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CONSTITUTIONALISING CAPITAL CRIMES: JUDICIAL VIRTUE OR 'ORIGINALISM' SIN?

YAP PO JEN*

I. INTRODUCTION

This comment seeks to respond to Professor Thio Li-ann's arguments recently published in this Journal,[1] where she applauds the Singapore Court of Appeal in *Yong Vui Kong v. Public Prosecutor*[2] for its purported discernment of the Framers' original intent when interpreting the *Constitution of the Republic of Singapore*,[3] and its new-found receptivity to comparative reasoning in constitutional adjudication.

Professor Thio's tribute to the Court of Appeal essentially rests on two grounds. First, she praises the Court in *Yong* for being exemplary in its thorough engagement with transnational jurisprudence and customary human rights law.[4] Second, she compliments the judiciary for exercising judicial modesty by interpreting the Singapore Constitution in light of the Framers' original intent, thereby avoiding "the situation of 'rule by judges' which subverts the rule of law".[5]

This author is in complete agreement insofar as Professor Thio lauds the value of comparative constitutionalism in Singapore. With the advent of globalisation and the proliferation of constitutional dialogue within the trans-judicial community,[6] the appeal and normative value in the judicial use of foreign legal resources is irresistible. Cosmopolitans observe that the "legal consensus of civilized nations"[7] on a particular question may be as authoritative as scientific theories of knowledge and can thus

* Associate Professor, University of Hong Kong.

1 Thio Li-ann, "'It is a Little Known Legal Fact': Originalism, Customary Human Rights and Constitutional Interpretation—*Yong Vui Kong v. Public Prosecutor*" [2010] Sing. J.L.S. 558.

2 [2010] SGCA 20 [*Yong*].

3 (1999 Rev. Ed.) [*Singapore Constitution*].

4 *Supra* note 1 at 559.

5 *Ibid.* at 560.

6 See Claire L'Heureux-Dubé, "The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court" (1998) 34 Tulsa L.J. 15; William Rehnquist, "Foreword", in Vicki Jackson and Mark Tushnet, eds., *Defining the Field of Comparative Constitutional Law* (Westport, Connecticut: Praeger, 2002) at vii, viii; and Aharon Barak, "Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy" (2002) 116 Harv. L. Rev. 16.

7 Jeremy Waldron, "The Supreme Court, 2004 Term—Comment: Foreign Law and the Modern Ius Gentium" (2005) 119 Harv. L Rev. 129 at 144.

provide domestic jurists with a measure of objectivity to help resolve domestic constitutional disputes.[8] Functionalists argue that if courts are perceived to be similarly situated constituted institutions performing the same tasks common to all systems of governance, comparative reasoning can help identify the institutional arrangements that best serve them.[9] At the very least, comparative constitutional study offers the possibility of sharpened insight into aspects of one's own constitutional system and explains how and why they work together in a distinctive way.[10]

However, this author respectfully disagrees with the learned Professor's defence of the Court's decision on an originalist understanding of the Singapore Constitution, and this point of departure will form the focus of my case comment.

The background facts in *Yong* are as follows: the appellant was convicted of trafficking 47.27 g of diamorphine, a controlled drug, by the High Court of Singapore and was sentenced to death accordingly under the *Misuse of Drugs Act*.[11] On appeal, the appellant only argued against his sentence, *i.e*. that the mandatory death penalty ("MDP") prescribed by the impugned statute infringed upon article 9(1)[12] and article 12(1)[13] of the Singapore Constitution. In this comment, I will only focus on the appellant's article 9(1) challenge, which was advanced in two alternative ways: (1) the MDP legislation was not "law" for the purposes of article 9(1) as the expression "law" excluded inhuman forms of punishment and accordingly the appellant could not be deprived of his life in his manner; (2) customary international law precluded the imposition of the MDP and since customary international law was part of the law of Singapore, this practice was prohibited by article 9(1).

