Singapore's Innovations to Due Process

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Tradition and Evolution

The legal institutions of Singapore, the law, the courts, the legal culture, and the police, were brought into being by the British colonial authority. Today, after more than 40 years of self government,[1] the legal profession still regards itself as part of the "common law world". Lawyers trained in Singapore can, without much difficulty, read and understand a statute or a judicial decision from the United Kingdom, Canada, Australia, South Africa, and even the United States. More specifically, the major Codes governing criminal justice are a very faithful borrowing of the British-inspired legislation in colonial India.[2] Singapore courts interpret the Codes in much the same manner as any court in a common law system would. The Constitution contains an enforceable Bill of Rights[3] very similar to that which exists in most modern constitutions. Yet it is only too obvious to even the casual observer that there is much that is different, if a comparison were to be made with the United Kingdom, Canada, Australia and more so the United States . This is, in part, driven by a particular attitude towards criminal justice held by the most powerful decision-makers in Singapore.[4] It has been officially attributed to "asian values". It takes the form of novel legislation introduced after Independence,[5] and of a certain approach to statutory interpretation.[6] The remaining "differences" are not so much a creation of

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[1] The British claimed Singapore in 1819. Self-government (power over internal affairs) was conferred in 1959. The British relinquished control when Singapore joined the Federation of Malaysia in 1963, but separated from the Federation as an independent republic in 1965.

[2] Penal Code (Cap 224), Criminal Procedure Code (Cap 68), Evidence Act (Cap 97).

[3] Part IV, Constitution of the Republic of Singapore, entitled "Fundamental Liberties".

[4] The Attorney-General of Singapore, Mr Chan Sek Keong, has published the most comprehensive justification of "the Singapore Model" of criminal justice: "The Criminal Process – The Singapore Model" (1996) 17 Singapore Law Review 431; "Rethinking the Criminal Justice System of Singapore for the 21st Century" in *The Singapore Conference: Leading the Law and Lawyers into the New Millennium @ 2020* (2000, Butterworths). In the latter piece, the Attorney-General says, p 31,

> Mr Lee's [Lee Kuan Yew, Singapore's Senior Minister and Prime Minister for more than 40 years] vision of how Singapore should be governed in the context of law and order has shaped the criminal justice system, its basic values, principles and objectives.

See Mr Lee's own pithy expressions in his speech at the Opening of the Singapore Academy of Law, 31 Aug 1990, http://www.sal.org.sg/a_opnlky.html. At one point he says:

> In English doctrine, the rights of the individual must be the paramount consideration. We shook ourselves free from the confines of English norms which did not accord with the customs and values of Singapore society.

[5] *Eg*, the Prevention of Corruption Act (Cap 241), enacted soon after Lee Kuan Yew came to power.

[6] See the enthusiastic reception of the Chief Justice of Singapore for the view of a British judge that "an overly legalistic attitude on the part of the courts would ultimately form `a clog on the proper exercise by the police of their investigatory function, and indeed on the administration of justice itself` ": *Fung Yuk Shing v Public Prosecutor* [1993] 3 Singapore Law Reports 421.

independent Singapore, but a result of a decision to retain laws and institutions which have since been abandoned elsewhere.[7] Whether it is innovation or retention, the major thrust is clear – the progressive removal of "obstacles" to conviction, severe punishment of the convicted; and where conviction is not possible, executive detention as a fallback. It is not necessary to dwell at length on the serious human rights and due process problems such an approach harbours. What is significant is the attempt, in recent years, of key criminal justice officials in Singapore to articulate and justify such a stance. It needs to be carefully examined alongside the human rights critique: unspoken assumptions of both approaches have to be tested, underlying value decisions and priorities ought to be made clear. The significance of this exercise goes beyond Singapore.[8] In the common law world, this phenomenon of a "common law form" inhabited by an autonomous spirit is not unique. The purpose of this discussion is to try to create a meaningful discourse between those who feel that human rights in the context of criminal justice have been trampled upon unfairly, and those who think otherwise.

