

Chapter 11

DEATH, DRUGS, MURDER AND THE CONSTITUTION

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I. Heat, light and the polarisation of death penalty discourse

1 There can be no doubt that the single most prominent event in criminal justice in Singapore in recent years has been the hanging of the Australian, Nguyen Tuong Van, following a mandatory death sentence for illegal importation of heroin above the amount stipulated for such a penalty.¹ Impassioned pleas for clemency from the Australian people and government were expectedly turned down with official declarations of complete faith in the use of the death penalty in Singapore. Not long before his impending execution hit the world headlines, Amnesty

1 As good an account as any can be found on the Wikipedia: The Free Encyclopedia webpage on “Van Tuong Nguyen” at <http://en.wikipedia.org/wiki/Nguyen_Tuong_Van> (accessed 3 September 2006). He was only the second national of a “Western” liberal democracy to be hanged for trafficking. Dutchman Johannes van Damme was executed a little more than ten years ago, in 1994, after a futile plea by the Queen: See “Archive of Johannes van Damme case now partially open” (The Hague, 15 October 2002) available on the National Archief website at <http://www.en.nationaalarchief.nl/nieuws/pers/Zaak_Johannes_van_Damme.asp?ComponentID=6340&SourcePageID=5084> (accessed 2 September 2006). The kind of international publicity generated did seem to have been much more fast and furious for Nguyen – perhaps a reflection of the quickening pace and volume of international journalism, perhaps because of the gathering momentum of the abolitionist cause. At least two others, German Julia Bohl (see “Drug Convict Released from Singapore Jail” (Germany, 15 July 2005) available on the Deutsche Welle website at <<http://www.dw-world.de/dw/briefs/0,1574,1649916,00.html>> (accessed 2 September 2006)) and Canadian Ronald McCulloch (see Pam Saltani, “Crime and Punishment in Singapore”, *Pacific Rim Magazine* (2003) available at <<http://www.langara.bc.ca/prm/2003/singapore.html>> (accessed 3 September 2006)) escaped potential execution. The amount of pure cannabis in Bohl’s possession turned out to be less than the amount which would have attracted the death penalty (see “German’s trafficking charge dropped” *The Straits Times* (19 May 2002)). McCulloch was far luckier – he had more than the stipulated amount, but had his charges reduced to possession. Sentencing judge MPH Rubin J told him that he was “extremely fortunate” (see “Judge tells drug convicts that they are very lucky” *The Straits Times* (27 June 1996)). What moved the Prosecution to take this course of action is not known – perhaps it was cannabis (and not heroin), and perhaps the amount was not that much in excess of the stipulated amount (about four times, compared with Nguyen’s over 30 times), or perhaps there was evidence that it was for his own use.

International (“Amnesty”) had issued a blistering report naming Singapore as having the highest per capita execution rate in the world,² only to be met with an equally vehement official defence of Singapore’s executions.³ While the death penalty is an issue which naturally attracts strong emotional responses, the resulting discourse has unfortunately descended into a polarised and unfruitful “is to, is not” kind of debate. So too has the “foreign factor” clouded meaningful discussion. The issue in Nguyen’s execution quickly became one of whether an exception ought to be made for Australian offenders⁴ – to which the response of most right-thinking Singaporeans was, naturally, “no”. Amnesty’s report was seen by many Singaporeans as an attempt by officious foreign busybodies to tell Singaporeans how to run their own country.⁵ Again, the reaction of these Singaporeans was naturally to tell them to mind their own business.

2 It is unfortunate that when the heat dissipates, along with it goes the energy to scrutinise the death penalty as it is used in Singapore.⁶ Yet the relatively enthusiastic use of the death penalty in Singapore ought to raise a number of legitimate questions in the mind of right-thinking

- 2 See “Singapore – The Death Penalty: A Hidden Toll of Executions” (15 January 2004) available on the Amnesty International website at <<http://web.amnesty.org/library/index/engasa360012004>> (accessed 2 September 2006). Amnesty reported that in the period 1994–1999, Singapore’s 13.57 executions per one million population topped the charts ahead of: Saudi Arabia (4.65), Belarus (3.20), Sierra Leone (2.84), Kyrgyzstan (2.80), Jordan (2.12) and China (2.01). The period 1994–1999 was perhaps not the happiest choice. Execution rates were boosted uncharacteristically by an efficiency drive in the courts, and especially the reduction of the two-judge court to one only. This led to very high rates for 1994–1996 (76, 73, 50, respectively) which drove up the figures. More representative are the figures for the past five years (*infra* n 3 at n 4 therein) which yield an average of about 27 executions per year. Nonetheless, this is not an insignificant figure.
- 3 See “The Singapore Government’s Response to Amnesty International’s Report ‘Singapore – The Death Penalty: A Hidden Toll of Executions’” (30 January 2004) available on the Ministry of Home Affairs’ website at <<http://www2.mha.gov.sg/mha/detailed.jsp?artid=990&type=4&root=0&parent=0&cat=0&mode=arc>> (accessed 2 September 2006) at para 5 (typical of the official defence of the death penalty):
The Singapore Government makes no apology for its tough law and order system. Singapore is widely acknowledged to have a transparent and fair justice system and is *one of the safest places in the world* to live and work in. [emphasis added]
- 4 *Eg*, Wilson Loo Kok Wee, “Australians shouldn’t get special treatment” *The Straits Times* (30 November 2005).
- 5 *Eg*, MHA Response, *supra* n 3 at para 9:
Singapore does not seek to impose its views on others. We only ask that others do not impose their views on us.
- 6 A notable exception is the decision by the Law Society of Singapore to set up an *ad hoc* committee to study the use of capital punishment in Singapore: see, “Law Society Plans to Study Death Penalty”, *The Straits Times* (6 January 2006).

members of the public, regardless of whether the offender is Australian or Singaporean, and regardless of what Amnesty has to say. The reasons advanced for the retention of the death penalty, and its mandatory nature, need to be subjected to careful analysis. The State is killing in circumstances in which it is not clearly necessary to do so to prevent greater harm⁷ – we need to know why it is doing so, and whether or not by so doing it is achieving what it is meant to achieve. That the topic of the pros and cons of the death penalty is such a favourite one for student debates ought to alert us that we are not likely to find cut-and-dried answers to these questions. Moral choices must be made at some point. But much can be done by way of official provision of statistics and details of the use and impact of the death penalty.⁸ What is needed is a dispassionate on-going discourse on the use of the death penalty, with as much input from a sufficiently informed⁹ Singaporean public as is reasonably possible. Entrenched positions are to be discarded, as the Government itself has demonstrated recently when it approved of large-scale gambling in Singapore in what it has euphemistically called “Integrated Resorts”.¹⁰

3 Why the fuss about the death penalty? It is not easy, but perhaps worthwhile, to articulate (albeit briefly) why we ought to be concerned about it. If we can execute people without any cost to society, then our

7 A rough and ready analogy can be drawn from the law of homicide. The current Penal Code (Cap 224, 1985 Rev Ed) (“the Penal Code”) sections exonerate a killer if the killing was necessary to prevent harm to self or others, but this “right of private defence” is narrowly circumscribed by conditions such as a “reasonable apprehension” of harm (ss 100(a) and 100(b)) and the infliction of no more harm than is “necessary” (s 99(4)). Execution for the purpose of deterrence fails on both counts.

8 It is a pity that official statistics on the death penalty are not systematically or consistently published. One has to wait for answers to a question in Parliament, or for the government to be sufficiently provoked to use statistics to respond to critics like Amnesty International.

9 The MHA Response, *supra* n 3, declares:

But the fact is that the death penalty is not a burning issue in Singapore. Most Singaporeans support the death penalty for serious crimes as it has helped to keep Singapore’s overall crime rate low ...

If indeed this is correct (for one might ask how the death penalty for *serious crimes* keep the *overall* crime rate low), one wonders what might be the basis upon which “most Singaporeans” know that the death penalty has had that sort of effect.

10 Prime Minister Lee Hsien Loong’s statement announcing plans “to change our long-standing policy not to allow casinos in Singapore” (see *Singapore Parliamentary Debates, Official Report* (18 April 2005) vol 80 at col 54, <http://www.parliament.gov.sg/reports/private/hansard/full/20050418/20050418_HR.html> (Lee Hsien Loong, Prime Minister and Minister for Finance) (accessed 2 September 2006)) is a model of the case for the need for, and how to go about, re-thinking long-held beliefs.

scrutiny need not be very searching. But when we kill, we take away the life of the offender – it is axiomatic for most right-thinking members of the Singaporean public that life has high intrinsic value.¹¹ Indeed the deterrence argument for the death penalty hinges on potential offenders valuing their lives. Killing someone also has severe repercussions on his or her family and friends. Acceding to the State the power to kill in circumstances outside of absolute necessity has the potential to affect fundamentally the relationship between the Government and the governed – if the State can kill, there is, it might be extrapolated, nothing else that it cannot do. There are also significant “international” costs. Reputational harm is undeniable – large tracts of humanity think the death penalty beyond the pale,¹² and many of those who retain it do not use it anywhere as liberally as Singapore does.¹³ More tangibly, extradition from these jurisdictions can only be bought at the cost of assurances that the death penalty will either not be imposed or carried out.¹⁴ None of these are, of course, “knock-down” arguments – all governmental policies have some sort of down-side or other – but the point here is that any decision to use the death penalty must be supported by reasons more formidable than the cost it will extract.

- 11 Sometimes expressed as the right to life. The very existence of Art 9 of the Constitution of the Republic of Singapore (1999 Rev Ed) (“the Constitution”) (“No person shall be deprived of his life ... save in accordance with law”) is testament to this. There are exceptions, and this is the burden of this discussion. Nonetheless, all too often is our attention wrongly focussed on the exception and not the fundamental value of life. Indeed, exactly what the exception allows must surely be informed by a keen appreciation of the commitment to life enshrined in Art 9.
- 12 Eg, All of Europe, Canada and Australia are abolitionist. Almost all of Latin America is either abolitionist, except for the most extraordinary of circumstances (eg, in wartime): See the Wikipedia: The Free Encyclopedia webpage on “Use of Capital Punishment Worldwide” available at <<http://en.wikipedia.org/wiki/Retentionist>> (accessed 2 September 2006).
- 13 For example, arguably the most prominent retentionist jurisdiction, the US, executes only for aggravated forms of murder: See the Wikipedia: The Free Encyclopedia webpage on “Capital Punishment in the United States” at <http://en.wikipedia.org/wiki/Capital_punishment_in_the_United_States> (accessed 2 September 2006). Either a mandatory death penalty, or the death penalty for a trafficking offence will be unlikely to survive constitutional scrutiny: *Roberts v Louisiana* 428 US 325 (1976) (mandatory death penalty for murder in the perpetration of armed robbery struck down); *Coker v Georgia* 433 US 584 (1977) (death penalty for rape struck down).
- 14 Most recently in the case of Michael McCrae, wanted for murder, but who fled to Australia. He was extradited only after the Singapore government gave an undertaking not to carry out a sentence of death: *Michael McCrea v Minister for Customs and Justice of the Commonwealth of Australia* [2005] HCATrans 761. There is no doubt great sense in giving the undertaking, for otherwise there might not be any trial at all. But one can also sympathise with those who feel the “injustice” of someone escaping the death penalty just because he managed to flee the jurisdiction in time.

4 The purpose of this piece is modest. It cannot hope to resolve the dispute between retentionists and abolitionists in any decisive manner. What it does try to do is to initiate a dispassionate discourse in Singapore, and amongst those with a stake in what happens in Singapore, as to whether our present death penalty practices are the best we can do.

II. The wages of murder

5 It is not appreciated often enough that the imposition of the death penalty occurs in significantly different contexts for different capital offences. There is a striking contrast between the use of the death penalty for the “big two” – murder and drugs. We start with murder which, for more than a century after the enactment of the Penal Code, was the only significant capital offence in Singapore.¹⁵ Because of its antiquity (by Singapore standards) it is not easy to discern a clear rationale for the use of the death penalty for murder. There could not have been a conscious deliberation by elected officials. It comes to us as a historical accretion, as it were. From the common law of England, it found its way into the Penal Code of colonial India, from whence it followed the maritime trade route to the Penal Code of the Straits Settlements, and eventually the Penal Code of independent Singapore.¹⁶

15 There are a cluster of offences punishable with death in the Penal Code, the vast majority of which have no record of ever being used: *eg*, the treason offences of waging war (s 121, mandatory) and “imagining” the death of the President (s 121A, mandatory), abetment of mutiny (s 132, discretionary), perjury causing an innocent person to be executed (s 194, discretionary), piracy with attempt to murder or endangerment (s 130B, mandatory), abetment of suicide of mentally incapable persons (s 305, discretionary), kidnapping in order to murder (s 364, discretionary). The one exception is gang robbery with murder (s 396, discretionary) which has seen infrequent action – it is similar in conception to the problem of common intention (see discussion below) and a similar analysis applies. There are also military offences in the Singapore Armed Forces Act (Cap 295, Cap 2000 Rev Ed) which attract the death penalty: mutiny (s 15, mandatory), misconduct in action (s 11, discretionary), assisting the enemy (s 12, discretionary). Again there is no recorded use. There was of course extraordinary (and now repealed) legislation dealing with the trial of persons assisting in the Japanese capture and occupation of Singapore – see *eg*, *Re Eric Woodford* [1946] MLJ 19, and the apparent use of international law in the death sentences meted out at the war crimes tribunal in Singapore after the war: See, *eg*, “Synopsis of Case No 235/941 from the Trials of Japanese War Crimes in Singapore Conducted by the British Military” available on the UC Berkeley War Crimes Studies Center website at <<http://ist-socrates.berkeley.edu/~warcrime/Japan/singapore/Trials/kasai.htm>> (accessed 2 September 2006).