II. Article 9(1) And Inhuman Punishment

Responding first to what the court termed the 'inhuman punishment' limb of the article 9(1) challenge, the Chief Justice, on behalf of the Court, re-affirmed the correctness of past Singapore precedents that upheld the constitutionality of the MDP for drug offences. In particular, back in 1981, whilst the Privy Council of Singapore in *Ong Ah Chuan v. Public Prosecutor*[14] had acknowledged that "law" for the purposes of article 9(1) also 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",[15] the Board nonetheless held that the MDP legislation did not breach any fundamental rules of natural justice.

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[8] See also Sujit Choudhry, "Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation" (1999) 74 Ind. L.J. 819 at 841-55, who argues that an universalist mode of constitutional interpretation holds that constitutional guarantees are cut from a universal cloth and hence, all constitutional courts are engaged in the identification and interpretation of the same set of norms.

[9] Mark Tushnet, "The Possibilities of Comparative Constitutional Law" (1999) 108 Yale L.J. 1225 at 1238.

[10] Vicki Jackson, "Comparative Constitutional Federalism and Transnational Judicial Discourse" (2004) 2 Int'l J. Const. L. 91.

[11] Cap. 185, 2008 Rev. Ed. Sing.

[12] *Supra* note 3, article 9(1) of the *Singapore Constitution* reads: "No person shall be deprived of his life or personal liberty save in accordance with law."

[13] *Supra* note 3, article 12(1) of the *Singapore Constitution* reads: "All persons are equal before the law and entitled to equal protection of the law."

[14] *Ong Ah Chuan v. Public Prosecutor* [1981] A.C. 648 [*Ong*].

[15] *Ibid* at 670-671.

The appellant's counsel had valiantly asked the Court to reconsider *Ong* in light of a series of Privy Council decisions from the Caribbean States[16] where the Law Lords in the United Kingdom, post-*Ong,* overturned the MDP imposed by the respective state legislations. Nevertheless, the Court of Appeal flatly rejected their applicability on the grounds that these foreign decisions involved Constitutions which expressly prohibited inhuman punishments whilst "the Singapore Constitution does not contain any express prohibition against inhuman punishment"[17] and "it would not be appropriate for [judges] to legislate new rights into the Singapore Constitution under the guise of interpreting existing constitutional provisions"[18] when such an exercise would be against the original intent of the constitutional framers. According to the Chief Justice, Singapore's Fundamental Liberties Clauses as enshrined in Part IV of Singapore Constitution[19] was based on its equivalent in the 1963 Malaysian Federal Constitution[20] which was in turn based on the 1957 Malayan Constitution drafted upon the advice of the Federation of Malayan Constitutional Commission chaired by Lord Reid (Reid Commission). In the Chief Justice's opinion, the fact that the Reid Commission did not recommend in favour of an express prohibition against inhuman punishment, even though such a provision existed in the European Convention of Human Rights—an instrument that applied in all the British colonies (including Singapore and Malaysia) prior to independence, clearly illustrated that this omission was deliberate and not due to ignorance or oversight.[21] Herein, the Court of Appeal appeared to espouse an originalist understanding of the Singapore Constitution and would only invalidate "legislation of so absurd or arbitrary a nature that it could not possibly have been contemplated by our (Singapore's) constitutional framers as being 'law' when they crafted the constitutional provisions protecting fundamental liberties".[22]

Professor Thio in turn celebrates originalism as her preferred mode of constitutional interpretation in Singapore:

> 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?[23]

Unfortunately, Professor Thio's espousal of originalism as the preferred theory of constitutional adjudication in Singapore is not unproblematic. First, the constitutional text of Singapore's Fundamental Liberties Clauses was not deliberated upon by

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[16] See *Reyes v. The Queen* [2002] 2 A.C. 235 (P.C.); *Fox v. Queen* [2002] 2 A.C. 284 (P.C.); *R v. Hughes* [2002] 1 A.C. 259 (P.C.).