Morality and Utility

The fundamental claim of the official Singapore position is that all these measures, which appear so repugnant to human rights advocates, are justified by gains in dealing effectively with crime. This is often paired with the secondary argument that all this is being done without putting the innocent in any jeopardy.[9] One kind of critique is to question the utilitarian assumptions involved – there is no clear evidence that of an increased conviction of the guilty and or of the deterrent effect such a system will have on potential offenders. Similarly there can be no assurance that the innocent will not be ensnared. The belief in the efficacy of "Draconian"[10] measures is grounded on common sense assumptions. Important government officials do not hide their disdain for "social science",[11] and, one supposes, criminological studies. The assertion that the innocent will not be at risk is based on a high degree of trust in governmental

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[7] Most notably, corporal punishment which was exported from Victorian England to Colonial India to Singapore (as part of the Straits Settlement). That form of punishment no longer exists in England or in India.

[8] Several other jurisdictions in the common law family resemble Singapore. Two clear examples are Malaysia (Singapore's much larger northern neighbour) and Brunei (a small but rich oil nation on the island of Borneo).

[9] See the arguments of the Attorney General of Singapore, *supra*, note 4. In "The Criminal Process …", p 442-3, he says:

> [The ultimate goal] would be a high rate of conviction of the factually guilty accused …However, no civilised government can be totally insensitive to potential miscarriages of justice in the criminal process.

[10] This was the word used by Lord Diplock to describe the penalties for drug trafficking under the Misuse of Drugs Act, in an appeal to the Privy Council from Singapore: *Ong Ah Chuan v Public Prosecutor* [1980-1981] Singapore Law Reports 48. Such appeals are no longer possible.

[11] See Lee Kuan Yew, *From First World to Third - The Singapore Story: 1965-2000* (2000, Singapore Press Holdings), p 242, where the firm belief in the deterrent effect of harsh punishment is based more on what the Senior Minister (as Lee Kuan Yew now is) experienced during the Japanese military occupation of Singapore during the Second World War than on any statistical analysis of crime and punishment data.

institutions. The focus of resources is on choosing the right personnel, not on setting up a system of checks and balances.[12]

The other set of questions are moral in nature. An unspoken value judgement in the official Singapore position is this – even if some innocent person might be caught, the projected gains in crime prevention nevertheless still outweigh the cost of that eventuality. It is the reverse of the aphorism that it is better to let 10 guilty persons go free than to convict one innocent one.[13] Which is right, and which is wrong? Another layer of the moral critique is this – even if it can be demonstrated that there is a high likelihood of gains in crime prevention, there are things which should be sacrosanct and immune from utilitarian barter. The use of torture, no matter how efficacious, is considered by most to be illegitimate. Jurisdictions are divided on the right against self-incrimination. The presumption of innocence is well accepted, but almost every jurisdiction recognises exceptions which cast the burden of proof of specific facts on the accused. The morality of the situation is not always clear.

The observation I wish to make at this point is that, for better or for worse, moral discourse in Singapore does not feature very prominently in official decision making in the context of criminal justice.[14] One may attribute it to "asian values", to the immigrant mentality of Singaporeans, or to official down-playing of moral discourse. A rigid cost-benefit analysis is applied to every proposed measure. If the cost of effective crime prevention is the accidental punishment of a few innocent persons, or the inordinate punishment of admittedly guilty persons, that price must be paid. Nothing is wrong in itself. It is no wonder that official justifications of Singapore's criminal justice system appeal to Packer's "crime control" model –[15] indeed, although Packer meant that model to be merely descriptive, Singapore has made it prescriptive. In short, the judicial role is minimised, either because of distrust,[16] or because of inefficiency,[17] and the executive or administrative role of police and prosecutor is maximised.

The underlying theme of Singapore's difference is not deliberate governmental repression, it is a stark utilitarian calculus. One aspect of this is the willingness to trade-in (what others might see as) respect for "human rights" for better crime control, expensive, time-consuming trial processes for the efficiency of administrative decisions. Utilitarian calculations cut both ways. There is also a cost to departures from accepted norms of criminal justice. Despite rhetoric to the contrary, Singapore

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[12] The argument is a "polar" one – if officials are responsible and competent, there is no need for checks and balances; if they are not, a system of checks and balances will never be sufficient.

[13] Direct expressions of this are understandably rare. The Attorney-General of Singapore does say, "The Criminal Process…", *supra* note 4, p 501, that the "high degree of certainty required by the common law judges (contained in the principle of proof beyond reasonable doubt) …is not sacrosanct".

[14] I certainly do not mean to say that moral considerations are unimportant in all spheres of life in Singapore.

[15] Heavy use is made of Packer's "crime control model" ("Two Models of the Criminal Process" (1964) University of Pennsylvania Law Review 1) by the Attorney-General of Singapore in both his published works, *supra* note 4.

