Death Penalty Singapore-Style: Clinical and Carefree

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Abstract: Singapore has developed a jurisprudence that death penalty and capital proceedings are no different from other minor criminal proceedings. Instead of scrutinizing criminal legislation on their substantive fairness, the courts have instead consistently restricted their adjudicative function to one of procedural assessment. In so doing, formalistic and textualist techniques are employed to achieve crime control ends at considerable expense of due process. This paper seeks to discuss the jurisprudence that has been moulded, and examines how much it has deviated from other Commonwealth jurisprudence.

Keywords: death penalty, mandatory, due process, constitutional law, criminal law, international law, Singapore

I. Introduction

Cadit quaestio

All plausible arguments against the constitutionality of the mandatory death penalty have been canvassed before us. We have considered the merits of these arguments and rejected them. In the circumstances, under Singapore law as it stands, further challenges in court to the constitutionality of the mandatory death penalty have been foreclosed by our decision in this appeal. (Chan Sek Keong CJ)¹

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In 2004, the news that Singapore topped (in terms of per capita execution rate) the ‘execution league’ was met with familiar international outrage and disapproval. Human rights activists reproached the Singapore government for the ‘shocking death toll’ arising from ‘arbitrary’ and ‘cruel’ use of the death penalty, and declared that it was ‘high time for the government to seriously re-consider its stance’. In a terse, official response, the Singapore government hit out at what it perceived to be ‘grave errors of facts and misrepresentations’, and made ‘no apology’ for its ‘tough law and order system’. Both sides refused to budge and 2004’s vitriolic exchange ended in a predictable deadlock, much like previous unfruitful clashes between the Singapore Government and abolitionists.

This paper analyses the effects of a retentionist philosophy in the context of Singapore criminal law, due process, international norms, constitutionalism and the procedural safeguards against arbitrary mandatory punishment.

II. Death, Murder, Drugs and Singapore Constitution

Whether or not our existing [mandatory death penalty] legislation should have been enacted and/or whether such legislation should be modified or repealed are policy issues that are for Parliament to determine in the exercise of its legislative powers under the Singapore Constitution. It is for Parliament, and not the courts, to decide on the appropriateness or suitability of the [mandatory death penalty] as a form of punishment for serious criminal offences.

Lawyers have mounted multiple constitutional challenges against the mandatory death penalty in Singapore, to no avail. However, even as the Singapore judiciary continues to sanction the constitutionality of mandatory death, cracks are beginning to appear in its once-staunt defence of the gravest—and some say inhuman—punishment on the penological menu.

i. Local and International Judicial Developments between Ong and Nguyen

Since the mandatory death sentence for drug trafficking survived constitutional scrutiny in the Privy Council decision in Ong Ah Chuan

4 See above n. 2.
v PP, the Singapore courts have been quick to hide behind the façade of Ong to provide legal justification for the death penalty.

The Privy Council endorsed the mandatory death penalty because its interpretation of Article 12(1) only prohibited laws ‘which require that some individuals within a single class should be treated by way of punishment more harshly than others’.

Thus, there was nothing in Article 12(1) that forbade ‘discrimination in punitive treatment between one class of individuals, and another class, in relation to which there is some difference in the circumstances of the offence that has been committed’. The Privy Council further held that the question of whether ‘dissimilarity in circumstances’ justified any differentiation in punitive treatment hinged entirely on legislative decision, unless legislative decision was ‘purely arbitrary’, or bore no ‘reasonable relation’ to the ‘social object of the law’.

Ong’s literalist pronouncements were reinforced in the landmark Singapore Court of Appeal decision of Nguyen Tuong Van v PP. Despite appeals to fundamental standards of humanity, and lengthy citation of various international norms (discussed below), the Singapore Court of Appeal concluded the discussion abruptly through a one-line assertion that the Misuse of Drugs Act (MDA) was ‘sufficiently discriminating to obviate any inhumanity in its operation’.

However, comparative jurisprudence demonstrates otherwise. A curious line of Singapore decisions saw the prosecution charge offenders for trafficking in amounts just below what would have attracted the mandatory death penalty, raising the spectre of prosecutorial discretion at work to mitigate the manifest injustice a mandatory penalty potentially causes. A ‘rare display of interpretational gymnastics’ obviated the inhumanity mandatory death would have caused in a case concerning a traditional Chinese medicine practitioner who knowingly used opium in externally-applied preparations for treating bone and joint afflictions. In view of the ‘unique nature

8 Ibid. at 64E.
9 Ibid. at 64F.
10 Ibid. at 64G–1.
12 Ibid. at para. 85.
13 (Cap 185, 2001 Rev Ed Sing).
14 See above n. 11 at para. 86.
15 See PP v Dhanabalan s/o A Gopalkrishnan [2003] SGHC 178 (charged with trafficking of 499.9g of cannabis—more than 500g attracted the mandatory death penalty); PP v Rahmat Bin Abdullah [2003] SGHC 206 (charged with trafficking of 499.9g of cannabis, although 1063g were found on the accused); PP v Vanmaichelvan s/o Barsathi [2005] SGHC 78 (charged with trafficking of 499.99g of cannabis, although 749.17g was found on the accused). See also Michael Hor, ‘Death, Drugs, Murder and The Constitution’ in Teo Keang Sood (ed.), Developments in Singapore Law between 2001 and 2005 (Singapore Academy of Law: Singapore, 2006) 499 at 534.
16 See Hor, ibid. at 534.
17 Ng Yang Sek v PP [1997] 3 SLR 661.
of these circumstances', the court departed from its longstanding adherence to textualism and found that the word 'trafficking' could not simply mean giving, selling or distributing but trafficking for the purpose of use as a narcotic drug. However, the court's generous interpretation did not extend to an offender who conveyed drugs back to a supplier in a bid to back out of trafficking, or one who gave his girlfriend the occasional joint.

The legal force of Ong (and by proxy, the arguments furthered in Nguyen) has weakened considerably across the world—in no small part owing to the influential and progressive Privy Council decisions of Reyes v The Queen and Watson v The Queen almost 20 years on. The Privy Council in Reyes all but rejected Ong, suggesting that it was made 'at a time when international jurisprudence on human rights was rudimentary'. The Privy Council found that the mandatory death penalty, imposed on the appellant upon his conviction of murder by shooting, 'subjected him to inhuman or degrading punishment or other treatment incompatible with his right' under section 7 of the Constitution of Belize. The Privy Council further envisioned that a mandatory death penalty would inflict manifest injustice on offenders who commit murders which are 'quite of different character ... in which the death penalty would be plainly excessive and disproportionate', thus refuting the Ong pronouncement that differential culpability had no bearing on a constitutional discussion of Article 12(1) and the death penalty.

In Watson, another constitutional dispute about the death penalty, the Privy Council demonstrated greater sensitivity and receptivity towards international human rights discourse. The Privy Council rejected Ong as a decision that 'long predated any international arrangements' for human rights protection, and flatly contradicted Lord Diplock's infamous pronouncement that there was 'nothing unusual in a death sentence being mandatory'. Instead, the Privy Council sought guidance from, inter alia, the Universal Declaration of Human Rights, the American Declaration of the Rights and Duties of Man and the European Convention on the Protection of Human Rights and Fundamental Freedoms, and held that the 'imposition of the mandatory death sentence on the appellant subjected him to an inhuman punishment'.

18 Ibid. at para. 53.
19 Ibid. at paras. 35–7.
20 See Hor, above n. 15 at 534, 535.
22 [2005] 1 AC 472.
23 See above n. 21 at para. 45.
24 Ibid. at para. 43.
25 Ibid.
26 See above n. 22 at para. 29.
27 Ibid.
28 Ibid. at para. 61.
29 Ibid. at para. 35.
While Reyes was only prepared to adjudicate the constitutionality of the death penalty in the context of shooting, Watson cast the net wider. The Privy Council decreed that a man should never be condemned ‘without giving him the opportunity to persuade the court that this would in his case be disproportionate and inappropriate’, taking into account the limitless ‘variety of circumstances which may lead a man to commit homicide’.30

ii. Van Nguyen, Ong and International Law: Inchng Out of the Four Walls Doctrine?

[Where our courts have reached the limits on the extent to which they may properly have regard to international human rights norms in interpreting the Singapore Constitution, it would not be appropriate for them to legislate new rights into the Singapore Constitution under the guise of interpreting existing constitutional provisions.]31

Despite the tide of international judicial resentment against the mandatory death sentence, the Singapore courts have clung on to trifling technicalities to reject these decisions and avoid any meaningful constitutional discourse on the death penalty. The Court of Appeal in Nguyen rejected the applicability of Reyes and its argument from differential culpability, on the technical ground that the Singapore Constitution did not contain a provision similar to that of section 7 of the Constitution of Belize which prohibited torture, inhuman and degrading treatment.32

30 Ibid. at para. 33.
31 Yong Vui Kong, above n. 6 at para. 59. The inherent ‘limits’ stated therein are ‘where the express wording of the Singapore Constitution is not amenable to the incorporation of the international norms in question, or where Singapore’s constitutional history is such as to mitigate against the incorporation of those international norms’.
32 See above n. 11 at para. 85. This position was similarly taken in the recent appeal of Yong Vui Kong, above n. 6 at paras. 50 and 61: ‘It should also be noted that the Appellant’s Art 9(1) cases (apart from Mithu) were decided in a different textual context. All of those cases (save for Mithu) involved Constitutions which expressly prohibited inhuman punishment. The key issue in those cases was thus interpretative in nature, i.e. in relation to the constitutional prohibition against inhuman punishment, was the [mandatory death penalty] an inhuman punishment? The decisions in the Appellant’s Art 9(1) cases (apart from Mithu) are therefore technically decisions on the question of what kind of punishment would constitute inhuman punishment and, strictly speaking, are not relevant to the meaning of the expression “law” in Art 9(1) of the Singapore Constitution. Hence, these cases are not direct authority on the question of whether the [mandatory death penalty] provisions in the MDA constitute “law” for the purposes of Art 9(1) . . . unlike the Constitutions of the Caribbean States, the Singapore Constitution does not contain any express prohibition against inhuman punishment. Our constitutional history is quite different from that of the Caribbean States. Belize and the other Caribbean States modelled their Constitutions after the ECHR, whereas the Singapore Constitution—specifically Pt IV thereof on fundamental liberties—was derived (albeit with significant modifications) from Pt II of the 1957 Constitution of the Federation of Malaya . . . which formed the basis of . . . the 1963 Malaysian Constitution.’
The court appeared well on its way in eschewing its long-standing philosophy of parliamentary supremacy and the complementary formalist approach towards constitutional interpretation:

The common law of Singapore has to be developed by our Judiciary for the common good. We should make it abundantly clear that under the Constitution of our legal system, Parliament as the duly elected Legislature enacts the laws in accordance and consistent with the Constitution of Singapore. If there is any repugnancy between any legislation and the Constitution, the legislation shall be declared by the Judiciary to be invalid to the extent of the repugnancy. Any customary international law rule must be clearly and firmly established before its adoption by the courts. The Judiciary has the responsibility and duty to consider and give effect to any rule necessarily concomitant with the civil and civilised society which every citizen of Singapore must endeavour to preserve and protect.33

Surprisingly, the court desisted from making any pronouncements on the appellant’s argument that the deprivation of liberty ‘in accordance with the law’ under Article 9 of the Singapore Constitution imported a prohibition against cruel and inhuman punishment. In fact, the court endorsed the prohibition against cruel and inhuman treatment or punishment as ‘a rule in customary international law’, and even indulged the appellant on the content of this customary international rule.34

The court’s reticence paves the way for a broader, extra-textual interpretation of Article 9. Scholars and lawyers have long argued that the proportionality requirement, which recognizes that the punishment should fit the crime, is built into the import of Article 9:

No person shall be deprived of his life or personal liberty save in accordance with law. (emphasis added)

The phrase ‘in accordance with law’ requires conformity with the fundamental rules of natural justice. Indeed, the Privy Council’s definition of ‘law’ in Ong subsumed ‘fundamental rules of natural justice that ... was in operation in Singapore at the commencement of the Constitution’,35 thereby superseding the proposed ‘narrow’36 interpretation of ‘law’ that encompassed only laws passed by Parliament. In Nguyễn, it was argued that this principle also includes such rules of international law that may apply, incorporating them into the Singapore Constitution.37

Ultimately, however, the court chose to rest its decision in favour of the death penalty on the flimsy assertion that ‘there [was] simply not

33 See above n. 11 at para. 88.
34 Ibid. at para. 91.
35 See above n. 7 at 62A.
36 Ibid. at 61E.
sufficient State practice to justify the next part of the appellant counsel’s argument as to the content of this customary international rule.\textsuperscript{38} This left open the possibility that Singapore courts will incorporate a rule of customary international law against death by hanging into the Constitution if it is established.