[17] *Supra* note 2 at para. 60.

[18] *Supra* note 2 at para. 59.

[19] *Supra* note 3.

[20] Singapore became a constituent state of Malaysia in 1963 and gained full independence as a sovereign republic in 1965.

[21] *Supra* note 2 at para. 62.

[22] *Supra* note 2 at para. 16.

[23] *Supra* note 1 at 570.

a Constituent Assembly of the independent state in question. Instead, upon gaining independence from Malaysia in 1965, Singapore simply made most Fundamental Liberties provisions found in the Malaysia Federal Constitution applicable in Singapore *via* the Republic of Singapore Independence Act.[24] Certainly, the fact that the legislature of a newly sovereign republic consciously adopted those provisions conferred upon these Singaporean liberties a legal life of their own. But the mere enactment of the law alone does not provide us with a clue as to what was the original meaning the Framers attached to those provisions they adopted. Given the fact that Singapore did not deliberate upon the phraseology of its Fundamental Liberties Clauses, but merely imported them as a matter of expedience from Malaysia, one does wonder whether it is even possible to discern the original meaning the Singapore Framers attached to those provisions adopted from Malaysia. At best, one can try to discern the original intent of the Framers when the Malaysia's Constitution was adopted but it would be very odd for judges in today's Singapore to give effect to and be fettered by the original intent of another nation-state's constitutional framers. The Chief Justice, possibly aware of the weakness in this line of reasoning, went on to shore up his argument by referencing the work of the Singapore Constitutional Commission, which was tasked in 1966 to make recommendations on changes that might be necessary to protect the rights of minorities in post-independence Singapore. In particular, the learned Chief Justice highlighted the fact that the Singapore Government had unequivocally rejected the Constitutional Commission's recommendation for the inclusion of a proposed article 13(1) that would have expressly prohibited torture and inhuman punishment. Therefore, according to the Court of Appeal, 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, especially given the historical context in which that right was rejected".[25] Yet, one must remember that the Fundamental Liberties Clauses of the Singapore Constitution came into effect in 1965 soon after Singapore's independence. Hence, it is debatable, even on an originalist understanding of the Singapore Constitution, whether it was legitimate for the Court to discern the original intent of the constitutional framers in 1965, when they imported the applicable Fundamental Liberties Clauses from Malaysia, from a Parliamentary decision taken four years later.

Even if we assume that the intention of the constitutional framers in 1969 to reject a constitutional prohibition against torture and inhuman punishment did mirror a similar intent amongst the framers in 1965, this would mean that any recommendation the Constitutional Commission made in 1966 but not taken up subsequently by the Government in 1969 should also not be judicially deemed a constitutional right. Taking this argument to its logical conclusion, the right to vote will also not be a constitutionally protected fundamental liberty as it is not expressly enshrined in the Singapore Constitution, and the Constitutional Commission in the 1960s had

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[24] For example, the Singapore Parliament deliberately omitted to include article 13 of the Federal Constitution which guarantees the right to property and provides for adequate compensation for depreciation of this right. See Kevin YL Tan & Thio Li-ann, *Constitutional Law in Malaysia & Singapore*, 3d ed. (Singapore: Lexis-Nexis, 2010) at 74; and Kevin YL Tan, "State and Institution Building through the Singapore Constitution 1965-2005" in Li-ann Thio & Kevin YL Tan, eds., *Evolution of a Revolution: Forty Years of the Singapore Constitution* (Singapore: Routledge, 2010) at 54.

[25] *Supra* note 2 at para. 72.

equally failed to convince the Government to entrench this right in the same manner as other enshrined rights.[26] The consequences of this line of reasoning, if followed by future Singapore courts, would be very grave. After all, if one takes the view that there can be no implied right against inhuman punishment under article 9(1) because the Singapore Government expressly refused to entrench this right in 1969, then the Courts, in order to be consistent, cannot also read in any implied right to vote because the Singapore Government had equally refused to entrench an express right to vote then. If so, on a literal (and lethal) reading of the Singapore Constitution,[27] Parliament can therefore pass laws restricting the right of suffrage in general elections to only a selected segment of society, or abolish confidential voting and still be in technical compliance with the constitutional requirements laid down in article 39 of the Singapore Constitution,[28] which merely requires Parliament to be composed of elected Members of Parliament to be returned at a general election.

