NOTES OF CASES

CONSTITUTIONALITY OF THE DEATH PENALTY

Ong Ah Chuan v. P.P.[1]
P.P. v. *Yee Kim Seng*[2]
P.P. v. *Lau Kee Hoo*[3]

IN 1966 a Constitutional Commission recommended that the Singapore Constitution be amended to include a provision that "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment."[4] Although the Government indicated acceptance of this proposal and expressed an intention that the Constitution would be so amended,[5] this has not been implemented. Nor does the Constitution of Malaysia contain such a provision. One consequence of this, as four recent cases[6] show, is that attacks on the constitutionality of the death penalty in Singapore and Malaysia seem almost certain to fail. Three cases were concerned with convictions under section 57(1) of the Malaysia Internal Security Act 1960 ("the I.S.A.") for unauthorised possession of firearms or ammunition in a security area,[7] whereas *Ong Ah Chuan* fell under the Singapore Misuse of Drugs Act 1973, as amended.

For the optimistic advocate seeking to establish the unconstitutionality of the death penalty, the first problem is Article 5(1) of the Malaysian Constitution (Art. 9(1) of the Singapore Constitution is in the same terms) which provides "No person shall be deprived of his life... save in accordance with law." As Lord Diplock pointed out in *Ong Ah Chuan,* any argument that capital punishment is unconstitutional *per se* is foreclosed by this implicit Constitutional recognition that a person may be deprived of life "in accordance with law".[8] This point is also made by Suffian L.P. in *Lau Kee Hoo*— "the Constitution itself envisages the possibility of Parliament providing for the death penalty, so it is not necessarily unconstitutional."[9] The

[1] [1981] 1 M.L.J. 64.
[2] [1983] 1 M.L.J. 252.
[3] [1983] 1 M.L.J. 157.
[4] Report of the Constitutional Commission (1966), para. 40.
[5] Singapore Parliamentary Debates, Vol. 25, Col. 1054.
[6] *Ong Ah Chuan* v. P.P. [1981] 1 M.L.J. 64 (P.C.), *A-G, Malaysia* v. *Chiow Thiam Guong* [1983] 1 M.L.J. 51 (O.C.J.), P.P. v. *Yee Kim Seng* [1983] 1 M.L.J. 252 (O.Cr.J.), P.P. v. *Lau Kee Hoo* [1983] 1 M.L.J. 157 (F.C.).
[7] "Any person who, without lawful excuse... in any security area carries or has in his possession or under his control (a) any firearm without lawful authority therefor; or (b) any ammunition or explosive without lawful authority therefor, shall be guilty of an offence and shall, on conviction, be punished with death."
[8] [1983] 1 M.LJ. at 72.
[9] [1983] 1 M.LJ. at 159.

Lord President further observed that the Malaysian Constitution contained no prohibition against "inhuman or degrading punishment", nor against "cruel and unusual punishment" on American lines. Even if it did, however, it is by no means clear that the unconstitutionality of the death penalty would follow, for the U.S. Supreme Court has refused to hold the death penalty unconstitutional *per se* on this test.[10] Furthermore, both the Canadian Supreme Court[11] and the English High Court[12] have held that the phrase "cruel and unusual" must be read conjunctively rather than disjunctively — in other words, that punishments must be *both* "cruel" and "unusual" to fall foul of this test.[13] While opinions on the cruelty of the death penalty may legitimately vary, the "unusualness" of the imposition of the penalty is at bottom a question of fact. It it a purely factual observation to note that executions in Singapore and Malaysia could not properly be described as "unusual", and that accordingly the death penalty would not be in breach of any "cruel and unusual" stipulation.

