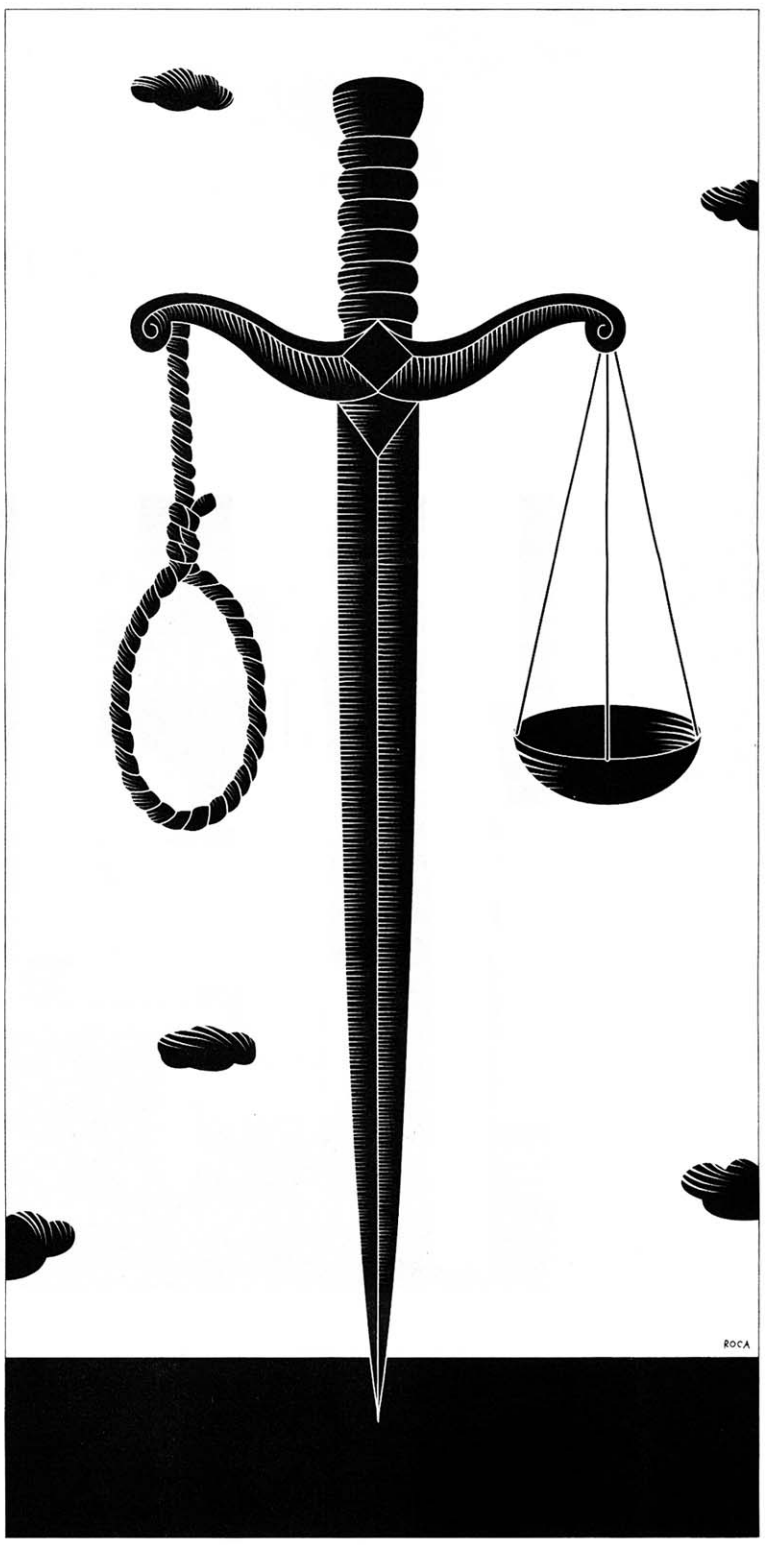
Headlines: Weighing The Death Penalty
Source: *The Straits Times, p22*
Date: 15 November 2005

Weighing the death penalty

BY ANDY HO
Senior Writer



TO COMBAT rampant drug trafficking in the region, Singapore mandated, three decades ago, the death sentence for anyone caught carrying more than 15g of heroin, 30g of cocaine or half a kilo of marijuana. Of the 138 people executed between 1998 and 2003, a total of 110 were hanged for such drug crimes.

