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# "IT IS A LITTLE KNOWN LEGAL FACT": ORIGINALISM, CUSTOMARY HUMAN RIGHTS LAW AND CONSTITUTIONAL INTERPRETATION

*Yong Vui Kong v. Public Prosecutor*[1]

**THIO** LI-ANN*

## I. INTRODUCTION

The judicial approach towards constitutional interpretation, in attributing meaning to words in the constitutional text, illumines judicial self-understanding of institutional competence, how the separation of powers animates or constrains judicial review, and where the fount of judicial legitimacy lies. Since appeals to the Privy Council ceased in 1994, Singapore public law has been judicially developed along autochthonous lines, consonant with the "fundamental values of Singapore society"[2] which are "communitarian"[3] in orientation, serving the "common good".[4]

Despite past practice requiring that the Constitution be "primarily" interpreted "within its own four walls, and not in the light of analogies"[5] from foreign jurisdictions, Singapore courts have not evinced a nationalist isolationism but have regularly evaluated comparative constitutional cases, which are merely persuasive in value, as models or anti-models.[6] The courts have distinctively rejected English decisions which have developed along a rights-expansive trajectory under the influence of the

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* Ph.D. (Cambridge); LL.M (Harvard); BA Hons (Oxford), Barrister (G.I.), Professor of Law, National University of Singapore.

1 [2010] 3 S.L.R. 489 (C.A.) [*Yong*].

2 Practice Statement (Judicial Precedent), (1994) 2 S.L.R. 689.

3 See *Public Prosecutor v. Kwong Kok Hing* [2008] 2 S.L.R. (R.) 684 (C.A.) at para. 17; Li-ann Thio "Protecting Rights" in Li-ann Thio & Kevin YL Tan, eds., *The Evolution of a Revolution: Forty Years of the Singapore Constitution* (New York: Routledge-Cavendish, 2009) [*Evolution of a Revolution*] at 193-233.

4 *Nguyen Tuong Van v. Public Prosecutor* [2005] 1 S.L.R. 103 (C.A.) [*Nguyen* C.A.] at para. 88.

5 Thomson CJ, *The Government of the State of Kelantan v. The Government of the Federation of Malaya* [1963] M.L.J. 355, referenced in *Chan Hiang Leng Colin v. Public Prosecutor* [1994] 3 S.L.R. 662 [*Chan*] (H.C.) at 681D.

6 Li-ann Thio, "Beyond the Four Walls in an Age of Transnational Judicial Conversations: Civil Liberties, Rights Theories and Constitutional Adjudication in Malaysia and Singapore" (2005-2006) 19:2

*European Convention of Human Rights*,[7] in a manner endemic to liberal constitutionalism, where powers are construed narrowly and rights, broadly. In an age of globalization and transnational judicial conversations,[8] Singapore courts increasingly have to evaluate international law-based arguments in adjudicating rights; in this, there has been a sea change from a culture of resistance, even hostility, as seen in the peremptory dismissal of such arguments,[9] to a skilled and thorough engagement with customary human rights law, of which the recent Court of Appeal decision of *Yong Vui Kong v. Public Prosecutor*[10] is exemplary.

The primary issue here was the challenged constitutionality of the Mandatory Death Penalty ("MDP") imposed for drug trafficking offences under the *Misuse of Drugs Act*.[11] The subject matter of this decision was not novel,[12] neither was the final decision that the MDP did not violate articles 9 or 12 of the Constitution. What is illuminating is the judicial reasoning supporting the categorical conclusion that Singapore constitutional developments had "foreclosed"[13] the argument that it was open to construe article 9(1) expansively to incorporate a prohibition against inhuman punishment. This was contended for by counsel in *Yong,* to set up the next argument that the MDP constituted inhuman punishment and so contravened article 9(1) which provides: "No person shall be deprived of his life or personal liberty save in accordance with *law*."

This note focuses on how the Court interpreted "law" in article 9(1), which encompasses something beyond "Parliament-sanctioned legislation".[14] The Privy Council in the 1981 decision of *Ong Ah Chuan v. Public Prosecutor*[15] described the article 9(1) reference to "law" as including "fundamental rules of natural justice" forming "part and parcel of the common law of England" operating in Singapore when the Constitution commenced. "Law" meant "a system of law that did not flout those fundamental rules",[16] as its *teleos* was to protect the individual through constitutionalised rights. Natural justice rules are basic principles pertaining to procedural fairness and it is not clear what "fundamental rules of natural justice" entail, in the context of interpreting constitutional liberties. Singapore courts have certainly not transmuted these "fundamental rules"[17] into the unruly horse of substantive due

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Colum. J. of Asian Law 428; Arun K. Thiruvengadam, "Comparative law and constitutional interpretation in Singapore: Insights from constitutional theory", in *Evolution of a Revolution*, *supra* note 3 at 114-152.

7 See *e.g.*, *Chee Siok Chin v. Minister for Home Affairs* [2006] 1 S.L.R. (R.) 582 at paras. 78-88 (rejecting intrusive proportionality-based judicial review); *AG v. Wain* [1991] 1 S.L.R. (R.) 85 at para. 34.

8 Thio Li-ann, "Reception and Resistance: Globalisation, International Law and the Singapore Constitution" (2009) 4:3 National Taiwan University Law Review 335.