Two years on, there is incontrovertible evidence that there is a worldwide movement to abolish, or at least restrict, the use of the death penalty. Professor Michael Hor observes:

Entire continents frown at its use and many jurisdictions which do so only for the most heinous murders and the like. There are retentionist strongholds, especially in Asia, but . . . few if any with Singapore’s level of economic and social development which use the death penalty as much as Singapore does. Singapore’s closest comparisons in terms of development and culture are probably Japan, which executes very few people and only for aggravated murder; South Korea, which is retentionist for murder but has had a moratorium in place since 1998; and Hong Kong, which is abolitionist and executed its last offender in 1966.\textsuperscript{39}

Already in the Commonwealth, the Privy Council has abandoned its infamous pronouncements in Ong to hold that virtually any mandatory sentence of death is unconstitutional, and violates the individual’s dignity, in the sense that he cannot be deprived of the right to have the court take into account all the mitigating and aggravating factors before pronouncing a sentence of death. The Privy Council in Reyes also observed a gradually emergent, and distinct, international movement against the mandatory imposition of the death penalty, spanning large swathes of Europe, South Africa and even selectively retentionist America.\textsuperscript{40}

A ground-breaking constitutional development saw the Constitutional Court of South Africa review and dismiss not only the constitutionality of the mandatory death penalty, but also that of the death penalty itself. Relying on decisions as far-reaching as Hungary, Massachusetts and Canada, the court in S v Makwanyane\textsuperscript{41} found the death penalty cruel, inhuman and degrading punishment, and thus ruled it unconstitutional:

Death is the most extreme form of punishment to which a convicted criminal can be subjected. Its execution is final and irrevocable. It puts an end not only to the right to life itself, but to all other personal rights which had vested in the deceased . . . It leaves nothing except the memory in others of what has been and the property that passes to the deceased’s heirs. In the ordinary meaning of the words, the death sentence is undoubtedly a cruel punishment. Once sentenced, the prisoner waits on death row in the company of other prisoners under sentence of

\textsuperscript{38} See above n. 11 at para. 92.
\textsuperscript{39} See Hor, above n. 15 at 538, 539.
\textsuperscript{40} See above n. 21 at paras. 31–42.
\textsuperscript{41} 1995 (3) SA 391.
death, for the processes of their appeals and the procedures for clemency to be carried out. Throughout this period, those who remain on death row are uncertain of their fate, not knowing whether they will ultimately be reprieved or taken to the gallows. Death is a cruel penalty and the legal processes which necessarily involve waiting in uncertainty for the sentence to be set aside or carried out add to the cruelty... it is degrading because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the state.  

Crucially, the court found the death penalty not only cruel punishment within ‘the ordinary meaning of the words’, but also within the meaning of section 11(2) of the previous South African Interim Constitution which explicitly prohibited ‘cruel, inhuman or degrading treatment or punishment’.

Similarly, the application of the death penalty in Singapore may violate a more enlightened Constitution that impliedly incorporates the international norm against cruel or degrading punishment through extra-textual interpretation of the words ‘save in accordance with law’ in Article 9(1).

Selectively retentionist America has also found that a mandatory death penalty is unconstitutional. The Supreme Court of the United States in Woodson v North Carolina considered a North Carolina statute that failed to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of sentence of death a grave ‘constitutional shortcoming’. A similar result was reached in Roberts v Louisiana. The Supreme Court struck out a Louisiana statute that provided a mandatory death penalty upon conviction of certain categories of murder, because it failed to consider particular mitigating factors, and thus was insufficiently discriminating.

The international abolitionist movement also resonates closer to home in Singapore. In Mithu v State of Punjab, the Supreme Court of India struck out a provision of the Indian Criminal Code which passed a mandatory sentence of death on a defendant convicted of a murder, committed while he was serving life imprisonment. The court found that a ‘standardized mandatory sentence’ failed to ‘take into account the facts and circumstances of each particular case’. It was so ‘final, so irrevocable and so irrestitutable’ that ‘no law which provides for it without involvement of the judicial mind can be said to be fair, just and reasonable’.

Yet, these developments continue to be unconvincing in the eyes of the local courts. In 2010, the Court of Appeal of Singapore was faced

42 Ibid. at paras. 26, 90–5.
47 1983 SCR (2) 690.
48 Ibid. at 704, 707 and 713.
with an appeal challenging the constitutionality of mandatory death penalty provisions under the MDA. Two central arguments were canvassed in support of the appellant’s case: first, that mandatory death penalty legislation is not ‘law’ for the purposes of Article 9(1) of the Singapore Constitution because mandatory death penalty is an inhuman punishment; secondly, that mandatory death penalty is prohibited by customary international law which is included in the expression ‘law’ in Article 9(1). Cases and state practice demonstrating the steady progress of the international abolitionist movement against mandatory death penalty for serious offences were cited in argument. Against the first argument, however, the Court of Appeal held:

Significantly, all of the Appellant’s Art 9(1) cases concern the offence of murder, unlike the offence in issue in this appeal, which is the offence of drug trafficking. Hence, the rationale underlying those cases has no direct application to the present appeal. In this regard, it is pertinent to note the following comments made by Lord Diplock in Ong Ah Chuan at 674 (these comments, although made in relation to Art 12(1), are also relevant to the present discussion on Art 9(1)):

Wherever a criminal law provides for a mandatory sentence for an offence there is a possibility that there may be considerable variation in moral blameworthiness, despite the similarity in legal guilt of offenders upon whom the same mandatory sentence must be passed. In the case of murder, a crime that is often committed in the heat of passion, the likelihood of this is very real; it is perhaps more theoretical than real in the case of large scale trafficking in drugs, a crime [for which the motive is cold calculated greed. [emphasis added]

With regard to the offence of drug trafficking, what is an appropriate threshold of culpability for imposing the [mandatory death penalty] is, in our view, really a matter of policy, and it is for Parliament to decide, having regard to public interest requirements, how the scale of punishment ought to be calibrated. This is par excellence a policy issue for the Legislature and/or the Executive, and not a judicial issue for the Judiciary . . . even if the Appellant’s Art 9(1) cases bear out the conclusion that the [mandatory death penalty] is an inhuman punishment when it is prescribed as the punishment for murder, it does not necessarily follow that the [mandatory death penalty], when prescribed as the punishment for drug trafficking, is likewise an inhuman punishment.

With regard to the question of whether there exists a customary international law prohibiting mandatory death penalty, the Court of Appeal, after reviewing the evidence of state practice canvassed in the

50 Ibid. at para. 33.
51 Ibid. at paras. 48–9. The constitutional development that the Court of Appeal alluded to was, inter alia, the fact that a proposed Art. 13 (which purported to provide that ‘[n]o person shall be subjected to torture or to inhuman and degrading punishment or other treatment’) in the Wee Chong Jin Commission Report was expressly rejected by the legislature during the formation of the Constitution of Singapore: see ibid. at paras. 64–74.
appeal, took the view, *inter alia*, that 'there does not presently exist a rule of [customary international law] prohibiting the [mandatory death penalty] as an inhuman punishment'\(^{52}\) because 'there is a lack of extensive and virtually uniform state practice'\(^{53}\) to support the existence of such a customary international law rule.

### iii. Constitutional Miscellany

In view of the decisive rejection of a constitutional prohibition against inhuman punishment in the evolution of the Singapore Constitution . . . any changes in [customary international law] and any foreign constitutional or judicial developments in relation to the [mandatory death penalty] as an inhuman punishment will have no effect on the scope of Art 9(1). If any change in relation to the [mandatory death penalty] (or, the death penalty generally) is to be effected, that has to be done by Parliament and not by the courts under the guise of constitutional interpretation.\(^{54}\)

In any event, the Singapore Court’s final words in *Nguyen* threatened to extinguish any progress *Nguyen* envisioned hitherto:

> We agree with the trial judge’s reasoning on the effect of a conflict between a customary international law rule and a domestic statute. The trial judge held that even if there was a customary international law rule prohibiting execution by hanging, the domestic statute providing for such punishment, *viz.* the MDA, would prevail in the event of inconsistency.\(^{55}\)

This must be true, but only if certain rules of customary international law are *not* capable of being imported into the words of the Constitution, *i.e.* the incorporation of the rule against death by hanging into the words ‘save in accordance with law’ in Article 9(1). In the instance of any such constitutional incorporation, the constitutional provision and the rule of customary international law it incorporates prevail over an inconsistent statutory provision.

However, in *Yong Vui Kong v PP*,\(^{56}\) the Court of Appeal refused to recognize the readiness with which it ought rightly to constitutionally incorporate rules of customary international law that strike at the heart of human rights protection. There, it was held:

> [A customary international law] rule must be first accepted and adopted as part of our domestic law before it is valid in Singapore—*i.e.*, a Singapore court would need to determine that the [customary international law] rule in question is consistent with ‘rules enacted by statutes or finally declared by [our] tribunals’ (*per* Lord Atkin in *Chung Chi Cheung* at 168) and either declare that rule to be part of Singapore law or apply it as part of our law. Without such a declaration or such application, the

55 See above n. 11 at 94.
56 *Yong Vui Kong*, above n. 6 at para. 91.

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[customary international law] rule in question would merely be floating in the air. Once that [customary international law] rule has been incorporated by our courts into our domestic law, it becomes part of the common law. The common law is, however, subordinate to statute law. Hence, ordinarily, [customary international law] which is received via the common law is subordinate to statute law ... even if we accept that 'law' in Art 9(1) includes [customary international law], the specific [customary international law] rule prohibiting the [mandatory death penalty] as an inhuman punishment (assuming there is such a rule) cannot be regarded as part of 'law' for the purposes of this provision ... [the court then reiterated the rejection by the government of the proposed Article 13 in the Wee Chong Jin Commission Report ... I given the historical development of the Singapore Constitution, it is not possible for us to accept [the appellant’s] submission on the meaning of the expression ‘law’ in Art 9(1) without acting as legislators in the guise of interpreters of the Singapore Constitution.57

With respect, the fact that statute prevails over the common law does not also preclude the Constitution from prevailing over parliamentary statute. The court must still be able to consider the possibility that a Singapore Constitution enlightened by customary international law may trump statutory prescriptions (like those found in the MDA) in order for the role of the judiciary as guardians of fundamental liberties to be properly and meaningfully discharged.58 Certainly, also, there may be some merit in the argument that deferential judicialism under a dualist theory of international law59 may be democratically and jurisprudentially inappropriate where an alleged customary international law rule is in substance a rule of human rights law—the sanctioning of which precisely falls within the burden of the judiciary by virtue of the doctrines of checks and balances and separation of powers.