[16] The "fear" is that judges, if given a discretion in the matter, are likely to be too lenient: see the Ministerial reasons for imposition of mandatory minimum penalties in a number of offences in the Penal Code (Singapore Parliamentary Reports, 26 July 1984, col 1863-6).

[17] Caused not by incompetence, but by the need to follow rules of procedure and evidence.

does care about what the international community says,[18] if only to attract investment. There is a point at which a normally government-trusting population will begin to feel uneasy. A general programme of extreme crime control measures is not optimal. A selective imposition of extraordinary measures for specific kinds of (what is perceived to be) especially problematic criminal conduct is the course usually taken. Even where they are instituted, there is the possibility of the judicious use of official discretion to prevent abuse. Many constitutions provide for the contingent use of "emergency powers" to deal with unusual situations in which the normal legal order is inappropriate. Singapore's innovations can be seen as a limited use of "emergency powers" when its officials consider that normal criminal processes are insufficient.

Whether Singapore's very utilitarian approach to criminal justice is right or wrong is indeed an important question, but one which this short discussion can only hope to explain rather than resolve. Nor can we proceed much further dwelling on generalities. I hope to flesh out these preliminary points with a few concrete examples of Singapore's attempt to reform its criminal justice system.

Detention Without Trial

The Criminal Law (Temporary Provisions) Act (CLTPA)[19] is a rather shocking piece of legislation for the uninitiated. It is not something novel, but a hold-over from British colonial legislation enacted to deal with communist insurgency in the 1950s. It enables the Minister (of Home Affairs) to detain indefinitely any person "associated with activities of a criminal nature" if he (or she) is satisfied that the detention is necessary for "public safety, peace and good order".[20] On its face, this provision is a complete contradiction of what is perhaps one of the most fundamental of human rights in the criminal process – the right to a fair trial.[21] It is the crime control model *par excellence*. Criminal activity is dealt with exclusively by administrative decision – no charge, no trial, no sentencing. The role of the judiciary is not just minimised, it is removed altogether.[22]

Yet the CLTPA regime is not without a degree of temperance. The Act itself must come up for renewal once every five years in Parliament.[23] The ministerial order of detention must receive the consent of the Public Prosecutor,[24] and must be confirmed by the President,[25] on advice from an advisory committee, before which the detainee is entitled to make representations in his or her "defence".[26] The detainee must be given a statement of the reasons for detention. The detention must be reviewed at least

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[18] See the Attorney-General's description of the "new challenge" of international norms of criminal procedure, "Rethinking the Criminal Justice System", *supra*, note 4, 36-9.
[19] (Cap 67).
[20] Part V, CLTPA.
[21] This is constitutionally achieved by an express provision in the Constitution: Art 9(6)(a).
[22] Although it has been the practice to appoint a Supreme Court Judge as a member of the Advisory Committee whose Report the President must consider in order to confirm the detention order.
[23] Although it has been continually renewed since 1955, the process does, on occasion, spark off some debate in Parliament. A government backbencher once said that the Act "nags our conscience": Singapore Parliamentary Reports, 4 Aug 1989, col 458-469.
[24] Who, in Singapore, enjoys an independence akin to a Judge: art 35, Constitution.
[25] Who is now popularly elected and has a the discretion to countermand the Minister.
[26] See Part V, CLTPA and the Criminal Law (Advisory Committee) Rules 1971.

once a year. In practice, detentions are never ordered except in the context of "secret society" (Chinese triad) activity, and in recent years, of drug trafficking.[27]

I do not wish to pretend that all this is an adequate substitute for a criminal trial. The argument clearly cannot be that the executive detention process is just as good, in all respects, as a criminal trial – if it were so, then it ought to supplant criminal trials altogether. That, even Singapore has not done. On a utilitarian calculus, there is little weight in the right to a criminal trial in itself. A Judge enjoys formal independence, but in the context of the kind of cases that detention has been used for,[28] there is no apparent reason to believe that the Minister will be anything but neutral. There is probably a reduction in the accuracy of the determination of "guilt". The Minister may consider evidence not admissible in court – the stock example given for the necessity of detention is the intimidation of potential witnesses. There is no right of cross-examination of witnesses who may have "testified against" the detainee. There is no transparency and hence little public accountability in detention proceedings. The government has made, rightly or wrongly, a utilitarian calculation – the legitimacy and accuracy of a criminal trial is traded in for the efficiency and effectiveness of executive detention. Errors there may be and liberty may be lost, but that is the price to be paid, it is often argued, to ensure the safety of Singapore's streets. The theme of reliance on official discretion rings through – the hope that officials will behave with restraint and responsibility. The possibility of judicial review exists, but the judges, apparently ascribing to the same official philosophy, are extremely reluctant to subject decisions to detain to any meaningful scrutiny.[29]