If the death penalty is not *per se* unconstitutional, there are nevertheless features of its application in Singapore and Malaysia which might raise further constitutional questions. In most capital cases the imposition of the death penalty is mandatory.[14] In the U.S.A., statutes which provide for mandatory capital punishment are held to be in breach of the "cruel and unusual" clause, on the argument that the clause incorporates a fundamental respect for humanity which necessitates consideration of each individual murderer's circumstances, his character and his record before the ultimate sanction is imposed.[15]

The Singaporean or Malaysian advocate, faced with the absence of an "inhuman or degrading" or "cruel and unusual" clause, must look elsewhere. In *Ong Ah Chuan* it was contended that Singapore Article 12(1) (Malaysian Art. 8(1)) was relevant. This Article guarantees equality before the law and equal protection of the laws. At first sight, nothing could be more "equal" than mandatory death sentences for all offenders, but of course the legislation differentiates between degrees of criminality, imposing the mandatory penalty only on those in the worst category. Does this infringe the concept of "equality before the law"? Plainly not, thought Lord Diplock:

> What Art. 12(1) assures to the individual is the right to equal treatment with other individuals in similar circumstances. It prohibits laws which require that some individuals within a single class should be treated by way of punishment more harshly than

[10] *Gregg* v. *Georgia* 428 U.S. 153 (1976).

[11] *R.* v. *Miller and Cockriell* 70 D.L.R. (3d.) 234.

[12] *Williams* v. *Home Office* (No. 2) [1981] 1 A.E.R. 1211.

[13] *Cf.* the disjunctive reading in *District Attorney for Suffolk* v. *Watson* 411 N.E. 2d 1274 (1980) (Sup. Ct. of Massachusetts). Any clause prohibiting "inhuman or degrading punishment" would clearly have to be read disjunctively.

[14] This note does not deal with constitutional challenges to the imposition of discretionary capital punishment (see, for example, s. 396 of the Penal Code). In the U.S.A., statutes which provide for discretionary capital punishment without adequately defining the criteria to be considered in making that decision will be held unconstitutional: *Gregg* v. *Georgia,* n. 10 *supra, Lockett* v. *Ohio* 438 U.S. 586 (1978). A recent attempt to introduce such a principle into Indian constitutional law failed—see *Bachan Singh* v. *State of Punjab* A.I.R. 1980 S.C. 898.

[15] *Woodson* v. *Carolina* 428 U.S. 280 (1976), *Roberts* v. *Louisiana* 431 U.S. 633 (1977).

> others; it does not forbid discrimination in punitive treatment between one class of individuals and another class in relation to which there is some difference in the circumstances of the offence that has been committed.[16]

Furthermore, it was for the legislature to decide what classifications to adopt, and how to distinguish between them — this was a matter of "social policy", which was reserved for the legislature under the doctrine of the separation of powers. The only role for the courts was to ensure that the factor or factors adopted to distinguish one class from another was not "purely arbitrary, but bears a reasonable relation to the social object of the law."[17] The factor in the instant case — the quantity of prohibited drug which the offender had in his possession — satisfied this test, for:

> There is nothing unreasonable in the legislative's holding the view that an illicit dealer on the wholesale scale who operates near the apex of the distributive pyramid requires a stronger deterrent to his transactions and deserves more condign punishment than do dealers on a smaller scale who operate nearer the base of the pyramid.

A different argument based on the equality/equal protection Article was advanced in *Yee Kim Seng* and *Lau Kee Hoo.*[18] Under Malaysian law the Attorney-General appears to have a choice, when suspects have been arrested for unauthorized possession, in a security area, of arms or ammunition, to proceed with charges either under the Arms Act 1960 or under the I.S.A. Conviction under the former leads to imprisonment or fine, whereas under the latter the mandatory death sentence applies. *Prima facie* this may appear to infringe the equality principle, since offenders convicted on very similar facts may receive, depending upon the Act under which they are charged, grossly disproportionate sentences. Nevertheless, in both cases the contention was rejected.

