INTRODUCTORY NOTE TO YONG VUI KONG V. PUBLIC PROSECUTOR (SING. CT. APP.)

BY YVONNE MCDERMOTT*

[March 4, 2015]
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Introduction

On March 4, 2015, Singapore's Court of Appeal issued its judgment in *Yong Vui Kong v. Public Prosecutor*, upholding the punishment of caning imposed on the defendant as constitutional. The decision is significant because it discusses the impact of the prohibition of torture, a peremptory norm of international law, on domestic legislation. The Court of Appeal determined that, even if caning were to be considered a form of torture, the customary international law prohibition on torture did not invalidate its domestic law permitting caning as a form of punishment.

Background

Yong Vui Kong is a Malaysian national, born in 1988. In 2007, he was charged with trafficking 47.27g of heroin, an offence under Singapore's Misuse of Drugs Act, which attracted a mandatory death sentence. In 2008, he was found guilty of the offence of drug trafficking and sentenced to the death penalty.

In 2010, Yong Vui Kong challenged his death sentence, contending that the mandatory death penalty was a form of inhuman punishment, which violated his right to life under Article 9(1) of the Constitution of Singapore.[1] The Court of Appeal rejected this challenge, finding that Singapore's Constitution did not include an implied prohibition of inhuman punishment,[2] and that, even if customary international law prohibiting inhuman punishment had been incorporated into Singapore legislation, the mandatory death penalty did not constitute inhuman punishment.[3]

In 2011, the Singapore government undertook a review of the mandatory death penalty and, as a result of this review, amended various pieces of legislation. Under the Misuse of Drugs (Amendment) Act 2012, which entered into force in 2013, a person convicted of a drug trafficking offence punishable with death could instead be sentenced to a mandatory sentence of life imprisonment and fifteen strokes of the cane, depending on their role and level of cooperation with the Narcotics Bureau. In November 2013, the High Court of Singapore found that Yong Vui Kong met the requirements set out in the amended Misuse of Drugs Act and commuted his death sentence, sentencing him instead to life imprisonment and fifteen strokes of the cane.

Singapore is one of only a small number of countries in the world that retains the punishment of caning on its statute books. Under its Criminal Procedure Code, male offenders under the age of fifty can be sentenced to up to twenty-four strokes of a rattan cane, not exceeding 1.27 centimeters in diameter.

The Court of Appeal's Decision

Yong Vui Kong challenged his sentence of caning on three grounds. First, it was argued that the practice of caning amounted to torture. Second, it was submitted that imposing the punishment of caning on a prisoner already sentenced to life imprisonment did not serve any deterrent function, and was irrational and illogical. Third, it was argued that the application of the punishment was discriminatory in nature, as it did not apply to men over the age of fifty or to women, and that it therefore contravened the Constitution's nondiscrimination clause.

There is no explicit prohibition of torture under the Constitution of Singapore. The appellant's first claim, that caning constituted torture, therefore centred on Article 9(1) of the Constitution, which provides that "[n]o person shall be deprived of his life or personal liberty save in accordance with law." The appellant argued that caning constituted a deprivation of personal liberty that could not be "in accordance with law," given that it contravened a peremptory (or *jus cogens*) norm of international law, the prohibition of torture.

Singapore is not a party to the Convention against Torture, but it is widely recognised that the prohibition against torture is both customary international law and a *jus cogens* norm of international law. The Court of Appeal, while accepting the international legal status of the prohibition against torture, found that, as a dualist state, Singapore's international legal obligations did not apply unless transposed into law through domestic legislation or "declared to be part of the domestic law by the courts."[4] The Court drew no distinction between *jus cogens* and other international legal norms in this regard, and found that even peremptory norms of international law could not take precedence over domestic legislation where there was inconsistency between the two.[5] Even if caning did amount to

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torture, the Court reasoned, the fact remained that it was expressly mandated by statute law, and the international legal prohibition of torture would only take precedence over such statute law if it had been both incorporated into domestic law and given constitutional status.[6]

The fact that Singapore was party to the Convention on the Rights of Persons with Disabilities, which expressly prohibits torture, was deemed similarly irrelevant, as the treaty had not, at the time of the judgment, been incorporated into domestic law. The Court declined to enter into an exercise of "interpretive incorporation" of the state's international legal obligations through its interpretation of domestic law, finding that treaty obligations cannot "trump an inconsistent domestic law that is clear and unambiguous in its terms."[7]

The Court did, however, accept that there was a common law prohibition against torture that had been transposed into domestic law.[8] However, it adopted a rather narrow definition of torture, finding that the prohibition relates to the torture of suspects during interrogations for the purposes of extracting information or confessions and thus did not cover corporal punishment.[9]

Notwithstanding that the Court found that caning would still be legal in light of the above findings on the status of the torture prohibition under domestic law, it proceeded to consider whether caning could be considered a form of torture.[10] It noted the distinction between torture and inhuman treatment, and reiterated its earlier decision that the latter was not prohibited under Singapore's law.[11]

The Court recalled that, in *Tyrer*, the European Court of Human Rights found that the practice of "birching" (whipping the clothed buttocks of boys with a birch rod) constituted degrading punishment, but not torture.[12] The Court distinguished one case, where the Inter-American Court of Human Rights found that flogging with a "cat-o-nine tails" (a whip made up of nine knotted lashes) constituted torture, from the case before it.[13] It deemed caning to be less severe than this form of flogging, as it is administered on the buttocks, in private, and with a medical expert present.[14] Similarly, an African Commission on Human and Peoples' Rights decision, where public lashing on the victims' bare backs using a wire and plastic whip was found to violate the prohibition on torture and cruel, inhuman, or degrading punishment,[15] was distinguished from caning in the present case.[16] In light of the above, the appellant's contention that the practice of caning constituted torture (and thus was not "in accordance with the law" under Article 9(1) of the Constitution) was unsuccessful.

Article 9(1) of the Constitution was also relied upon as the basis for the appellant's argument that imposing an additional sentence of caning on those already serving a life imprisonment sentence was so irrational and arbitrary that it could not constitute "law."[17] Evidence was brought to show that the practice had no deterrent effect in practice and that it could cause resentment and bad behaviour amongst prisoners who had been subjected to caning. The Court found that sentencing policy was a matter for the legislature, not the courts.[18]

Similarly, the appellant's argument that the imposition of the sentence of caning only on males under fifty was discriminatory was dismissed, because it was found that Parliament had its policy reasons for excluding women and older men.[19] As these reasons were not manifestly irrational, the Court could not interfere with them.[20] Lastly, the appellant's reference to the colonial and racist roots of the practice of caning was deemed to be irrelevant, as the punishment had been adopted by Singapore's own Parliament since independence.[21]

Conclusion

The Court's finding that torture could be permitted if expressly provided for in a domestic statute is troubling and may open the door to other states similarly deciding that the *jus cogens* prohibition of torture does not prohibit them from torturing individuals in their own territory. This restrictive reading of the prohibition seems to go against recent international developments, particularly in international courts. In *Furundžija*, the International Criminal Tribunal for the former Yugoslavia (ICTY) found that the fact that torture is prohibited by a *jus cogens* norm of international law had an effect on what states could do within their own territories.[22] The ICTY noted that it would be "senseless" to argue that the *jus cogens* nature of the prohibition renders treaties between States void *ab initio*, while at the same time finding that national law could authorise or condone torture.[23] Yet, this is exactly what the Singapore Court of Appeal found in this case. This decision stands in contrast to a growing body of practice,[24] which appears

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to show that peremptory norms of international law can and do have a bearing on states' legislative, administrative, and judicial functions.

The definition of torture in the decision is also overly restrictive and not in line with international or domestic practice. The Court referred to the 2005 House of Lords decision in the case of *A and others v. Secretary of State for the Home Department (No. 2)* in justifying its narrow definition of torture as being linked to the purpose of obtaining information or a confession. However, that decision pertains precisely to the use of evidence obtained through means of torture, and thus it is logical that it would focus on the link between the acts of torture and the evidence in question. Moreover, it does not limit the definition of torture in the way the Court of Appeal suggests it does; rather, it explicitly reiterates the full Convention against Torture definition (which includes the purpose of "punishing him for an act he has committed or is suspected of having committed") in full.[25] Indeed, Lord Justice Hoffman notes that he "would be content for the common law to accept the definition of torture which Parliament adopted in section 134 of the Criminal Justice Act 1988, namely, the infliction of severe pain or suffering on someone by a public official in the performance or purported performance of his official duties."[26] The Court's narrow definition of the "common law" prohibition of torture is not, therefore, supported by its own source.

As Singapore (like other ASEAN states) is not, at present, a party to a regional human rights mechanism with an independent human rights court or commission, it is not open to Yong Vui Kong to take his case to such a body. An attempt to seek a prohibiting order from the High Court, preventing the caning from going ahead, was struck out in July 2015 and a costs order was imposed against Yong's lawyer.[27] Unless Singapore amends its domestic legislation, it seems very likely that the punishment of caning will go ahead.

ENDNOTES

1 Yong Vui Kong v. Public Prosecutor [2010] SGCA 20 (Sing.).

2 *Id.* ¶ 72.

3 *Id.* ¶ 120. For further analysis, see Yvonne McDermott, Yong Vui Kong v. Public Prosecutor *and the Mandatory Death Penalty for Drug Offences in Singapore: A Dead End for Constitutional Challenge?*, 1 INT'L J. H.R. AND DRUG POLICY 35 (2010); Aravind Ganesh, *Insulating the Constitution:* Yong Vui Kong v. Public Prosecutor *[2010] SGCA 20*, 10 OXFORD UNIV. COMMONWEALTH LAW J. 273 (2010).

4 Yong Vui Kong v. Public Prosecutor [2015] SGCA 11, ¶ 29 (Sing.).

5 *Id.* ¶¶ 35–36.

6 *Id.* ¶ 38.

7 *Id.* ¶ 50.

8 *Id.* ¶ 58.

9 *Id.* ¶ 59 (citing A and others v. Secretary of State for the Home Department (No. 2) [2005] UKHL 71).

10 *Id.* ¶ 76.

11 *Id.* ¶ 83 (citing Yong Vui Kong v. Public Prosecutor [2010] SGCA 20, ¶ 72 (Sing.)).

12 *Id.* ¶ 86 (citing Tyrer v. The United Kingdom [1978] ECHR 2).

13 *Id.* ¶¶ 87–90 (citing Caesar v. Trinidad and Tobago, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 123 (Mar. 11, 2005)).

14 *Id.* ¶ 99.

15 Curtis Francis Doebbler v. Sudan, Communication 236/00, Afr. Comm'n H.P.R. (May 4, 2003).

16 *Id.* ¶ 99.

17 *Id.* ¶ 100.

18 *Id.* ¶ 101.

19 *Id.* ¶¶ 108–110, 114–16.

20 *Id.* ¶ 111.

21 *Id.* ¶ 119.

22 Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 155 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

23 *Id.*

24 See the examples cited in Erika de Wet, *The Prohibition of Torture as an International Norm of* jus cogens *and Its Implications for National and Customary Law*, 15 EUR. J. INT'L LAW 97 (2004).

25 A and others v. Secretary of State for the Home Department (No. 2), [2005] UKHL 71, ¶ 32.

26 *Id.* ¶ 97.

27 Yong Vui Kong v. Attorney-General [2015] SGHC 178 (Sing.).

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YONG VUI KONG v PUBLIC PROSECUTOR
[2015] SGCA 11

Suit No: Criminal Appeal No 11 of 2013

Decision Date: 4 March 2015

Court: Court of Appeal

Coram: Sundaresh Menon CJ, Andrew Phang Boon Leong JA and Tay Yong Kwang J

Counsel: M Ravi (L F Violet Netto) for the appellant; Tai Wei Shyong, Francis Ng, Sarala Subramaniam and Scott Tan (Attorney-General's Chambers) for the respondent.

Subject Area / Catchwords

Criminal Law – Misuse of Drugs Act

Constitutional Law – Fundamental liberties – Right to life and personal liberty

Constitutional Law – Equal protection of the law

4 March 2015 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 This is an appeal against the decision of the High Court judge ("the Judge") in Criminal Motion 56 of 2013 to re- sentence the Appellant to life imprisonment and 15 strokes of the cane for drug trafficking. This was the sentence that the Appellant had contended for before the Judge. The Appellant now argues that the sentence of caning violates Arts 9(1) and 12(1) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution"). This was the central issue raised in this appeal.

Background facts

2 The Appellant was charged with trafficking in 47.27 g of diamorphine, which is an offence under s 5(1)(a) of the Misuse of Drugs Act (Cap 185, 2001 Rev Ed) ("the MDA"). The offence was committed on 12 June 2007. He was convicted after a trial and sentenced to death by the Judge on 14 November 2008.

3 The Appellant's sentence of death was held in abeyance as he brought a series of legal challenges against:

(a) the constitutionality of the mandatory death penalty imposed by s 33 of the MDA read with the Second Schedule thereto (see *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489 ("*Yong Vui Kong (MDP)*"));

(b) the integrity of the clemency process set out in Art 22P of the Constitution (see *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189); and

(c) the Public Prosecutor's decision to prosecute him for a capital offence under s 5(1)(a) of the MDA while applying for (and obtaining) a discontinuance not amounting to an acquittal of various charges under the MDA against the Appellant's alleged principal and supplier (see *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872).

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4 In the meantime, while these various proceedings were working their way through the courts, the Government had begun a review of the mandatory death penalty and as a result, all executions were suspended from July 2011 pending completion of the review. The review culminated in the passage of various pieces of legislation including the Misuse of Drugs (Amendment) Act 2012 (Act 30 of 2012) ("the MDA Amendment Act") on 14 November 2012, which came into effect on 1 January 2013. Under s 33B of the MDA as amended ("the amended MDA"), a person convicted of a drug trafficking offence punishable with death could instead be sentenced to:

(a) imprisonment for life and caning of not less than 15 strokes if he only played the role of courier and the Public Prosecutor certifies that he had substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities ("the substantive assistance limb") (s 33B(1)(a) read with s 33B(2)); or

(b) imprisonment for life if he only played the role of courier and was suffering from such abnormality of mind as substantially impaired his mental responsibility for his acts and omissions in relation to the offence (s 33B(1)(b) read with s 33B(3)).

5 By virtue of the transitional provisions set out in s 27(6) of the MDA Amendment Act, the Appellant was entitled to apply to the High Court for re-sentencing under s 33B of the amended MDA. He did so on 26 September 2013 via Criminal Motion 56 of 2013, relying on the substantive assistance limb in s 33B(2). On 12 November 2013, the Public Prosecutor issued a certificate of substantive assistance in respect of the Appellant. On 14 November 2013, the Judge held that the Appellant had satisfied the requirements of the amended MDA and imposed on him the mandatory minimum sentence of life imprisonment and 15 strokes of the cane.

Grounds of appeal

6 The Appellant now appeals against his sentence of caning on several grounds. A number of those grounds were subsequently withdrawn, and those that remain are as follows:

(a) Caning constitutes a form of torture that is prohibited by a peremptory norm of international law (or *jus cogens*) as well the common law. Thus, the statutory authorisation of mandatory caning is in breach of Art 9(1) of the Constitution. Even if caning as a form of corporal punishment in general does not necessarily constitute torture, the punishment as it is implemented in Singapore by the Commissioner of Prisons or by his officers is so severe and painful that it amounts to torture.

(b) The imposition of mandatory caning on a prisoner who is already sentenced to life imprisonment is irrational, illogical and does not serve any lawful purpose because there is no evidence of its value as a deterrent. It therefore lacks the essential features of law within the meaning of Art 9(1) and is unconstitutional.

(c) Caning in Singapore is administered in a discriminatory manner because it is not applied to men above the age of 50 or to women. Thus, the statutory authorisation of caning violates Art 12(1) of the Constitution.

Correspondence and submissions after the hearing

7 At the hearing of the appeal, we granted the Appellant leave to tender further written submissions to respond to certain additional authorities tendered by the Respondent regarding the definition of torture with leave to the Respondent to reply. The Appellant subsequently wrote to the Respondent and the Singapore Prison Service ("Prisons") asking for a copy of any rules and directions made under s 329(1) and (2) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the CPC"). