture, even though the government was equally silent on that issue in its response to the Wee Commission’s report. This is because “no domestic legislation permits torture”<sup>80</sup>, and in a speech made more than 20 years after the reception of the report, the Minister for Home Affairs “expressed the view that torture is wrong.”<sup>81</sup> Accordingly, conduct by the executive decades after the constitutional changes recommended by the Wee Commission is of probative value in discovering precisely what was adopted and what wasn’t. If this is the case, it would appear that a speech by a minister in Parliament deploring inhuman treatment would go some way into creating such a constitutional right against inhuman treatment. Conversely, a statute providing for torture would squash any embryonic right against torture: the existence of the statute will itself be proof of its constitutionality. In any case, the Court declined to definitively declare that there was a right against torture, on the grounds that the issue was not before it. As such, it is still an open question as to whether there is a right against torture in the Singapore Constitution, and the Court’s methods of answering that question are better described as divination rather than determination.

*Cruelty, inhuman and degrading treatment and the common law*

Nor can it be said that inhuman and degrading punishments are not as “odious” or inimical to the common law as slavery, and that a certain amount of clandestine subterfuge on this matter can therefore be tolerated on the part of constitutional drafters. This argument too would also be untenable *as a matter of law*. As Lord Diplock’s judgment in *Ong Ah Chuan* states, references to “law” in constitutions following the Westminster model *must* be taken to mean “*a system of law*” incorporating 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 Singapore constitution.*” Few things are more distinctive of the English common law that was in operation in Singapore until 1963 than its historic aversion to cruelty and torture. This is evident at both the pre- and post-conviction stages of the criminal process. With respect to the pre-conviction stage, the late Lord Bingham describes how, in the wake of the papal bull declaring trial by ordeal to be cruel, the English common law invented the mechanism of the jury to determine factual matters, while the continent preferred the use of torture to obtain

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<sup>78</sup> It is submitted that this proposed requirement of a good faith attempt at meeting political consequences is not incompatible with the attitude of the Constitutional Tribunal in *Constitutional Reference No 1 of 1995* [1995] 2 SLR 201, where it called for a purposive approach towards interpreting the Constitution to give effect to Parliament’s intentions. This is because Parliament’s intention is precisely the question raised here, and it must be strongly presumed that it does not intend to deprive or deny fundamental rights.

<sup>79</sup> *Yong* (n 1) at [75].

<sup>80</sup> *Yong* (n 1) at [75].

<sup>81</sup> *Yong* (n 1) at [75]. Quoting Prof. S. Jayakumar, Minister for Home Affairs, *Singapore Parliamentary Debates, Official Report* (29 July 1987) vol 49 at columns 1491 – 1492.

confessions<sup>82</sup>. Needless to say, there is also Blackstone's pride at the English judiciary's refusal to torture the assassin of the Duke of Buckingham. With respect to the attitude of the common law regarding cruel inhuman treatment, there is, most famously the Bill of Rights of 1689<sup>83</sup>, which specifically prohibits the imposition of "cruel and unusual punishments", the text of which was ultimately enshrined in the Eighth Amendment to the U.S. Constitution. Earlier precursors include such practices as the refusal to execute idiots and lunatics. As Coke put it:

"The execution of the offender is for example, *ut poena ad paucos, metus ad omnes perveniat* [that few may be punished, and that a fear of punishment may operate on all]; but so it is not when a madman is executed; but should be a miserable spectacle, *both against law, and of extreme inhumanity and cruelty, and be not an example to others.*"<sup>84</sup> (emphasis added)