The fuller discussion is to be found in *Lau Kee Hoo,* where the Federal Court relied on the decision of the Privy Council in *Teh Cheng Poh* v. P.P.[19] to support its conclusion that "the Attorney-General has complete discretion whether to charge the respondent under one or other law."[20] It is submitted that that conclusion indicates an incorrect reading of *Teh Cheng Poh,* but a correct reading does nothing to assist an advocate challenging the constitutionality of the death penalty. In *Teh,* the Privy Council was faced with the same argument (from the same advocate) as was advanced in *Lau Kee Hoo*—that charging the appellant under the I.S.A. constituted an infringement of his constitutional right to equality before the law when others in like factual circumstances were being charged under the Arms Act. The contention was rejected. On the *assumption* that the Attorney-General had a discretion as to which offence to charge, all that equality before the law required was that all cases

[16] [1981] 1 M.L.J. at 72.
[17] *Ibid.* See S.M. Huang-Thio, "Equal Protection and Rational Classification" [1963] P.L. 412.
[18] See n. 6, *supra.*
[19] [1979] 1 M.L.J. 50.
[20] [1983] 1 M.L.J. at 161.

"be given unbiased considerations by the prosecuting authority, and that decisions whether or not to prosecute in a particular case for a particular offence should not be dictated by some irrelevant consideration."[21] However, in truth there was no such discretion — all charges based on unauthorized possession of firearms or ammunition in a security area had to be made under the I.S.A. This result was reached by examining the history of the two pieces of legislation. The I.S.A. made special provision for those accused of firearms offences in a security area, whereas the later Arms Act made general provisions applicable everywhere in Malaysia in respect of firearms offences. In circumstances where subsequent general provisions prove incompatible with earlier special provisions relating to a particular class of case (here, firearms offences within a security area), the Latin maxim *genemlia specialibus non derogant* applies — the legislature is presumed not to have intended that provisions of general application in a subsequent statute were to apply in circumstances for which special and different provisions had been made in earlier statutes.

It follows from this that Arms Act offences are only to be charged when the I.S.A. does not apply, that is, when the alleged offences have not taken place in a security area. It scarcely needs pointing out that the whole of Malaysia has been a security area since 1969.[22] It would therefore follow that *all* charges of unauthorized possession of firearms or ammunition, in whatever part of Malaysia should now be made under the I.S.A. rather than under the Arms Act. Accordingly, in *Teh's* case, far from the appellant's constitutional rights having been infringed by a charge under the I.S.A., this was in law the only possible charge, and the Federal Court's assertion, in *Lau Kee Hoo,* of a continuing discretion in the Attorney-General as to which offence to charge is, with respect, plainly erroneous. Be that as it may, it is clear that the equality/equal protection Article of the two Constitutions cannot be invoked to challenge the constitutionality of the death penalty.

Our optimistic advocate is therefore driven back to Article 5 of the Malaysian Constitution (or its Singapore equivalent, Art. 9), which provides for capital punishment only "in accordance with law". This leaves open the possibility that a given capital statute is not "law", being itself unconstitutional in some regard. In both *Yee Kim Seng* and *Lau Kee Hoo* attempts were made to have I.S.A. s. 57 declared unconstitutional. Article 149 of each of the two Constitutions empowers Parliament to legislate, on the recital that a substantial body of persons have engaged or are threatening to engage in subversive acts, to "stop or prevent" such subversion. It was contended that s. 57 I.S.A. (which is enacted by authority of Art. 149) was concerned not with "stopping or preventing" subversive acts, but with punishing those guilty of them. As such, it went beyond the limits of Art. 149 and was unconstitutional. This argument was summarily rejected in *Lau Kee Hoo* — "what better way is there of preventing similar acts than by prosecuting offenders such as the respondent."[23] This must be correct — the distinction contended for by counsel for the respondent

[21] [1979] 1 M.L.J. at 56.

[22] See the Proclamation published as P.U.(A.) 148/1969, and *Teh Cheng Poh's* case, n. 19 *supra* at pp. 54-5.

[23] [1983] 1 M.L.J. at 160 (Suffian L.P.).

seems wholly artificial. There is no reason to think that the powers legitimated by Art. 149 are to be directed only to specified individuals through such processes as preventive detention. They may equally operate at the level of "general deterrence", punishing convicted individuals so as to deter others and thereby assisting in achieving a "stoppage" of subversive acts.

