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It was not unexpected that the Singapore Court of Appeal would reaffirm the constitutionality of the mandatory death penalty for certain forms of drug trafficking in *Yong Vui Kong v Public Prosecutor* [2010] 3 S.L.R 489. Similar arguments had been raised unsuccessfully before the Privy Council in *Ong Ah Chuan v Public Prosecutor* [1981] A.C. 648; [1979–1980] S.L.R.(R.) 710 when it was Singapore’s final appellate court; and in *Nguyen Tuong Van v Public Prosecutor* [2005] 1 S.L.R. 103 CA. The appellant in *Yong Vui Kong* had been convicted of trafficking in 47.27 grammes of diamorphine. Under the Misuse of Drugs Act (Cap.185, 2008 Rev. Ed.), a person found to have trafficked in more than 15 grammes of diamorphine must be sentenced to death. The court took the opportunity to explain in some detail why recent Commonwealth case law on the issue was distinguishable, as well as to clarify its prior decision in *Nguyen Tuong Van*. The appellant made submissions based on arts 9(1) and 12(1) of the Constitution, which respectively guarantee rights to life and personal liberty, and to equality before the law and equal protection of the law. This note examines aspects of the art.9(1) arguments.

Article 9(1) states: “No person shall be deprived of life or personal liberty save in accordance with law”. The first argument advanced by the appellant was that the word “law” excludes a mandatory death penalty, as that is a form of inhuman punishment. He relied, inter alia, on a series of recent Privy Council decisions on appeal from various parts of the Commonwealth, many on appeal from Caribbean states. These included *R. v Watson* [2004] UKPC 34; [2005] 1 A.C. 472; and *Bowe v The Queen* [2006] UKPC 10; [2006] 1 W.L.R. 1623. *Watson* had doubted the opinion in *Ong Ah Chuan* that the mandatory nature of the death penalty did not make it arbitrary and thus not “in accordance with law” within the meaning of art.9(1) by preventing a court from imposing differentiated sentences on offenders according to their individual blameworthiness:

“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”(*Ong Ah Chuan* at 672–673).
Lord Hope of Craighead, speaking for the majority in Watson, said:

“It is no longer acceptable, nor is it any longer possible to say, … that there is nothing unusual in a death sentence being mandatory. … The decision in that case was made at a time when international jurisprudence on human rights was rudimentary …”(at [17]).

The Court of Appeal distinguished these Privy Council decisions because reliance had been placed on express constitutional prohibitions against inhuman punishment which have no analogue in the Singapore Constitution (at [61]-[63]). In fact, Ong Ah Chuan had been found inapplicable to the Bahamaian Constitution in Bowe by reason of the lack of an equivalent in the Singapore Constitution to provisions which prohibited subjecting a person to torture or inhuman punishment (Bowe at [41], cited in Yong Vui Kong at [30]). More importantly, the 1966 Constitutional Commission appointed to examine how the rights of racial, linguistic and religious minorities could be adequately safeguarded in the Constitution had proposed an express prohibition against torture and inhuman or degrading punishment or treatment. While the Government accepted in principle that no individual should be subjected to torture, it eventually decided not to amend the Constitution in 1969 as proposed by the Commission. Therefore, it was now inappropriate for the court to read into art.9(1) a constitutional right that had been decisively rejected by the government (at [64]-[65], [71]-[72]).

The appellant not only had to demonstrate that the mandatory death penalty amounted to inhuman punishment, but in the first place it was necessary for him to convince the court that the sparsely worded art.9(1) included a right against subjection to such punishment. The court noted the appellant was arguing that a law which permitted inhuman punishment was not “law” within the meaning of the term in art.9(1)—that the right to be protected from such punishment should be read into the term (at [52] and [56]). It did not elaborate on the means by which this could be achieved. As art.2(1) of the Constitution defines “law” as including “the common law in so far as it is in operation in Singapore”, the right may be regarded as amounting to a common law principle so fundamental as to be constitutional in nature, and thus capable of overriding inconsistent legislation. Such an approach is not alien to Singapore. The Privy Council held in Ong Ah Chuan that constitutional references to “law” in such contexts as “in accordance with law”, “equality before the law”, and “protection of the law” refer to a system of law which incorporates fundamental rules of natural justice that were part of English common law (Ong Ah Chuan at 670). Arguably, the Government’s apparent rejection of the right was not as clear as the court made it out to be. The Constitutional Commission’s support for an express prohibition of torture and inhuman or degrading punishment or treatment was neither referred to by the Select Committee on the Constitution (Amendment) Bill nor by Parliament prior to the 1969 amendment of the Constitution. The documentary record is thus equivocal as to why Parliament decided against incorporating the right into the Constitution. It is possible that legislators felt the existing wording of art.9(1) to be sufficient protection. Hence, the events of 1969 should not have prevented the court from taking a generous approach and inferring the right into art.9(1). In any case, it is significant that the court has not entirely dismissed the possibility of art.9(1)
embodying fundamental common law rules. It commented, obiter, that the Government’s decision against amending the Constitution to expressly prohibit torture did not mean that an Act of Parliament which permits torture forms part of “law” for art.9(1) purposes. The court pointed out that in *Ong Ah Chuan* the Board was “not disposed to find that article 9(1) justifies all legislation whatever its nature” (*Ong Ah Chuan* at 659), and this might refer to ad hominem statutes or “legislation of so absurd or arbitrary a nature that it could not possibly have been contemplated by our constitutional framers as ‘law’ when they crafted the constitutional provisions protecting fundamental liberties” (at [16] and [75]).