The Singapore government does treat the right to a criminal trial as a norm. Although executive detention is technically available for any criminal activity, it is in practice treated as a kind of "emergency power", used only in circumstances where officials feel that matters have gone out of hand, and in practice, is used only in very few areas of criminal activity. Executive detention is, the government feels, a justifiable exception to the fundamental right to a trial.

"Drift-Net" Crimes

In the task of defining what a crime is, there is always a tension between criminalising too much and criminalising too little. If the crime is too broad, it impinges unnecessarily on individual liberty. It increases the discretion of police and prosecutors to pick and choose when to enforce the law, and when not to – the possibility of abuse rises. It puts the courts in a difficult position, and in hard cases they (the courts) are likely to create informal exceptions, making what is sought to be prohibited unclear. On the other hand, if a crime is defined too narrowly, people who in substance fall within the mischief which the crime is meant to deal with, may escape on a "technicality". This in turn encourages others to steer close to the border

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[27] *Supra*, note 23. The Minister recently revealed that 450 persons had to date been detained under the CLTPA (Singapore Parliamentary Reports, 20 Jan 1999, col 1989)

[28] This is in contrast to another kind of detention without trial under the Internal Security Act (Cap 143), which has been employed for "political" detention outside of criminal activity. It is not the intention of this discussion to deal with that piece of legislation, also a holdover from the British colonial government.

[29] *Re Ong Yew Teck* [1960] 1 Malayan Law Journal 67 (no review allowed); *Kamal Jit Singh v Minister for Home Affairs* [1993] 1 SLR 24 (cursory review).

of what is a crime and what is not, hoping to get away with it. The criminal law is blunted.

It should come as no surprise that, when the government of Singapore sees a utilitarian need to do so, it does not hesitate in the creation of very broadly defined offences – known locally as "drift-net" crimes. An example is the definition of drug trafficking under the Misuse of Drugs Act (MDA) where "traffic means to sell, give, administer, transport, send deliver or distribute".[30] Unlike its (then) Canadian counterpart, from which the definition was borrowed,[31] the punishment for trafficking is considerably more severe, often involving a mandatory jail term, sentence of caning or death penalty.[32] Singapore courts have interpreted the words literally – so long as someone intends to pass possession on to someone else, that is trafficking. It does not matter that it was the offender's own use and merely given to someone else for safekeeping; it does not matter if the offender merely gave the occasional joint or two to his girlfriend.[33] The only exception is a recent decision in which a traditional Chinese physician was held not to be trafficking when he included opium (secretly) in an external remedy he gave to his patients for joint pain.[34] The scope of this interesting example of the courts refusal to adopt a harsh stand is not yet clear.[35]

The human rights critique will point to a violation of the right to proportionate punishment. If the severe punishment enacted for trafficking is meant for peddlers and distributors of drug, then merely passing possession should not be trafficking, although it would constitute the crime of possession, a far less serious crime. But to restrict the definition to "distribute" or "supply", which might more accurately reflect the moral culpabilities, would, the government feels, allow "real" traffickers to escape conviction for trafficking on technical arguments about the meaning of "distribute", and on evidential problems of proof of distribution. The utilitarian calculus is clear – the broad definition is not meant to capture those who merely (literally) "give" drugs, it is to prevent the "real" traffickers from getting away. True, they (the literal givers) might be ensnared, but that is price that is to be paid. This is borne out by the fact that in all the cases in which offenders were prosecuted on a literal reading of the word "traffic", the police and prosecution did not believe that the offender was merely a bona fide Chinese physician, or had merely given drugs to another for safekeeping. One can surmise that if they did, they would not have prosecuted them for trafficking. Again, the theme of reliance on official discretion is clear – it does not matter if the crime is drafted broadly, the police and prosecutors can be relied upon to identify and prosecute only the "real" traffickers.