16 It became law in Singapore as Ordinance 4 of 1871, the direct ancestor of the Penal Code now in force. See Andrew Phang Boon Leong, “Of Codes and Ideology: Some Notes on the Origins of the Major Criminal Enactments of Singapore” (1989) 31 Mal L R 46, for what is perhaps the only extended historical discussion of that event.

One may search the Parliamentary Debates of independent Singapore and the proceedings of its predecessors, the Legislative Assembly and Legislative Council, but one is unlikely to find any sustained or coherent articulation of a rationale for the imposition of the death penalty for murder. A thorough historical analysis is beyond the scope of this piece, and perhaps the competence of the author. What is important for the present inquiry is why it is thought that the death penalty should remain for murder in Singapore in 2006. It seems unlikely that the deterrence of potential murderers is the critical reason.¹⁷ The annual report of the murder situation in Singapore by the Police Force makes, thankfully, rather boring reading. The figures have dipped from 37 reported murders in 1998 to 19 in 2004¹⁸ – for a population of approximately four million, possibly the lowest murder rate in the world.¹⁹ A description, like this one for 2001, normally follows:²⁰

All cases of murder were isolated and unrelated. A large proportion of the cases were *crimes of passion* which occurred mainly as a result of misunderstandings, disputes between known parties and family matters or problems. [emphasis added]

6 There is thus not the kind of social alarm that rouses governments to enact or retain the death penalty for deterrence purposes. It might be countered that the murder rate is so low because of the death penalty, but that is unconvincing. A “large proportion” of murders are crimes of passion where the offender kills without thought of the consequences. Murderers “of passion” are simply not deterred by the death penalty. Murder, or the potential for it, in modern Singapore is just nowhere near proportions which make deterrence the major reason for the preservation of the death penalty.

17 There was perhaps a token attempt to advance a deterrence rationale in the MHA Response, *supra* n 3 at para 4:

[The mandatory death penalty] sends a strong signal to would-be offenders, to deter them from committing crimes such as murder ... which would severely compromise the safety and security of Singapore.

It must surprise Singaporeans that murder has been apparently elevated to a matter of national security.

18 The figures are available on the Singapore Police Force website under “Statistics” at <<http://www.spf.gov.sg/>> (accessed 2 September 2006).

19 Singapore’s homicide rates compare favourably with legendary Japan’s: See The Sensible Sentencing Trust website at <<http://www.safe-nz.org.nz/Interstats/homicide.htm>> (accessed 2 September 2006).

20 Singapore Police Force, “Crime Situation for the Year 2001” available on the Singapore Police Force website at <<http://www.spf.gov.sg/>> (accessed January 2006) at para 12.

7 A more plausible rationale rests with what criminologists call retribution – not so much in the sense of primal revenge, but in the modern guise of just desert. The idea has been around for a long time. Mosaic law prescribed that “if any mischief follow, then thou shalt give life for life”.²¹ The Penal Code, notably, prescribes the death penalty only for murder,²² which of course involves the causing of death. The task then is to take a closer look at the foundational belief which underlies the retributive rationale for the death penalty – that one who causes death deserves death. Despite its instinctive appeal, this “strict equivalence” rendering of retribution is, on further thought, rather anomalous. We do not punish with amputation someone who cuts off the hand of a victim, nor do we torture an offender who has tortured others.²³ Indeed there are few offences indeed which abide by the principle of strict equivalence between harm and punishment.²⁴ There might have been a time in the past that punishments such as these were countenanced, but one might justifiably think that one of the great achievements of civilisation is the “humanising” of punishment. It is true that Singapore preserves caning as a means of punishment, primarily for offences of violence²⁵ – this is the other (and perhaps the only other) example of “strict equivalence”. It is not the purpose of this piece to talk about corporal punishment, which attracts a controversy similar to that of capital punishment, but, curiously, in a far more acute fashion – there are jurisdictions which are willing to execute, but not to cane.²⁶

21 The Bible, King James version, Exodus 21:23. The injunction can perhaps be read more benevolently in that it possibly prescribes the maximum punishment and not the only punishment – a life for a life, if it is so desired, but no more.

22 With the exceptions mentioned at *supra* n 15.

23 Instead, the appropriate crime is probably voluntarily causing grievous hurt which carries a maximum penalty of seven years imprisonment and a discretionary sentence of caning and fine (s 325 of the Penal Code). If it is simple hurt, even the discretionary sentence of caning disappears (s 323 of the Penal Code).

24 A policy of strict equivalence will run into serious difficulties with sexual offences (where equivalent treatment would be unthinkable) and offences of dishonesty (where mere equivalent treatment will be insufficient).

25 Parliament was to go beyond this principle for vandalism and immigration offenders (s 3 Vandalism Act (Cap 341, 1985 Rev Ed); s 57 Immigration Act (Cap 133, 1997 Rev Ed)).

26 The caning of Michael Fay in 1994 provoked a storm of protest from the United States, which would presumably not have complained if Fay had been executed for murder: see Alejandro Reyes, “Rough Justice: A Caning in Singapore Stirs Up a Fierce Debate about Crime and Punishment” available on the World Corporal Punishment Research website at <<http://www.corpun.com/awfay9405.htm>> (accessed 2 September 2006). Somewhat counter-intuitively, while there are 76 death penalty retentionists, there are only about 21 practitioners of judicial corporal punishment (14 caning, seven amputation): see “It’s Time to Stop Torture – Court Ordered Torture” available on the Amnesty International (Canada) website at <<http://www.amnesty.ca/stoptorture/corporal.php>> (accessed 2 September 2006).

8 The formulation of “life for life” obscures a crucial factor in the death penalty equation – that of *mens rea*, the mental element which transforms the mere causing of harm into a crime. The Penal Code does not prescribe death for all offences in which the offender causes the death of another. Notably, s 304A of the Penal Code makes the offence of causing death by a rash or negligent act punishable with only a (maximum of) two years imprisonment.²⁷ It is only for murder that death is the punishment. Ask anyone on the street and he or she will tell you that murder means only the intentional infliction of death²⁸ – and they would be wrong. One of the first things a law student in Singapore discovers about the criminal law is that murder under the Penal Code can be committed without the intention of causing death or even the knowledge that death would be likely to be caused. This is the result of the famous, or infamous, s 300(c) of the Penal Code. This variety of murder is the one almost exclusively resorted to in modern murder prosecutions.²⁹ The reason is clear. The Court of Appeal has recently affirmed a long line of decisions that s 300(c) murder is constituted if the offender intentionally inflicts any injury, and that injury objectively causes the death of the victim. It does not matter that the offender did not intend death or know that the injury inflicted was likely to lead to death.³⁰ The difference between s 300(c) murder and the popular lay conception of murder was startlingly demonstrated by the facts of this decision. The offender had slashed the victim on the leg to prevent the victim from escaping. It was found on the facts that this was done

27 Also s 299 of the Penal Code (culpable homicide not amounting to murder), and s 66, Road Traffic Act (Cap 276, 2004 Rev Ed), both of which involve the causing of death and in circumstances in which the offender may well have known that there was a significant likelihood of death, do not carry the death penalty.

28 Or causing death with the knowledge that death was likely. The *mens rea* of intention to cause death and causing death with such knowledge is captured by ss 300(a), 300(b) and 300(d) of the Penal Code.

29 This does not, of course, mean that had the Prosecution chosen to charge offenders under the other limbs of murder, the Prosecution would have failed. Indeed, as far as can be predicted from the judgments, a vast majority of prosecutions would have succeeded nonetheless.

30 *PP v Lim Poh Lye* [2005] 4 SLR 582. The Court of Appeal said (at [23]):
Thus, if the offender intended to inflict *what, in his view, was an inconsequential injury*, where, in fact, that injury is proved to be fatal, the offender would be caught by s 300(c) for murder.

Until this decision, the law of murder in Singapore was plagued by the clash between this interpretation, originating in the Indian Supreme Court (in *Virsa Singh v State of Punjab* AIR 1958 SC 465), and a Privy Council decision from Singapore (*Mohamed Yasin bin Hussin v PP* [1975–1977] SLR 34), the result of which could not be explained if the *Virsa Singh* interpretation prevailed. In this case, the Court of Appeal has now affirmed the view of an earlier High Court decision that *Yasin* was “factually” correct, but not of “universal application”.

because the offender had the clear intention of *not* killing the victim, a finding not upset by the Court of Appeal.³¹ Unfortunately, the leg wound involved the severing of the femoral artery leading to death through loss of blood. It was found on the facts that the offender had no idea that this would happen, and that a layperson might well have been under the misapprehension that leg wounds do not kill.³² The trial judge could not bring himself to convict the offender for murder, presumably because it carried the mandatory death penalty. He was overturned on appeal – the fact that the offender genuinely and reasonably held the (mistaken) view that leg wounds do not kill was simply irrelevant – the leg wound was intended, and it caused death.

9 What bearing does this have on the retributive rationale of the death penalty for murder? Official execution is nothing less than the *intentional* infliction of death – it follows from a principle of strict equivalence that only those who have intentionally caused death ought to be punished with (intentional) death. When the Penal Code prescribes the death penalty for s 300(c) murder, it is, by the principle of strict equivalence, punishing the offender more than what he or she deserves. This is why the trial judge balked at pronouncing the death penalty on the s 300(c) “murderer”. This is why in India, where its Penal Code gives the judge a discretion, the death penalty is generally not visited upon a s 300(c) “murderer”.³³

10 This recent decision of the Court of Appeal bore another significant holding – one concerning “group liability” for murder through the doctrine of “common intention”. The operation of common intention

31 *PP v Lim Poh Lye* [2005] 2 SLR 130. The trial judge held at [16]:

... I find that the general act intended by Lim [one of the accused] was to cause stab wounds to Bock’s [the victim] legs to prevent him from escaping... I find ... that the severing of Bock’s femoral vein was not intentional, but ... accidental.

32 *Id* at [15]:

I am satisfied that there was no intention by any of the three to kill Bock [the victim]. Although there were several stab wounds, all of them were inflicted on the lower limbs, where such injuries are not normally expected to be fatal.

33 M Sornarajah, “The Definition of Murder Under the Penal Code” [1994] Sing JLS 1 at 16:

[T]he Indian courts have a discretion to choose between capital punishment and life imprisonment and have generally exercised the choice in favour of life imprisonment in circumstances where the conviction has been under the third clause.

Indeed, Professor Sornarajah had anticipated this very set of facts. He described it, at 13, as “a situation in which the harshness of the application of section 300 is obvious”.

is best illustrated by an example – where two or more people combine to commit a crime, say robbery, then all members of the group are liable not only for what they individually do or what they jointly intended to do, but also for what any member of the group does “in furtherance of” the joint enterprise.³⁴ Thus, if any member of the group commits murder “in furtherance of” the joint criminal enterprise, then all are liable for murder, even if murder was neither jointly intended nor, presumably, foreseen.³⁵ The only condition is that the murder was done to further the jointly-intended robbery. The Court of Appeal again affirmed a line of decisions rejecting any idea that the murder had to be commonly intended, nor apparently does it matter that the killing was foreseeable or that there was an express agreement not to kill.³⁶ What relevance has the doctrine of common intention to the retributive rationale for the death penalty for murder? Simply, the members of the group who did not inflict the fatal injury are guilty of murder and are liable for the death penalty although they neither actually caused death nor even contemplated that it

34 Section 34 of the Penal Code:

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.

35 Compare s 34 with ss 111 and 113 of the Penal Code which contain a clear criterion of either “probable consequence” or knowledge that the murder was a likely effect.

36 *PP v Lim Poh Lye* [2005] 4 SLR 582 at [54]–[57] where the Court of Appeal stated:

[I]t is clear [from the authorities] that the prosecution does not have to prove that there exists, between the participants ... a common intention to commit the crime actually committed.

[W]hat s 34 means is that where the actual crime committed is not what the participants had planned, then for the other participants to be *vicariously liable* for the act of the actual doer the actual offence must be consistent with the carrying out of the common intention ...