One may also counter by saying that the above is a highly selective and sentimental whitewashing of English legal history, and as both the Court of Appeal in *Yong Vui Kong* and the Privy Council in *Ong Ah Chuan* notice<sup>85</sup>, mandatory sentencing was the norm when it came to the death penalty for most of the life of the common law. Moreover, whatever the position may have been regarding the *manner* of execution, it may be argued that the common law was in actual fact particularly bloodthirsty in terms of the alacrity with which it sanctioned hanging for countless offences. However, to argue thus would be merely to point out instances of specific *rules* of law. Lord Diplock's *dicta* do not speak of specific rules, but of "a system of law" and "fundamental rules of natural justice". Courts often deal with rules of law that on examination are found to be entirely incompatible with the general "system of law" and "fundamental rules of natural justice". In the U.S. many States had long-standing laws which outlawed contraception, abortion, homosexuality, suicide, *etc.*, which were only much later discovered to be in violation of both the general system of American law, and of fundamental principles of liberty and equality. At any rate, the very existence of the ECHR makes it impossible, even on quintessentially conservative Diceyan grounds, to argue that the system of English law in 1963 had not recognised a prohibition against inhuman punishments as one of its fundamental rules of natural justice. As a recent pamphlet by two conservative writers notes,

"... the Convention was framed by British jurists, working within a common law legal tradition stretching back past the US Bill of Rights 1791 to encompass our own Bill of Rights 1689, and the Petition of Right 1628. So it is not surprising that its essential principles – including the right to fair trial, the right not to be held without charge, and *the right not to be subject to cruel and unusual punishment* – are manifestations of the English common law as it took shape during a centuries-long jostling for power between the different estates of the realm... The ECHR thus marks a vital

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<sup>82</sup> The reliance on torture became necessary because of the Roman law's requirement of either a confession or the corroborating testimony of two witnesses in order to arrive at a conviction. Witnesses were difficult to find, and defendants reluctant to confess of their own accord, so torture was carried out to supply the necessary persuasion. Tom Bingham, *The Rule of Law*, (Allen Lane, 2010) 14 – 17. See also, on the logic of torture in the early modern French law of proofs: Michel Foucault, *The Spectacle of the Scaffold*, (Penguin Great Ideas, 2008) 43 – 54.

<sup>83</sup> 4 Blackstone, at 326.

<sup>84</sup> 2 Blackstone, 25, citing Coke, 3 Inst. 6.

<sup>85</sup> *Yong* (n 1) [21], quoting Lord Diplock in *Ong Ah Chuan*, 672 – 673.



codification of the common law, not its repudiation.”<sup>86</sup>

Certainly, Lord Diplock in *Ong Ah Chuan* did not make this finding, but this was because he was not apprised of the fact that the ECHR applied to Singapore for a time. As such, although the conclusion was *per incuriam*, the principle enunciated by Lord Diplock is still valid. Thus, even if the Reid Commission had positively conspired to deprive Singaporeans of the liberties they enjoyed under English law, and *the rights they enjoyed under the ECHR*, a Singaporean court must be barred from taking this into consideration, because according to *Ong Ah Chuan*, it must be “taken for granted” that it would not have done so. Instead, the Court holds that at independence this heritage was discarded for all time, and by mere silence at that.

#### *Mithu v State of Punjab*

The Court held that *Mithu* was not applicable. Certainly, the texts of Article 9(1) of the Singapore Constitution and Article 21 of the Indian Constitution are slightly different. Whereas the Singapore Constitution prohibits the deprivation of life and liberty “save in accordance with the law”, Article 21 of the Indian Constitution provides that “No person shall be deprived of his life or liberty except according to procedure established by law”. Accordingly, the court found three reasons to distinguish *Mithu*: first, the main issue in *Mithu* was not about inhumanity or cruelty, but about whether life is deprived according to “fair, just and reasonable procedure.”<sup>87</sup> Article 9(1) on the other hand requires only that the deprivation be in “accordance with law”, and although “law” may include procedural as well as substantive law, there was no requirement that such procedure be “fair, just and reasonable”<sup>88</sup>. The Court then noted that *Ong Ah Chuan* did not enunciate such a requirement that law be “fair, just and reasonable”, but only that it meet the apparently different standard of consistency with “fundamental principles of natural justice”<sup>89</sup>.