9 *Chan, supra* note 5 at 681I.

10 *Yong*, *supra* note 1.

11 (Cap. 185, 2001 Rev. Ed. Sing.) [*MDA*].

12 *Yong*, *supra* note 1 at para. 4.

13 *Ibid.* at paras. 49 and 72.

14 *Nguyen* C.A., *supra* note 4 at para. 82.

15 [1980-1981] S.L.R. 48 (P.C.) [*Ong Ah Chuan*].

16 *Ibid.* at 62A.

17 See T.K.K. Iyer, "Article 9(1) and 'Fundamental Principles of Natural Justice' in the Constitution of Singapore" (1981) 23 Mal. L. Rev. 213; A.J. Harding, "Natural Justice and the Constitution" (1981) 23 Mal. L. Rev. 226; Tan Seow Hon, "Constitutional Jurisprudence: Beyond Supreme Law—A Law Higher Still?", in *Evolution of a Revolution, supra* note 3 at 79-113.

process associated with activist American judicial review, particularly in the articulation of unenumerated fundamental rights like the right to privacy, which entails the imposition of subjective, elitist values by an unelected juristocracy,[18] which implicates judicial legitimacy. Singapore courts demonstrate far more judicial modesty than their counterparts in Western liberal democracies; in *Yong* itself, the Court of Appeal reminded itself thrice not to act as "legislators in the guise of interpreters of the Singapore Constitution".[19] While critics of the Singapore judiciary may lament the failure to adopt a rights-oriented liberal constitutionalist orientation in treating rights as defeasible interests and not 'trumps',[20] contrary to the rights-prioritising, individualist dogma of legal liberalism, this modesty avoids the situation of "rule by judges" which subverts the rule of law.[21]

Counsel in *Yong* sought to impute a substantive value to the meaning of "law" in article 9(1), rather than urge the Court to declare a new right, although the practical effect might be the same. In contending for an expansive definition of "law", reference was made to comparative constitutional law and international human rights law, to service a "value argument" which asserts claims about "what is morally or politically correct", measured against a standard "independent of what the constitutional text requires".[22] This rested on the assertion that "human values have changed" and so too, should legal norms, to harmonise article 9(1) with "the civilised norms of humanity".[23] This advocates reading the Constitution as a 'living tree' whose meaning evolves as society evolves, as determined by a judicial elite. The Court in *Yong* roundly rejected this, applying an originalist approach to interpretation instead, which focuses on the text and intent of the constitutional founders, constructed by reference to historical materials. Primacy was accorded to the controlling factor of original intent located in the conscious, "decisive rejection" of a constitutional prohibition against inhuman punishment, such that "any changes in [customary international law] and any foreign constitutional or judicial developments in relation to the MDP as an inhuman punishment"[24] did not affect the scope of article 9(1).

This note analyses how the apex Singapore court handles the utility and limits of these two sources of law in framing constitutional arguments, which lends insight into the jurisprudential premises underlying constitutional review and the contours of the separation of powers principle in practice.

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[18] This has been expanded from the right to use condoms (*Griswold v. Connecticut*, 319 U.S. 479 (1965)) to servicing a controversial sexual liberationist agenda: see *Roe v. Wade*, 410 U.S. 113 (1973); *Lawrence v. Texas*, 539 U.S. 558 (2003)). For a critique of judicial over-activism, see Robert Bork, *The Tempting of America* (New York: Free Press, 1997) at 95-100, and 110-125; John Smillie, "Who Wants Juristocracy?" (2005-2008) 11 Otago L. Rev. 183; *Cf.* Ronald Dworkin, *Justice in Robes* (Cambridge, Massachusetts: Harvard University Press, 2008).

[19] *Yong*, *supra* note 1 at paras. 59, 92, and 112.

[20] In the sense that Courts do not adjudicate in singular terms, but balance rights against competing rights, duties and goods: *Public Prosecutor v. Benjamin Koh* [2005] SGDC 272 at para. 8.

[21] Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (New York: Cambridge University Press, 2004) at 140.

[22] Richard Fallon, "A Constructivist Coherence Theory of Constitutional Interpretation" (1987) 100 Harv. L. R. 1189 at 1208-1209.

[23] *Yong, supra* note 1 at para. 52.

[24] *Ibid.* at para. 122.

## II. Constitutional Interpretation

In interpreting Part IV fundamental liberties, a "generous" rather than legalistic interpretation to ensure individuals the "full measure" of their liberties is adopted.[25] This sits uneasily with admonitions to afford a "generous and not a pedantic interpretation" to the legislative mindset behind restrictive legislation.[26] Generosity to one item on the balancing scale connotes parsimony towards another. The danger is that if an item is privileged as a 'trump',[27] this may preclude the optimalisation of competing rights, duties and goods.

In purporting to apply this approach in *Haw Tua Taw v. Public Prosecutor* by requiring that criminal procedure not offend some 'fundamental rule of natural justice', the Privy Council did not define this category but only observed that such procedure or law "must not be obviously unfair".[28] In painting a picture of what 'fairness' might be, it drew from a broad comparative palette as a normative resource for articulating standards, including the *Universal Declaration of Human Rights*[29], the *European Convention on Human Rights*[30] and referenced the practice of non-common law systems in the non-communist world.[31] While this was done in cursory fashion, this is not typical of latter-day judicial decisions, including *Yong*, where counsel drew from both foreign law and international law in imbuing article 9(1) with a non-textual standard of inhuman punishment. Interestingly, no mention was made of the "four walls" doctrine which usually forms part of the preliminary throat-clearing preceding the treatment of non-textual, transnational legal sources.