As stated in *Too Yin Sheong v PP* [1999] 1 SLR 682 at [28]:

[T]he participants need only have the *mens rea* for the offence commonly intended. It was not necessary for them to also possess the *mens rea* for the offence for which they are actually charged. [emphasis added]

The precise requirements of s 34 are still not entirely free from doubt. The Court of Appeal also quoted with approval this passage from an earlier decision, *Shaiful Edham bin Adam v PP* [1999] 2 SLR 57 at [57]:

[T]he participants must have *some knowledge* that an act may be committed which is consistent with or would be in furtherance of, the common intention. [emphasis added]

And it went on to say at [60]:

While it may well be that the knives were brought to frighten Bock [the victim], it must have been *within the contemplation* of the trio [common intenders] *to use* them if Bock should turn out to be difficult. [emphasis added]

It remains a matter of some uncertainty whether what must be in contemplation is the mere use of knives, or the use of them in a fatal manner. I discuss this issue at length in Michael Hor, “Common Intention and the Enterprise of Constructing Criminal Liability” [1999] Sing JLS 494.

might occur – a very far stretch for any principle of equivalence, let alone strict equivalence. The most that can be said is that the members of the group who did not kill objectively created a risk that death might occur – but that is more akin to the s 304A offence of causing death by rash or negligent act, punishable with a maximum of two years imprisonment.

11 Whatever one may feel about the morality of imposing the death penalty on a cold-blooded killer, what s 300(c) murder and the doctrine of common intention does is to expand the class of capital offenders to people who conform less and less to lay conceptions of who a murderer is. When we combine the operation of s 300(c) with s 34 of the Penal Code an almost astonishing picture emerges. Two people agree to rob. One stands guard while the other is supposed to demand money from a cashier with a knife, which the two agree is only to be used to frighten or to inflict minor injuries in order to frighten. In the course of the robbery, the cashier puts up a resistance and is slashed on the leg. This was done so as to subdue the cashier without seriously harming him. To his horror the femoral artery is severed and the victim dies from loss of blood. The one standing guard does not know what has happened. The one who slashed is guilty of s 300(c) murder – he hangs. The one who stands guard is also guilty of murder as the victim was slashed “in furtherance of” the robbery – he also hangs. We have strayed very far from the retributive logic of strict equivalence.

12 Nor do these two examples exhaust the retributive anomalies of the death penalty for murder, as it is practised in Singapore. The Court of Appeal, in a decision which we will revisit, declared that the death penalty in our drug laws were “sufficiently discriminating” to pass the test of proportionate punishment.³⁷ Can the same be said of our murder laws?

13 In fact, not everyone who falls within the definition of murder on the facts is punished with death, notwithstanding the oft repeated, and technically correct, assertion that the death penalty is mandatory. Those who come under the cover of a “general exception”, like private defence,³⁸ are absolved from liability altogether. Those who fall under a “special exception” have their conviction mitigated from murder to culpable homicide not amounting to murder. If there is any one remarkable development in the law of murder in recent years, it is the blossoming of

37 *Nguyen Tuong Van v PP* [2005] 1 SLR 103 at [87].

38 Particularly ss 100 to 103 of the Penal Code.

the peculiar special exception of “sudden fight”.³⁹ It is an unlikely defence – in the context of a killing in the course of a fight, there is the general exception of private defence which enables someone to kill if that is needed to protect the self. There is also the special exception of “excess of private defence” where the defender goes a little overboard.⁴⁰ Then there is the special exception of provocation which mitigates the killing if sufficiently “grave and sudden”.⁴¹ Why then the existence of the special exception of “sudden fight” which appears to rely on the rather dubious rationale that there is something about a fight which ought to relieve a killer from murder and the death penalty.⁴² A particularly striking application of “sudden fight” occurred in a recent Court of Appeal decision.⁴³ The victim, a deaf mute, was walking along a street with his friend when the accused was parking his car. The friend hit the car window with his hand to the grave annoyance of the accused. When the accused got out of his car to confront him, he had disappeared, so the accused accosted the victim, advancing and shouting at him. Eventually the victim pushed the accused to the ground. The accused, realising that he was rather smaller in stature than the victim and could not “win” without a weapon, looked around and picked up a stick and proceeded to beat the victim on the head – the wound was fatal. The Court of Appeal held that the special exception of sudden fight applied to reduce the conviction from murder to culpable homicide not amounting to murder. On a retributivist analysis, why on earth was the reprieve deserved?⁴⁴ The

39 Section 300 Exception 4 of the Penal Code:

Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.

40 Section 300 Exception 2 of the Penal Code.

41 Section 300 Exception 1 of the Penal Code.

42 B J Brown, “‘Chance Medley’ and the Malayan Penal Codes” (1961) 3 Mal L R 73 at 80:

The framers of the Indian Penal Code incorporated the doctrine at a time when it was still generally regarded (probably erroneously) as a valid common law defence. And for perhaps no better reason than that it appeared in the Indian statute, it was automatically adopted as part of the Malayan law of homicide.

43 *Tan Chun Seng v PP* [2003] 2 SLR 506.

44 A hint of a rationale may perhaps be found in *Tan Chee Wee v PP* [2004] 1 SLR 479, at [52]:

[Section 300 Exception 4 of the Penal Code] envisions situations where, notwithstanding the fact that provocation may have been given or that a blow may have been struck or for whatever other reasons the quarrel may have started, the subsequent conduct of both parties implies mutual provocation and aggression which *renders the task of apportioning blame between the parties impossible* and they must thus be placed on equal footing with respect to blameworthiness. [emphasis added]

This passage is perplexing on several levels. Just why there is a need to *apportion* blame is a mystery – for it is only the blame of the accused that a criminal

accused did not need to use force to defend himself – although he was pushed to the ground, the victim was already walking away when he got up. Nor could he argue that he was provoked – he himself had provoked the victim, and he obviously had not acted out of a loss of self-control. It appears that the only distinguishing feature here is that he killed in the course of a fight which he himself had precipitated⁴⁵ – a factor which one might have thought should have counted against him in any moral calculus. We will probably never be certain why the court ruled this way⁴⁶ – perhaps it was a technical reading of the sudden fight provisions, perhaps it was because the court did not think that the accused intended to kill, and the context of a fight afforded the opportunity for the court to differentiate between intended and unintended killing. It is not often that I find myself accusing the law of being overly lenient to the accused, nor is this my intent now. My point is simply that there are significant quirks in the law of homicide in Singapore to cast considerable doubt on any assumption that it is “sufficiently discriminating” for the institution of a mandatory death penalty.

14 The special exception of diminished responsibility and the way it has worked out in practice also significantly blurs the supposedly clear retributive line between who deserves the death penalty and who does not. Diminished responsibility is about excusing someone, who would otherwise be a murderer, because of reduced mental capacity.⁴⁷ The problem is that in practice, we see case after case of contested diminished responsibility pleas reduced to a “swearing match” between the accused’s

prosecution is concerned with. If the apportioning of blame is “impossible” and the accused and the victim must be placed on a “equal footing”, then the accused who comes under sudden fight ought to be acquitted of any crime whatsoever, not convicted of the high crime of culpable homicide not amounting to murder (punishable on the facts of *Tan Chun Seng* to a maximum of life imprisonment). In any event, on the facts of *Tan Chun Seng*, it is not easy to see why the victim (who pushed the accused to the ground because he – the accused – refused to stop harassing the victim) is to be tarred with the same blameworthiness as the accused (who used a stick to hit the victim several times over the head until he died).

45 This is expressly included in the defence of sudden fight by the explanation to s 300 Exception 4:

It is immaterial in such cases which party offers the provocation or commits the first assault.

46 The Court is not, by any means, always so generous – and the limitation that the accused must not take “undue advantage” or act in a “cruel or unusual manner” is normally employed. See, eg, *PP v Vijayakumar s/o Veeriah* [2005] SGHC 221 where the defence failed because the accused was bigger than the victim and had used a knife to stab the victim.

47 Section 300 Exception 7 of the Penal Code:

Culpable homicide is not murder if the offender was suffering from such abnormality of mind ... as substantially impaired his mental responsibility ...

psychiatrist who testifies that the accused was indeed suffering from a sufficiently serious mental condition, and the Prosecution's psychiatrist proclaiming with equal conviction that the offender is either exaggerating or malingering.⁴⁸ The nature of the science is such that experts are much more likely to disagree in matters of psychiatry than in other branches of medicine. A look at the result of such contests will reveal that, with very few exceptions, the Prosecution's psychiatrist is normally believed.⁴⁹ This is perhaps because of an unspoken "presumption" in favour of the prosecution expert on the often unspoken ground that they are more neutral than the defence expert, who is likened, as it were, to a "hired gun". We know too little about how someone becomes a prosecution expert and what his or her biases might be to be really confident about this supposed neutrality. Can we ethically place so much reliance on this speculative presumption of prosecution-psychiatrist neutrality for the purpose of the application of the mandatory death penalty?

15 Even if we can discount this assumption of prosecution-psychiatrist neutrality, there is one other problem – the peculiar principle under the Penal Code, as it has been interpreted, that where it has to be decided whether or not a general or special exception applies, the normal principle of proof of guilt beyond reasonable doubt is to be displaced, and it is the accused who bears the burden of proving the exception on a balance of probabilities.⁵⁰ The court can therefore come down in favour of the prosecution psychiatrist even if no presumption of prosecution-psychiatrist neutrality is employed – for where two experts disagree, surely neither testimony has been proved on a balance of probability. The

48 I deal with this in detail in Michael Hor, "When Experts Disagree" [2000] Sing JLS 241. Two recent High Court decisions on diminished responsibility was predictably in the context of a head-on clash between distinguished psychiatrists: *PP v Took Leng How* [2005] 4 SLR 472 (defence psychiatrist disbelieved – appeal dismissed in *Took Leng How v PP* [2006] 2 SLR 70) and *PP v Juminem* [2005] 4 SLR 536 (defence psychiatrist believed). A reading of these cases do not reveal a particularly satisfactory reason why the result was different.

49 A LawNet search reveals that since 1990, some 17 cases of contested diminished responsibility pleas resulted in only one in which the defence psychiatrist prevailed. The caveat must of course be that there might be cases not captured by the search – eg if there was no written judgement – but the figures must at least roughly indicate the trend.

50 This, it has been held, is prescribed by s 107 Evidence Act (Cap 97, 1997 Rev Ed) ("the Evidence Act"). I discuss this in detail in Michael Hor, "The Presumption of Innocence – A Constitutional Discourse for Singapore" [1995] Sing JLS 365 at 369–378. Burden of proof language figures prominently in diminished responsibility cases – eg, *Chia Chee Yeen v PP* [1991] SLR 312 at [16]:

In law, the burden of proving diminished responsibility, which is on a balance of probability, rested on the appellant.

retributive anomaly is this – where the accused argues that he or she did not have the necessary *mens rea*, say, of the intention of inflicting the fatal wound, the defence succeeds if a reasonable doubt is cast on existence of such intention; where however the Defence argues diminished responsibility (or indeed any other general or special exception) it must be proved on a balance of probabilities. No convincing reason for such a distinction exists. Where the accused can only cast a reasonable doubt, and not prove on a balance of probabilities, he or she lives or dies depending on a technical taxonomic classification of the nature of the defence. Is this “sufficiently discriminating” enough for our retributive sensibilities?

16 In any event, even a moment’s reflection will tell us that the “mandatory” nature of the death penalty for murder is to a significant extent a myth – and this is because of the evident use of prosecutorial discretion in the decision whether or not to charge an offender for murder.⁵¹ There have clearly been cases where the facts well justify a murder charge, but instead the offender was charged with culpable homicide not amounting to murder. The normal course is for the offender to plead guilty and the case appears in the legal databases as a sentencing decision. Some are explicable because the Prosecution agrees with defence counsel that some sort of special exception applies,⁵² but not all are capable of being explained in this way. It is likely that the Prosecution has, at least in some cases, taken into account mitigating circumstances to reduce a potential murder charge.⁵³ If this is correct,

51 Prosecutorial discretion is indeed conferred by Art 35 Constitution, and it is certainly not my intention to argue that it should not exist. The point here is that the need for such “escape hatches” takes away the thunder from both the retributivist argument that murder must always be accompanied by the death penalty, and the utilitarian argument that only a mandatory death penalty will provide sufficient deterrence.

52 *Eg, PP v Kok Weng Shang Bernard* [2005] SGHC 64; *PP v Ng Kwang Lim* [2004] SGHC 85.