The second reason the Court gave was the same one Lord Diplock interposed in *Ong Ah Chuan*, i.e. that a ban on the mandatory death penalty would also take down with it other mandatory punishments, such as fines or minimum or maximum limits on sentences<sup>90</sup>. The Court, anticipating the argument that a mandatory death sentence is *qualitatively* different from a minimum fine, says that although this might be the case, the “plain wording of Art 9(1) does not support the conclusion that Parliament cannot make the death penalty mandatory”. As such, the very contention that is being disputed is raised in its support.

Thirdly, the Court says that *Mithu* is understandable only in India’s specific economic, social and cultural context, and because of India’s unique habit of giving the right to life “pride of place in (its) constitutional framework.”<sup>91</sup> The Court then defends this statement with reference to the fact that the mandatory death penalty has featured in Singapore’s criminal law throughout its history<sup>92</sup>. It was present in the

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<sup>86</sup> Jesse Norman and Peter Osborne, *The Conservative Case for the Human Rights Act* (Liberty, 2009), 7 – 8.

<sup>87</sup> *Mithu* (n 39) at [6].

<sup>88</sup> *Yong* (n 1) [80].

<sup>89</sup> *Ong Ah Chuan* (n 3) 670.

<sup>90</sup> *Yong* (n 1) [81].

<sup>91</sup> *Yong* (n 1) [83].

<sup>92</sup> *Yong* (n 1) [84].

first Penal Code of 1871<sup>93</sup> (based on the Indian Penal Code, which also contained such provisions), was applied by the British even during the period when Singapore was covered by the ECHR, affirmed in by the Privy Council in *Ong Ah Chuan*, and affirmed by the Singapore Court of Appeal in *Nguyen*. Again, the very practices and precedents in dispute are used as arguments in their own support.

## CONCLUSION

The most curious thing about the part of the judgement concerning the status of customary international law in the Singaporean legal sphere is the fact that the rule it arrived at was not necessary to reach the judgement: it could simply have said, as it eventually did, that there was insufficient state practice to give rise to such a rule<sup>94</sup>. Indeed, apart from the section on the possible right against torture<sup>95</sup>, the judgement seems quite unblemished by excessive judicial parsimony. We have already considered the Court's venturing to speak for the prosecution, and then accepting an argument that it not only never actually made, but was the exact opposite of the one it did make. At a number of instances, the Court pre-emptively rejects arguments that the defence never made. For instance, the defence never argued that the right to life under Article 9(1) prohibits the entire death penalty. Nonetheless, the Court offers that "(i)t is not surprising that the Appellant has adopted this stance because Art 9(1) expressly allows a person to be deprived of his life "in accordance with law"; i.e. it expressly sanctions the death penalty."<sup>96</sup> A little further on, we see the court "note in passing that, although Art 2(1) defines the expression "law" to include "custom or usage"... , Mr Ravi [*counsel for the appellant*] has not argued that these words are intended to include CIL. *If such an argument had been made, we would have rejected it* because, in our view, the phrase "custom or usage" in Art 2(1) refers to local customs and usages which (in the words of this provision) "[have] the force of law in Singapore"..."

Of course, judicial parsimony alone would not have rescued the part of the judgement dealing with inhuman punishments; the intellectual planks behind the Privy Council's sanctioning of the mandatory death penalty have eroded steadily since *Ong Ah Chuan*, in a fashion not dissimilar to Lord Diplock's justifications of other practices associated the death penalty<sup>97</sup>. A considerable body of jurisprudence exists to the effect that the mandatory death penalty is inhuman, cruel and degrading in a way incompatible with a belief in basic human dignity. Apart from the Caribbean and the Indian cases mentioned above, Stewart J. in the US Supreme Court case of *Woodson* held that mandatory death sentences "treat(ed) all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of

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<sup>93</sup> Penal Code (Ordinance 4 of 1871)

<sup>94</sup> *Yong* (n 1) [96]–[98].

<sup>95</sup> *Yong* (n 1) [75]. See text pertaining to footnotes 72 – 74.

<sup>96</sup> *Yong* (n 1) [6].