This view has much in common with McGechan J.’s remark in *Westco Lagan Ltd v Attorney General* [2001] 1 N.Z.L.R. 40 HCNZ at [91], to the effect that the prospect of the courts overriding legislation in egregious breach of fundamental human rights should be left open in perpetuity.

The appellant also relied on *Mithu v State of Punjab* A.I.R. 1983 S.C. 473. This Indian Supreme Court judgment was relevant, as the Constitution of India, like the Singapore Constitution, lacks a specific proscription of inhuman punishment. Moreover, art.21 of the Indian Constitution is worded similarly to Singapore’s art.9(1). This case was also distinguished by the Court of Appeal, though not, it is submitted, on particularly satisfactory grounds. First, the court declined to apply to art.9(1) the “fair, just and reasonable” test applied by the Indian Supreme Court to the concept of “law” in art.21, contending that since the test hinged on the court’s view of the reasonableness of the law in question, it required the court to “intrude into the legislative sphere of Parliament as well as engage in policy making” (at [79]-[80]). Fundamental liberties guarantees do not count for much, though, if courts are unwilling to assess the reasonableness of legislation. There is no escaping the fact that some policy-making is inherent in human rights adjudication. Rather, judicial review is best seen as part of a constitutional dialogue between the courts and the political branches of government, who are entitled to seek a constitutional amendment if they disagree with a judicial ruling. Secondly, the court stated there was nothing on a plain reading of art.9(1) which prevented Parliament from making the death penalty mandatory (at [81]-[82]). This was a rather curious argument since the vague language used in art.9(1) clearly requires judicial interpretation to determine its scope. Finally, the expansive interpretation of art.21 was said to be understandable

“having regard to the economic, social and political conditions prevailing in India and the pro-active approach of the Indian Supreme Court in matters relating to the social and economic conditions of the people of India” (at [83]-[84]).

Unfortunately, the court did not explain how the conditions in Singapore were relevantly different. It merely asserted that the mandatory death penalty had remained unchanged in Singapore since penal legislation first came into force in the island in 1872.

The appellant’s second argument was that the mandatory death penalty is contrary to customary international law, and since the latter is “law” within the meaning
of art.9(1) the penalty is unconstitutional. A similar submission was made in *Nguyen Tuong Van*. There it had been claimed that capital punishment by hanging amounted to cruel and inhuman treatment or punishment, and since there was a customary international law principle prohibiting its infliction, execution by hanging violated art.9(1). The Court of Appeal’s judgment in *Nguyen Tuong Van* acknowledged that the prohibition against inhuman punishment was widely accepted to be a customary international law rule, but did not discuss the relationship between such rules and the concept of “law” in art.9(1). However, the court stated that in the event of inconsistency between a domestic statute and a customary international law rule, the former would prevail, citing *Cheung (Chung Chi) v The King* [1939] A.C. 160 PC HK; and *Colico Dealings Ltd v Inland Revenue Commissioners* [1962] A.C. 1 HL (*Nguyen Tuong Van* at [91] and [94]). In *Yong Vui Kong*, the court clarified that given the dualist nature of the Singapore legal system, rules of customary international law are not self-executing and do not become part of domestic law until applied as, or definitively declared to be, part of domestic law by a domestic court. A court may only regard a customary international law rule as “law” for the purpose of art.9(1) if it has been transformed thus into domestic law. However, as mentioned in *Nguyen Tuong Van*, a customary international law rule cannot be incorporated into domestic law in the face of an inconsistent statute. The court therefore rejected the appellant’s second argument on the basis that the usual hierarchy of legal rules would be subverted if a court could regard rules of customary international law as “law” within the meaning of art.9(1) as this would give them constitutional status over conflicting legislation (at [90]-[91]).

The court’s analysis seems to have entirely ruled out the possibility of “law” in art.9(1) including customary international law rules. A judge will be compelled to hold that such a rule cannot be incorporated into Singapore common law in the face of an inconsistent statutory provision; or, if the rule has already been applied as part of domestic law, an inconsistent statutory provision enacted subsequently will be regarded as having overridden the rule so as to disentitle the court from importing it into the concept of law in art.9(1). One wonders whether the court could have reasoned that since constitutional principles differ qualitatively from ordinary legal principles, it is open to a judge to declare a rule of customary international law to be a constitutional rule rather than a common law rule. After all, common law rules of natural justice were declared to have constitutional effect by the Privy Council in *Ong Ah Chuan*. The definition of “law” in art.2(1) of the Constitution includes written law and the common law in operation in Singapore, and customs or usages having the force of law in Singapore, which suggests that the constitutional conception of law extends beyond the enumerated types of law. Nonetheless, even if the court had accepted this argument, the appellant would probably not have succeeded, since the court also found insufficient uniform state practice to establish a customary international law rule that the mandatory death penalty amounted to inhuman punishment (at [96]).

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