53 *Eg, PP v Wan Chin Hon* [2005] SGHC 121, a fatal road rage incident where the accused taxi driver drove alongside a motorcycle, both travelling at about 100kmph, and then swerved towards the motorcycle causing the motorcyclist to lose control of the vehicle – he was flung to his death. There can surely be no doubt that the requirements of s 300(d) of the Penal Code would have been satisfied – for in what way was the probability of death here different from that of the illustration in the Penal Code in which a canon is fired into a crowd? One can only speculate that the Prosecution was sympathetic because there was no intention to kill. See also *PP v Tay Teik Chai Robson* [2003] SGHC 46 where the accused was part of a gang of five persons who decided to indulge in a “long and brutal assault” (at [4]) of the victim who was eventually stabbed to death by one of the gang. It appeared that (at [3]):

... [the accused] had no intention of killing [the victim]. He was not armed and was not aware at the crucial moment when [the victim] was stabbed.

then in truth, the death penalty for murder is only mandatory in so far as the courts are concerned – the Prosecution retains the discretion to avoid the death penalty through the charging decision. One might reasonably think that if there is to be a discretion, then let it also be exercised by our judges who enjoy security of tenure and who must openly declare their reasons.⁵⁴ But the point here is that if the mandatory sentence of death is thought to reflect some pre-ordained or well-established moral judgment of what the offender deserves, then the exercise of prosecutorial discretion to avoid, in effect, the death penalty must cast considerable doubt on such an ethical position.

17 A word ought to be mentioned of “public opinion” in Singapore on the death penalty. An attempt is sometimes made to justify the use of the death penalty on the ground that that is what “society” wants. The Court of Appeal recently had this to say, in the context of the death penalty for drugs:⁵⁵

We also respectfully disagreed with [defence] counsel’s assertion that *our society* is indifferent to whether a convicted drug trafficker is hanged or imprisoned for life, now that a term of life imprisonment is for the remainder of the convict’s natural life. The mandatory death penalty imposed under the [Misuse of Drugs Act] *reflects our society’s abhorrence* of drug trafficking ... [emphasis added]

18 The court did not say how it managed to figure out whether or not “our society” was or was not indifferent to the death penalty. Nor did it reveal its reasoning process for the conclusion that the mandatory

But as we have seen all this is quite irrelevant to a common intention plus murder charge. The accused was, for reasons not apparent, charged only with culpable homicide not amounting to murder. Could it be that the Prosecution itself here saw the injustice of the concept of common intention? Also telling is *PP v Ng Hua Chye* [2002] 4 SLR 412 where a domestic maid was physically abused and starved over a nine-month period until she died. It would be surprising indeed if a s 300(c) charge (at least) could not be proven. Yet the Prosecution opted for culpable homicide not amounting to murder – one again can only speculate that it was because he did not really have an intention to kill. The caveat to these comments must of course be that sentencing decisions after a plea of guilt are normally quite sparing on the details, and there might be circumstances which do not appear at all on the face of the judgments. But the point here is simply that there are not infrequently situations in which the definition of murder or common intention plus murder is amply fulfilled, but the prosecutor does not think that the death penalty is suitable – and this must cast doubt on any argument that the death penalty must be mandatory.

54 The conferment of a judicial discretion does not of course necessarily take away prosecutorial discretion – where the death penalty is discretionary, there is a two-key mechanism – both the Prosecution and the judge must be convinced that the death penalty is deserved in a particular case.

55 *Chew Seow Leng v PP* [2005] SGCA 11 at [40].

death penalty (for drugs, anyway) reflects society's abhorrence of the offence. I know of no statistically significant study of what public opinion in Singapore is concerning the death penalty. It might be argued that the public has consistently voted in a government which believes in the mandatory death penalty for murder (and drugs) and that is evidence enough.⁵⁶ Suffice it to say that this is slender proof indeed – elections are fought over many things and the death penalty is unlikely to have been a major electoral issue in Singapore. Even if such data exists, we need to exercise caution. Experience elsewhere has shown how tricky opinion polls can be – results vary tremendously over differences like how the question is posed⁵⁷ and whether or not the poll was carried out when, say, a particularly gruesome murder was still in public memory. In the context of Singapore, the issue of whether or not public opinion is sufficiently informed is very real. Perhaps one of the very few things for which Singapore ranks poorly in the world is press freedom.⁵⁸ The Government is not ashamed of it – it has deliberately enlisted the press in the cause of nation building and forging a national consensus and not allowed the

56 See, eg, Singapore Government Press Release, "Comments by MHA Spokesman" (16 January 2004) available on the National Archives of Singapore's STARS website at <<http://stars.nhb.gov.sg/stars/public/>> (accessed 2 September 2006):

The proper way to change the law is through the constitutional route. If a person wants to advocate a particular stand, *he should campaign on the basis of his platform and get the people of Singapore to vote him into Parliament*. But he won't find much support here. Most Singaporeans know that our tough but fair system of criminal justice makes Singapore one of the safest places in the world to live and to work in. [emphasis added]

Needless to say, it is not enough to get into Parliament – the would-be reformer and his supporters must win a majority of the seats in order to successfully push an amendment through. Notice also the familiar assertion about what "most Singaporeans" know or believe – exactly how this was ascertained is almost never explained.

57 There is, eg, reason to believe that the result varies significantly depending on whether the people polled are expressly offered an suitable alternative punishment: Richard C Dieter, "Sentencing for Life: Americans Embrace Alternatives to the Death Penalty" available on the Death Penalty Information Centre (DPIC) website at <<http://www.deathpenaltyinfo.org/article.php?scid=45&did=481>> (accessed 2 September 2006).

58 Singapore ranked 140: see the "Worldwide Press Freedom Index 2005" available on the Reporters Without Borders website at <http://www.rsf.org/article.php3?id_article=15334> (accessed 2 September 2006). Also disturbing was the reason for the refusal of the Government to allow an Amnesty International official to speak on the death penalty at a public forum: see "Statement on the rejection of Open Singapore Centre's appeal for a Professional Visit Pass for Mr Tim Parritt" available on the Ministry of Home Affairs website at <http://www2.mha.gov.sg/mha/detailed.jsp?artid=1498&type=4&root=0&parent=0&cat=0&mode=arc>> (accessed 2 September 2006):

We do not require a foreigner to tell Singapore and Singaporeans how our criminal justice system should function.

press to encourage “criticism and opposition”.⁵⁹ The point here is not whether or not the Government is right in defining the role of the press in this manner, but that the stronger the prohibition against “criticism and opposition” to establishment positions and convictions is, the more one is impelled to ask whether or not any kind of public opinion on the death penalty can be sufficiently well-informed under prevailing circumstances.

19 The law decrees that the wages of murder is death. Yet, because of the considerable costs involved in using the death penalty, we need to ask why this must be the *only* satisfactory punishment. In the context of modern Singapore, it is unlikely in the extreme that the death penalty, mandatory or otherwise, is needed to deter people from killing each other. It would be extraordinary if abolition of the death penalty for murder will result in a causally-linked increase in murder rates.⁶⁰ Any justification must lie in the retributive belief of “life for life”. This principle of strict equivalence in harm and punishment is exceptional indeed in the law and practice of sentencing; almost all other crimes being satisfactorily punished with imprisonment and in some cases with caning. Even if it is thought that the most heinous kinds of killing deserve death, our law and practice in murder cases are very far from being “sufficiently discriminating” to justify a *mandatory* sentence of death. Murder can be committed without an intention to kill or even knowledge that death was likely under the problematic s 300(c) of the Penal Code. Responsibility for murder is imposed “vicariously” under s 34 of the Penal Code, so long as the killing was done by any member of the group

59 See “Singapore – Annual Report 2005” available on the Reporters Without Borders website at <http://www.rsf.org/article.php?id_article=13440> (accessed 2 September 2006) which quotes Minister Lee Boon Yang:

We have a different model in Singapore. It has been developed in particular circumstances and allows our media to contribute to our nation’s construction [as opposed to a role of criticism and opposition].

What this means is that the press in Singapore tend to support governmental policies and positions, and opposing views given rather less emphasis than in most other jurisdictions.

60 See “Facts and Figures on the Death Penalty” (6 April 2004), quoting Roger Hood, *The Death Penalty: A World-wide Perspective* (Clarendon Press, 3rd ed, 2002) at p 230, available on the Amnesty International (Canada) website: at <<http://www.amnesty.ca/deathpenalty/news/view.php?load=arcview&article=1712&c=Death-Penalty-Reports>> (accessed 2 September 2006):

In Canada, for example, the homicide rate per 100,000 population fell from a peak of 3.09 in 1975, the year before the abolition of the death penalty for murder, to 2.41 in 1980, and since then it has declined further. In 2002, 26 years after abolition, the homicide rate was 1.85 per 100,000 population, *40 per cent lower* than in 1975. [emphasis added]

“in furtherance of” a joint criminal enterprise, where the other members need not have had any inkling that death would result. The ethically dubious defence of “sudden fight” continues to excuse offenders from the death penalty, apparently on the ground that the killing occurred in the course of a fight. Offenders arguing “diminished responsibility” are hamstrung by unsatisfactorily resolved expert opinion conflict and the odd rule of evidence that general and special exceptions must be proved by the accused, resulting in convictions or acquittals which are not particularly ethically defensible. In the background, the use of prosecutorial discretion to reduce murder charges seriously dents the retributivist assertion that those who qualify for murder under the law invariably deserve death. There is much justification to be done before it can be said with any conviction that the mandatory death penalty for murder is “sufficiently discriminating”.

III. Drugs, death and deterrence

20 The use of the death penalty for drug offenders presents a markedly different picture. The history of government policy on narcotics is a fascinating story of shifts from economic exploitation to restriction to prohibition.⁶¹ Yet, when drugs were finally banned, there was initially no thought that the death penalty might be employed. Indeed, the Government of independent Singapore operated for a good few years without it.⁶² When the problem was perceived to be getting out of hand, the Government proceeded in graduated steps, first increasing the punishment and then, only as a “last resort”, introducing the death penalty in 1975.⁶³ It is quite clear that the driving force behind the death

61 See Andrew Phang Boon Leong, *The Development of Singapore Law : Historical and Socio-legal Perspectives* (Butterworths, 1990).

62 Drugs legislation drew legislative attention on a number of occasions, primarily the enactment of the Dangerous Drugs Act of 1951, the Drugs (Prevention of Misuse) Act of 1969 and the Misuse of Drugs Act of 1973 (Act 5 of 1973), which consolidated the earlier legislation. Throughout this period, there was no suggestion of the imposition of the death penalty.

63 There was a significant increase in penalties following the enactment of the Misuse of Drugs Act in 1973. Minister Chua Sian Chin said, in sponsoring the Misuse of Drugs Bill:

Government views the present situation with deep concern. To act as an effective deterrent, the punishment provided for an offence of this nature must be decidedly heavy. We have, therefore, expressly provided minimum penalties and the rotan for trafficking. However, *we have not gone as far as some countries which impose the death penalty for drug trafficking.* [emphasis added]

(See *Singapore Parliamentary Debates, Official Report* (16 February 1973) vol 32 at col 416 (Chua Sian Chin, Minister for Health and Home Affairs). Not long

penalty for drug offenders is not so much one of retribution, where it is felt simply that they “deserve death” – if it were so, then there would not have been the obvious reluctance in its imposition. The official thinking seemed to be not so much that drug offending is so morally reprehensible that death is ethically warranted,⁶⁴ but that the then fledgling Singapore was in danger of having its economic development programme, which the Government saw was necessary for national survival, defeated by rampant drug usage.⁶⁵ The death penalty was introduced to deter. Our task is to ask if there has indeed been a significant deterrence of drug offending occasioned by the death penalty. This discussion is likely to frustrate those who are looking for clear-cut answers and, as with all complex social phenomena, we may never know for sure, but we do need to scrutinise official claims that the death penalty has worked and that Singapore is such a “drug free” place because of it.⁶⁶ The reason for the existence of the death penalty, and the extent of its use, is pragmatic – it must stand or fall according to whether or not it has achieved, and will continue to achieve, its professed purpose.

afterwards Minister Chua, introducing the 1975 amendment which first imposed the death penalty for drug offences said:

These statistics show clearly that existing penalties under the Misuse of Drugs Act, 1973, have *not been a sufficient deterrence* to traffickers. [emphasis added]

(See *Singapore Parliamentary Debates, Official Report* (20 November 1975) vol 34 at col 1381 (Chua Sian Chin, Minister for Health and Home Affairs)).

64 It is of course not suggested that the Government does not think that drug offenders are reprehensible – only that the reason for the imposition of the death penalty for drugs was, in contrast to its imposition for murder, *mainly* for deterrence purposes.

65 See *Singapore Parliamentary Debates, Official Report* (20 November 1975) vol 34 at col 1380 (Chua Sian Chin, Minister for Health and Home Affairs) where Minister Chua said:

Rampant drug addiction among our young men and women will also strike at the very foundations of our social fabric and *undermine our economy*. Once ensnared by drug dependence they *will no longer be productive digits* contributing to our economic and social progress. They will not be able to carry on with their regular jobs. Thus, as a developing country, our progress and very survival will be seriously threatened. [emphasis added]

66 Eg, see Joseph K H Koh, Singapore High Commissioner in Australia, Opinion/Editorial, “Separating Fact from Fiction” (30 November 2005) available on the Ministry of Foreign Affairs website at <<http://www.mfa.gov.sg/internet/>> (accessed 27 September 2006). Mr Koh, in the midst of the Nguyen controversy, wrote:

The death penalty has not completely eliminated drug trafficking, but it has *certainly deterred* drug trafficking. Since the introduction of tough anti-drug laws in the mid-70s, *drug trafficking and drug abuse in Singapore have come down significantly*. [emphasis added]

This is typical of official justifications with its curious glossing over of the very problematic causative question of whether or not it was the death penalty, or something else, that did the trick.