### A. *Comparative Constitutional Law—Utility and Limits*

A foreign decision has only persuasive (or dissuasive) force, lacking precedential value. Considering foreign cases is akin to an exercise in moral reasoning, like reading a law review article to know what one's peers are thinking, and to emulate or depart from this.

The Court in *Yong* considered cases arising from two main streams sharing a common history of British colonialism: first, from Constitutions enacted by Constituent Assemblies which had a distinctive drafting style, such as India and the United States; second, from various Caribbean constitutions which were generally drafted by British lawyers steeped in Westminster conventions, in consultation with local elites. The drafting of the latter were particularly influenced by the ECHR,[32]

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25 *Ong Ah Chuan, supra* note 15 at 61C-D, *per* Diplock L.J.

26 *Chee Siok Chin v. Minister for Home Affairs* [2006] 1 S.L.R. 582 (H.C.) at para. 49, *per* Rajah J.

27 Dworkin's anti-utilitarian conception of a right as "trump" which a collective goal may not defeat (Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth Press, 1977) at xi) finds no empirical resonance in Singapore where rights are more akin to defeasible interests. Indeed, determinative status has been attributed to statist considerations: *Chan, supra* note 5 at 685F-G.

28 [1980-1981] S.L.R. 73 at 76F-G.

29 *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) [*UDHR*].

30 *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221 at 223, Eur. T.S. 5 (entered into force 3 September 1953) [*ECHR*].

31 *UDHR*, *supra* note 29 at 81G-I.

32 *ECHR*, *supra* note 30. Lord Wilberforce noted this in *MHA v. Fisher* [1980] A.C. 319 (H.L.) at 328.

which accounts for the subsequent influence of European Court of Human Rights jurisprudence in interpreting Commonwealth Caribbean constitutions.[33] While the *U.S. Eighth Amendment* prohibits "cruel and unusual punishment",[34] the African cases from Malawi and Uganda concerned inhuman punishment prohibition clauses drafted after the prototypical article 3 of the ECHR which provides: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." This borrows from article 5 of the UDHR.[35] The object of citing these cases was to argue that *Ong Ah Chuan*, as subsequently affirmed,[36] was incorrectly decided in holding that the MDP for drug-related offences did not violate article 9(1).

1. *Indian cases and analogical reasoning: "In accordance with procedure"*

At first blush, article 21 of the Indian Constitution appears similar to article 9(1), providing that "No person shall be deprived of his life or personal liberty *except according to procedure established by law*" (as opposed to "in accordance with law"). Counsel argued that the approach towards interpreting article 9(1) should adopt the Indian approach towards article 21, which permits deprivation of life only where this was "according to fair, just and reasonable procedure established by valid law",[37] as stated in *Mithu v. State of Punjab.* Here, section 303 of the *Indian Penal Code* was held to violate article 21 in imposing the MDP on persons who commit murder while sentenced to life imprisonment, since "it was harsh, unjust and unfair to condemn a murderer to death" without considering "the circumstances in which he committed the murder".[38] Applied to Singapore, the MDP provision in the MDA would fall short of this test and so not qualify as "law" under article 9(1).

The Indian approach was rejected on three grounds. First, the Indian test for assessing the constitutionality validity of laws differed from the article 9(1) test that laws be consistent with 'fundamental rules of natural justice'. Although "law" in article 9(1) is broader and can encompass both substantive and procedural law, it did not follow that procedural law in the Singapore context had to be fair, just and reasonable before it satisfied article 9(1), since this was not facially apparent, nor could it be contextually implied.[39]

The object of objection in *Mithu* was removing judicial discretion in sentencing. The Singapore Court pointed out that *Mithu* did not address the substantive content of inhuman punishment, but the more specific issue of whether the Penal Code provision was procedurally "fair, reasonable and just" ("the article 21 test"), despite depriving the accused of the "wise and beneficent discretion" of the Court in "a matter of life and death".[40] The Singapore Court rejected the test that "law" must conform

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[33] Rose-Marie Belle Antoine, *Commonwealth Caribbean Law and Legal Systems*, 2nd ed. (London: Routledge-Cavendish, 2006) at 208. A list of cases from Belize, St Christopher & Nevis, Saint Lucia, Barbados, Jamaica, Trinidad & Tobago, Bahamas, Grenada is found in *Yong*, *supra* note 1 at 34.

[34] U.S. Const. amend. VIII.

[35] *UDHR*, *supra* note 29: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".

[36] *Nguyen* C.A., *supra* note 4 at 120-124.

[37] 1983 S.C. 473 [*Mithu*] at para. 6, referenced in *Yong, supra* note 1 at para. 78.

[38] *Mithu*, *ibid*. at para. 12; referenced in *Yong*, *supra* note 1 at para. 78.

[39] *Yong, supra* note 1 at para. 80.