In any event, it should also be pointed out that no matter how the Singapore courts choose to act in the future, they must tread carefully. The mandatory death penalty has been a central tenet of drugs legislation in Singapore since 1975. Throughout time, key political leaders have reinforced parliamentary belief in the death penalty as a suitable,
and essential, deterrence of drug offending.\textsuperscript{60} Incorporating customary international law into the Constitution may affect the proper separation of the executive power in foreign affairs and the Singapore judiciary. If the Singapore courts pronounce the mandatory death penalty unconstitutional, it may well be that the Singapore Constitution itself will be changed to sanction it. It is unclear how the Singapore judiciary and executive powers will converge in this area, and this perhaps explains Nguyen’s reticence.\textsuperscript{61}

\textit{iv. Murder through the Lenses of Ong: Hidden Treasure?}

In any event, whatever might be the merits of the argument... that the [mandatory death penalty] imposed for the offence of murder is an inhuman punishment and is thus unconstitutional, this argument has been foreclosed by constitutional developments in Singapore.\textsuperscript{62}

We would add that, although there is room for arguing that there is insufficient evidence that the [mandatory death penalty] deters serious offences like murder, it can be equally said that there is insufficient evidence that the [mandatory death penalty] does not have such a deterrent effect. Surveys and statistical studies on this issue in one country can never be conclusive where another country is concerned. The issue of whether the [mandatory death penalty] has a deterrent effect is a question of policy and falls within the purview of Parliament rather than that of the courts.\textsuperscript{63}

In the province of murder, there is no official articulation of the necessity, or constitutionality, of the mandatory death penalty. A complete judicial discourse is virtually non-existent. Singapore’s deliberative bodies have never debated why the death penalty should be mandatory for murder, perhaps relying on the ‘force of history’, and the ‘instinctive but anomalous “life for life” doctrine’\textsuperscript{64} to keep the punishment intact.

Does the mandatory death penalty for murder pass constitutional muster? Again, two potential constitutional rights are implicated: (i) Article 12, ‘which guarantees equal protection of the law and with it the constitutional requirement that all legislative classifications must be rationally based’\textsuperscript{65} (the rational nexus test); and (ii) Article 9, which has the potential of incorporating the emerging international custom against cruel, inhuman or degrading punishment within the words ‘in accordance with law’.

Even applying Ong’s narrow interpretation of Article 12, it is unclear if current murder legislation survives the rational basis nexus for

\textsuperscript{60} See most recently, ‘Tough stance on serious crimes saves lives: Minister’, \textit{The Straits Times} (10 May 2010) (Factiva).
\textsuperscript{61} For a more elaborate discussion, see above n. 37 at 230.
\textsuperscript{62} \textit{Yong Vui Kong}, above n. 6 at para. 49.
\textsuperscript{63} \textit{Ibid.} at para. 118.
\textsuperscript{64} See Hor, above n. 15 at 530.
\textsuperscript{65} \textit{Ibid.}
equal protection. Two constructive liability provisions in the Penal Code section 300(c) (constructive murder) and section 34 (constructive or vicarious murder)—are particularly incriminating in this respect. Both these offences envision capital liability for conduct that is significantly less serious than intentional killing: an intention merely to cause injury for the former, and subjective knowledge of potentially fatal violence while engaging in an otherwise non-fatal criminal activity for the latter. 'Like should be compared with like'. There is no rational, moral or penological basis for classifying wounding and killing within the 'single class' that Ong speaks of.

There must be at least a credible argument that the mandatory death penalty is disproportionate to the seriousness of section 300(c) and common intention crimes, thus attracting the potential constitutional protection against cruel, inhuman and degrading punishment.

In intentional killing situations, it is also tempting to apply Ong's Article 12 interpretation. However, the global effacement of Ong notwithstanding, there is more to Ong than meets the eye. The Privy Council left open the possibility that a mandatory death penalty for murder may not be sufficiently discriminating:

Wherever a criminal law provides for a mandatory sentence for an offence there is a possibility that there may be considerable variation in moral blameworthiness ... In the case of murder, a crime that is committed in the heat of passion, the likelihood of this is very real ... The Singapore courts have also gone to great imaginative lengths to circumvent the injustice a mandatory death penalty will otherwise cause in complex murder situations. Professor Hor observes:

We have seen the courts being almost liberal in the application of the ethically dubious defence of 'sudden fight' to 'save' killers who would have otherwise been guilty of murder—what of offenders who kill in similarly mitigatory circumstances who have not killed in the context of a fight? We have also seen how the prosecutor on occasion exercises its discretion to reduce the charge from murder to culpable homicide not

66 It is useful to also note that in Yong Vui Kong, above n. 6 at para. 113, the Court of Appeal (in the context of drug offences) continued to follow Ong: 'Although a differentia which takes into account something more than merely the quantity of controlled drugs trafficked may be a better differentia than the 15g differentia, what is a better differentia is a matter on which reasonable people may well disagree. This question is, in truth, a question of social policy, and, as the Privy Council stated in Ong Ah Chuan at 673 ... it lies within the province of the Legislature, not the Judiciary. Our judiciary has to respect the constitutional role of our legislature as delineated in the Singapore Constitution (under Art 38), and this is why our courts will only act to ensure that the differentia employed in the MDA for determining when the [mandatory death penalty] is to be imposed bears a rational relation to the social object of that statute ... we find that the 15g differentia does satisfy this test.'

67 (Cap 224, 2008 Rev Ed Sing).

68 These offences are discussed more elaborately in Section V of this paper.

69 See above n. 7 at 64D.

70 Ibid. at 64E.

71 Ibid. at 65C.
amounting to murder in situations where murder would have been proven without much of a problem—presumably because of overriding mitigating circumstances. What of those who do not impress the prosecutor but who may have persuaded the court? Mentally impaired offenders caught in the invidious bind of a conflict of psychiatric testimony for which no really satisfactory solution has been found face mandatory death.⁷²

Current murder legislation is also ill-suited to the penal ramifications of the mandatory death penalty. Professor Hor further observes:

the mandatory death penalty in our Penal Code is itself a deviation from the original discretionary provision in the Indian Penal Code, which remains till this day. Scholarship to date has not uncovered why it was felt that the Straits Settlements Code should be different. While that mystery may never be solved, the historical point is simply that the drafters of the original Indian Penal Code did not write the murder provisions thinking that they were ever going to be coupled with a mandatory sentence of death—they were unlikely to have been under the impression that their provisions had to be as discriminating as a mandatory scheme ought to be.⁷³

The result is that an offender convicted of murder—and who even the original drafters thought was deserving of a lesser punishment than death—is sentenced to death regardless, under the current Singapore penal regime, thereby potentially raising grave doubts about the constitutional validity of the mandatory death penalty. However, such potential doubts have been roundly denied and rejected by the Court of Appeal by holding that arguments alleging the unconstitutionality of mandatory death penalty for murder have already been ‘foreclosed by constitutional developments in Singapore’ and that in any event ‘[t]he issue of whether the mandatory death penalty has a deterrent effect is a question of policy and falls within the purview of Parliament rather than that of the courts’.⁷⁴

III. Administration of Criminal Procedure: Innovations to Due Process or the Failure of Judicial Imagining?

i. The Nascence of Due Process in Singapore

In the context of due process, no constitutional provision bears more importance, and relevance, than the vaguely worded and potentially loaded Article 9(1):

No person shall be deprived of his life or personal liberty save in accordance with law.⁷⁵ (emphasis added)

⁷² See Hor, above n. 15 at 533.
⁷³ Ibid. at 533, 534.
⁷⁴ See above nn. 62 and 63.

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When due process rights and their constitutional expression first came before the courts in *Haw Tua Tau v Public Prosecutor*, the Privy Council found it ‘imprudent to attempt to make a comprehensive list of what constitute fundamental rules of natural justice applicable to procedure for determining the guilt of a person charged with a criminal offence’. This is regrettable, and set the precedent for piecemeal jurisprudence on due process rights in Singapore.

Since then, the Singapore judiciary has yet to comprehensively list, or discuss, the fundamental rules of natural justice that Article 9(1) entrenches in criminal jurisprudence. Instead, Singapore courts have refused to engage the prescribed means of finding out whether procedural safeguards have evolved into fundamental rules of natural justice, increasingly constraining the accused’s rights in criminal procedures that potentially lead to the mandatory death sentence.

**ii. Curtailing the Right to Counsel**

Judicial pronouncements emanating from Singapore courts have slowly but certainly encroached upon and prejudice the constitutional right to counsel. *Rajeevan Edakalavan v P* stands for the proposition that an accused does not have the right to be informed of the right to counsel, presumably in a capital case or otherwise.

Before *Rajeevan*, criminologists had long endorsed a landmark Privy Council decision emanating from the courts of Trinidad and Tobago that conferred on the accused not only the right to counsel, but also the constitutional right to be informed of such a right. However, Yong CJ distinguished this case decision on the basis that the Singapore Constitution did not expressly provide the accused the right to retain and instruct without delay a legal adviser of his own choice. Under Article 9(3), there was only a right ‘to consult and be defended by a legal practitioner of his choice’. Yong CJ accordingly held:

The right in art 9(3) is a negative right. The words ‘shall be allowed’ are couched in negative terms in a sense that there is no obligation imposed on the relevant authority to inform and advise the person under custody of his right to counsel.

Citing the Singapore judiciary’s historic adherence to textualism, Yong CJ chose to interpret Article 9(3) in a narrow, literalist fashion, explaining that:

The duty of the judge is to adjudicate and interpret the laws passed by parliament with the aim of ensuring that justice is upheld. He is in no position to expand the scope of or imply into the Constitution and other

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78 Attorney-General of Trinidad and Tobago v Whiteman [1991] 2 AC 240.
79 See above n. 77 at para. 19.
legislation his own interpretation of the provisions that is clearly contrary to parliament's intention.80

Yong CJ found that depriving the accused of the right to be informed would hardly negate the right to counsel itself; in fact, such a conclusion was 'wholly speculative and unwarranted'.81 Instead, he suggested that any attempt to broaden the scope of the rights of the accused should be a strict legislative exercise, dependent on the 'interests of the constituency who entrust [legislators] to act fairly, justly and reasonably'.82

In terms of constitutional interpretation, Rajeevan upholds the letter of the Constitution at the expense of its spirit, and totally ignores the crucial judicial function of checking legislative power, deliberately casting the Singapore judiciary in a severely limited role. A textualist judiciary might find itself helpless in the face of a clearly wrong legislative decision that Parliament has made, but is unlikely to overturn it, leaving the accused vulnerable to static, inaccurate applications of the Penal Code and the Constitution. A lot more is at stake in capital proceedings. Lapses in due process owing to textualist proclivities may cast moral and legal doubt on a capital conviction.

The absence of an express clause in the Singapore Constitution, thus, ought to make no difference to the position of the right to be informed. A purposive interpretation of Article 9(3) more than adequately fills the gap the provision leaves. Like the privilege against self-incrimination, the right to be informed must, by necessary implication, be part of the right to counsel itself.83

Additionally, the accused's exercise of the right to counsel can be delayed for up to two weeks during pre-trial detention and interrogation.84 The court in Jasbir Singh v PP85 found that there was no 'statutory basis' for the position that the accused must be allowed to consult a lawyer before making certain statements to the police.86 Instead, it found that the right to counsel enshrined in Article 9(3) of the Constitution required only a reasonable period of time, rather than immediacy.

It is no secret that 'the principal reason for the delay is to enable the police to extract incriminatory statements from the accused undisturbed by any advice to the contrary by his or her lawyer'. This was a

80 Ibid.
81 Ibid. at para. 21.
82 Ibid.
83 See discussion above. For a more elaborate discussion, see Michael Hor, 'The Right to Counsel—The Right to be Informed' (1993) 5 Singapore Academy of Law Journal (hereafter, SACLJ) 141. Suffice it to also note that the Law Minister has in 2010 rejected calls in Parliament for changes to the current system of an arrested person's access to legal counsel: see 'Access to counsel: Minister rejects call for changes', The Straits Times (20 May 2010) (Factiva).
84 Michael Hor, 'The Death Penalty in Singapore and International Law' (2004) 8 Singapore Year Book of International Law (hereafter, SYBIL) 105.
86 Ibid. at 32B.
reality acknowledged by the court, which found that the exercise of the right to counsel 'must be subject to a balance between the arrested person’s right to legal advice and the duty of the police to protect the public by carrying out effective investigations'.