21 For a jurisdiction which apparently believes so strongly in the deterrent effects of severe punishments like the death penalty and caning, Singapore produces remarkably few, if any, credible deterrence studies, empirical or otherwise.⁶⁷ What we have are repeated assertions that it has worked, and the occasional and rather crude comparison of rates of offending.⁶⁸ It appears that the belief in the efficacy of the death penalty is implicit, anecdotal and instinctive, rather than one which is based on any sophisticated analysis of empirical data. Founding Prime Minister Lee Kuan Yew, in his autobiography, expressed guarded admiration for the brutal regime of the Japanese Occupation; not for its brutality as such, but for the fact that it worked and deterred crimes very effectively.⁶⁹ The intuitive “common sense” appeal of the especial deterrence of the death penalty is undoubted. Human beings value life more than anything and if there is a significant danger that life will be lost, they will not take that risk. In the context of a crime apparently so coldly calculating as drug trafficking, it might be reasonably surmised that the deterrence logic will work its magic without a hitch. Yet, evidence of such deterrence is not readily available. It is true that drug figures for Singapore are amongst the lowest in the world, and perhaps the lowest now than for most of its history, but to what extent is this to be attributed to the death penalty?

22 Going by the logic of death penalty deterrence, one might expect to find drug offending plummeting immediately after the introduction of the death penalty in 1975 and staying put at a consistently low level of offending thereafter. But the reality is not so compliant. The available figures do seem to indicate a drastic reduction in drug offending *following* the introduction of the death penalty in 1975.⁷⁰ But the picture is

67 Indeed I know of no proper official statistical study. Formidable obstacles stand in the way of non-official investigation of death penalty data – no system is in place for consistent and comprehensive publication of death penalty data.

68 This tack was taken in the MHA Response, *supra* n 3.

69 In *The Singapore Story: Memoirs of Lee Kuan Yew* (Times Editions, 1998), the Minister Mentor wrote at p 74:

The Japanese Military Administration governed by spreading fear. ... Punishment was so severe that crime was very rare. In the midst of deprivation after the second half of 1944, when the people half-starved, it was amazing how low the crime rate remained. ... As a result I have never believed those who advocate a soft approach to crime and punishment, claiming that punishment does not reduce crime. That was not my experience in Singapore before the war, during the Japanese occupation or subsequently.

70 Minister of State Lee Boon Yang said, in a situation report on drug addiction, that: [T]he drug addiction problem in Singapore is under control. Over the last 10 years, we have brought the addict population down from 13,000 in 1977 to about 7,000 [in 1986].

complicated by the fact that there was an evident increase in the resources put into the enforcement of drug laws⁷¹ – criminologists have long said that (within reason) it is certainty of detection and not so much the severity of the penalty which deters. It might be argued that the success was due to a combination of the death penalty and increased enforcement – but there is precious little to show that there was indeed such a joint causation. There is at least a significant likelihood that even if the punishment levels were not pushed up to the death penalty, the substantial increase in enforcement would have achieved the same result. Oddly, at least for adherents of death penalty deterrence, after this initial and stunning success, the figures started to rise again in the late 1980s into the early 1990s, raising fears that the problem had returned.⁷² This curious development does not gel with any belief in the foolproof deterrence effect of the death penalty, which was well in place throughout. Curiouser still, the figures started falling again in the mid-1990s, and except for a brief and unsustainable spurt in the early 2000s, fell to relatively vanishing proportions by the mid-2000s.⁷³ A crude

(See, *Singapore Parliamentary Debates, Official Report* (20 May 1987) vol 49 at col 1221 (Lee Boon Yang, Minister of State for Home Affairs)).

- 71 Minister of State Professor S Jayakumar, speaking on drug abuse and trafficking, revealed that:

The drug situation in Singapore, which reached epidemic proportions in 1976, is now contained as a result of six years of relentless effort in pursuing the Supply and Demand Reduction Strategies of Operation Ferret launched on 1st April 1977. We have succeeded in reducing our addict population by half and have broken up the internal illicit drug distribution system in Singapore. [emphasis added]

(See, *Singapore Parliamentary Debates, Official Report* (23 March 1983) vol 42 at col 1476–1477 (Prof S Jayakumar, Minister of State for Law and Minister of State for Home Affairs)). Curiously, the death penalty did not figure at all and the rest of the speech focussed on prevention and detection.

- 72 Minister Professor S Jayakumar, speaking on steps to curb drug abuse, declared:

The drug abuse problem in Singapore *has risen*, from 4,730 arrested drug offenders in 1987 to 6,062 in 1988. [emphasis added]

(See, *Singapore Parliamentary Debates, Official Report* (29 May 1989) vol 54 at col 161 (Prof S Jayakumar, Minister for Home Affairs)).

- 73 Deputy Prime Minister Wong Kan Seng said:

[T]he Singapore drug situation has improved significantly as compared to a decade ago. The number of drug abusers arrested dropped from over 6,000 in 1994 to less than 800 in 2005. The number of new abusers also dropped from about 1,300 in 1994 to around 450 last year. In addition, the total drug abuser population in the Drug Rehabilitation Centres, or DRCs, which was at a record high of around 8,900 in 1994, has decreased to only about 190 in 2005. The relapse rate of drug abusers has declined from 68% in 1994 to just about 5% last year.

(See, *Singapore Parliamentary Debates, Official Report* (16 January 2006) vol 80 at col 2095 (Wong Kan Seng, Deputy Prime Minister and Minister for Home Affairs)). The runaway success since 1994 is remarkable by any measure, dwarfing (in proportion) the gains between 1975 and 1994.

death penalty deterrence logic is again at a loss to explain any of this. Singapore's famed "drug free" environment cannot be, *on the available evidence*,⁷⁴ linked, or at least so simplistically linked, to the death penalty.

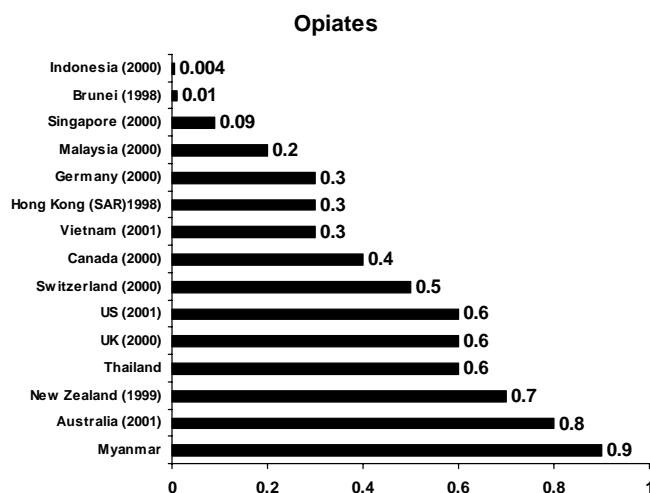
23 What then about cross-country comparisons? Assertions are again made that Singapore fares better in combating the drug problem because it uses the death penalty, when compared with other countries which do not.⁷⁵ Available data from the United Nations Office on Drugs and Crime presents a very untidy picture indeed for believers of crude death penalty deterrence.⁷⁶ For consumption of opiates, Malaysia, which uses the death penalty for drug offences in a manner similar to Singapore, has twice the rate of abuse. Vietnam, another jurisdiction with the death

74 One must of course not commit the reverse error of saying that these figures prove that the death penalty has no deterrent effect – they do not. However, one might reasonably expect the government, with its possession of the necessary data and the resources to subject them to statistical scrutiny, to at least attempt to conduct and publish such studies. One might also be so bold as to say that if none are forthcoming, perhaps adverse inferences from silence might be in order.

75 MHA Response, *supra* n 3:

Singapore's holistic approach [which includes the mandatory death penalty] to tackling the drug problem has worked for Singapore. According to the UN Global Illicit Drug Trends Report 2003, Singapore has among the lowest prevalence of drug abuse across a range of hard and soft drugs. (Annex B) ... [emphasis added]

Annex B (for opiate abuse, as a percentage of population aged 15 and above) is:



76 United Nations Office on Drugs and Crime (UNODC), *Global Illicit Drug Trends 2003* (United Nations Publication, 2003) available on the UNODC website at <http://www.unodc.org/pdf/trends2003_www_E.pdf> (accessed 27 September 2006) at pp 335–336.

penalty for drugs, has three times the rate of abuse. On the other hand, Sweden and Finland, countries which do not have the death penalty at all, have about the same rate of abuse as Singapore. Japan, which does not execute for drug offences, enjoys a rate of abuse even lower than Singapore. Cross-country comparisons reveal no evidence that the death penalty deters drug offending in any significant way, nor does it provide evidence that abolishing the death penalty or a limitation of its use will result in a worsening of the drug situation.

24 One might speculate why apparently rational and economic criminogenic motives,⁷⁷ which one would expect to be so eminently deterrable, simply might not be significantly affected by the death penalty. Offenders may be optimistic about evading detection⁷⁸ – no matter what the penalty is, if they think they will not be caught, however unjustified that belief may be, they will not be deterred. Offenders may not be entirely rational in their decision to engage in drug crime – they might be driven by the need to find money to feed their own addiction or for some other purpose they deem worthy of taking the risk. It bears a reminder that we are not talking about the difference between the death penalty and not having a penalty at all, or a penalty which is considerably less severe. It is *marginal* deterrence we are concerned with – the difference in deterrent force between the death penalty and, say, life imprisonment. The death penalty makes a difference only if there are significant numbers of potential drug offenders who would take the risk of a term of life imprisonment but not of a death penalty. We need to consider if, for example, a term of life, or a lengthy period of, imprisonment already affords *optimal* deterrence – if so, any increase in severity of punishment will yield very little by way of actual deterrence of drug crime.

25 Similar questions of marginal and optimal deterrence need to be asked in the context of the utility of the *mandatory* death penalty. It has been said that the sting of death penalty for drug offences in Singapore is in the fact that it is mandatory⁷⁹ – again relying on potential offenders making a rationalistic calculation that the absence of sentencing discretion will tip the balance against them choosing to embark on drug

77 Lord Diplock in *Ong Ah Chuan*, *supra* n 96 at 65, [39], described drug trafficking as “a crime of which the motive is cold calculated greed”.

78 Otherwise it is unlikely that they will embark on the enterprise, even if the penalty were life imprisonment instead of death.

79 By none other than Lord Diplock, *Ong Ah Chuan*, *supra* n 96 at 64, [33]:
There is nothing unusual in a capital sentence being mandatory. Indeed its efficacy as a deterrent may be to some extent diminished if it is not.

crimes. Do we have any evidence to support the belief that the certainty of the death penalty on conviction, as opposed to the possibility of it (if the death penalty were discretionary), has made a significant difference in the deterrence of drug offences? On a crude rationalistic calculus, one might have expected the mandatory death penalty for drugs to have worked a greater deterrent magic than the discretionary death penalty for kidnapping.⁸⁰ Yet, the data is again inconvenient – what has happened is that the statistics for kidnapping have dipped to literally vanishing levels, and there they have remained for years,⁸¹ but, as we have seen, the drug figures have see-sawed. We have no reason to believe that the drug figures would have been worse had the death penalty not been mandatory. Again, one may surmise why this has been so. Perhaps those who would have in the past committed kidnapping offences have logically turned their energies to rather more legitimate and lucrative pursuits following Singapore's phenomenal economic progress since the 1960s. It therefore made no difference that the death penalty was not mandatory – indeed it may not even have made a difference if instead of the death penalty, life imprisonment was the maximum penalty.⁸² Perhaps increasing levels of

80 Section 3 Kidnapping Act (Cap 151, 1999 Rev Ed) introduced as The Punishment of Kidnapping Ordinance 1961 (Ordinance 15 of 1961). Minister Ong Pang Boon had this to say:

[T]he introduction of this Bill will, it is hoped, achieve its desired purpose and deter criminally-minded kidnapers from kidnapping persons for ransom. It will be noted that the death sentence is not mandatory but is only provided as an alternative to life imprisonment. ... This Bill should be regarded as a stern warning that kidnapping does not pay. Should there be any future kidnapping case, it could become an appointment with death or an invitation to life incarceration ...

(See, *Singapore Parliamentary Debates, Official Report* (24 May 1961) vol 14 at col 1507 (Ong Pang Boon, Minister for Home Affairs)).

81 As Minister Wong Kan Seng reported:

The introduction of the death penalty for kidnapping in 1961 had likewise resulted in a dramatic drop in such cases. There were *only six cases of kidnapping reported in the last 10 years*, compared to a peak of 38 cases in 1959 alone. [emphasis added]

(See, *Singapore Parliamentary Debates, Official Report* (23 May 1994) vol 63 at col 61 (Wong Kan Seng, Minister for Home Affairs)).