[40] *Mithu, supra* note 37 at para. 12, referenced in *Yong*, *supra* note 1 at para. 79.

to a standard of reasonableness to be constitutionally valid, as this was too vague and involved judicial intervention in the legislative sphere. Secondly, the article 21 test in *Mithu* would not only invalidate the MDP, but all other forms of mandatory sentencing, which "is not the law in Singapore".[41] Nor was this argued. Article 9(1) read plainly did not limit legislative power in enacting mandatory death sentences, even if this was qualitatively different from other punishments.[42] Last, the expansive reading of article 21 as a source of 'new rights' such as the right to education and healthcare, reflective of Indian judicial activism, could not be adopted in Singapore where the right to life, "the most basic of human rights",[43] was not treated as a fount giving birth to new rights; indeed article 9(1) expressly qualified the right to life in regulating state deprivation of life. This point strictly does not relate to the definition of "law" in article 9(1), as it relates to the content of "life" and "personal liberty", but it seemed to be made to underscore differing judicial philosophies and self-understandings of Singapore and Indian judicial roles. An important historical point is that the MDP for murder has operated in Singapore since 1883 and continues to survive in 2010, since the Court found "no change in the legal matrix" requiring that "law" in article 9(1) be newly interpreted so as to render MDP legislation not "law".

### 2. *The content of inhumanity—was Ong ah Chuan wrong?*

Unlike *Mithu,* the raft of decisions from the Caribbean, United States and some African jurisdictions were cited to elucidate the content of a norm prohibiting "inhuman punishment", to oppugn the correctness of *Ong Ah Chuan* and to frame the MDP as an inhuman punishment because it removed judicial discretion from sentencing. This precluded any consideration of mitigating circumstances as to why the offender should not suffer the ultimate penalty of death, treating all persons convicted of a certain act as "members of a faceless undifferentiated mass to be subjected to the blind infliction of the penalty of death".[44] With respect to capital cases, "the fundamental respect for humanity…requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death".[45] The issue of possible error was not related to the dehumanising effect of the MDP.[46]

The Court of Appeal in *Nguyen* acknowledged the Privy Council's latter-day observations that it was "no longer acceptable" to say, as Lord Diplock did in *Ong Ah Chuan*, that "there is nothing unusual in the death sentence being mandatory",[47] as such penalties "predated any international arrangements for the protection of human rights", when "international jurisprudence on human rights was rudimentary".[48]

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41 *Yong*, *supra* note 1 at para. 81.
42 *Ibid.* at para. 82.
43 *Ibid.* at para. 84.
44 *Woodson v. North Carolina*, 428 U.S. 280 (1976) at 303-305, cited in *Yong, supra* note 1 at para. 37.
45 *Ibid.*
46 *Yong*, *supra* note 1 at para. 38.
47 [1981] A.C. 648 (P.C.) at para. 674, noting that the prerogative of mercy would mitigate legal rigidity, following long-standing Singapore and English constitutional practice: 665E.
48 *Watson v. The Queen* [2005] 1 A.C. 472 (P.C.) at paras. 29-30, *per* Hope L.J.

Counsel's basic argument in *Yong* was twofold. First, article 9(1) should be construed as prohibiting inhuman punishment, since courts from other Commonwealth jurisdictions which actively engaged human rights standards, had condemned the MDP as inhuman punishment. This was supported by two human rights experts' opinions.[49] Thus, the Court was invited to "read the moral bases of human rights" into the expression "law".[50] For example, in *Reyes v. The Queen*[51], Lord Bingham argued it would be "disproportionate and inappropriate" not to allow an offender facing capital punishment to present mitigating circumstances, denying him the "basic humanity" which "section 7 [of the *Belize Constitution*] exists to protect".[52] The Attorney-General ("AG") retorted that "the Privy Council does not dictate human rights standards for the rest of humanity".[53] This reveals the contested interpretation of this particular human rights norm, which undermines the claim to general applicability.

Second, it was argued that the MDP constituted inhuman punishment and was thus unconstitutional. This expansive construction effectively implies an 'inhuman punishment' norm into the 'right to life' clause; counsel referred to Privy Council decisions where the MDP was considered inconsistent with constitutional norms protecting the individual right to life, deprivation of which must be by "due process of law".[54]

The Court of Appeal reviewed these cases and distinguished them, as they dealt with the substantive content of constitutional prohibitions against inhuman punishment,[55] and arose out of murder and not drug trafficking offences.[56] Thus, "the development in human rights jurisprudence" in these cases were not direct authorities which spoke to the arguments in *Yong* as they were irrelevant to interpreting "law" in article 9(1).[57] It rejected the suggested expansive construction on two grounds. First, the text-oriented argument that unlike the Caribbean constitutions,[58] the Singapore Constitution, did not contain an express prohibition against inhuman punishment, which was itself a matter of deliberate choice. Caribbean constitutions,

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49 Asma Jahangir considered the MDP was never permissible while Philip Alston sought to persuade the Singapore Court to favour the dissenting views in *Boyce v. The Queen* [2005] 1 A.C. 400 (P.C.) at para. 81 that "No international human rights tribunal anywhere in the world" has ever found the MDP compatible with human rights: *Yong, supra* note 1 at paras. 40-41. The Court noted at para. 97 that such opinions were only subsidiary means of determining CIL.