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[30] Cap 185, s 2.
[31] Canadian Narcotics Control Act 1960.
[32] *Eg*, trafficking in more than 1000gm of cannabis attracts mandatory death. Where the amount is between 660gm and 1000gm the punishment is a maximum of 30 years or life imprisonment and 15 strokes (of the cane), and a minimum of 20 years and 15 strokes. Where the amount is less than 660, it is a maximum of 20 years and 15 strokes, and a minimum of 5 years and 5 strokes.
[33] See *Muhammad Jefrrey v PP* [1997] 1 Singapore Law Reports 197; *Lee Yuan Kwang v PP* [1995] 2 Singapore Law Reports 349.
[34] *Ng Yang Sek v PP* [1997] 3 Singapore Law Reports 661
[35] See Hor, "Misuse of Drugs and Aberrations in the Criminal Law", Sept 2000 Singapore Academy of Law Journal, forthcoming.

Again, although several broadly drafted offences exist,[36] it is not the norm. Most laws are not defined in any way which is significantly different from elsewhere.[37] There is a measure of restraint in that "drift-net" laws are resorted to only when there is a perceived utilitarian need to do so. Again, any critique based on the morality of the result cuts no ice in Singapore.

Reforming the Adversarial System

Singapore's belief in the "crime control" model has led to a significant dismantling of the traditional common law adversarial system.[38] The utilitarian emphases on crime control and efficiency combine to shift much of the fact-finding process and decision-making from judges and trials to police and prosecutors at the pre-trial stage. Much of the cluster of rights protecting the adversarial process are significantly pruned. The right to counsel exists, but is subordinated to the "needs" of police investigation, which includes the procurement of self-incriminatory statements admissible in court.[39] No published rules or guidelines governing the manner of police interrogation exist.[40] The right to silence has been declared not to be a constitutional right,[41] and on a statutory level, it comes with the price of adverse inferences.[42] It is not only the statement of the accused which is admissible, confessions of persons charged and tried jointly with the accused are also admissible.[43] Witness statements (taken before the trial) are not normally admissible, but if these witnesses testify inconsistently in court, their previous statements can stand in place of their testimony.[44] Confessions may be challenged for involuntariness, but opportunities to demonstrate undue pressure are few.[45]

It is not within the scope of this discussion to analyse each measure in detail, but the thrust is clear. Although it is the case that the adversarial system has never been pure in any jurisdiction, the degree of its dilution in Singapore is perhaps unprecedented in the common law tradition. The utilitarian trade-off is clear – the "due process" (human rights friendly) model is premised on the philosophy that no one is to be treated as guilty until found guilty at the trial - the bulk of the conviction decision is to be taken at the trial. The pre-trial process is simply the administrative prelude. The accused must have a fighting chance at the trial. This is good for the innocent accused

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[36] Notably s 5 of the Prevention of Corruption Act, Cap 241. See Hor, "The Problem of Non-Official Corruption" (1999) 11 Singapore Academy of Law Journal (Part II) 393.

[37] It is significant that there been very little change in the definition of most crimes in the Penal Code.

[38] It is sometimes said that there has been a shift to an "inquisitorial" system of justice. I do not know enough about inquisitorial systems to say that with any certainty: *eg* Attorney-General in "The Criminal Process …" *supra* note 4.

[39] Art 9(3), Constitution confers the right. In *Jasbir Singh v PP* [1994] 2 Singapore Law Reports 18, a delay of 2 weeks was held to be reasonable without any specific reason. In *Rajeevan Edakalavan v PP* [1998] 1 Singapore Law Reports 815, it was held that there is no accompanying right to be informed of the right to counsel.

[40] See generally, Hor, "The Confessions Regime in Singapore" [1991] 3 Malayan Law Journal lvii.

[41] *PP v Mazlan bin Maidun* [1993] 1 SLR 512. See comment in Hor, "The Privilege Against Self-Incrimination and Fairness to the Accused" [1993] Singapore Journal of Legal Studies 35.

[42] S 123, Criminal Procedure Code, a provision adopting the recommendations of the English *Criminal Law Revision Committee (11th Report)* 1973, enacted in 1976.

[43] *Chin Seow Noi v PP* [1994] 1 Singapore Law Reports 135. See also Hor, "The Confession of a Co-Accused" (1994) 6 Singapore Academy of Law Journal 366.

[44] *Sng Siew Ngoh v PP* [1996] 1 Singapore Law Reports 143.