82 Indeed, reported decisions since *Sia Ah Kew v PP* [1972–1974] SLR 208 have invariably *not* opted for the death sentence (see, eg, *Selvaraju s/o Satippan v PP* [2005] 1 SLR 238, and *PP v Tan Ping Koon* [2004] SGHC 205 (especially the description of recent decisions at [56]–[59])). In *Sia Ah Kew*, Chief Justice Wee Chong Jin (delivering the decision of the Court of Appeal) had this to say at 210, [7]:

Another factor which influenced the trial judges' decision [opting for the death penalty] was their view, based on a statement by the Solicitor General that kidnapping is rampant in Singapore, that this type of crime is on the increase in Singapore. We have before us an official communication which was not available to the trial judges, which reveals that for the past four years from 1970 to 1973 the total number of persons kidnapped for ransom was six, one in each

technology and police competence have made enforcement more effective and it is this which has deterred potential offenders. It is at least a significant possibility that the drug figures would similarly not have been altered for the worse had the death penalty been discretionary.

26 The careful reader will inevitably object that a simple comparison of raw crime statistics is grossly unreliable – and it is. The foregoing discussion is not by any means a substitute for sound and sophisticated statistical analysis of deterrence. Yet, this kind of crude data is often trotted out in support of the deterrence orthodoxy in Singapore – the discussion has proceeded thus, in part, to tackle these arguments on their own terms, and in part because there is precious little else which is publicly available to look at. Singapore is in many ways the ideal jurisdiction for proper empirical work on the real deterrent effects of the death penalty – it has had more than a century of experience and data, it is compact, it is efficient, it can well afford the resources required for such studies. Yet, decent published statistical studies are rarer than kidnapping. It might be that there are internal studies, but it would be odd that if they exist, and if they somehow support the orthodoxy, they would not be revealed. Why the seemingly unshakeable conviction in the deterrent effect of the death penalty has remained the orthodoxy is an intriguing question. A similar official conviction exists concerning the deterrent effects of caning as punishment. In 1989, caning was introduced as the mandatory punishment for certain immigration offenders, mainly illegal workers.⁸³ There were declarations of implicit faith that we need only cane a few, and the problem, it was firmly believed, would certainly be solved.⁸⁴ Well, it patently was not and immigration offending continued to rise

of the years 1970 and 1972 and two in each of the years 1971 and 1973. On these statistics it is clear that the crime of kidnapping for ransom *is neither rampant nor on the increase* in Singapore. [emphasis added]

The point is simply that there appears to be no crude correlation between the *discretionary* death penalty and the practice not to sentence offenders to death, and the dramatic reduction and very low level of offending.

83 Immigration (Amendment) Act 1989 (Act 6 of 1989).

84 Minister Lee Hsien Loong (as he then was) declared:

... Of course, *it will work* ...

[I]f you get caught being an illegal immigrant in Singapore, you will get caned. *I am sure* if we do this, we will only need to cane a few, but *the problem will be solved*. [emphasis added]

(See, *Singapore Parliamentary Debates, Official Report* (26 January 1989) vol 52 at cols 618–619 (Lee Hsien Loong, Minister for Trade and Industry).

precipitously until the Asian currency crisis resulted in a significant deterioration in the job situation in Singapore.⁸⁵ Yet, the belief persists.

27 It would be a mistake to think that there is a runaway deterrence policy in Singapore. The Government has not by any means been as trigger happy as some of its critics make it out to be – independent Singapore has created no more than three new kinds of capital offences.⁸⁶ It has not used the death penalty for undoubtedly serious offences like robbery or rape.⁸⁷ Nor has it extended it to “softer” drugs like Ecstasy and Ketamine, even in the face of a sharp rise in abuse of these substances.⁸⁸ It was not considered when immigration offending reached alarming proportions in the late 1980s, when even caning did not seem to “work”. It certainly has not gone the way of China in using it for economic or white-collar crimes.⁸⁹ Even the Government of Singapore is, to an extent,

85 Minister Wong Kan Seng reported:

Since 1989 ... [c]anining was introduced for illegal entry and overstaying by over 90 days. The situation improved for a while after the amendments. In recent years, it has worsened significantly. Last year [1994], nearly 10,000 immigration offenders were arrested – *double the number in 1988*.

The situation shows *no signs of abating*. In the first nine months of this year, 9,343 were arrested. The problem will grow bigger so long as there are unscrupulous employers willing to employ illegals. [emphasis added]

(See, *Singapore Parliamentary Debates, Official Report* (1 November 1995) vol 65 at cols 73–74 (Wong Kan Seng, Minister for Home Affairs)). It is telling that the Government did not push through legislation to increase the number of mandatory minimum strokes of the cane (three, by s 57 Immigration Act (Cap 133, 1997 Rev Ed)), a move which would have been more in accord with the declared belief in the deterrence of caning. The figures reached an all time high in 1998 (22, 973 arrests: see *Singapore Parliamentary Debates, Official Report* (9 May 2000) vol 72 at cols 199–200 (Table 1) (Wong Kan Seng, Minister for Home Affairs)), after which it began to fall significantly (11, 900 arrests in 2003: *Singapore Parliamentary Debates, Official Report* (16 November 2006) vol 78 at col 1071 (Ho Peng Kee, Senior Minister of State for Home Affairs)). This dramatic decrease had nothing to do with the deterrence of caning.

86 Namely, for drug offences (1975), firearm offences (1973) and kidnapping offences (1961). Technically, Singapore was not independent but “self-governing” in 1961. Although there has been a degree of expansion of the use of the death penalty for drugs and firearms, there has for the past 30 years been no real addition to this list.

87 Although there is constructive liability for murder in the context of gang robbery (s 396 Penal Code) – but this was in the original Penal Code and is discretionary.

88 Consider the discriminating approach of the Government in extending the death penalty to “Ice”, but not to Ecstasy or Ketamine: see Minister Wong Kan Seng’s speeches in *Singapore Parliamentary Debates, Official Report* (1 June 1998) vol 69 at cols 41–42 (Wong Kan Seng, Minister for Home Affairs) and *Singapore Parliamentary Debates, Official Report* (16 January 2006) vol 80 at col 2095 (Wong Kan Seng, Deputy Prime Minister and Minister for Home Affairs).

89 Amnesty International reports that China executes for offences like burglary, tax fraud, embezzling public funds, corruption and panda poaching: see Amnesty International, “People’s Republic of China: Executed “according to law”? – The death penalty in China”, available on the Amnesty International (USA) website at

restricted by considerations other than the perceived utility of deterrence. Call it political calculation or call it ethical constraint, but the death penalty has been reserved for what the Government thinks is criminal activity of the highest order.

28 It is in this regard that there are practices surrounding the death penalty for drugs which trouble. Two examples will perhaps suffice. The first is the existence of presumptions for death-penalty prosecutions.⁹⁰ No amount of official explication can get around the fact that the only conceivable purpose of a presumption is to enable a conviction notwithstanding the existence of reasonable doubt, which in all other situations would entitle the accused to be acquitted.⁹¹ A conviction in spite of reasonable doubt is disturbing enough for any criminal conviction, but an ethical line must somewhere be crossed when it exists for capital cases. Do we need the presumptions so badly that we need to make the ethical sacrifice? One would have thought, if at all, only if the gains in deterrence are sufficiently clear and founded.⁹² The second example is the precise *mens rea* requirement for the capital offence of trafficking. There appears to be some confusion somewhere. Official pronouncements seem to say that people are executed only when they intentionally or knowingly traffic in drugs.⁹³ That is an incorrect statement of the law, as it appears to have been interpreted by the courts. There have been distinct and repeated pronouncements that one can

<<http://www.amnestyusa.org/abolish/document.do?id=806E474AFD57DC5980256E5C00688E40>> (accessed 23 September 2006).

90 See, eg, s 4(2) Arms Offences Act (Cap 14, 1998 Rev Ed); s 17 Misuse of Drugs Act (Cap 185, 2001 Rev Ed).

91 See, eg, this defence by Minister of State Associate Professor Ho Peng Kee:
[E]very presumption that has been introduced has been carefully thought through. The presumptions have been introduced for specific purposes. ... [T]hey are *applied carefully*. ... In this case, even though there was an operation of a presumption, it was *not just the operation of a presumption alone* that resulted in Mr Zulfikar's [the accused] conviction. Because, first and foremost, the prosecution had to prove that he had possession of the drugs, and possession includes knowledge. In other words, the prosecution had to adduce evidence to show that, given all the circumstances of the case, Mr Zulfikar knew that he was carrying drugs. [emphasis added]
(See, *Singapore Parliamentary Debates, Official Report* (11 July 2001) vol 72 at col 1799 (Ho Peng Kee, Minister of State for Law). Needless to say, it is quite beside the point whether or not presumptions are used carefully or that the presumption alone does not suffice – the crux of the matter is that a presumption enables a conviction notwithstanding reasonable doubt.

92 This is dealt with in some detail in Michael Hor, "The Burden of Proof in Criminal Justice" (1992) 4 SAclJ 267 at 297–308 and Michael Hor, "The Presumption of Innocence – A Constitutional Discourse for Singapore" [1995] Sing JLS 365 at 389–403.

93 *Parliamentary Debates, supra* n 91.

indeed be found guilty of capital trafficking although there is no knowledge that one is possessing drugs.⁹⁴ Thus, if the accused thought he was trafficking aspirin or Viagra, but the tablets turn out to be heroin, he or she is deemed to be trafficking in heroin – it does not matter whether or not the accused genuinely or even reasonably believed that they were aspirin or Viagra. Thus, also, if the accused is delivering a container, he or she is liable for trafficking in whatever the box contains as long as there was a reasonable opportunity for inspection – it does not matter that the accused genuinely, and perhaps foolishly, believed that the box contained chocolates. Do we need such strict liability for capital cases so badly that we have to make the ethical sacrifice? Again, if at all, only if there are convincing gains in deterrence.

IV. Death and the Constitution

29 If Singapore were governed by Parliamentary supremacy, then the discussion ought to end here. But Singapore has a Constitution, against which even the collective decision of the elected representatives in Parliament cannot normally prevail. It has become the responsibility of the Judiciary to provide the definitive interpretation of its provisions.⁹⁵ What does the Constitution say about the death penalty? It seems undeniable that the terms of Art 9 envisage the State taking away life so long as it is “in accordance with law”. It is also uncontroversial that this must mean a law properly enacted by Parliament according to the prescribed procedure. But is this all that it means? There have been

94 This is dealt with in detail in Michael Hor, “Misuse of Drugs and Aberrations in the Criminal Law” [2001] 13 SAclJ 54 at 56–75. For a recent pronouncement, see *Shan Kai Weng v PP* [2004] 1 SLR 57 at [24]:

The position under our law, therefore, is that possession is proven once the accused knows of the existence of the thing itself. Ignorance or mistake as to its qualities is no excuse. The appellant knew that the tablet was in his car. He believed it to be a sleeping pill, which ... is a drug. As such, *his ignorance as to the qualities of the tablet did not provide him a defence* to the charge of possession ... [emphasis added]

Although this case was one of mere possession and thus not a capital charge, the authorities relied on were from a capital context and there is every reason to believe that a charge of possession for the purpose of trafficking will be similarly construed.

95 Recently affirmed in *Nguyen, supra* n 37 at [57]–[58], this apparently commonplace proposition is *in practice* something rather revolutionary for Singapore where there has never been an occasion where Parliamentary legislation has ever been struck down. There was only one case in which a constitutional challenge succeeded at first instance, only for the Court of Appeal to overturn that decision: *Taw Cheng Kong v PP* [1998] 1 SLR 943.

essentially two contending views.⁹⁶ The “positivist” one is that that is indeed all that Art 9 means. The attraction of this position is that it seems to give full force to the democratic legitimacy of Parliament over that of the unelected Judiciary. It is also tempting in its clarity – the job of the judges is nothing more difficult than to ask if there is a piece of legislation which says that the State can take away life. But this is already the position if there were no Constitution at all – for this is how Parliamentary supremacy works. It suffers from the very serious flaw of pointlessness.⁹⁷ “Fundamental Liberties” must mean something. The twin great cases of *Ong Ah Chuan* and *Haw Tua Tau*,⁹⁸ perhaps the Privy Council’s greatest legacy for Singapore, decided for the contending view that properly enacted legislation must also abide by the “fundamental rules of natural justice” – this is the “naturalist” position. Notwithstanding some intervening doubt, the Court of Appeal in the recent *Nguyen* decision has reaffirmed that this is indeed the correct interpretation.