50 *Yong, supra* note 1 at paras. 40-41, 56.

51 [2002] 2 A.C. 235 (P.C.) [*Reyes*].

52 *Reyes*, *ibid.* at para. 43.

53 *Yong*, *supra* note 1 at para. 42. The Privy Council in *Reyes* considered human rights standards from various treaties and declarations, including the UDHR, Covenant on Civil and Political Rights, and American Convention on Human Rights, so noted in *Nguyen* C.A. *supra* note 4 at para. 85.

54 *Matthew v. State of Trinidad and Tobago* [2005] 1 A.C. 433 (P.C.); referenced in *Yong, supra* note 1 at para. 55.

55 *Yong*, *supra* note 1 at para. 84.

56 *Ibid.* at para. 48.

57 *Yong*, *supra* note 1 at para. 50. The comparative jurisprudence cited was two steps removed from the issue in *Yong* concerning the meaning of "law" in article 9(1). To argue that the MPD in the MDA was unconstitutional, one must first establish the existence of a customary international law norm prohibiting inhuman punishment, which could be read into "law", before evaluating whether the MDP in fact violated this norm.

58 *Reyes*, *supra* note 51 (Belize); *Boyce v. The Queen* [2005] 1 A.C. 400 (P.C.) (Barbados); *Matthew v. State of Trinidad & Tobago* [2005] 1 A.C. 433 (P.C.); *Watson v. The Queen* [2005] 1 A.C. 472 (P.C.) (Jamaica).

modelled on the ECHR, contained 'inhuman punishment' clauses; Malaysia and then Singapore distinctly rejected this trajectory in constitution-making.[59]

From the vaults of constitutional history, the Court uncovered the "little known legal fact"[60] that the ECHR formerly applied in Singapore and Malaysia. In 1953, the U.K. made a declaration that the ECHR applied to its territories.[61] Singapore was then a Crown Colony and thus, for a decade (1953-1963), the ECHR applied in Singapore, ceasing to have effect in 1963 when Singapore became a constituent state of the Malaysian Federation. Furthermore, the Malaysian constitution drafters, while aware of such clauses, did not recommend including one[62] in the 1957 Federal Constitution. This omission was thus not due to the Reid Commission's "ignorance or oversight"[63]; such clauses were also excluded from the 1963 Malaysian Constitution and the Singapore Constitution after 1965.[64] The absence from the Constitution of an inhuman punishment prohibition undercut the contention that article 9(1) should be construed as containing an "implied prohibition" to this effect.[65]

Singapore constitutional history foreclosed the argument that article 9(1) could be read to incorporate an inhuman prohibition. Drawing from academic research,[66] the Court noted that the 1966 Constitutional Commission had "studied the constitutional texts of some 40 different British colonies and dominions and newly independent nations as well as non-Commonwealth Constitutions"[67] and explicitly recommended including a proposed new constitutional clause, article 13, so formulated: "No person shall be subjected to torture or to inhuman or degrading punishment or treatment." The Commission considered it beneficial to add this "fundamental human right", absent from the Malaysian Constitution, to the Singapore Constitution. In debating this Report, the government did not directly refer to the proposed anti-torture clause and eventually did not elevate it into a constitutional right;[68] the Court concluded that the proposed clause was "ultimately rejected".[69]

From constitutional history, the Court discerned the original intent of the constitutional framers which underscored its conclusion that it was not open to the Court to interpret article 9(1) as incorporating a prohibition against inhuman punishment. The Commission must have understood the proposed new article 13(1) as having a content independent of existing constitutional rights, specifically, article 9. It was

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59 *Yong, supra* note 1 at para. 63 ("…the Singapore Constitution…is not modeled after the ECHR…"). Part IV of the Singapore Constitution was largely derived from Part II (Fundamental Liberties), Malaysian Federal Constitution.

60 *Yong*, *supra* note 1 at para. 61.

61 Citing Karel Vasek, "The European Convention of Human Rights beyond the Frontiers of Europe" (1963) 12 Int'l. & Comp. L. Rev. 1206 at 1210, *Yong*, *supra* note 1 at para. 61. Art. 63(1) ECHR allows a state party to declare the application of the Convention to any territories for whose international relations the U.K. was responsible.

62 Federation of Malaya Constitutional Commission, *Report of the Federation of Malaya Constitutional Commission 1957*, noted in *Yong*, *supra* note 1 at para. 62.

63 *Yong, supra* note 1 at para. 62.

64 Upon Independence, Singapore inherited a State Constitution, set out in Schedule 3 to *The Sabah, Sarawak and Singapore (State Constitutions) Order in Council 1963* (GN No S1 of 1963) and most fundamental liberties provisions from Part II, Malaysian Constitution.

65 *Yong*, *supra* note 1 at para. 63.

66 Citing *Evolution of a Revolution*, *supra* note 3, pp. 11-12, *Yong*, *supra* note 1 at para. 64.

67 *Yong*, *supra* note 1 at para. 64.

68 *Yong, supra* note 1 at para. 74.