<sup>97</sup> See *Pratt and Another v Attorney General for Jamaica and Another*, [1994] 2 AC 1, [1993] 4 All ER 769, [1993] 3 WLR 995, 143 NLJ 1639 (PC), overruling *Abbott v Attorney General of Trinidad and Tobago* [1979] 1 WLR 1342 (PC), where, at 1345, Lord Diplock held that it was constitutionally permitted to hold prisoners on death row for years on end before they are eventually executed, because "while there's life, there's hope", and that a death row appellant could not complain of delay when he himself brought the appeal proceedings. Instead, Lord Bingham held, at 786, that "It is part of the human condition that a condemned man will take every opportunity to save his life through the use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner... The death row phenomenon must not become established as part of our jurisprudence."

death.”<sup>98</sup> As such, it was necessary to settle the issue of whether there was a right against inhuman treatment or punishment.

Whatever may be said about the reasoning, the practical effect of the judgement in *Yong Vui Kong* is to insulate the Constitution from all external stimuli: customary international legal developments, and even developments in domestic attitudes towards the infliction of the death penalty will simply glance off it. For Singaporean lawyers, the judgement is likely to be a source of confusion, especially regarding the holding on the effect of customary international law in the domestic legal sphere. For the Singaporean citizen, like the author, the most worrying aspect the judgement must be its account of what transpired at the Reid Commission. The author once had an disagreement outside the King’s Arms public house in Oxford with a gentleman who proposed to him that it would have been better, had his country remained a British colony. References were made to the hypocrisy of the Empire unmasked by Orwell in *Shooting an Elephant* and in *Burmese Days*, and to the fact that people like him would not have been allowed in the Raffles Hotel in colonial Singapore. Notice could also have been taken (but unfortunately wasn’t) of the work of Amartya Sen, who observed that no famine had ever occurred in India after independence, even though it was a frequent and devastating occurrence during colonial rule<sup>99</sup>. This said, the Court of Appeal makes absolutely clear that whereas Singaporeans as colonial subjects definitely had some rights under Article 3 ECHR against inhuman and degrading treatment, no matter how distant and removed, now, as citizens of an independent republic, they have nothing<sup>100</sup>. *Yong Vui Kong v PP* is therefore a mistake of considerable consequence. For all Singaporeans who believe that independence and nationhood were things that they can genuinely be proud of, this must be a profoundly humiliating. It is therefore a matter of urgency to remedy the situation by amending the constitution<sup>101</sup>.

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<sup>98</sup> *Woodson et al v North Carolina* (1976) 428 US 280, 304.

<sup>99</sup> The last Indian famine occurred in Bengal in 1943, in which three million people died. See generally Amartya Sen, *Poverty and Famines; Development and Freedom* (Allen Lane, 2009). Prof. Sen, albeit one of the most revered economists and political philosophers of our time, is actually quoted in the judgment, oddly enough as a legal authority on the meaning and purpose of the UDHR (at [57]. Quoting Amartya Sen, *The Idea of Justice*, (2009) Allen Lane, 359), and more understandably on the relation between law and morality (at [58] quoting Sen, *The Idea of Justice*, 363).

<sup>100</sup> K.S. Rajah ‘The Unconstitutional Punishment’, Law Gazette (Singapore), August 2003 (2), 6:

“In interpreting the Constitution of Singapore, it is also relevant to recall that from 1953 till Singapore became part of Malaysia, England and Singapore were covered by the [ECHR] (1953) Arts 2 (right to life), 3 (torture, inhuman or degrading punishment) and 6 (fair trial by impartial tribunal). The provisions of the Articles must in some measure be regarded as incorporated into Part IV of the Constitution. *It could not have been the intention of the framers of our constitution to diminish the rights which Singaporeans as colonial subjects were entitled to enjoy, and to lose it on becoming independent citizens of a Republic with censorial power in their hands after freedom has taken into effect.*”

<sup>101</sup> *Yong* (n 1) [122].