However, fortunately for Singapore, the Court of Appeal proved unwilling to take its own argument to its logical conclusion. As observed by the Chief Justice, "[t]his conclusion does not mean that, because the proposed Art 13 included a prohibition against torture, an Act of Parliament that permits torture can form part of 'law' for the purposes of Art 9(1)".[29] Whilst one should certainly applaud this judicial concession, this pronouncement is very puzzling. As a matter of logic, if the Chief Justice is reluctant to expand, *via* an interpretive exercise, the scope of article 9(1) so as to include a constitutional prohibition against inhuman punishment because Parliament had deliberately refused to enact such a provision, surely this reasoning must also bar any elevation of a prohibition against torture to a constitutional right since this proposal too was deliberately rejected by the Government in 1969. The Court of Appeal interestingly justified this distinction on the basis that the Singapore Minister of Home Affairs in 1987 had explicitly recognised that torture was wrong[30] and that torture, in so far as it caused harm to another's body with criminal intent, was already criminalised under the Singapore Penal Code.[31] With respect, the logic of this argument eludes this author. One wonders how a mere statement from the Home Minister during the Parliamentary Debates in 1987 would license the Court, on an originalist understanding of the Singapore Constitution, to elevate a prohibition against torture into a constitutional right and the fact that bodily assault is a crime in Singapore would surely not have any bearing on this matter. Perhaps, the Chief Justice is a "faint-hearted originalist"[32] and Singapore's constitutional jurisprudence will be better for it. Unfortunately, the Court of Appeal whilst recognising that article 9(1) prohibited torture, went on to state unequivocally that "currently, no domestic legislation

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[26] Interestingly, the Chief Justice, when he was Attorney General, opined in an advice to the Government that the right to vote is "implied within the structure of our (Singapore's) Constitution" since article 39 requires Parliament to be composed of elected Members of Parliament to be returned at a general election: see Sing., *Parliamentary Debates*, vol. 73, col. 1726 (16 May 2001). One must also note that although article 65 of the Singapore Constitution states that the lifespan of the Singapore Parliament is five years, it does not in any way guarantee who may vote in such elections.

[27] *Supra* note 3.

[28] *Ibid.*

[29] *Supra* note 2 at para. 75.

[30] Sing., *Parliamentary Debates*, vol. 49, cols. 1491-1492 (29 July 1987).

[31] *Supra* note 2 at para. 75.

[32] Antonin Scalia, "Originalism: The Lesser Evil" (1989) 57 U. Cin. L. Rev. 849 at 864.

permits torture", thereby insulating all current official state practices from a challenge on this ground, and in particular judicial caning, a common-place punishment for vandalism and rape in Singapore.

Interestingly, in addition to recognising an implicit constitutional right against torture, the Court of Appeal also opined that article 9(1) would equally invalidate:

> colourable legislation which purported to enact a "law" as generally understood (*i.e.*, a legislative rule of general application), but which in effect was a legislative judgment, that is to say, legislation directed at securing the conviction of particular known individuals (see *Don John Francis Douglas Liyanage and others v. The Queen* [1967] 1 AC 259 at 291.[33]