96 The history of this debate is an interesting one. One of the earliest commentators of this provision, Professor Sheridan, was of the view that this provision presented no substantive constraint on the Legislature (see, L A Sheridan, “Federation of Malaya Constitution: Parts Two and Three” (1959) 1 Mal L R 175 at 175). This drew a stinging critique from the young Professor S Jayakumar in “Constitutional Limitations on Legislative Power in Malaysia” (1967) Mal L Rev 96 at 98–102. Things were certainly going the “positivist” way with the influential Malaysian decision of *Arumugam Pillai v Government of Malaysia* [1975] 2 MLJ 29 (context of the property rights clause which was not carried into independent Singapore), but the judicial tide turned abruptly and decisively in favour of the “naturalist” interpretation following the two Privy Council decisions in *Ong Ah Chuan v PP* [1980–1981] SLR 48 and *Haw Tua Tau v PP* [1980–1981] SLR 73. The positivist position was to enjoy a revival of sorts with the utterance of some rather disturbing *dicta* from the Court of Appeal in *Jabar v PP* [1995] 1 SLR 617 at 631, [53]:

Any law which provides for the deprivation of a person’s life or personal liberty, is valid and binding so long as it is validly passed by Parliament.

This provoked a pointed response from Professor Thio Li-ann in “Trends in Constitutional Interpretation: Oppugning Ong, Awakening *Arumugam*?” [1997] Sing JLS 240, who castigated this change of heart as being “narrow”, “literal” and “parsimonious” (at 289). The recent decision of *Nguyen*, *supra* n 37 seems to have restored the naturalist approach (at [82]):

It is well established that the phrase ‘in accordance with law, in Art 9(1) connotes more than just Parliament-sanctioned legislation.

Unfortunately nothing was said of *Jabar*.

97 And of constitutional toothlessness in the face of an oppressive government, see Prof S Jayakumar, *id* at 117:

I am not prepared to assume that there will never come into power an authoritarian, arbitrary government. In such a situation it would be paradoxical if such a government could justify any of its oppressive measures by reference to the Constitution itself.

See also, Prof Thio Li-ann, *id* at 289:

[A]s judges refuse to adjudge the morality, justice and reasonableness of laws... [it] is left to the province of the legislature with the attendant danger that the majority can always pass immoral, unjust and unreasonable laws.

98 *Supra* n 96.

30 This breathes meaning into Art 9, but the very two strengths of the (rejected) positivist position become a formidable challenge for a judge attempting to exercise judicial review on the basis of Art 9. Who is this judge who would dare to override the collective will of the democratically elected members of Parliament? In Singapore it can never be forgotten that, at least in the foreseeable future, the Government of the day will have the Parliamentary majority needed to amend the Constitution itself – something which has indeed happened when Parliamentary displeasure was sufficiently aroused by particular judicial decisions.⁹⁹ The judge who would decide a constitutional matter must tread carefully, for the end result may be worse for whatever cause he or she is trying to champion. Then there is the rather more “legal” matter of how these overriding “fundamental rules of natural justice” are to be determined.¹⁰⁰ There is no convenient list at hand to be consulted. Into the interpretational pot must go “circumstantial evidence”, as it were, which might consist of judicial precedent and attitudes, other constitutional liberties, legislative agenda and behaviour, national values, history and sensibilities, and perhaps international or regional practice. It is only to be expected that such an exercise presents the judge with a wide range of possible and plausible interpretations of the precise meaning of the crucial phrase “in accordance with law”. The challenge is to choose the appropriate one.

31 A comprehensive treatment of each and every death penalty issue that raises potential constitutional questions is beyond the scope of this discussion. What I shall attempt to do is to pick and choose from the juiciest ones in order to illustrate the nature of the task. I start with the often decisive matter of judicial posture or attitude. This is what constitutional observers around the world look at when they try to label a particular court or judge as “right wing” or conservative, “left wing” or liberal, or “centrist”. The one striking contrast between the death penalty for murder and the death penalty for drugs is the difference in the apparent strength of Parliamentary belief in the necessity of the death penalty. No Singapore Parliament or its predecessor deliberative

99 This was precisely what happened following the great judicial review decision of *Chng Suan Tze v Minister for Home Affairs* [1988] SLR 132, where mere *dicta* was sufficient to prompt Parliament to react: I discuss this in detail in “Singapore Stories and Malaysian Dilemmas” in Ramraj, Hor and Roach, *Global Anti-Terrorism Law and Policy*, 2005, Cambridge University Press.

100 A problem recognised early by Professor Andrew J Harding in “Natural Justice and the Constitution” (1981) 23 Mal L R 226, but one which the author does not think “intractable”.

institutions, to my knowledge, have ever consciously debated or decided to retain the death penalty for murder. Murder has not been a particularly serious problem in Singapore for a very long time and, as we have seen, it is highly unlikely that the death penalty is needed for deterrence in modern Singapore. The retention of the death penalty for murder appears to be fuelled by force of history and powered by the instinctive but anomalous “life for life” doctrine. Parliamentary belief in the death penalty for murder is not particularly strongly held. This is in stark contrast to the death penalty for drugs. There is no doubt that it has been a serious social problem in recent years. Parliament itself decided to introduce the death penalty, after initially withholding it. There have been repeated proclamations by key political leaders that they think the death penalty to be essential to deter drug offending. It is a central tenet of the drug policy in Singapore. A judge who would overturn any legislation on constitutional grounds must always exercise a high degree of deference, but must tread much more deferentially when the death penalty for drugs is being considered as opposed to the death penalty for murder. It might well be that a particular practice for murder is to be considered unconstitutional, but not a similar practice for drugs.

32 The easier issues first, and these have to do with the penumbral – the situations where the death penalty is now applied, but which are furthest from the core murder and drug trafficking paradigm. The two outstanding provisions in the context of murder are s 300(c) (constructive murder) and s 34 (constructive or vicarious murder). Either of two potential constitutional rights might be implicated. Article 12 guarantees equal protection of the law and with it the constitutional requirement that all legislative classifications must be rationally based.¹⁰¹ Article 9 has the potential of embodying the emerging right against cruel, inhuman or degrading punishment under the rubric of “in accordance with law”. The foci of the two are different but the thrust is similar. The right to equal protection enjoins legislation to classify rationally – there must therefore be a rational basis to the inclusion of s 300(c) murder and murder by extension of s 34 within the definition of capital murder. Such a rational basis will not be easy to find and defend convincingly. The right to protection against cruel, inhuman and degrading punishment contains, at least, a requirement that criminal conduct which attracts the death penalty must be sufficiently serious.¹⁰² Even if we can accept that

101 Called the “rational nexus” or “reasonable classification” test.

102 This requirement is discussed in Michael Hor, “The Death Penalty in Singapore and International Law” (2004) 8 SYBIL 105 at 106–109.

intentional killing satisfies this injunction, ss 300(c) and 34 encompass conduct which is significantly less serious – an intention merely to cause injury for the former, and the intention to engage in (non-fatal) criminal activity for the latter. A case can be made that these penumbral murders are simply not serious enough to attract the death penalty – or put in another way, the death penalty will be disproportionate to the seriousness of the crime. The same analysis must apply to the idea that capital trafficking is made out without the offender actually knowing that he or she is in possession of illicit drugs. There appears to be no rational basis to classify “negligent” or “strict liability” trafficking together with intentional or knowing trafficking for the purpose of the death penalty. There must be at least a credible argument that the death penalty for such kinds of penumbral trafficking is sufficiently disproportionate to attract the potential constitutional protection against cruel, inhuman and degrading punishment. Although this is in the context of drugs where heightened deference to the Legislature was counselled, this penumbral trafficking is in fact not a creation of the Legislature, but that of the courts itself.¹⁰³

33 The operation of presumptions in the context of capital offences raises issues of greater complexity. The rule of evidence that it is the accused who must prove a general or special exception does appear to be in violation of both equal protection and the potential right against cruel and inhuman punishment. Just why the accused must bear the burden for general and special exceptions but not for elements of the offence has never been rationally explained.¹⁰⁴ A credible case can surely be made that visiting the death penalty on an offender where there is in existence reasonable doubt violates the protection against cruel and inhuman punishment. Like the murder provisions in the Penal Code, the governing provision in the Evidence Act was not one which was consciously deliberated upon in any of our representative bodies. The presumptions in the Misuse of Drugs Act cannot be so cursorily disposed of. One of them was challenged without success in *Ong Ah Chuan*.¹⁰⁵ In a ruling which has become more quoted (elsewhere) now for what the law should no longer be,¹⁰⁶ the Privy Council declared that so long as there was some

103 And the Government seems to be still under the impression that the death penalty is only visited upon the knowing trafficker – see *Parliamentary Debates*, *supra* n 91.

104 *Supra* n 50.

105 *Supra* n 96.

106 For example in the Canadian Supreme Court in *Her Majesty The Queen v David Edwin Oakes* [1986] 1 SCR 103 at 128, where similar presumptions were struck down.

evidence logically probative of guilt, presumptions pose no constitutional problems. There was no such thing as a “presumption of innocence”, nor did the Privy Council deem it important, or indeed relevant, that the death penalty followed on conviction. History was not to be kind to the Privy Council – all over the world, constitutional courts and human rights instruments were soon to elevate the presumption of innocence to a fundamental right,¹⁰⁷ just as the move to scrutinise death penalty process more stringently than ordinary criminal process gathered momentum. No convincing reason has ever been advanced for the *necessity* of these presumptions, nor have the serious ethical problems in ignoring the existence of reasonable doubt ever been addressed. Yet, here the courts must move cautiously. Whatever the Judiciary, or anyone else, might think, the drug presumptions were introduced by a conscious and deliberated decision in Parliament. This does not of course mean that the courts must never strike down such legislation, but it does mean that if the courts choose to act at all, they must do so with a clear idea of what the ultimate result of their intervention might be.

34 The issue which has occupied the courts twice before, which is not inconsiderable attention by Singapore standards, is the mandatory nature of the death penalty. It was challenged in *Ong Ah Chuan* and, 25 years later, in *Nguyen*, but without success. Both cases concerned the mandatory death penalty for trafficking in a stipulated amount of drugs – always the more delicate context. We begin with the mandatory death penalty for murder. We put aside the kind of penumbral and evidential problems with the law of murder discussed earlier and concentrate on the core paradigm of murder – intentional or knowing killing. In an influential decision from the Caribbean, the Privy Council held that fundamental human rights embodied in the particular domestic constitution concerned required that mandatory capital punishment provisions had to be “sufficiently discriminating” to pass constitutional muster.¹⁰⁸ A provision for a mandatory death penalty for murder by shooting was declared unconstitutional.¹⁰⁹ *Ong Ah Chuan* was summarily

107 For example in the House of Lords in *R v Lambert* [2002] 2 AC 545, where a presumption was upheld only by reading it as casting an evidential (and not a legal) burden on the accused.

108 *Reyes v The Queen* [2002] 2 AC 235 (PC, Belize).

109 Under Belize law, murder by shooting was one of a few kinds of murder (“class A murders”) for which the punishment was a mandatory death penalty – for all other murders (“class B murders”), there was a discretion to impose life imprisonment instead.

dismissed as something way past its “use by” date.¹¹⁰ The Court of Appeal in *Nguyen*, faced with this development, appeared to agree with the general statement of principle that mandatory death penalty provisions must be sufficiently discriminating.¹¹¹ Are the murder provisions “sufficiently discriminating”? There are reasons to believe that they are not. 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 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?¹¹² 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. It may come as a surprise to some, but 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

110 The Privy Council, in a classic piece of British understatement found *Ong Ah Chuan*, a decision of its own, of “limited assistance” because it was “made at a time when international jurisprudence on human rights was rudimentary”: see *Reyes, supra* n 108 at [45].

111 The Court of Appeal, [2005] 1 SLR 103, did not categorically say this, but perhaps an implicit agreement can be inferred from the eagerness of the court to say, twice, that our drugs provisions were “sufficiently discriminating” (at [87]):

[W]e are of the view that the mandatory death sentence prescribed under the [Misuse of Drugs Act] is sufficiently discriminating to obviate any inhumanity in its operation.”

and, (at [98]):

[T]heir Lordships [of the Privy Council in *Reyes*] did allow that there might be circumstances in which the mandatory death sentence could be “sufficiently discriminating to obviate any inhumanity in its operation”.

112 The Privy Council in *Reyes, supra* n 108 at [43], said:

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

The reality in Singapore is that while the offender is free to persuade the Public Prosecutor or the President (in an appeal for pardon), he or she is foreclosed from persuading the court.

day.¹¹³ 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. As with the other provisions in the Penal Code we have considered, the mandatory death penalty provision was never, and has never been, debated by Singapore’s deliberative bodies. Nor has there been any official articulation of the necessity for the death penalty to be mandatory for murder.