69 *Ibid.*

reasonable to assume that article 9(1) and the proposed article 13 "did not deal with the same subject matter", otherwise, "Art 9(1) would have been redundant".[70]

Without making its reasons explicit, the Court found "unambiguous"[71] the government's rejection of proposed article 13, the content of which constituted the "basis" of the Privy Council decisions cited relating to article 9(1), to the effect that MDP is inhuman punishment. This original intent, constructed by reference to text and history, was the conclusive factor governing judicial reasoning that it was "not legitimate for this court to read into Art 9(1) a constitutional right which was decisively rejected by the Government in 1969" given the historical context leading up to this rejection.[72] Otherwise, this would bring the stillborn article 13(1) through the backdoor.

### B. *International Human Rights Law and Customary International Law before a National Court*

Reflecting the internationalisation of constitutional law, courts now regularly face arguments drawing from international human rights law in rights adjudication, for the varied purposes of grounding a course of action, influencing interpretation or for exhortatory purposes.[73]

Clearly, Singapore courts will adopt a Customary International Law ("CIL") rule, provided it is "clearly and firmly established".[74] This means that any putative norm must undergo the rigours of satisfying the international law requirements for CIL rule formation, beyond bare assertion. Once established, a CIL rule is of general application.[75] Both the subjective element of *opinio juris* and the material element of state practice must be present; the latter must demonstrate a general degree of consistency and extensive practice which is representative and includes specially affected states.[76]

For example, the death penalty for serious criminal offences issue is an emotive one for some,[77] though the constitutionality of the death penalty *per se* were not at issue in *Yong*, and has been challenged in previous decisions. Despite the opinions and chest-thumping advocacy of certain parties, no general customary international prohibition against the death penalty exists. Inconsistent state practice indicates a consensus deficit;[78] the fragmentation rather than harmonization of viewpoints, a

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70 *Ibid.*

71 *Ibid.*

72 *Ibid.*

73 In the Singapore context, see Thio Li-ann, "Reading Rights Rightly: The UDHR and its Creeping Influence on the Development of Singapore Public Law" (2008) Sing. J.L.S. 264. Generally, see Stephane Beualac, "Customary International Law in Domestic Courts: Imbroglio, Lord Denning, Stare Decisis", in Christopher Waters, ed., *British and Canadian Perspectives on International Law* (Koninklijke Brill NV, Leiden, the Netherlands: Martinus Nijhoff Publishers, 2006) at 379-392.

74 *Nguyen* C.A., *supra* note 4 at para. 88.

75 But see Ted Stein, "The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law" (1985) 26 Harv. Int'l L.J. 457; J.G. Starke, "The Concept of Opposability in International Law" (1968) Australian Yearbook of International Law 1.

76 See the *North Sea Continental Shelf Case*, [1969] I.C.J. Rep. 3. See Maurice Mendelson, *Formation of Customary International Law* (1998) 272 Rec. des Cours 155 at 165.

77 See *e.g.*, Michael Hor, "The Death Penalty in Singapore and International Law" (2004) 8 S.Y.B.I.L. 105.

78 The Court of Appeal in *Nguyen*, *supra* note 4 at 128, referred to a UN Commission on Human Rights Report on the death penalty (UN Commission on Human Rights, *Question of the Death Penalty: Report*

deficit of *opinio juris*, which would also undermine arguments that such prohibition has the status of a peremptory norm. Indeed, article 6(1) of the *Covenant on Civil and Political Rights*[79] provides no one shall be "arbitrarily deprived of his life", and clause (2), that "[in] countries which have not abolished the death penalty" the death sentence could only be imposed for "the most serious crimes". This reflects the principle of proportionality as the gravest penalty is reserved for the most serious crimes, which is a category that will remain contested at its edges, beyond the staple of murder and treason.[80] An objective observer could only conclude that the matter remains controversial and unsettled. Given its highly disputed nature, it falls within a global 'margin of appreciation' and thus, to subordinate the issue to a contested moral *diktat*, as opposed to an overwhelmingly endorsed norm, would create a legitimacy gap.

Counsel in *Yong* rehearsed a three-part argument similar to the one raised in *Nguyen* in seeking to read a standard of 'humanity' into the meaning of law in article 9(1), drawn from CIL.[81] First, that CIL formed part of "law" in article 9(1); second, that a CIL norm prohibiting torture, cruel and inhumane treatment or punishment (embodied in article 5 of the UDHR) existed, which encompassed the MDP; third, the courts should read this into article 9(1) and so find the MDP unconstitutional. This raises issues of how Singapore courts receive general international law and the rank of accepted international norms in relation to domestic legal sources; is international law incorporated through constitutional interpretation and so of constitutional rank, or is it received as part of judge-developed common law?[82]

### 1. *Does a CIL norm prohibiting inhuman punishment exist?*

Counsel argued that extensive practice supported the proposition that a CIL prohibition against the MDP as an inhuman punishment existed, by offering the disputed figure that only 14 States still retained the MDP for drug-related offences.[83] The AG asserted that 31 States[84] continued to impose the MDP for drug-related and other

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*of the Secretary-General submitted pursuant to Commission resolution 2002/77*, UN ESCOR, 59th Sess., UN Doc. E/CN.4/2003/106 (2003)), noting that the status of the death penalty worldwide was fairly evenly split between states retentionist and abolitionist states. What might be considered an emergent trend towards abolition may to some constitute evidence of a nascent *opinio juris* while, to others, it denotes the absence of *opinio juris*. See Schwebel J.'s dissenting opinion, *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, [1996] I.C.J. Rep. 226 at 319.