This is a laudable but very curious pronouncement, especially since the Chief Justice held that this would perhaps be what "the Privy Council (in *Ong*) had in mind *vis-à-vis* the kind of legislation that would not qualify as 'law' for the purposes of Art 9(1)".[34] But one does wonder on what evidence the Chief Justice based this inference for his Honour did not provide any. After all, the Privy Council in *Ong* did not discuss *Don John Francis Douglas Liyanage and others v. The Queen*,[35] and it was decided about 15 years before *Ong* by the Privy Council on appeal from Ceylon, not Singapore. *Liyanage* was probably not even brought to the attention of the Privy Council in *Ong* as the former did not concern the adjudication of a constitutional clause in *pari materia* with Singapore's article 9(1); on the facts, the Privy Council in *Liyanage* held that the colourable legislation passed to secure the convictions of specific individuals was inconsistent with an implied 'separation of powers' principle enshrined within the Constitution of Ceylon.[36] In the absence of further elaboration, one is left guessing as to the motivations behind this judicial sleight of hand, but it is certainly an unusual move from a Court that has been very wary about adopting overseas norms when the constitutional provisions under consideration are not the same.

III. Customary International Law and MDP

The Court of Appeal next confronted the alternate article 9(1) argument that Customary International Law ("CIL") prohibited the imposition of the MDP; therefore since CIL formed part of the laws of Singapore under article 9(1), the MDP was unconstitutional. This argument was similarly rejected by the Chief Justice:

> Given that the Government [in 1969] deliberated on but consciously rejected [the] suggestion of incorporating into the Singapore Constitution an express prohibition against inhuman punishment generally, a CIL rule prohibiting such punishment—let alone a CIL rule prohibiting the MDP specifically as an inhuman punishment—cannot now be treated as "law" for the purposes of Art 9(1). In other words, given the historical development of the Singapore Constitution, it is

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[33] *Supra* note 2 at para. 16.

[34] *Ibid.*

[35] [1967] 1 A.C. 259 [*Liyanage*].

[36] *Supra* note 36 at 291. It is also noteworthy that the Privy Council in *Liyanage* rejected the argument that the Ceylon Parliament was limited by an inability to pass legislation that was contrary to fundamental principles of justice as natural justice was too vague and unspecified a term (at 284-285).

> not possible for us to accept [appellant counsel's] submission on the expression "law" in Art 9(1) without acting as legislators in the guise of interpreters of the Singapore Constitution.[37]

Professor Thio surprisingly also concluded that this "judicial analysis, resting on the cornerstone of originalism, was clearly well-reasoned".[38] It is unclear whether the Court of Appeal or the learned Professor was aware of the significance of the judicial pronouncement above; the Court of Appeal was in effect stating that since the Government in 1969 had rejected an express prohibition against inhuman punishment *in general*, any CIL norm that evolved after 1969 which might prohibit inhuman punishment *in general* or any CIL norm prohibiting a specific form of inhuman punishment would never be judicially treated as part of Singapore law for the purposes of article 9(1).

With regard to CIL, the common law rule is that such norms automatically form part of the municipal law though they may be overridden by legislation.[39] In Singapore, the traditional approach taken by the courts has been to automatically treat CIL norms as part of the common law applicable in Singapore though these norms could be legislatively overturned by Parliament. In an earlier decision in *Ngyen Tuong Van v. Public Prosecutor*,[40] the Court of Appeal, *inter alia*, had to decide whether judicial hanging was contrary to the prohibition under CIL against inhuman punishment and was therefore unconstitutional as CIL norms were implicitly recognised as part of Singapore law under article 9(1). In response, the Singapore Court of Appeal stated that, "[i]t is quite widely accepted that the prohibition against cruel and inhuman treatment or punishment does amount to a rule in customary international law" but on the facts, concluded that there was insufficient State practice to show that a specific CIL norm prohibiting hanging as a mode of execution exists, and in any event such a CIL norm could be overridden in Singapore by domestic legislation. Hence, whilst the Court of Appeal in *Nguyen Tuong Van* was amenable to incorporating any specific CIL norm against inhuman punishment when there is no domestic statute in conflict with it, the Court of Appeal after *Yong* appears to reject the applicability of all such CIL norms as the Constitutional Framers (arguably) had deliberately rejected the inclusion of a constitutional clause prohibiting inhuman punishment in general. Whilst the Court of Appeal in *Yong* was probably right on the facts to conclude that a CIL norm had yet to develop against the use of the MDP for drug trafficking offences,[41] it is another thing altogether to reject outright the notion that a general CIL norm prohibiting inhuman punishments can form part of the laws in Singapore.