However, the court’s interpretation of Article 9(3) to attenuate the accused’s right to counsel cannot pass constitutional muster. Even if the ‘reasonable time’ interpretation holds water, it should be adopted much more restrictively. It is instructive to set out the relevant portions of the Privy Council’s decision in Ong Ah Chuan, which applied principles of ‘generous interpretation’ to the words ‘life’ and ‘personal liberty’ in Article 9(3). Lord Diplock made clear the ramifications of the word ‘law’ in the phrase ‘in accordance with law’:

The Public Prosecutor accepts the principle of reasonableness and fair and just procedure accorded by the Indian authorities to the words ‘in accordance with law’ in so far as the phrase refers to natural justice, procedure before the courts and all that part of the common law such as the presumption of innocence. But the definition of ‘law’ used in the phrase includes both statute law and common law, and if the Singapore Parliament passes express legislation that is the ‘law’ referred to ... ‘In accordance with law’ is directed against arbitrary execution or arrest at the discretion of the executive. So far as the legislature is concerned, art 9(1) requires no more than a properly passed statute making provision for deprivation of life or liberty for the deprivation to be in accordance with the law. That is so provided that the statute does not offend any other provision of the Constitution. ‘Properly’ means passed in accordance with the Constitution. (emphasis added)

The pronouncements in Jasbir are not supported by any legislation: there is no statute that makes two weeks a reasonable period of time for an accused to be denied counsel. Article 9(4) of the Constitution provides the only relevant legislative comparison on what constitutes a ‘reasonable’ period of delay—the accused must be produced before a magistrate ‘within 48 hours’ and cannot be further detained in custody without the magistrate’s authority.

The Jasbir two-week maximum time-span is far beyond any delay mandated by the Constitution. Thus, according to principles of reasonableness, fairness and justice, the right to counsel should occur within the same 48-hour time frame.

Furthermore, the right to counsel also performs an additional executive function during police interrogations. It is worth noting that there is no legal requirement to record interrogation proceedings: what exactly transpires depends solely on witness testimonies from the police and the accused. Thus, the right to counsel acts as the sole

87 Ibid. at 32D.
90 See above n. 84 at 114.
check and balance against police pressure, and abuse, in the interrogatory room.\textsuperscript{91}

The Singapore judiciary’s approaches to the right to counsel, and the privilege against self-incrimination—tentative, scattered and ambiguous—are characteristic of its treatment of other due process rights. Its historic refusal to define and develop due process jurisprudence has triggered the development of constraints to the accused’s rights, in favour of the executive and prosecutorial powers.

In addition to the derogations discussed in this paper, the judicial handling of witness statements further perpetuates lapses in due process. For example, the incriminating statements of other accused persons and accomplices are fully admissible against the accused even if they are subsequently retracted at trial. There is also no right of pre-trial discovery for any of these statements.\textsuperscript{92}

Due process experts have observed that ‘all these rules and practices taken together must at least cast some doubt on whether there is sufficient due process for the conduct of capital cases’ in Singapore.\textsuperscript{93}

\textbf{iii. Silencing the Right to Silence}

Similarly, the Singapore judiciary has stifled the privilege against self-incrimination or \textit{nemo debet se ipsum prodere}, which decrees that the court must not order or coerce a person standing trial to disclose what he knows about the offence he is charged with and does not admit.\textsuperscript{94}

In \textit{Haw Tua Tau}, the Privy Council was ambivalent about the role of the privilege in Singapore criminal law. After lengthy discourse on its place in English criminal jurisprudence and the Criminal Procedure Code (which had been adopted in Singapore with amendments), the Privy Council did not find that it was ‘necessary to decide whether by virtue of that maxim it should be recognized, as a fundamental rule of natural justice under the common law system of criminal procedure’. Non-observance did not infringe the presumption of innocence; in fact, exceptions had been made in ‘many countries of the non-communist world’ where the court itself ‘has an investigatory role to play in the judicial process for the trial of criminal offences’.\textsuperscript{95}

\textsuperscript{91} For a more elaborate discussion, see above n. 88.
\textsuperscript{92} See above n. 84 at 114, 115.
\textsuperscript{93} \textit{Ibid.} at 115.
\textsuperscript{94} See, more generally, above n. 76 at 81G. The Privy Council’s inference stems from the broader definition of the privilege, which entitles ‘[the accused] not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings’. The United States Supreme Court strongly asserted this privilege in \textit{Lefkowitz v Turley} (1973) 414 US 70, but has used dubious distinctions since to carve out exceptions to the application of the privilege. See also the latest decision of \textit{Bergbuis v Thompsons} 560 US (2010), where the US Supreme Court held by a 5–4 majority that the invocation of the right to remain silent must be unambiguous.
\textsuperscript{95} See above n. 76 at 81G–I.
The Privy Council ultimately found the privilege a matter for the Singapore courts to decide; it felt ‘incumbent on them to seek the views of the Court of Criminal Appeal (as the current Court of Appeal was then known) as to whether the practice of treating the accused as not compellable to give evidence on his own behalf had become so firmly based in the criminal procedure of Singapore’ and as a ‘fundamental rule of natural justice’.  

The Singapore Court of Criminal Appeal duly considered the privilege against self-incrimination but refused to accord it constitutional status in *PP v Mazlan.* With ‘alarming finality’, Yong CJ found that the privilege had never been regarded ‘as subsumed under the principles of natural justice’. Furthermore, elevating a privilege of ‘evidentiary nature’ to a constitutional right ‘despite its having been given no explicit expression in the Constitution’ envisioned an unacceptable degree of ‘adventurous extrapolation’.

*Mazlan*’s constitutional pronouncements fall apart on closer scrutiny. Professor Hor observes:

That the privilege is not express [in the Constitution] merely means that it has to be decided whether it is a fundamental rule of natural justice. Indeed, much of what is generally accepted to be fundamental rules of natural justice is not express.

Furthermore:

The evidential nature of the privilege should not disincline the court from deciding that it is a fundamental rule of natural justice. The one principle mentioned by Lord Diplock in *Haw Tua Tau*, the presumption of innocence, is about as ‘evidential’ as a rule can get but is nevertheless an ‘undoubted fundamental rule of natural justice’.

The sweeping nature of the Singapore court’s comments in *Mazlan* were especially perplexing post-*Haw Tua Tau*. Then, the Privy Council, while refusing to make any definitive pronouncements, had directed the courts towards the appropriate methodology of finding out if any particular right of privilege should attain constitutional status:

in considering whether a particular practice adopted by a court of law offends against a fundamental rule of natural justice, that practice must not be looked at in isolation but in the light of the part which it plays in the complete judicial process. Their Lordships accordingly recognise that the fact that under a system of justice in which the court itself is invested with what are in part inquisitorial functions, compelling an accused to answer questions put to him by a judge would not be regarded as contrary to natural justice, does not necessarily justify compelling the accused to submit to hostile interrogation by the prosecution.

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96 *Ibid.* at 82E-F.
99 Michael Hor, ‘The Privilege against Self-Incrimination and Fairness to the Accused’ [1993] SJLS 35 at 47.
100 *Ibid.*
at a trial in which the procedure is predominantly, if not exclusively, adversarial.\textsuperscript{101}

In depriving the right of silence of constitutional status, the accused in Singapore no longer has the ability to ‘resist any effort to force him to assist in his own prosecution’.\textsuperscript{102} Taken to its logical conclusion, the accused may be coerced to court his death in capital proceedings. This further endangers other rules based on the privilege, like the protection of the innocent from conviction, and the protection of the accused from improper conduct by law enforcement officials.

As a crucial check and balance against foul play during police interrogations, the privilege against self-incrimination protects ‘the suspect against the extraction of unreliable and improperly obtained statements’.\textsuperscript{103} Thus, any derogation of the privilege implicates other fundamental common law ideals, which collectively ensure a fair trial through an adversarial or accusatorial process.

Post-\textit{Mazlan}, the right to silence and its penumbral rights and privileges lack constitutional force in Singapore’s criminal procedure, with no alternative safeguards established to fill the gaps and to protect the accused.\textsuperscript{104} Since the law on the right to silence applies to all criminal proceedings without exception, the accused may be condemned to death even though the court, by virtue of their silence, is morally uncertain of their guilt.

A separate legislative point must be made about the right to silence. The 1976 amendments to the Criminal Procedure Code (CPC) dealt another beating to such a right, allowing Singapore courts to draw from silence adverse inferences against the accused if he fails to mention his defence ‘on being charged with the offence or officially informed that he might be prosecuted for it’.\textsuperscript{105} This additional modification renders any exercise of the privilege hopelessly ambiguous: it would be impossible to know if the authorities will construe the accused’s silence as an inference of guilt, or the exercise of their privilege. It remains to be seen what the courts make of the conflict between the privilege and adverse inferences.

In the context of capital proceedings, it cannot be that a capital conviction may wholly or in part depend on the accused’s refusal to answer questions during interrogation or while on trial. It must surely weigh on the court’s legal and moral consciousness that the death penalty may be meted out by virtue of his \textit{silence}.

\textit{Mazlan} also brought police conduct during interrogations into sharp focus, continuing the theme of silence in favour of the executive powers, and to the disadvantage of the accused. With reference to the CPC, Yong CJ held that the right to be expressly informed of a right to

\textsuperscript{101} See above n. 76 at 82A–B.
\textsuperscript{102} See above n. 99 at 35.
\textsuperscript{103} \textit{Ibid.} at 45.
\textsuperscript{104} For more elaborate discussion, see above n. 99.
\textsuperscript{105} Criminal Procedure Code (Cap 68, 1986 Rev Ed Sing), s. 123(1).
remain silent did not exist under section 121(2), and that any statement recorded from a suspect or an accused under section 121(1) can be admitted, even if no such caution had been read to them.¹⁰⁶

Indeed, section 121 of the CPC does not expressly provide for the accused’s right to be informed of such a privilege. However, several considerations detract from a literal construction of section 121. The 1976 amendments to the CPC excised a host of procedural safeguards that prescribed the proper manner in which a police interrogation should be carried out, thus allowing the police to interrogate ‘any person supposed to be acquainted with the facts and circumstances of the case’.¹⁰⁷

The right to silence thus remains one of the precious few rights that the legislature currently endows the accused with in police interrogations, which often exert tremendous pressure on the accused to answer self-incriminatory questions.¹⁰⁸ It is argued that the right to silence ‘cannot exist in any real sense’ unless the accused is informed of it during post-charge questioning.¹⁰⁹

The consequence of Mazlan is that only those who already know of the right will be in a position to exercise it. No respectable criminal justice system should disadvantage the ignorant or the more vulnerable, the less formally educated or the less well-off.¹¹⁰

The case for an implied right to be informed of the privilege becomes especially cogent in the context of post-charge interrogation. Under section 122(6) of the CPC, the police, on charging the accused, must warn him or her that adverse inferences may be drawn against them if he or she does not mention anything that they may rely on in court. The accused might reasonably assume that the same warning applies for subsequent questioning; an assumption that is ‘quite wrong as the risk of adverse inferences only occurs for silence on being charged or officially informed of the possibility of a charge’.¹¹¹ Consequently, failure to inform the accused of their right of silence may constitute ‘a positive misrepresentation of the rights of the person questioned’, which the Court of Criminal Appeal itself disapproves.¹¹²

_Mazlan_ thus sanctions a deafening executive silence that reduces the privilege of self-incrimination to a bare, theoretical right. In the

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¹⁰⁶ See above n. 97 at 514H–515B.
¹⁰⁹ See above n. 99 at 40.
¹¹⁰ Ibid. at 39–42.
¹¹¹ Ibid. at 40.
¹¹² See above n. 97 at 519G.
context of capital proceedings in Singapore, this represents yet another alarming lapse in due process, in turn casting moral and legal doubt on the guilt of those condemned to death in Singapore.