79 *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976).

80 *Art 1 of Protocol 6 to the ECHR concerning the Abolition of the Death Penalty, as amended by Protocol No. 11 (Strasbourg 28.IV. 1983), European Treaty Series 114* , *supra* note 30 provides: "the death penalty shall be abolished." Article 2 allows parties to apply the death penalty "in respect of acts committed in time of war or of imminent threat of war."

81 *Nguyen* C.A., *supra* note 4. In *Nguyen*, the issue was whether death by hanging constituted cruel and inhuman punishment so as to violate the accepted prohibition against such punishment which was recognised as a customary international law norm.

82 The Singapore Constitution is silent on this issue. International law may also be given domestic effect where statutorily enacted, *e.g.*, s. 4, *Sale of Goods (United Nations Convention) Act* (Cap. 283A, 1996 Rev. Ed. Sing.).

83 *Yong*, *supra* note 1 at para. 43.

84 *Yong*, *supra* note 1 at paras. 94-95, taking note of Roger Hood & Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective*, 4th ed. (New York: Oxford University Press, 2008) at 137-138.

serious offences, arguing there was neither widespread state practice nor *opinio juris* to support counsel's contention. Additionally, the post-*Ong Ah Chuan* Privy Council decisions cited merely reflected the Privy Council's changed attitude towards the MDP rather than an "international consensus" on the topic.[85] Notably, in finding a CIL rule relating to consular relations in *Nguyen*, the High Court highlighted the fact that the Prosecutor "did not assert the contrary",[86] which sharply contrasts with the AG's robust objections here. Further, the Court noted that the state practice of certain countries regarding whether MDP violated an inhuman punishment norm was inconsistent, insofar as judicial affirmation of this argument was contradicted by subsequent legislation authorizing the MDP.[87] Even if the majority of states did not impose the MDP for drug-trafficking offences, the Court concluded the MDP prohibition was not a CIL rule, absent the "extensive and virtually uniform practice" of all states.[88]

2. *The meaning of "law" in Article 9(1), the judicial reception of CIL into the municipal legal system and legal hierarchy*

The Court of Appeal clarified the ambit of the word "law" in article 9(1) in finding that the article 2(1) definition of law, including "custom or usage", only applied to domestic customary law.[89] The AG accepted that "law" should be liberally interpreted to include CIL.[90] The Court stated that this did not mean that CIL automatically applied as part of Singapore law for purposes of article 9(1), so as to be received internally with constitutional rank, thereby overriding inconsistent statutes.[91] Consistent with positivist readings of international law, it followed precedent[92] in stating that CIL was incorporated into domestic law as "part of the common law",[93] which could be superseded by statute and the Constitution as a matter of norm hierarchy. Furthermore, CIL was not "self-executing", becoming part of Singapore law only after the courts first accepted it by *declaring* or *applying* a CIL norm to be part of Singapore law.[94] Absent this judicial act of recognition, the CIL norm in question "would merely be floating in the air".[95] This suggests a dualist orientation towards CIL law

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85 *Yong*, *supra* note 1 at para. 45.

86 With respect to art. 36(1), *Vienna Convention on Consular Relations*, 24 April 1963, 596 U.N.T.S. 261, art. 36(1) (entered into force 19 March 1967), which Singapore was not then party to: *Public Prosecutor v. Nyugen Tuong Van* [2004] 2 S.L.R. (H.C.) at 328, 346 and at para. 37.

87 The Court discussed the Indian Supreme Court case of *Mithu*, *supra* note 37, and the subsequent enactment of inconsistent MDP legislation: *Yong, supra* note 1 at para. 96.

88 *Yong*, *supra* note 1 at paras. 96-98.

89 *Ibid.* at para. 12.

90 *Ibid.* at para. 44.

91 *Ibid.* at para. 88.

92 *Nguyen* C.A., *supra* note 4.

93 *Yong, supra* note 1 at para. 89. See C.L. Lim, "The Constitution and the Reception of Customary International Law: *Nguyen Tuong Van v PP"* [2005] Sing. J.L.S. 218; Li-ann Thio, "The Death Penalty as Cruel and Inhuman Punishment before the Singapore High Court? Customary Human Rights Norms, Constitutional Formalism and the Supremacy of Domestic Law in *Public Prosecutor v. Nguyen Tuong Van*" (2004) 4 O.U.C.L.J. 213. Following British practice, the Court of Appeal in *Nguyen* at para. 94, approved in *Yong* at para. 90, stated that domestic statutes inconsistent with CIL norms would still prevail.

94 *Yong*, *supra* note 1 at para. 90.

95 *Ibid.*

and domestic law, with a monist sensibility insofar as the courts can directly apply CIL without legislative intervention.