[45] *Supra*, note 40.

seeking an acquittal, but it is also helps the guilty one to escape conviction. The value judgement made by the more mainstream common law jurisdictions is that the acquittal of the guilty is the price that must be paid in order to allow an innocent person to earn an acquittal. The particular fundamental right underlying this is the presumption of innocence. In Singapore, moral arguments do not carry much weight in themselves, and with that gone, there is no compelling reason why the conviction of an innocent person is to be avoided more than the acquittal of the guilty. With the presumption of innocence out of the way,[46] the pre-trial process can be re-structured to play the role of confirming an administrative conclusion of guilt. The trial is not done away with completely (unlike in executive detention), but its role is largely residual – to weed out the really glaring cases of administrative mistakes. There are acquittals in Singapore courts, but they are rare.[47] Those whom the police and prosecutor choose to charge have very few avenues of exculpation. With such efficiency comes deterrence, and these are thought, in Singapore, to outweigh the presumption of innocence.

From another point of view, there is a presumption of innocence (the police and prosecutors do not simply assume that anyone who is accused is guilty unless they can prove otherwise), but it is moved a stage earlier, before the administrative decision that the accused is guilty. But once the administrative decision of guilt is made, the presumption of innocence disappears, notwithstanding the rhetoric. Once again, the heavy reliance on law enforcement and prosecutorial officials is apparent.[48] The courts step out of the way and only intervene in the most obvious cases of administrative error. It is almost as if the trial *de facto* is conducted by administrative officials and the courts only exercise a supervisory function of countermanding in cases of obvious mistake.[49]

Capital and Corporal Punishment

Two fundamental rights are stake here – the right to proportionate punishment and the right against cruel or unusual punishment.[50] Both have very strong moral underpinnings, which would, one might expect, have considerably less force in Singapore than some other jurisdictions. There are utilitarian reasons to be cautious about finding someone guilty of a crime – there is no utility in punishing the innocent in itself. When someone has already been convicted of a crime, however, restraints on quality and quantum of punishment are largely moral. Utilitarian considerations of

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[46] Predictably, frequent recourse is made to reverse onus provisions which cast the burden on the accused to prove his innocence (with respect to particular facts – normally guilty knowledge). See Hor, "The Presumption of Innocence – A Constitutional Discourse for Singapore" [1995] Singapore Journal of Legal Studies 365.

[47] The Attorney-General reports a conviction rate of 92% for subordinate court trials (which is the lion's share of criminal proceedings in Singapore, "Rethinking the Criminal Justice System …", supra note 4, fn 20.

[48] The Chief Justice in *Sng Siew Ngoh*, *supra* note 44 says:

> There is every reason to accept the professionalism of police officers and the efficiency of their training.

[49] Akin to a supervisory court in administrative law stepping in only when the administrative decision is one which no reasonable person would have made.

[50] Neither of these are expressly mentioned in the Constitution. The scope of unmentioned "fundamental rules of natural justice", which have been held to be implied, is uncertain: *see Ong Ah Chuan*, *supra* note 10.

deterrence and incapacitation work against parsimony in punishment. In Singapore, we see clearly the absence of moral constraints and the deterrence and incapacitation agenda join forces to push up punishment levels beyond what is normally seen elsewhere. The two most eye-catching ones are the death penalty and the sentence of caning. Although neither of these were invented in Singapore, their use has been extended far beyond the kind of crimes which traditionally attracted these penalties. Essentially, the death penalty was available (and mandatory) only for murder,[51] but now it is employed for the offence of drug trafficking beyond a certain statutory limit.[52] Death for death has a certain moral force, and there were attempts to portray drug traffickers as "merchants of death". But it is beyond doubt that the primary reason for the imposition of the mandatory death penalty for drugs is deterrence and incapacitation. One can observe a progressive increase in the prescription of penalties.[53] When the government perceived that the problem was not being "solved" by existing punishment levels, the penalty went up, and the logical culmination was the death penalty.[54]

A similar dynamic is at work in the imposition of caning. Traditionally, it was prescribed only for offences of violence to the person.[55] There is a certain retributive logic to that. But eventually it was extended,[56] most controversially to the offence of illegal entry or over-staying to deal with the rising problem of illegal foreign workers in Singapore.[57] No retributivist pretence was employed this time – it was out and out deterrence, personal and general.[58] Interestingly, as in the case for drugs, the problem was not "solved" and a host of other measures were progressively put in place, including the provision of caning for employers of illegal workers, imprisonment for harbouring illegal workers and presumptions of knowledge.[59] Significantly, the government seemed to observe some limitation on the use of punishment as a deterrence – the amount of strokes was not increased, neither was the punishment

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[51] S 302, Penal Code. There are other quaint offences punishable with death, *eg*, waging war against the Government, s 121; and imagining the death of the President, s121A.