**iv. The Constitution of the Bench in Capital Proceedings and Appellate Criminal Procedure: Innovation or Misadventure?**

The focus now shifts from interrogation to judicial procedure. When Singapore abolished jury trials, the Singapore judiciary installed two High Court judges to hear capital cases: if they disagreed, the benefit of the doubt would accrue to the accused. The resulting cost of efficiency was apparently too great a price to bear, and Parliament moved to amend section 194 of the CPC,\(^{113}\) such that only one judge would hear capital cases to ensure their ‘speedy disposal’.\(^{114}\)

Then Minister of Law Professor S. Jayakumar asserted:

This would enable the courts to deal with more cases, and reduce the waiting times ... there is the ugly and unacceptable risk that, if the waiting time for such cases is not shortened, an accused person who is eventually acquitted may have spent several unnecessary years in prison before his acquittal.\(^{115}\)

The learned Minister also sought to make a crude utilitarian bargain:

To achieve a fairer trial of capital cases, it occurred to me that what is even more important than having them heard before two judges is to have them prosecuted by two DPPs and similarly defended by two counsel ... Accordingly, in all capital cases in future in which the accused persons have not engaged their own counsel, arrangements will be made for the two counsel to be assigned to the defence.\(^{116}\)

This is a dubious exchange indeed. It is difficult to see how the role of prosecutorial or defence counsel—to persuade the court of the state’s or accused’s position—can substitute that of a judge, who adjudicates fact and law. For example, in cases that turn on whether a particular statement is given voluntarily in the course of an interrogation, it is the judge that decides whether to believe the accused or the state: either counsel is in no position to assess the weight of the evidence and legal arguments for the purposes of adjudication. Furthermore, without the additional check and balance of another judge, the accused is vulnerable to a prejudiced conviction ‘in the sense that in the past the other judge might have believed him’.\(^{117}\)

**v. Death in a Less than Unanimous Decision**

Current appellate procedures in Singapore dictate that the accused is still found guilty in capital proceedings even if the Court of Appeal

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115 Ibid.
116 Ibid. at 1293.
117 See above n. 84 at 116.

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passes a less than unanimous decision. In *Took Leng How v PP*,\textsuperscript{118} the accused, charged with the murder of an eight-year-old girl in a game of hide-and-seek gone wrong, had his death sentence upheld by the Court of Appeal with a less than unanimous decision. One of the critical facts in issue was whether the deceased had died from the accused smothering her mouth and nose with his bare hands in the course of an alleged struggle (in which case the accused would be criminally responsible for the deceased’s death) or from other causes as claimed by the accused in his statements to the police, namely a fit or a seizure. The medical officer responsible for the deceased’s autopsy report had, in the course of cross-examination, conceded that notwithstanding his damning findings in the report, the possibility of death solely by fit or seizure of the deceased could not be entirely ruled out.\textsuperscript{119} Kan Ting Chiu J in his dissenting judgment held:

The account of the [accused] of the early vomiting, spasms and the discharge of urine was consistent with a fit resulting in death by choking, and not as part of the dying process. There was also the vomitus, the bruised tongue and the faecal discharge found in the post-mortem examination, which were consistent with a fit and seizure. There was no conclusive evidence on the cause of the occlusion of the airway. If it was caused by smothering as Dr Chui had concluded, murder was made out. If it was the result of a fit, no offence of murder is disclosed. Had the Prosecution proved a case of murder beyond a reasonable doubt? ... The absence of injuries to the nose when bruises to other regions were present raised a doubt whether there was smothering of the nose. The vomitus, bruised tongue and faecal discharge, the possibility of a spontaneous fit and the incomplete family history also created a doubt whether death resulted from smothering. This is not a fanciful possibility. It was a serious doubt the Prosecution had to remove if it were to prove its case, and the Prosecution had not done that.\textsuperscript{120}

The majority judges, however, disagreed with Kan J\textsuperscript{121} and proceeded to uphold the accused’s death sentence despite the fact that one of the

\textsuperscript{118} [2006] 2 SLR 70.
\textsuperscript{119} Ibid. at para. 23.
\textsuperscript{120} Ibid. at paras. 94–7.
\textsuperscript{121} See ibid. at para. 25: ‘At this juncture, we would refer to a point on which our learned brother, Kan Ting Chiu J, has expressed some concern; namely, the absence of any bruising on the deceased’s nose. In Kan J’s view, the absence of any injuries to the deceased’s nose indicates the lack of complete blockade of all the air passages and, in turn, raises some doubts as to whether the deceased was smothered in the first place. However, we do not share the same concern. It should be borne in mind that Dr Chui had demonstrated to the trial judge how the five injuries were consistent with the accused having cupped his hand over the deceased’s nose and mouth. More importantly, it should be noted that the Defence had never once challenged this aspect of the pathologist’s evidence. Furthermore, it is not the task of this court to second-guess the various ways in which the accused could have blocked the deceased’s nose and mouth without having caused any injury to the nose. That has to be established on the evidence. On this, Dr Chui’s evidence is quite clear. We therefore accept, as did the trial judge, Dr Chui’s description of the manner in which the smothering of the deceased had taken place.’
three judges on the panel had expressed reasonable doubt in the prosecution’s case against the accused.

This stands in stark contrast to judicial procedure pre-1992, where both High Court judges must agree to convict the accused of the capital charge. In the face of judicial disagreement on law and fact at the highest level, one expects the benefit of the doubt to accrue in favour of the accused. A less than unanimous decision casts reasonable doubt on the court’s legal and evidential findings and, in turn, the accused’s liability in capital proceedings.

If there is a customary norm demanding some sort of heightened requirement for due process in death penalty cases, then to execute the accused whose guilt is at least controversial must surely be beyond the pale, either as torture or inhuman treatment. It is inconceivable that any argument from efficiency can tip the scales in favour of deficient capital proceedings.

vi. Tried Twice for the Same Crime or Death without a Proper Trial?

Judicial lapses do not stop at trial level. When an appeal is heard, Singapore courts convict and sentence respondents like a trial court, endangering the respondent’s constitutional right against being tried twice for the same crime.

In \textit{PP v Lim Poh Lye,}\footnote{122 [2005] 4 SLR 582.} the Court of Appeal set aside the lesser offence of voluntarily causing hurt in the course of committing a robbery under section 394, and instead convicted the respondents of murder under section 302 read with section 34 of the Penal Code, which carries the mandatory death penalty. Although the respondents did not stand before the Court of Appeal on a charge of murder, the Court of Appeal not only quashed the acquittal, but also convicted and sentenced the respondents to death without a trial.

The outcome of \textit{Lim} violates Article 11(2) of the Constitution:

A person who has been convicted or acquitted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was convicted or acquitted.


The Court of Appeal did not have before it a conviction for murder. That was not the final judgment that was being reviewed. It did not have before it a ‘tentative, informal or incomplete’ court ruling but a firm and final decision. It has before it persons who had once been tried by a
court of competent jurisdiction for the offence of murder and acquitted of that offence. There is a constitutional prohibition against being tried again for the same offence, except where the acquittal had been quashed and a retrial ordered.\textsuperscript{124}

The double jeopardy clause protects persons from being tried twice for the same offence unless the acquittal has been quashed and a retrial ordered. The Court of Appeal in \textit{Lim} essentially sanctioned double jeopardy against respondents caught off guard: they did not expect to defend themselves against a charge of murder, and reasonably believed that they were not guilty of such a charge.

**IV. Presumptions in Drug Trafficking: Distorting the Reasonable Doubt Doctrine and to What End?**

\textit{i. The Importance and Constitutionality of Innocent Until Proven Guilty}

In common law legal tradition, an accused person can only be convicted of a crime if their guilt can be proved beyond reasonable doubt. Traditionally the golden evidential standard of any criminal prosecution—the reasonable doubt doctrine—ensures that the community is not in doubt whether ‘innocent men are being condemned’, and thus represents ‘the moral force of the criminal law’.\textsuperscript{125}

In a criminal justice system where the accused stands to lose not only their liberty but their life, the reasonable doubt doctrine maintains the accused person’s right not to be convicted, unless society is morally certain of their guilt. From a community perspective, the doctrine maintains a vital relationship of trust and confidence between the criminal justice system and the society it aims to protect. Society must first be assured that only the guilty will be punished before the judiciary and executive powers can claim to have legitimate power to punish those they designate as criminals.\textsuperscript{126}

Unlike most modern Bills of Rights, the Singapore Constitution does not expressly protect the presumption of innocence. However, two general provisions of the Constitution may serve to enshrine the reasonable doubt doctrine: (i) Article 9(1), which provides that life and personal liberty can be taken away only where it is ‘in accordance with law’; and (ii) Article 12(1), which grants to all persons ‘equal protection of the law’. In a decision that has transformed Singapore’s constitutional jurisprudence, the Privy Council concluded that ‘law’ cannot merely refer to just any law the legislature passes—instead, ‘law’ must also mean ‘fundamental rules of natural justice’, which

\textsuperscript{124} Ibid.
\textsuperscript{126} For a more elaborate discussion, see Michael Hor, ‘The Burden of Proof in Criminal Justice’ (1992) 4 SAclJ 267.
encompass due process of law and procedural and evidentiary safeguards established by law. Inarguably, one such evidentiary safeguard is the presumption of innocence. More significantly, the ASEAN Inter Parliamentary Organization Declaration of Human Rights—which the Singapore government had a hand in creating—contains an express provision for the protection of ‘the right to be presumed innocent until proven otherwise’.

**ii. Derogations from the Reasonable Doubt Doctrine: Statutory Presumptions against the Backdrop of Death and Drugs**

One of the most serious and complex threats that the reasonable doubt doctrine encounters is the increasingly pervasive use of statutory presumptions.

In Singapore, these presumptions are exercised in all manner of offences, from corruption to illegal immigration to controlled drugs. There are two conflicting interpretations of statutory presumptions. The first places an evidentiary burden of proof on the accused once the prosecution proves one or more facts that trigger the presumption: consequently, ‘the trier of fact will not consider the excusing fact unless the accused raises a reasonable doubt of the existence of that fact’. The other, more onerous interpretation—largely frowned upon in many jurisdictions but favoured by Singapore courts—casts a persuasive burden of proof on the accused. Once the presumption is triggered, the burden of proof shifts to the accused to disprove the presumed fact.

**iii. Presumption upon Presumption**

The most prolific and controversial use of statutory presumptions in Singapore to date lies in the MDA. Where a person is caught ‘trafficking’ certain controlled drugs exceeding a stipulated amount, the MDA imposes a mandatory sentence of death.