The entry of CIL into the domestic order was also controlled by the article 2(1) definition of "law" as including common law only "insofar as it is in operation in Singapore".[96] Given the existence of MDP legislation in Singapore, the court "cannot treat the alleged CIL rule prohibiting inhuman punishment" as being incorporated into Singapore law and so forming "law" for article 9(1) purposes. Further, even if such a prohibitive CIL rule existed, and even if the Court could depart from precedent in finding this,[97] the Court affirmed the supremacy of domestic law over an incorporated CIL norm.[98]

The Court accepted the presumption of compatibility[99] insofar as domestic law should "as far as possible"[100] be consistently interpreted with Singapore's international obligations. Thus, international human rights law can increase the normative pool judges may resort to, in interpreting the Constitution. However, there are "inherent limits"[101] and two further things must be ascertained: the shape and content of this pool, the contours of which will be delimited by the constitutional *text*, where express provisions are not amenable to incorporating the international norm in question, and where constitutional *history* "militates against the incorporation of those international norms".[102] Thus, the deliberate rejection of the proposed article 13(1) foreclosed arguments that a CIL norm of similar content could be read into "law" under article 9(1).[103]

## III. Singapore Constitutionalism: The Primacy of the Political

If in the past the judiciary manifested a culture of resistance towards international law or foreign decisions, *Yong* indicates this posture is steadily dissipating. *Yong* is significant for clarifying the inter-relationship between CIL and Singapore law, how it is received and ranked, demonstrating a deft familiarity with the rules governing CIL formation, and with formal and material international law sources.

Whether one agrees with the decision that a putative CIL norm prohibiting inhuman punishment cannot be read into article 9(1), the judicial analysis, resting on the cornerstone of originalism, was clearly well-reasoned. It stands in contrast to the perfunctory styles of judicial reasoning characteristic of some past cases.[104] In terms of legitimacy and institutional competence, the judicial understanding of the separation of powers doctrine reveals a recognition that Parliament holds the primary

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96 *Yong*, *supra* note 1 at para. 91.

97 See Lord Denning, *Trendtex Trading Corporation v. Central Bank of Nigeria* (1977) 1 All E.R. 881 (C.A.).

98 Following *Chung Chi Cheung v. The King* [1939] A.C. 160 (P.C.); *Yong*, *supra* note 1 at paras. 90-91.

99 *R v. Secretary of State for Home Department*, ex parte *Brind* [1991] 1 A.C. 696 (H.L.).

100 *Yong*, *supra* note 1 at para. 59.

101 *Ibid.*

102 *Ibid.* at para. 59.

103 *Ibid.* at para. 82.

104 See the efforts to disabuse a highly positivist reading of *Jabar v. Public Prosecutor* [1995] 1 S.L.R. (R.) 326 (C.A.) in *Yong, supra* at paras. 17-19.

responsibility for determining the substantive content of law;[105] thus, issues concerning the constitutionality of the death penalty or its deterrent effect fell within the legislative province, as questions of social policy.[106]

Originalism here acts to restrain judicial discretion. This avoids the spectre of juristocracy, where activist judges advance a political agenda through applying their subjective values in interpretation. While non-originalism or a 'living tree' vision of the Constitution urges the wisdom of allowing the Constitution to evolve as society evolves, how are judges guided in this process? If a judge can insulate politically contentious issues by constitutionalising them, is not public debate thwarted and democracy, impoverished?

Judges have "no licence" to read their own moral values into the Constitution, guising legislation as interpretation, but must consider the "substance of the fundamental right at issue" and must ensure its protection "in the light of evolving standards of decency that mark the progress of a maturing society…"[107] However, standards of decency at the international level may themselves be controversial, in an increasingly heterogeneous and plural international society where the term 'human rights' is cheapened where deployed as a rhetorical device to advance contested political agendas through rights language, when insufficient consensus exists to ground a CIL norm. The tension between universal human rights and the self-determination of public values involves complex issues, which can partly be clarified by distinguishing *core* accepted human rights from *contested* political claims. Indeed, "[it] is open to the people of any country to lay down the rules by which they wish their state to be governed and they are not bound to give effect in their Constitution to norms and standards accepted elsewhere, perhaps in very different societies".[108]

There will, in democratic polities, always be diverse viewpoints and conflicting claims. Unlike the rights-based legal constitutionalism characteristic of many liberal democracies, where the courts wield supreme authority to interpret and enforce the constitution, the Singapore context is more accurately identified with the practice of political constitutionalism, where the focus is on political methods of accountability and the pre-eminent role of the political branches in saying what the Constitution is. This brings to the fore the importance of serious public debate and democratic freedoms in pressuring the legislature to reconsider or amend a law. Clearly, the path of legal reform in Singapore is hewn not by the judiciary but by Parliament, although the courts have made recommendations for change.[109] On resolving human rights issues and the scope of constitutional liberties, it appears that Parliament, not unelected judges, takes the lead. In other words, if you want a right, enact it.

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[105] Contrast this with other jurisdictions where courts have asserted greater influence through intrusive review: *e.g.* Julian Rivers, "Proportionality and Variable Intensity of Review" (2006) Cambridge L.J. 174.

[106] *Yong, supra* note 1 at para. 49.

[107] Quoting Lord Bingham, *Reyes*, *supra* note 51 at paras. 25-26, cited in *Yong*, *supra* note 1 at para. 51.

[108] *Reyes*, *ibid*. at paras. 27-28, cited in *Yong*, *supra* note 1 at para. 58.

[109] See *e.g.*, *Taw Cheng Kong v. Public Prosecutor* [1998] 2 S.L.R. 410 (C.A.) at 437F-G.