35 Are mandatory capital offences for drugs sufficiently discriminating? Again, there are indications to the contrary. We see rather curious charges of trafficking in amounts just slightly below that which would have attracted the mandatory death penalty.¹¹⁴ Prosecutorial discretion is at work again to mitigate the mandatory penalty¹¹⁵ – what of offenders who fail to move the prosecutor? There was a fascinating decision concerning a practitioner of traditional Chinese medicine who knowingly used opium in an apparently rather effective externally-applied preparation for treating bone and joint complaints. The death penalty was averted only by a rare display of interpretational gymnastics – trafficking does not mean simply giving, selling or distributing, as the legislation appears to say, but must mean trafficking for the purpose of use as a narcotic drug. The court departed from its long-standing practice

113 See, M Sornarajah, “The Definition of Murder Under the Penal Code” [1994] Sing JLS 1; Micheal Hor, *supra* n 102; and s 302 Indian Penal Code (Act No 45 of Year 1860) which states:

Whoever commits murder shall be punished with death, *or imprisonment for life*, and shall also be liable to fine. [emphasis added]

114 See, *eg*, *PP v Dhanabalan s/o A Gopalkrishnan* [2003] SGHC 178 (charged with trafficking in 499.9 gm of cannabis – more than 500 gm attracts the mandatory death penalty), *PP v Rahmat Bin Abdullah* [2003] SGHC 206 (charged with trafficking in 499.9 gm of cannabis, although 1063 gm were found on the accused), *PP v Vanmaichelvan s/o Barsathi* [2005] SGHC 78 (charged with trafficking in 499.99gm of cannabis, although 749.17gm was found on the accused)

115 I do not for even a moment suggest that the Public Prosecutor should not have such a discretion or that the discretion was somehow exercised wrongly – the point is simply that the courts be given a similar discretion to avoid the death penalty in meritorious cases.

of reading the definition literally.¹¹⁶ The court was not similarly persuaded in the case of an offender who conveyed drugs back to the supplier because of a change of mind about getting involved, nor was the court moved by an offender who gave his girlfriend the occasional joint.¹¹⁷ The Court of Appeal in *Nguyen* did in fact hold that the mandatory penalty was sufficiently discriminating, but without elaboration. It did affirm the holding in *Ong Ah Chuan* that the legislation passed the normal rational basis test of equal protection – the death penalty was predicated on the trafficking of 15g of heroin or above, the increasing amount of the drug logically corresponding to the increase in the harm that the drug might cause.¹¹⁸ Yet, it was obvious that the Privy Council in *Reyes* was not employing a mere rational nexus test – for the provision which was struck down there must have passed such a test.¹¹⁹ The Privy Council appears to have employed the more stringent test, one which was more appropriate

116 *Ng Yang Sek v PP* [1997] 3 SLR 661 at [41]:

It is clear to us that the appellant does not fall within the class of offenders which Parliament had in mind ... The opium in the appellant's possession was never meant or even remotely contemplated to be used in a manner associated with drug addiction. On the incontrovertible evidence before us, it can be categorically stated that he was never associated in any way with the 'evil trade' in narcotics.

This decision is discussed in detail in Micheal Hor, *supra* n 94 at 80–83. This case was subsequently pressed upon the court in *Ong Chin Keat Jeffrey v PP* [2004] 4 SLR 483, only to be distinguished in a not particularly convincing manner (at [24]):

[U]nlike in *Ng Yang Sek* ... there was no ambiguity as to the appellant's guilt in the present case. Here, there was no doubt that the appellant had sold the drug. He had admitted to selling the drug, and had also admitted that he knew that he was selling Ecstasy."

There was, of course, no doubt in *Ng Yang Sek* that the accused sold opium (in the medical compound) knowing that it contained opium. More to the point was that the opium was not sold for the purpose of it being used for the "normal" addictive purpose. The problem with Ecstasy is that there is little evidence that it is (physically) addictive in the damaging way that the opiates are – see, *eg*, Concar, "Ecstasy on the Brain", *New Scientist*, 20 April 2002:

"Nobody claims ecstasy is benign. It isn't, and never could be - no drug is. Yet few of the experts we contacted believe that research has yet proved ecstasy causes lasting damage to human brain cells or memory."

117 These decisions are discussed in Michael Hor, *supra* n 94 at 75–80. See especially the contradictory (of *Ng Yang Sek*) language in *Muhammad Jefry v PP* [1997] 1 SLR 197 at [122]:

[O]nce the court had found that an accused 'gave' drugs – and this contemplated *only a physical act* without any reference to ownership – to another person for *whatever reason*, be it for *consumption or for safekeeping*, the accused would also be liable for trafficking ...

118 *Nguyen*, *supra* n 37 at [68]–[69] and [87].

119 It will be remembered that the mandatory death penalty provision held to be constitutionally infirm in *Reyes*, *supra* n 108, concerned murder by shooting – surely it can be rationally argued that death caused by a firearm is "normally" a more serious affair because of the lethality of the weapon used.

to the qualitatively different sentence of death.¹²⁰ Yes, in general, it might be said that murders caused by shooting (firearms) are more serious and alarming, but there will be instances where that is not the case, said the Privy Council.¹²¹ So too the trafficking of 15g of heroin might be a one-off thing or an enduring affair, trafficking may be directed at seasoned adult heroin aficionados, or at vulnerable and young first-time users. There can be no doubt that on the *Reyes* test, as it was applied in *Reyes*, the mandatory penalty for drugs in our legislation is in grave danger. Yet, the context of drugs legislation ought to give the courts pause before it thinks of striking down anything in it. The mandatory penalty was presented, debated and passed in Parliament, almost as the centerpiece of the war against drugs. There has been no lack of repeated and sustained official attempts to defend and justify the mandatory penalty, both in and out of Parliament. However the courts may think about it, the Government of the day has spoken and spoken clearly. Indeed, there is every likelihood

120 Three majority Justices of the US Supreme Court in *Woodson v North Carolina* (1976) 428 US 280, 304–305 were rather more explicit when they ruled that a mandatory death penalty provision was unconstitutional:

A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

...

This conclusion rests squarely on the predicate that *the penalty of death is qualitatively different* from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. [emphasis added]

It is ironic that the existence of the death penalty in the United States is sometimes cited in support of death penalty practices in Singapore when it seems clear that the mandatory death penalty provisions in Singapore would almost definitely be struck down by the Supreme Court if any legislature in there tried to enact them.

121 *Reyes, supra* n 108 at [43]:

The use of firearms by dangerous and aggressive criminals is an undoubted social evil and, so long as the death penalty is retained, there may well be murders by shooting which justify the ultimate penalty. But there will also be murders of quite a different character (for instance, murders arising from sudden quarrels within a family, or between neighbours, involving the use of a firearm legitimately owned for no criminal or aggressive purpose) in which the death penalty would be plainly excessive and disproportionate.

that if the courts were to pronounce the mandatory penalty unconstitutional, the Constitution itself will be changed to make way for it. The call is not a clear one, and this perhaps explains the result in *Nguyen*.¹²²

36 There is, finally, the strict abolitionist position that death penalties of any kind ought to be unconstitutional; for the State to take away the life of someone who no longer poses a threat to anyone is simply cruel and inhuman – the South African courts have so held.¹²³ It has been repeatedly held that this is precluded by the words of Art 9 which implicitly assumes that the State can kill so long as it is “in accordance with law”.¹²⁴ The Privy Council in *Reyes* was similarly constrained. Whether or not the words of Art 9 must necessarily allow the Legislature to impose the death penalty is perhaps the most controversial issue of

122 The reasoning in *Nguyen*, *supra* n 118, is somewhat surprisingly enigmatic, and might one day open the way to a more active judicial role. First, although the Court held (at [87]) that the mandatory death penalty for drugs was “sufficiently discriminating”, in another place in the judgment (at [77]), the Court said:

The appellant had not placed comparable material before us to properly decide whether the legislative judgment made in s 7 read with the Second Schedule of the [Misuse of Drugs Act] is insupportable. *In the absence of full arguments* on the issue, the 15g differentia is upheld, and the Art 12(1) argument is therefore dismissed. [emphasis added]

Could it be that the Court is hinting that, with proper groundwork, a future constitutional challenge might succeed? Similarly, while the Court apparently held that domestic law must always prevail over customary international law (at [94]), it also declared, at [88], that:

“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.”

The implication here would seem to be that, in the context of the death penalty at least, a clearly established rule of customary international law would normally be “adopted” as domestic constitutional law – and thus domestic legislation must give way to customary international law, via adoption as domestic constitutional law. Could it be that the Court is hinting that if the day should come when Singapore’s death penalty practices are contrary to clear norms of customary international law, the courts will give effect to those norms in preference to domestic legislation?

123 *State v Makwanyane* [1995] 1 LRC 269 (South Africa).

124 Notably, *Ong Ah Chuan v PP* [1980–1981] SLR 48 at 63, [32]:

It was not suggested on behalf of the appellants that capital punishment is unconstitutional per se. Such an argument is foreclosed by the recognition in art 9(1) of the Constitution that a person may be deprived of life ‘in accordance with law’.

them all¹²⁵ and is, at the moment, probably a premature question. The South African example is probably unique¹²⁶ and if one day the courts do decide that the death penalty *per se* is unconstitutional, it is likely to be a gradual development with the courts picking off the easier peripheral issues first.

V. Death in Singapore and the world

37 There is no doubt that a worldwide movement to abolish or at least restrict the use of the death penalty has gathered considerable momentum. Entire continents frown at its use¹²⁷ and many jurisdictions which do retain it do so only for most heinous murders and the like.¹²⁸ There are retentionist strongholds, especially in Asia, but there few if any with Singapore's level of economic and social development which use the death penalty as much as Singapore does.¹²⁹ Singapore's closest comparisons in terms of development and culture are probably Japan, which executes very few people and only for aggravated murder;¹³⁰ South

125 One might argue that Art 9(1) of the Constitution does not clearly permit the death penalty – it merely says that the state may kill if it is “in accordance with law”. For example, a not unreasonable interpretation might be that the state may allow killing only if it is strictly necessary to preserve other lives, or perhaps potential catastrophic damage to essential services, under a “private defence” type rubric. *Cf.*, the explicit wording of the Constitution of Belize (No 14 of 1981), cited in *Reyes, supra* n 108, at para 7:

S 4(1) A person shall not be deprived of his life intentionally *save in execution of the sentence of a court in respect of a criminal offence* under any law of which he has been convicted. [emphasis added]

126 The courts of many jurisdictions appear to be constrained by explicit allowance of the death penalty in their domestic constitutions – see, for example, decisions in Nigeria (*Kalu v State* [1998] 2 CHRLD 337) and Tanzania (*Mbushuu v Republic* [1995] 1 LRC 335), described in Alexandra Mc Dowall and Alan Brady, British Institute of International and Comparative Law, “The Continued Use of the Death Penalty in the Commonwealth” (1 January 2003) available on the Journal of the Institute of Legal Executives website at: <http://www.ilexjournal.co.uk/special_features/article.asp?theid=577&themode=2> (accessed 23 September 2006).

127 Europe is the prime example.

128 For example, the US.

129 China arguably outdoes Singapore in the expansiveness (though not it seems in *per capita* executions) of its death penalty practices, but it would be interesting to observe how the phenomenal economic changes going on there might or might not change this attitude.

130 Charles Lane, “Why Japan Still Has the Death Penalty”, *The Washington Post* (16 January 2005) available on The Washington Post website at <<http://www.washingtonpost.com/wp-dyn/articles/A11306-2005Jan15.html>> (accessed 23 September 2006). It appears that only two (murderers) were executed in 2004. Japan has a population of about 127 million. Singapore (population 3.5 million) executes about 20 odd people per year. In Japan, there was a moratorium on executions from November 1989 to March 1993.

Korea, which is retentionist for murder but has had a moratorium in place since 1998;¹³¹ and Hong Kong, which is abolitionist and executed its last offender in 1966.¹³² Yet, no Singaporean would think twice about visiting these countries for fear of being victims of crime. The *Nguyen* decision reveals an interesting ambivalence – there were near simultaneous pronouncements that Singapore courts must abide by international norms, but that if there were to be a clash between domestic law and international norms, domestic law must prevail.¹³³ Singapore desires to be like the developed economies of Asia and the West, but at the same time jealously guards its peculiar political culture, one which appears to have been untouched by the passage of almost half a century. People who argue that economic and social development must always bring with it political change have surely not been right, but are we to believe that economic and social change can be for all time hermetically sealed from political repercussions? It must be right that Singapore is not to change its behaviour simply because another country or an international organisation tells it to do so – that would be foolish. Yet, it must also be prudent to listen to what others have to say to us and to observe what they are doing in their own jurisdictions in order to reflect on how we can improve the governance of Singapore – to do otherwise would also be foolish.

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- 131 Amnesty International reports on South Korea that:
Prisoners continued to be sentenced to death, but *an unofficial moratorium on executions in place since 1998 continued*. More than 60 prisoners were under sentence of death at the end of 2004. [emphasis added]
(See, the Amnesty International (USA) website at <http://www.amnestyusa.org/countries/south_korea/document.do?id=ar&yr=2005> (accessed 23 September 2006))
- 132 Although formal abolition only occurred in 1993. The Hong Kong Bill of Rights Ordinance (Section 8) nonetheless preserves option to reimpose the death penalty: see the New South Wales Council for Civil Liberties website at <http://www.nswccl.org.au/issues/death_penalty/asiapac.php#hongkong>. (accessed 23 September 2006). Hong Kong's common law tradition, predominantly Chinese culture, and smallness provide a particularly apt predictor of what might happen if Singapore chose to abolish the death penalty.
- 133 *Supra* n 122.