The state is sanctioned to presume that a person possesses a controlled drug if, for example, he or she has ‘keys to anything containing a controlled drug’ or ‘the keys of any place or premises . . . in which a controlled drug is found’. That person is also presumed to know

127 See above n. 7.
128 Only a snapshot of the constitutional argument for the reasonable doubt doctrine is presented here—a more exhaustive discussion can be found in Michael Hor, ‘The Presumption of Innocence—A Constitutional Discourse for Singapore’ (1995) SJLS 365.
130 See above n. 126 at 300.
131 See [2002] 2 AC 545. discussed in Section IV.v below.
132 See [2008] 1 SLR(R) 1, discussed in Section IV.iii below.
133 (Cap 185, 2001 Rev Ed Sing).
134 MDA, ss. 18(h) and 18(c) respectively.
‘the nature of the drug’ if he or she is ‘proved or presumed’ to possess that drug. Presumptions are also constructed upon presumptions: in the context of trafficking, section 17 stipulates:

Any person who is proved to have had in his possession more than [a certain quantity of a particular drug stipulated in subsections (a) to (i),] whether or not contained in any substance, extract, preparation or mixture, shall be presumed to have had that drug in possession for the purpose of trafficking unless it is proved that his possession of that drug was not for that purpose. (Emphasis added)

In the context of illicit drugs, Singapore’s then Minister for Home Affairs and Education attempted to justify the MDA’s introduction of statutory presumptions, and the death penalty for trafficking, during the 1979 Parliamentary Debate. One can discern three dominant concerns anchoring Singapore’s draconian drugs policy. The then minister envisioned that the MDA would thwart proliferation of the drug trade, which caused ‘irreparable damage’ to the ‘health and career of the drug abuser’, and thus prevented him from contributing to society as a ‘productive digit’. Related to this was the ‘sorrow, anxiety and the shame’ that a drug abuser’s family would suffer. Drugs also warranted the use of emergency powers because they posed grave threats to ‘national security and viability’. If left to fester, ‘rampant drug addiction’ would ‘penetrate’ right into the vital and sensitive institutions of the State, like the Police and the Armed Forces’. The final, crucial tipping factor was Singapore’s ‘rather vulnerable position’ in the ‘Golden Triangle’, the infamous source of narcotics straddling Thailand, Laos and Burma. Attempts to set up illicit heroin laboratories alarmed Parliament, which did not want Singapore to be transformed into the narcotics hub of Southeast Asia.136

These general policy concerns were given huge weight by the Court of Appeal in Tan Kiam Peng v PP where academic criticism of the presumptions embedded in section 18 of the MDA was critically considered:

The general thrust of [academic] dissatisfaction [with s. 18] is that the concept of mens rea has been undermined . . . The Act is structured in such a manner as to ensure that truly innocent persons are (in so far as the issue of possession is concerned) able to rebut the initial presumption (in s. 18(1)) without any difficulties. However, this structure also ensures that accused who are truly guilty under the relevant provisions of the Act are not given carte blanche to deny possession by mere assertion, without more, hence undermining the general policy of the Act itself . . . the inimical effects that would result from a frustration of the general policy of the Act generate not only social ills and tragedy but also simultaneously violate the individual rights of those who are adversely and directly impacted by the availability (and hence purchase as well as consumption) of controlled drugs on the open market (including,

135 MDA, s. 18.
in many instances, innocent members of their respective families as well. These very important aspects have generally been downplayed by critics of the Act who, at best, mention them in passing without more—only to revert to the alleged contravention of the rights of the accused against whom (in their view) no presumptions should operate. However, these critics never directly address the issue as to what the reality would be if no presumptions were in operation . . . In any event, the courts must observe these considerations of policy enacted by the Legislature by applying the law objectively to the facts at hand . . . we are of the view that these considerations of policy are not only valid and practical but also . . . protect the precious individual rights of others in society. A purely theoretical discourse which tends to abstract itself from the realities and adopts a one-sided approach (which, at bottom, favours only the accused) tends to not only implode by its very abstraction but also ignores the fact that, in an imperfect and complex world, there is necessarily a whole compendium of rights, all of which must be balanced. Looked at in this light, any theoretical discourse which tends to favour only one conclusion whilst ignoring other approaches as well as considerations and (worse still) other wider consequences, gives, with respect, a distorted view . . . [T]o argue that the presumptions should be jettisoned altogether just because they might (potentially) operate against an accused not only ignores the reality of things but also throws out the baby together with the bathwater.  

The value in such ‘purely theoretical discourse’ was, in the court’s opinion, merely confined ‘[to remind] us that we must also never forget the rights of the accused and that, where the context and facts warrant it, the presumptions should be rebutted accordingly’.

iv. Ong Ah Chuan: A Moral, Political and Constitutional Critique

The policy, morality and constitutionality of the MDA’s statutory presumptions were challenged in Ong Ah Chuan, a Privy Council decision that has dominated Singapore’s constitutional jurisprudence ever since. Lord Diplock asserted that a criminal conviction can only be sustained where ‘it has been established to the satisfaction of an independent and unbiased tribunal that he committed it’. The court must be ‘satisfied that all the physical and mental elements of the offence . . . conduct and state of mind as well where that is relevant, were present on the part of the accused’. Lord Diplock hesitated to describe this ‘fundamental rule’ as the ‘presumption of innocence’, and it became dismayingly clear why moments later.

According to Lord Diplock, the ‘fundamental rule’ is one that requires the ‘material before the court’ to be ‘logically probative of facts sufficient to constitute the offence with which the accused is charged’ (emphasis added). This is in stark contrast to his previous statements in the same court that ‘there is no principle in the criminal law . . .

137 Tan Kiam Peng v PP [2008] 1 SLR(R) 1 at para. 75.
138 Ibid. (emphasis in original).
139 See above n. 7 at 62C–D.
more fundamental than that the prosecution must prove the existence of all essential elements of the offence ... and the proof must be "beyond all reasonable doubt" ..."

Professor Hor eloquently states the difference between the reasonable doubt doctrine, and an evidentiary test that merely requires the "material before the court" to be 'logically probative of guilt':

The second merely prescribes no more than a test of simple relevance. So long as there is evidence which increases the probability that the accused is guilty, the test is satisfied. It has nothing to say about the necessary probative weight of such evidence. The prosecution may have succeeded in adducing 'logically probative' material which manages only to raise a reasonable doubt that he is guilty. His conviction is constitutionally justifiable, as the Privy Council will have it. (emphasis added)

Ong Ah Chuan thus severely dilutes the evidentiary requirements for proof of guilt in a criminal conviction for no credible reason. Lord Diplock casts the presumption of innocence as a colonial relic, a 'legacy of the role played by juries', and thus 'inappropriate to the conduct of criminal trials in Singapore'.

However, this is unnecessary politicking that cloaks a cherished community and universal value in empty neo-colonialist rhetoric. On a moral level, the presumption reflects the 'community's assessment of the value of protecting the innocent from conviction'. Far from being mere colonial 'legacy', the presumption also finds international expression in common law criminal jurisprudence, not least in the European, American and Canadian Bill of Rights. Admittedly, a very subtle balancing exercise is often at work to countenance the occasional exception to the presumption of innocence. However, any such derogation must draw on government objectives of 'sufficient weight', for which Lord Diplock's statements are no substitute.

The procedural shift from jury to judge also blind-sides substantive legal discussion of the value of the reasonable doubt doctrine. In so far as they are triers of fact, juries and judges serve the same judicial function: they assess the 'material before the court', including all reasonably innocent explanations and relevant evidence, according to the same evidentiary standard. Whether the criminal justice system should retain the presumption of innocence is a matter of judicial and constitutional discourse, not mere technical refinement.

Another astonishing passage reveals the Privy Council's ambivalence towards the capital crime context:

140 Ibid. at 62D-F.
141 See above n. 126 at 302.
142 See above n. 7 at 62D.
143 See above n. 126 at 302.
144 The Singapore judiciary has not considered whether the war on drugs is of sufficient importance to warrant overriding the presumption of innocence. The test devised and proposed here draws from American and Canadian jurisdictions, which are discussed above at n. 128.
Their Lordships would emphasise that in their judicial capacity they are in no way concerned with arguments for or against capital punishment or its efficacy as a deterrent to so evil and profitable a crime as trafficking in addictive drugs.145

However, the complex of presumptions surely changes in the context of the death penalty: the issue becomes whether capital cases are sufficiently different to demand a more stringent standard of due process in customary international law. No less than the United Nations Economic and Social Council seems to think so—insisting that there must be ‘clear and convincing evidence leaving no room for an alternative explanation of the facts’.146

Lord Diplock’s reasoning finally turns to morality and policy for justification. His Lordship places some emphasis on the fact that ‘no wholly innocent explanation of the purpose for which the drug was being transported is possible’.147 Thus, there appears to be ‘nothing unfair in requiring [the accused] to satisfy the court that he did the acts for some less heinous purpose . . .’.148

It is unclear why the legal and moral quality of the triggering fact—that of possession—should influence the burden of proof the judiciary imposes on the accused. Indeed, possession is not ‘wholly innocent’. However, there is no reason why its unlawfulness should prejudice the judiciary’s adjudication of the crime of trafficking, for which there are different liabilities and penalties altogether. There is no need to additionally ‘punish’ the accused for possession by placing a persuasive burden of proof on him for trafficking. One expects that sections 18(1) and 18(2) of the MDA and their respective penalties deal sufficiently with possession.

Furthermore, while possession is a necessary precursor to trafficking, it is merely just that. Criminologists have pointed out that proof of possession cannot justify the leap to proof of the intention to traffic:

Surely the possession of a drug per se is logically probative of an intention to traffic. It is now obvious that a test of such a low threshold is of little use. The only guarantee is that the triggering fact cannot be completely irrelevant to the presumed fact. This would be rare indeed.149

v. The International Demise of Ong Ah Chuan in Singapore

Subsequent decisions in the Commonwealth were unable to stomach Ong’s cavalier treatment of the presumption of innocence. In the landmark decision of R v Oakes,150 the Canadian Supreme Court struck
down a presumption very similar to those used in the MDA because it violated the presumption of innocence. Dickson CJC declared:

In general, one must, I think, conclude that a provision which requires an accused person to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence ... If an accused bears the burden of disproving on a balance of probabilities ... it would be possible for a conviction to occur despite the existence of reasonable doubt.

When considering Ong, Dickson CJC all but dismissed the applicability of the decision:

The case concerned constitutional provisions of Singapore which are significantly different from those of the Charter; in particular, they do not contain an explicit endorsement of the presumption of innocence. Moreover, the Privy Council did not read this principle into the general due process protections of the Constitution of Singapore.

This painstaking attempt to distinguish Ong was the first of many around the world. In R v Lambert, the House of Lords resolved the ‘very difficult question’ of ‘balancing the interests of individual in achieving justice against the needs of society to protect against the abuse of drugs’ in favour of the presumption of innocence:

there is obviously much force in the contention that section 28(2) imposes the legal burden of proof on the accused ... but I incline to the view that this burden would not be justified under article 6(2) of the [European Convention for the Protection of Human Rights and Fundamental Freedoms].

Intriguingly, Lord Slynn suggested that the ‘most obvious way’ to read the statutory presumption in the UK equivalent of the MDA was not the only way, and certainly not the correct way:

Even if the most obvious way to read section 28(2) is that it imposes a legal burden of proof I have no doubt that it is ‘possible’, without doing violence to the language or to the objective of that section, to read the words as imposing only the evidential burden of proof. Such a reading would in my view be compatible with Convention rights since ... it ensures that the defendant does not have the legal onus of proving the matters referred to in section 28(2) ... It seems to me that given that that reading is ‘possible’ courts must give effect to it in cases where Convention rights can be relied on.

Despite overwhelming criticism, the Ong Ah Chuan interpretation of statutory presumptions—which casts a persuasive burden of proof on the accused—remains the golden standard of evidence law in Singapore. The Singapore Court of Appeal recently pronounced that the

151 See above n. 131.
152 Ibid. at para. 17.
153 Ibid.
accused bears the burden of ‘rebutting the presumptions in sections 18(1) and 18(2) of the MDA] on a balance of probabilities’, affirming a series of decisions that placed a persuasive burden of proof on the accused.

These decisions do not rationally explain why the accused must bear a persuasive burden of proof, despite numerous criticisms internationally and the ascendancy of the presumption of innocence to a fundamental right. The Singapore judiciary has also failed to advance convincing reasons why such presumptions are necessary, let alone address the serious ethical problems that derogations of the reasonable doubt doctrine create. The Singapore High Court has only once attempted to justify the use of presumptions almost two decades ago:

When a person is caught conveying drugs in a quantity much larger than is likely to be needed for his own consumption, the inference that he was transporting them for the purpose of trafficking in them, in the absence of any plausible explanation from him, is irresistible. The effect . . . is to transform the inference into a presumption.

However, presumptions elevate their respective triggering facts to rebuttable inferences: if presumptions were so much in line with common sense, there would be no need for them at all. Instead, the presumption ‘forces the trier of fact in other situations to draw the inference even when it is contrary to common sense to do so’. The danger of this is that the Singapore judiciary is forced to draw the inference even with ‘plausible explanation’, leaving reasonable doubt as to the accused’s guilt upon conviction.