After *Yong*, it also remains an open question in Singapore as to how the Court of Appeal would view a *jus cogens* norm if that conflicts with any pre-existing domestic statute. *Jus cogens* norms are rules of customary law which cannot be set aside by

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[37] *Supra* note 2 at para. 92.

[38] *Supra* note 1 at 569.

[39] *Trendex Trading Corporation v. Central Bank of Nigeria* [1977] 1 Q.B. 529 (C.A.).

[40] [2005] 1 S.L.R.(R.) 103 [*Nguyen Tuong Van*].

[41] See *supra* note 2 at para. 95. 14 states retain the MDP for drug related offences and 31 states impose the MDP for drug related or serious offences like murder. Unfortunately, it appears that there is a lack of "extensive and virtually uniform state practice" (*North Sea Continental Shelf Cases*, (1969) I.C.J. Rep. 3 at para. 74) to support the argument that CIL prohibits the MDP as an inhuman punishment. See also Roger Hood and Carolyn Holye, *The Death Penalty: A Worldwide Perspective* (USA: Oxford University Press, 2008) at 137-138.

treaty or individual state practice but only by the formation of a subsequent customary rule of contrary effect.[42] Examples of the class include the law of genocide, crimes against humanity and rules prohibiting the slave trade. Certainly, any judicial deference to domestic legislation in this regard would be highly inappropriate as *jus cogens* norms embody peremptory fundamental international values from which no state derogation is allowed.[43]

IV. Conclusion

Leaving aside all the difficulties addressed above with regard to the espousal of originalism as the preferred mode of constitutional interpretation in Singapore, one key problem remains with Professor Thio's views.

Originalist judges, like Justice Antonin Scalia on the United States Supreme Court, have argued that in interpreting the Constitution, judges should "look for a sort of objectified intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris".[44] In deriving this objective intent, Scalia would look to historical understandings and practices that were accepted at the time the constitutional provisions were adopted. Thus, contemporary practices, especially foreign ones, would be irrelevant during constitutional adjudication. This was precisely why Justice Scalia got so livid when his liberal brethren turned to foreign case law during constitutional adjudication.[45] Therefore one does wonder why as an originalist, Professor Thio would endorse the Singapore Court of Appeal's efforts made in exploring the persuasiveness or utility of foreign case-law. If the judicial task is to only discern the original intent of the Framers of the Singapore Constitution as formed in the 1960s, surely this intent cannot be derived from modern overseas case-law developments? For an originalist, judicial recourse to current foreign case law would serve no legitimate purpose; this is unlike references to law review articles that attempt to shed light on the historical background behind the enactment of the constitutional provisions in question.

In short, Professor Thio can either be an originalist or a comparativist. She cannot be both. By not fencing off all comparative constitutional reasoning as forbidden fruit, one cannot help but wonder whether the learned Professor could indeed just be cherry-picking?

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[42] Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 2008) at 510.

[43] See article 53 of the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980). See also 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 at 289-290.

[44] Antonin Scalia, "Common Law Courts in a Civil Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws", in Amy Gutmann, ed., *A Matter of Interpretation* (Princeton: Princeton University Press, 1998) at 17.

[45] See *Lawrence v. Texas*, 539 U.S. 558 (2003) at 598 where Scalia J held: "[t]he Court's discussion of these foreign views… is therefore meaningless dicta" and *Roper v. Simmons*, 543 U.S. 551 (2005) at 628 where he opined: "I do not believe that approval by 'other nations and people' should buttress our commitment to American principles any more than (what should logically follow) disapproval by 'other nations and people' should weaken that commitment."