[52] And also under the Kidnapping Act (Cap 151) and the Arms Offences Act (Cap 14), but they are statistically rather less significant.

[53] The Misuse of Drugs Act replaced earlier legislation in 1973 with a general increase in punishment, but there was no imposition of the death penalty. Only in 1975 (Act 49 of 1975), when it was perceived that the levels of punishment were not "working", as resort to the death penalty made.

[54] There is a discernible upward spiral of penalties – an increase in criminal activity brings on a corresponding increase in penalties. If the problem is not "solved", then the penalties go up again. If crime rates are, for the time being, brought down – there is no return to the original punishment levels, for that will be seen as "going soft". When crime rates go up again some time in the future, increased penalties will follow. It is almost like a journey of no return.

[55] *Eg*, causing grievous hurt (s 325, Penal Code). Most of the traditional caning provisions are found under Chapter XVI, Penal Code entitled "Offences Affecting the Human Body".

[56] The other famous example is the Vandalism Act (Cap 341) enacted in 1966 to deal with politically motivated graffiti in support of the communist insurgency. It was used a few years ago on the American teenager Michael Fay (*Fay v PP* [1994] 2 Singapore Law Reports 154) who was found guilty of spray-painting some motorcars, although he could hardly have been part of the insurgency (which had died out a few years before that). This is an example of a "drift net law" gone wrong.

[57] Immigration Act (Cap 133), which imposes a mandatory minimum of 3 strokes for, *inter alia*, illegal overstaying for 90 or more days (s 15), and for an employer who hires 5 or more illegal workers (s57).

[58] See the Ministerial justification in Singapore Parliamentary Reports, 26 Jan 1989, col 594-619. This measure stirred up an unusual amount of backbencher objections, showing, perhaps, that there is a limit to utilitarianism which many Singaporeans are not willing to go beyond.

[59] See the debates following the many amendments: Singapore Parliamentary Reports, 31 Aug 1989, col 512-4; 1 Nov 1995, col 73-80; 4 Sept 1998 col 930—9; 9 May 2000, col 151-162.

elevated to the death penalty. It is not easy to discern if this restraint is for utilitarian (realisation that it is not working) or for moral reasons (illegal employment is simply not good enough a moral reason for greater punishment), or both.

Again, it is important to see the bigger picture. Corporal punishment, and more so capital punishment, is not the normal penalty in Singapore. It has been used selectively, like in executive detention, to deal with what the government perceives to be exceptional circumstances. There is no evidence of a general policy of repression – the moral "cost" of the use of brutal punishment is considered by the government, rightly or wrongly, to be outweighed by the gains in deterrence and incapacitation.

A feature of recent decisions to impose capital and corporal punishment is the removal of sentencing discretion from the courts. These punishments are often mandatory. The real discretion lies with the prosecutors, and, it would perhaps be needless to repeat, in Singapore it is felt that that is where it should be. Again, it ought to be repeated also that mandatory penalties are not the norm, but employed selectively to deal with crime situations which are perceived to have gone out of hand.[60]

Perhaps a curious feature of Singapore's brand of utilitarianism is its almost total distrust of social science data. One might have expected that if the death penalty is being imposed on drug offences to deter or incapacitate, the government would be keenly interested in statistical and other studies to find out if, in fact, the increased penalties are working. But such studies, if they exist, are seldom revealed.[61] Statistical [62]data are not provided in any consistent or meaningful way by the government. One can only speculate why.

Critique, Apology and Dialogue

The weakness of purely moral arguments in Singapore must appear more than a little curious to some. Much debate has gone on about whether it is to be attributed to cultural tradition or governmental creation.[63] Whether or not moral considerations

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[60] Curiously, the courts, on occasion beat the legislature to it and imposes "mandatory" caning on itself: *Tan Kok How v PP* [1995] 1 Singapore Law Reports 735 (self-imposed mandatory caning for use of force with intent to outrage modesty).

[61] One has to rely on official speeches in which the results of in-house analysis of crime data are revealed. There are few, if any, opportunities to scrutinise the data or the analysis. An example of an in-house study is Chang Hwee Yin, "Crime in Singapore: A Statistical Comparison With Major Cities" (1994) 17 (2) Statistics Singapore Newsletter, http://www.singstat.gov.sg/PUBN/SSN/4Q94/feat.html, which concludes that Singapore is "relatively crime free" when compared to other major cities.