**vi. The Way Forward**

Admittedly, jurisdictions around the world do not demonstrate relentless obedience to the reasonable doubt doctrine. Common international consensus suggests that statutory presumptions are only valid derogations from the doctrine if they protect some public interest sufficient to override the ‘very strong and historic public interest in the protection of the innocent from conviction’.

Both the Supreme Courts of Canada and the United States decree that statutory presumptions are constitutionally acceptable deviations only if ‘the objective of the impugned legislation [is] of sufficient importance to warrant overriding a constitutionally protected right’, or if they can be justified by government objectives of sufficient

154 See above n. 137 at para. 60.
156 PP v Ng Chong Teck (1992) 1 SLR 664 at 670.
157 See above n. 126 at 207.
158 With little by way of local case law challenging or affirming constitutional protection of the presumption of innocence, one must turn towards international constitutional developments to achieve a comparative perspective.
159 See above n 126 at 270.
‘weight’. It remains to be seen whether the MDA will pass constitutional muster—one must ask if statutory presumptions that cast a persuasive burden on the accused are necessary to combat even serious crimes like drug trafficking?

V. Death Penalty, Criminal Liability and Threshold

i. Thou Shalt Not Kill: A Question of Strict Liability?
The murder provisions under the Singapore Penal Code are closely modelled after Scots law. Section 299 first defines ‘culpable homicide’, and section 300 subsequently defines ‘murder’, leaving the reader to deduce the circumstances under which culpable homicide does not amount to murder. Section 300 is further divided into four subsections, each enshrining an apparently different mental state that constitutes the mens rea for murder. The same mandatory penalty—death—attaches to all four mens rea.

Section 300(a) and (b) are relatively straightforward: the accused is liable for murder if he commits a fatal act ‘with the intention of causing death’, or ‘with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused’. Section 300(d) is also similarly direct: if the accused commits an act knowing that ‘it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death’, he is also liable for murder. These three sections peg the mens rea for murder high: only intention to cause death or something very close to it renders the accused liable for murder.

ii. Oppugning Lim, Eviscerating Yasin: section 300(c) and the Objective Liability Theory in their Early Days
The vague wording of the remaining, and most commonly used, subsection in murder situations—subsection 300(c)—has caused much controversy. Subsection 300(c) jurisprudence opens the door to varying and complex interpretations of the mens rea of murder, potentially facilitating the arbitrary imposition of the death penalty. Subsection 300(c) states that the accused is liable for murder if he commits an act ‘with the intention of causing bodily injury to any person, and the

160 Further discussed at above n. 128 at 391.
161 This is, of course, disputable: purists may argue that intention to cause injury that the offender knows is likely to cause death under s. 300(b) requires only (1) the subjective intention to inflict grievous bodily harm and (2) a subjective knowledge of the physical condition of the victim which would make him succumb to the harm that is inflicted. These requirements lower the mens rea of murder from intention to kill to intention to injure and subjective foreseeability of death. However, s. 300(b) is almost certainly redundant: a Lawnet search (www.lawnet.com.sgil indicates that there are no reported instances of the use of the clause in Singapore.

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bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death' (emphasis added).

The early Indian cases struggled to articulate the precise mental state that subsection 300(c) espoused. The Rangoon High Court in Aung Nyung held that the accused must have intended to grievously injure the victim, and knew that the specific injury he inflicted would result in death. However, this combination of subjective intention to injure and subjective foreseeability of death retreated quickly into oblivion. The Indian courts rejected the Aung Nyung test, and devised the now infamous 'objective interpretation' of the clause, first promulgated in Virsa Singh v State of Punjab, and subsequently endorsed in a string of Supreme Court decisions.

The circumstances of Virsa Singh are relatively simple: the accused thrust a spear into the victim, who died 21 hours later from peritonitis caused by the wound. The defence counsel urged the court to find the accused guilty only if the prosecution established that the accused intended to injure the victim and knew that the injury was sufficient in the ordinary course of nature to cause death. The Supreme Court rejected this argument and set out the four elements that the prosecution must prove:

First, it must establish, quite objectively, that a bodily injury is present; Secondly, the nature of the injury must be proved. These are purely objective investigations. Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other injury was intended. Once these elements are proved to be present, the enquiry proceeds further; and Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender. Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under S. 300 'thirdly'. It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter purely of objective inference, the injury is sufficient in the ordinary course of nature to cause death. (emphasis added)

162 (1940) Rang LR 441.
163 AIR 1958 SC 465.
165 See above n. 163 at 467.
The Supreme Court clarified that the third element of the test—whether the accused intended to inflict the injury actually found to be present—must proceed on ‘broad lines’. Thus, the court has to determine whether the accused intended ‘to strike at a vital and dangerous spot’, and ‘with sufficient force to cause the kind of injury found to have been inflicted’. However, ‘it is not necessary to enquire into every last detail as, for instance, whether the prisoner intended to have the bowels fall out, or whether he intended to penetrate the liver or kidneys or the heart’. Otherwise, someone with no knowledge of anatomy could never be convicted: the inquiry should be ‘broad-based and simple and based on commonsense’.

Singapore first established Virsa Singh as the locus classicus in subsection 300(c) murder situations when the Privy Council purportedly endorsed the broad-based subjective approach in Mohamed Yasin bin Hussin v PP.\(^{166}\) The accused went to the victim’s hut to burgle it, ending up raping her before discovering she was dead. In the course of raping her, the accused sat forcibly on the victim’s chest, thus inducing cardiac arrest, and subsequently death. Their Lordships were unable to find that the accused ‘intended to inflict upon her the kind of bodily injury which, as a matter of scientific fact, was sufficiently grave to cause the death of a normal human being of the victim’s apparent age and build even though he himself may not have had sufficient medical knowledge to be aware that its gravity was such as to make it likely to prove fatal’. The prosecution had failed to discharge its duty to prove that the appellant did intend by sitting on the victim’s chest to inflict upon her some ‘internal, as distinct from mere superficial, injuries or temporary pain’.

Their Lordships duly applied Virsa Singh and found the third branch of the objective test wanting. The accused may have intended the injuries caused in the course of raping her, but not those when he restrained her and sat on her chest. Thus, the injury that in fact caused the victim’s death was ‘accidental or unintentional’.

While commentators have largely focused their criticism on the dicta in Yasin, the Privy Council’s holding is also perplexing. Yasin requires the prosecution to prove whether the fatal injury was one the accused exactly intended. Liability for murder becomes a metaphysical struggle to determine precisely what injury the assailant was trying to inflict.

Singapore courts that adopt a Yasin-like approach have struggled to determine whether the accused covered the victim’s face with a pillow merely to stop her from screaming or to kill her (PP v Ow Ah Cheng),\(^{167}\) or whether the accused thrust a knife into the deceased’s mouth with the intention of subduing her or to cause death (Tan

\(^{166}\) [1976] 1 MLJ 156.
\(^{167}\) [1992] 1 SLR 797.
**Cheow Bock v PP**. In reality, the inquiry is not always as precise. In *Tan*, the court swiftly dismissed defence counsel’s objections to the trial court’s finding that the accused had intended a fatal injury:

> It is *sufficient at this juncture to note that great force was used*, that the knife was *stuck in the deceased’s mouth*, and that Lye Hwa could not *remove it* from the deceased’s mouth. *(emphasis added)*

The outcomes of *Ow* and *Tan* suggest that the exacting standards *Yasin* aspires to are more arbitrary than real.

We now come to *Yasin’s* infamous dicta, which blurred the already fine line between the objective and subjective approaches and ignited a storm of controversy. The Privy Council further found that:

> In the instant case, the act of the appellant which caused the death, *viz.* sitting forcibly on the victim’s chest, was voluntary on his part. He knew what he was doing; he meant to do it; it was not accidental or unintentional. This, however, is only the first step towards proving an offence under section 300(c) of the Penal Code. Not only must the act of the accused which caused the death be voluntary in this sense; the *prosecution must also prove that the accused intended, by doing it, to cause some bodily injury to the victim of a kind which is sufficient in the ordinary course of nature to cause death*. *(emphasis added)*

It thus becomes unclear whether *Yasin* adopts the objective approach or in fact suggests a more subjective approach. Commentators sensed a departure from the former; they seized on the controversial passage to advocate that subsection 300(c) murder is only proved if the accused intended to cause a bodily injury, *and* also knew that such an injury is sufficient in the ordinary course of nature to cause death.

However, a slew of decisions emanating from Singapore’s highest courts dashed any hope of a subjective liability theory here. Two years after *Yasin*, the court in *PP v Visuvanathan* held that it was ‘irrelevant and totally unnecessary to enquire what kind of injury the accused intended to inflict’. This loosely-phrased statement caused alarm in academic circles, drawing sharp criticism for ‘dispensing with the need to prove that the accused intended to cause the injury of the type that was in fact caused’ and widening the net of subsection 300(c) liability. Fortunately, the Court of Appeal qualified the statement almost 30 years later: it clarified that *Visuvanathan* merely sought to convey that ‘it was immaterial whether the accused appreciated the true nature of the harm his act would cause so long as the physical injury caused was intended’.

169 Ibid. at 301B.
170 See above n. 166 at 157.
171 Victor V. Ramraj, ‘Murder without an Intention to Kill’ [2000] SJLS 560 at 566.
The court in Visuvanathan was also hard pressed to reconcile the Privy Council decision with its Indian predecessor Virsa Singh. The Singapore court concluded, with difficulty, that the Yasin dicta ‘was factually appropriate in ... Yasin’s case’ but not of ‘universal application’.

Singapore completed its return to Virsa Singh in Tan Joo Cheng v PP\(^{175}\) and PP v Lim Poh Lye, and has consistently applied the objective approach in murder situations since. In contrast, India has developed an ‘evident distaste’\(^{176}\) for the objective theory, focusing on the circumstances of the case to ‘wriggle out of using the clause’\(^{177}\) or imposing punishment lesser than the death penalty when it is used to at least mitigate its effects.

Despite India’s tendency towards subjective liability, the Singapore judiciary has clung on to Virsa Singh, a decision that has become increasingly outmoded even in its country of origin. When pressed to justify the objective approach, the Singapore Court of Appeal issues the familiar refrain that ‘no one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder’\(^{178}\).

When Singapore was still in its infancy, one could understand and perhaps even empathize with, the judiciary’s aims of applying the objective theory. At a time when the government was reasserting its governance and rebuilding the nation, such a theory would hurriedly ‘indicate the standards of conduct that [citizens] should aspire to, particularly in regard to activity that is potentially dangerous to others’.\(^{179}\) Consequently, the judiciary could not allow ‘persons who deviate from these standards to plead that they had not realized the consequences of their conduct’. In a bid to deter ‘potentially hazardous activities which are threatening to human life’, the most serious breaches of external standards of behaviour and care would thus invoke liability for murder.

However, in more progressive times, the appeal of a deterrence-based penal philosophy has faded. Applying the objective theory may lead to ‘punishment of the innocent to ensure that standards were maintained’.\(^{180}\) Such a theory ignores the difference in culpability between one who intentionally kills, and another who only intends to inflict a minor injury but happens to cause death. Taken to its logical conclusion, an offender who ‘cuts the victim on his foot with the specific idea of avoiding the causing of a fatal injury’ may be found liable for subsection 300(c) murder if ‘an artery is severed and the

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176 See above n. 173 at 13.
177 Ibid.
179 See above n. 173 at 5.
180 Ibid.
medical evidence is that in the ordinary course of nature the injury would prove to be fatal’.\textsuperscript{181}

Such a result defies principles of natural justice. Precious little would differentiate the \textit{mens rea} for murder, which attracts the mandatory death penalty, and that of ‘voluntarily causing hurt’ under section 321,\textsuperscript{182} which attracts a maximum of two years’ imprisonment and S$500 fine. The objective approach ends up making an offender liable ‘as if he had intended to kill even though he intended only to cause hurt’,\textsuperscript{183} elevating causing hurt ‘voluntarily’ to a crime of murder. Subsection 300(c) in Singapore thus \textit{constructs} a murder conviction when the accused inflicts a much less serious injury that happens to kill.