An alternative argument which might be advanced is that the imposition of the death penalty, either in the individual case or in a class of cases of which the appellant's is one, would be so disproportionate to the offence committed as not to be "in accordance with law". Proportionality arguments have succeeded in the U.S.A. on the basis that disproportionate punishments are "cruel and unusual".[24] Such arguments could also be raised before the European Commission of Human Rights on an argument alleging "inhuman or degrading punishment."[25] In the absence of such clauses locally, could Article 5 (Article 9 in Singapore) be read to include a requirement of proportionality?

In *Ong Ah Chuan* the Privy Council held that "law" in Article 9 referred to "a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution.'[26] The crucial question then is, do "the fundamental rules of natural justice" embrace any notion of proportionality, such that imposition of the death penalty in a given case or class of cases is disproportionate, hence in breach of natural justice and so not "in accordance with law"? The answer on general principles appears to be no — natural justice in the common law has traditionally been regarded as a matter of procedure rather than substance.[27] Furthermore, in *Ong Ah Chuan* itself the Privy Council indicated its unwillingness to undertake proportionality inquiries.[28] Perhaps this is a wise response. The Privy Council is in practice staffed by British Law Lords, accustomed to British norms of conduct and aware of the pressures on British society. Singapore and Malaysian societies are very different, and subject to very different pressures — it would take a very bold, or possibly very foolish, Privy Council to assert that in response to those different pressures, the significance of which might be quite misunderstood, the local legislature had adopted a quite disproportionate response.[29]

[24] *Coker* v. *Georgia* 433 U.S. 584 (1977), *Enmund* v. *Florida* 73 L. Ed. 2d. 1140 (1982). The Supreme Court is notably less willing to hold prison sentences unconstitutionally disproportionate: *Hutto* v. *Davis* 70 L. Ed. 2d. 509.

[25] Jacobs, "The European Convention on Human Rights", p. 23. *Cf.* the Privy Council's unwillingness to become involved in an inquiry of this type: *Runyowa* v. *The Queen* [1967] A.C. 26.

[26] [1981] 1 M.L.J. at 71.

[27] Harding, "Natural Justice and the Constitution" (1981) 23 Mal. L.R. 226, 230.

[28] "Whether there should be capital punishment in Singapore, *and if so for what offences,* are questions for the legislature of Singapore. . ." (and, by implication, not for the courts) —Lord Diplock [1981] 1 M.L.J. at 72 (emphasis added).

[29] See the comment of Suffian L.P. in *Lau Kee Hoo:* "We should decide cases before us in the light of our own Constitution, our own laws and the conditions in our own country which are not necessarily the same as conditions in other countries." [1983] 1 M.L.J. at 160. Malaysia has abolished appeals to the Privy Council in constitutional matters: see Courts of Judicature (Amendment) Act 1976 (No. A 328), s. 13.

In the light of these cases there can be little doubt that the institution of the death penalty is in accordance with the Constitutions of Singapore and Malaysia. It seems that neither Malaysian Articles 5 nor 8 (Singapore Articles 9 or 12) can compensate for the absence of a "cruel and unusual" or "inhuman or degrading" clause. Had the recommendations of the Constitutional commission been implemented the position in Singapore might now be different. But even this is uncertain — adoption of such a clause would not lead *automatically* to a decision that the death penalty was unconstitutional, and much would depend upon the attitudes of both the judiciary and the public. At present there seems no reason to dissent from the observation of the learned Lord President in *Lau Kee Hoo:*

> As regards the death penalty, which has existed here for well over a century, while it may be regarded as cruel in certain other countries, public opinion here is not quite ready to follow suit as far as certain grave offences are concerned, though it might do so in the future; and... if the fathers of our constitution had desired to abolish it they would have said so in the clearest of language."[30]

H.F. RAWLINGS

[30] [1983] 1 M.L.J. at 159.