[62] Regular publication of crime statistics ceased in the 1980s.

[63] See Simon Tay, "Human Rights, Culture, and the Singapore Example (1996) 41 McGill Law Journal 743; Amartya Sen, "Human Rights and Asian Values: What Lee Kuan Yew and Le Peng Don't Understand about Asia, (1997) 217 (2,3) *The New Republic*, http://www.sintercom.org/polinfo/polessays/sen.html; Winslow, "A Legal and Constitutional Perspective of Human Rights within Singapore's Socio-Political Framework" 10 Mar 2000, http://www.socraticcircle.org.sg/resources/tcp21/p21hr_vwinslow.html ; Zahralddin-Aravena, "Chile and Singapore: The Individual and the Collective, A Comparison" (1998) 12(2) Emory International Law Review, http://www.law.emory.edu/EILR/volumes/spg98/zahra.html ; Rodriguez, "A Comparative Study of Internet Content Regulation in the United States and Singapore" Asia Pacific Law and Policy Journal, Feb 2000, http://www.hawaii.edu/aplpj/1/09.html .

should affect governmental decision-making in Singapore in the context of criminal justice (more than is currently the case) is, I feel, the starting point for a potentially fruitful dialogue between critics and apologists. The government in Singapore has, on occasion, expressed the view that the largely amoral population they inherited from the British has served it well. When radical decisions had to be made to lift Singapore out of the crisis in the wake of communist insurgency and British withdrawal, the government was able to appeal to utilitarian ends without needing to deal very much with moral objections. But times have changed and, presumably, so too the people of Singapore. With increasing education levels and satiation of material needs, the question is no longer survival, but how to improve the quality of life, and that is, I propose, intimately linked with how Singapore society deals with moral issues. A rigidly utilitarian society is a soulless one, efficient and affluent, but not particularly happy or content. It is potentially unstable – the people will treat the government and the State as they have been treated – in a calculating, selfish ("what is in it for me") fashion. In the language of utilitarianism – there is a cost, and a potentially high one, for moral apathy.

The almost complete trust which the people of Singapore have in their government and its officials also comes with a cost. It is a dangerous symbol that the people accede to their government the right to do anything and everything for utilitarian ends. It becomes too easy to slip into a kind of "lesser included" argument: if we (the government) can detain you (the individual) without trial, cane you and even kill you, you should have no cause to complain if we do anything else to you. There is no need for a "bad" government to come to power for this to turn sour – officials are human beings who naturally believe in themselves and who will seek out easiest way to do something. The problem is that they can be quite wrong, and there will be nothing to stand between the government and the individual. The point is not that the government of Singapore in particular or its officials should not be trusted, but that no government or official should be given such latitude. If something is to stand between the government and its people when the government goes too far, then the independent judiciary is it. That is its constitutional function. We have seen how the judiciary has receded into the background in many aspects of the criminal justice system in Singapore – perhaps the time has or will come that they regain their original role.

The final point is that of the quality of the utilitarian lines of reasoning inherent in much of the reforms and innovations in the criminal justice system in Singapore. Criminology is not an exact science, but that is no reason to reject that discipline in its entirety. Many common-sense assumptions employed, especially in the context of deterrence,[64] ought to be tested by rigorous statistical and other kinds of criminological analysis. Singapore has a wealth of data on, for example, capital and

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[64] Senior Minister Lee Kuan Yew writes, *From Third World to First*, *supra* note 11, p 242:

> I do not accept that theory that a criminal is a victim of society. Punishment then [in the Japanese occupation] was so severe that even in 1944-45, when many did not have enough to eat, there were no burglaries and people could leave their front doors on latch, day and night…We found caning more effective than long prison terms and imposed it for crimes related to drugs, arms trafficking, rape, illegal entry into Singapore and vandalising of public property.

There is precious little evidence for these beliefs.

corporal punishment, but no statistics are consistently released, no studies published or encouraged. It has often been observed that one of the unifying traits of being a Singaporean is the "kiasu syndrome" (literally, afraid to lose out or fail) – to ensure the death of a fly, one should not hesitate to use a cannon because lesser methods might fail. Ensuring the conviction of the guilty can become an unhealthy obsession, and without appropriate criminological studies and a moral sense to temper it, it can get out of hand. The fly will probably be killed, but much else that ought not have been harmed would be too.