Currently, many jurisdictions witness a paradigm shift from crime to the criminal, and from retribution to reformation, accounting for the individual’s rights as much as society’s. These judicial trends favour a subjective liability theory which predicates fault and punishment on the particular \textit{mens rea} of the offender.

Consequently, if the accused intends to wound and not kill, he should be guilty of the wounding, not the killing. To be sure, deterrence is no dirty word: one would expect Parliament to increase penalties for sections 321 and 322—the offences of voluntarily causing hurt and grievous hurt respectively—to better thwart potential offenders from freely inflicting injuries on others. However, this is starkly different from imposing murder liability and the punishment of death on one who merely wounds. A subsection 300(c) offence may well turn what are in themselves mere accidents into murders: ‘[t]o punish as a murderer every man who, while committing a heinous offence, causes death by pure misadventure, is a course which evidently adds nothing to the security of human life’.\textsuperscript{184} If the legislature aims to impose a mandatory death penalty for the infliction of a minor injury that \textit{happens} to kill, then ‘we should be forthright about what we are doing rather than cloaking capital punishment for voluntarily causing hurt under the guise of murder’.\textsuperscript{185}

The court’s perplexing interpretation of subsection 300(c) thus introduces an element of moral luck into an assessment of murder and death penalty liability.\textsuperscript{186} Moral luck is repugnant in any assessment of criminal responsibility; liability should depend on moral choice, not chance; ‘on the subjective aspects of the agent’s conduct (since it is

\textsuperscript{181} \textit{Ibid.} at 13.

\textsuperscript{182} Penal Code (Cap 224, 2008 Rev Ed Sing), s. 321.

\textsuperscript{183} See above n. 171 at 571.


\textsuperscript{185} See above n. 171 at 574.

\textsuperscript{186} \textit{Ibid.} at 573. Ramraj argued that the objective approach makes criminal liability a matter of ‘luck or chance, and in any event, on circumstances that are beyond that person’s control as a moral agent’.

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these that she controls and that are properly hers), not on its objective aspects (which may be matters of chance). There must be a ‘significant enough difference in culpability’ between a murderer and an offender who voluntarily causes hurt, because the subjective culpability of the former must be significantly more than that of the latter.

Perception became reality in two Court of Appeal decisions, illustrating the devastatingly fine line between the morally lucky and the unlucky. In Tan Cheow Bock, the accused thrust a knife into the victim’s mouth, apparently to stop her from screaming further. While the court acknowledged that ‘it may well be that to duplicate the precise path of the knife on another human being would be difficult’, it reaffirmed the trial court’s decision that the ‘unusual nature of the fatal injury and the high degree of chance with which it was inflicted should not by those two factors alone exclude the formation of the culpable intention to inflict that particular injury within the meaning of para (c) of s 300 of the Penal Code’. Given that the chance of causing a fatal stab wound to the victim’s mouth was small, the accused may well have escaped the gallows if he struck the victim at a different angle.

In Lim Poh Lye, the accused stabbed the victim in the leg and struck his femoral artery, leading to excessive bleeding and eventual death. Although the court accepted that the accused ‘did not know that there was a main artery running through the leg and that the bleeding, if unattended to, would, in the normal course of nature, cause death’ and thus did not ‘realise the full gravity of his act’, it found that the accused was liable for murder because he intended to cause the stab wound, which was sufficient in the ordinary course of nature to cause death. One can reasonably infer that if the accused had stabbed the victim’s leg without striking a crucial artery, both the victim and the accused might have survived.

Fortunately, the outcomes in Tan Cheow Bock and Lim Poh Lye are reconcilable on other, more substantive legal grounds. However, they illuminate the potential inconsistencies within a criminal justice system purportedly concerned about the moral culpability of the offender, but also deeply attracted to an objective liability theory. Moral luck violates well-established principles of punishment and responsibility: it surely cannot be a question of millimetres or angles whether the accused faces the death penalty or a few years’ imprisonment.

188 See above n. 168 at paras. 24, 27.
189 See above n. 174 at para. 37.
190 For example, the accused in Lim Poh Lye stabbed the victim repeatedly and with great force, and thus clearly intended to kill him. This would have easily qualified for s. 300(a) murder.
iii. Reconsideration and Reiteration: Subsection 300(c) Now and the Statutory Façade

The Court of Appeal was again invited to reconsider subsection 300(c) liability in *Mohammed Ali bin Johari v PP*. The accused, apparently frustrated by his two-year-old stepdaughter’s crying, dipped her head into a pail of water repeatedly and drowned her. Although defence counsel appeared to contest the application of subsection 300(c), rather than its interpretation, the court felt compelled to justify an objective formulation of subsection 300(c), this time resorting to statutory interpretation.

The court relied on Bose J’s observation in *Virsa Singh* that a subjective liability theory would render subsection 300(a) otiose: ‘if there is an intention to inflict an injury that is sufficient to cause death in the ordinary course of nature, then the intention is to kill and in that event [300(c)] would be unnecessary because the act would fall under the first part of the section . . .’. The court reiterated that the ‘subjective and the objective bases of the first and second limbs’ of subsection 300(c) were ‘complementary’ but ‘ought not to—and cannot—be conflated’.

However, this argument is easily dismantled on closer analysis. Section 300 already suffers from a glaring redundancy, subsection 300(c) notwithstanding. Subsection 300(d), which requires ‘imminent knowledge’ of the likelihood of death, readily subsumes subsection 300(b), which requires an intention to injure and knowledge of the likelihood of the ‘death of the person to whom the harm is caused’. Since capital punishment is mandatory, one subsection strips the other of its practical and symbolic value—the accused is condemned to death regardless of whether he or she is convicted of subsection 300(b) or subsection 300(d) murder. That such repetitiveness has gone unnoticed for decades suggests that the interpretative flaws a subjective theory may cause are more illusory than real.

Furthermore, an argument from objective liability cannot rest on statutory interpretation alone. If the objective liability theory has little substantive merit, retaining it preserves a tidy section 300 scheme, but a faulty one nonetheless. A casual survey of subsection 300(c) jurisprudence also reveals that most, if not all, such decisions can be resolved on a subsection 300(a) or subsection (b) approach: proving intention to kill or to cause an injury that the accused knows is likely to cause death. In *Lim Poh Lye*, the court found that the accused had inflicted seven stab wounds to his victim’s legs with great force causing uncontrolled and continuous bleeding. The irresistible inference is that the accused intended to kill, or at least to injure the victim in a manner he knew was likely to cause death. In *Johari*, the court suggested that the prosecution ‘could have proceeded with the charge of
murder against the appellant under s. 300(a) instead.\textsuperscript{193} Thus, the overlap argument becomes a red herring: the presence of subsection 300(a) and subsection 300(b), rather than a subjective liability theory, renders subsection 300(c) otiose.

\textit{iv. Widening the Net: Group Liability and Death}

The doctrine of common intention also spreads capital punishment to offenders involved in group crime situations that result in death. Section 34 of the Penal Code stipulates:

When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

Section 34 jurisprudence is varying and complex. The \textit{mens rea} requirement for common intention was pitched high in the early cases—first in \textit{R v Vincent Banka}\textsuperscript{194} and subsequently in \textit{R v Chhui Yi}\textsuperscript{195} the common intender will only be liable for the secondary offence if he fulfills the \textit{mens rea} requirement of such an offence.

Unfortunately, the requirement was upset in \textit{Wong Mimi v PP},\textsuperscript{196} which held that the intention of the actual doer and the common intention of all must merely be ‘consistent’. This ambiguous term led to various interpretations of the precise \textit{mens rea} requirement for common intention, ranging from subjective knowledge (\textit{Shaiful Edham v PP})\textsuperscript{197} to objective foreseeability (\textit{PP v Tan Lay Heong})\textsuperscript{198} and occasionally even to strict liability (\textit{Asogan Ramesh v PP}).\textsuperscript{199}

More than a decade later, the court seized on a group murder situation to clarify its position on inchoate liability in \textit{Lee Chez Kee v PP}.\textsuperscript{200} The Court of Appeal concluded that a group criminal may be liable for an offence their accomplice commits in the course of the primary crime, as long as he or she knows that the latter is likely to commit that offence. While the court ended lingering uncertainty over the precise \textit{mens rea} required under the common intention provisions, it also rendered group criminals vulnerable to a murder conviction, even if they may not possess the \textit{actus reus} or \textit{mens rea} for murder.

That the murder provisions are so broadly conceived also heightens a group criminal’s exposure to the death penalty. Applying subsection 300(c) in the context of common intention, a gang robber may also be liable for murder, if he or she knows that their accomplice is likely to

\textsuperscript{193} \textit{Ibid.} at para. 65.
\textsuperscript{194} [1936] MLJ 53.
\textsuperscript{195} [1936] MLJ 142.
\textsuperscript{196} [1972] 2 MLJ 75.
\textsuperscript{197} [1999] 2 SLR 57.
\textsuperscript{198} [1996] 2 SLR 150.
\textsuperscript{199} [1998] 1 SLR 286.
\textsuperscript{200} [2008] 3 SLR 447.
injure in the course of the robbery, and if the latter inflicts an injury that is sufficient ‘in the ordinary course of nature’ to cause death.

The ramifications are disturbing. Merely participating in a plan to rob, assault or kidnap—which inevitably envisages some sort of injury—may well render the accused liable for murder and the death penalty.

In a robbery-murder situation post-Lee Chez Kee, the Singapore High Court found the accused’s knowledge ‘that violence would be necessary [for the commission of the robbery] sufficient to render him liable for murder’.201 The court did not consider the degree of violence a common intender must contemplate, suggesting that subjective knowledge of any kind of violence can render the accused liable. The judiciary’s treatment of group criminals thus bears eerie resemblance to the now-defunct felony-murder rule which scholars have denounced for pronouncing a felon guilty of murder, because misfortune befell him while he was committing another offence.

Proponents argue that the court’s lowering of the mens rea requirement for certain secondary offences locates a fine balance between individual criminal responsibility and the need to deter group crime. However, deterrence can be achieved without constructing liability for secondary offences. Accused persons convicted of the original crimes—gang robbery, assault or kidnapping—are still liable for their respective penalties, and these are certainly ‘no tea party’.202 There is no need to depart from the ‘relentless logic and good sense’203 that liability should accord with fault.

VI. Singapore-Style—Clinical and Carefree

The supreme political ideology governing Singapore, with its strong emphasis on crime control, has nudged the Singapore judiciary—whether consciously or subconsciously—into moulding a jurisprudence that views death penalty and capital proceedings as no different from other minor criminal proceedings.

In cases involving criminal rights, the Singapore judiciary has consistently adopted a narrow and formalistic approach to adjudication. Instead of scrutinizing legislation for substantive fairness, the Singapore judiciary restricted its role to screening for procedural propriety. On various occasions when it could have interpreted constitutional provisions expansively to include implicit rights, the Singapore judiciary adhered rigidly to the text of the law.

Due process was subordinated to crime control without properly weighing the competing interests at stake. In dealing with foreign jurisprudence, the Singapore judiciary has exhibited an inconsistent

203 Ibid. at 519 fn. 84.
stance. When foreign authorities were adverse to the favoured judicial outcome, the Singapore judiciary disposed of them by relying on superficial differences and unargued assertions. On the other hand, when foreign authorities were favourable, the Singapore judiciary conveniently ignored the differences and accepted them without proper analysis.

Such clinical and carefree approach in this area of jurisprudence, where execution of the condemned prisoner is the end product, leaves a lot to be desired.

_Summum iūstitia summā iniūriā._