Short of a miracle, Nguyen Tuong Van will join them soon. On Dec 12, 2002, the Australian citizen of Vietnamese origin was flying from Cambodia to Melbourne when, on a stopover at Changi Airport, he was found with 396.2g of heroin. Tried under the Misuse of Drugs Act (MDA) and found guilty — he knew full well what he was doing and he never disputed his guilt — Van received the mandatory death sentence.

Following that, he appealed but was unsuccessful. On Oct 21, President S R Nathen also rejected his plea for clemency. Death row prisoners in Singapore are generally executed within six weeks of that rejection, so Van is now likely to become the first Australian citizen to be executed here for drugs charges since 1993.

Some activist groups are now fighting for his life, including the Australian branch of Amnesty International, whose opposition to the death penalty is well known. Locally, the Think Centre civil rights group is also campaigning for Van. Think Centre president Sinapan Samydorai said that it was also pushing for a moratorium on the mandatory death penalty in all drug cases.

In fact, Mr Samydorai said, he supported the complete abolition of capital punishment for all crimes, however vile, heinous or atrocious, because, to him, the death penalty was "cruel and inhuman punishment".

Pressed to further explain their opposition to the death penalty, most activists are unable to do so. For most, it is an axiomatic belief: You either accept it or you don't.

Associate Professor Michael Hor of the National University of Singapore (NUS) law school, however, has a more nuanced view on the death penalty.

He says that while an individual may use lethal force to defend one's own life when threatened by an assailant, there isn't the same compelling logic behind the authorities judicially executing someone they already have in detention and who can thus pose no threat to society.

Conversely, the intuitive feeling that someone who has intentionally killed another rightly deserves the death penalty, for example, is but a moral assertion that is not provable. Thus also the case for the death penalty, Prof Hor said.

Assume, for example, a private citizen, on witnessing a murder or drug trafficking, then proceeds to kill the perpetrator. Does the greater good — the deterrence of future offenders — not justify the killing? Yet, no legal system would buy into this reasoning because the good that supposedly results is simply too speculative and uncertain. If so, how is it morally different when the state does the killing in the name of "defending the public"?

These being moral intuitions, however, reasonable people may disagree. In the final analysis, your perspective will depend on the system of morality, philosophy or religion that you live by.

Unconstitutional?

THE courts of the land are meant, however, to settle points of law, not moral disputes. Accordingly, prisoner Van appealed on the ground that his death sentence was unconstitutional and, therefore, illegal.

Two main arguments were raised to that end, said NUS law professor Thio Li-Ann.

First, it was argued that the death penalty amounted to cruel and inhuman punishment. However, as constitutional scholar Dr Kevin Tan pointed out, there is no formal prohibition in the Singapore Constitution against cruel and inhuman punishment as such. In fact, there is no prohibition against the death penalty per se. The constitutional text explicit says that no one may be deprived of his or her life "save in accordance with the law" — the law in this case being the Misuse of Drugs Act.

Some, like Senior Counsel KS Rajah, argue that as a member of the United Nations, Singapore should accept the principles enshrined in the Universal Declaration of Human Rights. Its Article 5 declares that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".

However, the court's position on this issue was that Van's lawyers had not proven that such a prohibition was in itself a customary international rule such that it should be adopted here. As Dr Thio pointed out, while 86 nations have abolished the death penalty for all crimes, some 75 countries have retained it. Thus an international consensus on capital punishment is clearly lacking. That is, abolition is not a customary international norm yet.

Prof Hor agreed that customary international law does not forbid the death penalty, adding that it was difficult to see how a customary international norm on the death penalty could emerge anytime soon.

Moreover, it is also not settled as a customary international norm that hanging itself is cruel and inhuman punishment. In fact, whether hanging is that or not does not even come into play unless it is being compared to death by, say, lethal injection or firing squad, Dr Tan observed.

In addition, most jurisdictions do not accept the view that a treaty — even more so when the declaration is not even a treaty — once signed, applies automatically in the signatory country. Most countries, instead, regard no treaty as ever self-executing, Dr Tan explained.

That is, a country may well sign a treaty but will apply its provisions domestically only after they have been "accepted and adopted by our own domestic law", as the Van appeals court put it. This is to ensure that the former is consistent with the latter. In other words, Singapore will apply such provisions according to its own understanding of the relevant document.

Conversely, where there is sufficient international consensus on a norm, Singapore would apply it even when the Republic is not party to the relevant treaty. An example Dr Thio gave was Article 36 of the Vienna Convention on Consular Relations, which requires consular notification and access to foreign detainees.

Although Singapore is not a signatory to the treaty, the Australian High Commissioner here was notified of Van's arrest within 20 hours. (By contrast, the International Court of Justice found, in a 2003 case brought by Mexico, that the US had repeatedly violated Article 36 of the Convention to which it is a signatory.)

Discriminatory?

THE second argument in the Van appeal was that the mandatory death sentence deprived him of the Constitution's promise that he would receive equal protection before the law like any other individual. How so? For one thing, because the death sentence was already mandated, he was robbed of the right to plead that his relative lack of moral blameworthiness should mitigate his sentence.

According to Mr Rajah, the right to mitigate in the sentencing phase of a criminal case existed in law when the Van case was decided. In fact, it existed under common law before the MDA was even enacted. Against that, it may be argued that a mandatory sentence by its very nature precludes mitigation pleas, said Dr Thio. That is, once the crime is proven, the judge has no discretion to hear mitigation pleas. Instead, there is only the plea of clemency left, which is made not to the judicial but the executive branch (Cabinet/President).

For another thing, the law also denied Van equal protection because it was over-inclusive. Van was on his way to Australia and landed in Singapore only because he had to change flights. It would not have been Parliament's intention, Mr Rajah averred, to send foreigners exporting drugs from Cambodia to Melbourne to the gallows, so the legislation overreaches.

Dr Tan, however, disagreed with this argument. When the laws were passed in 1975, Parliament's intent was to ensure that Singapore did not become a drug trafficking hub, so it could well have intended to include not only those dealing here but also those in transit, he said.

And even if the law did reach beyond Parliament's intentions, it would be the law that needs to be revised, not the judgment changed, said Dr Thio. But changing the law is something the judiciary cannot do without exceeding its current mandate. Concurring, Dr Tan said that this boiled down to the separation of powers, where the "answer" was a historical one: In Singapore, the courts have generally been deferential to Parliament.

Still, the lines "have never been completely clear", argued Prof Hor. Yes, the courts determine guilt and pass sentence but Parliament, in deciding what elements constitute an offence (say, possession of 15g of heroin), "in a sense, interferes with the finding of guilt". Also, in providing sentencing options, Parliament affects sentencing as well.

One last question remains.

Could Van have also been denied equal protection because the 15g rule discriminated against him — as compared to a 500g rule, say? The Court argued that the 15g rule did not discriminate between individuals since it did not distinguish between individuals. Rather, two classes of people were distinguished, those caught with 15g of heroin or less, and those caught with more than 15g of heroin. So it was a discrimination between class and class, not individual against individual.

Equal protection before the law was concerned with "equal treatment with other individuals under similar circumstances", and the law rationally metes out "equal punitive treatment for similar legal guilt", the court argued. (In the MDA, "moral blameworthiness" was not a consideration at all. That is, the law was not concerned if Van was a "worse" criminal than the last person executed for an MDA offence.)

As to whether 15g was the right threshold to use, this was a matter of social policy that only Parliament — which has argued that, in fact, even 2g of heroin is already many times the average dose used by addicts — was empowered to make, the court noted.

As Dr Tan pointed out, this was also about the separation of powers, that is, whether sentencing should rest within the realm of the judiciary or the legislature. The answer, as before, was also a historical one.

Challenge

AT ANY rate, Van had not adduced any data from sociological studies or sketched out any irregularities in the way the relevant laws had been passed to contest the 15g rule. Had these been done, the court surmised, it would have taken them into consideration.

This is a very significant development for it means that the door is now open for the courts to not defer exclusively to whatever has been legislated. That is, where compelling sociological or legislative evidence is available, the courts might be willing to evaluate the MDA against the substantive standards of fairness, humanity and proportionality that the "fundamental rules of natural justice" demand, Dr Thio deduced.

To date, however, the courts here have not developed to any depth what such a standard of natural justice might entail, she opined. So, even as Van's sentence has been found to be constitutional, and thus not illegal, activists might want to focus their energies on sociological research concerning the empirical question of whether the 15g rule is so low as to be purely arbitrary.

This, in fact, was the gauntlet thrown down as early as 1981 by the Privy Council — still the highest court of appeal for several Commonwealth countries but not, since Aug 9, 1994, Singapore — in yet another MDA case, Ong Ah Chuan versus Public Prosecutor. That challenge remains unanswered to this very day.

andyho@sph.com.sg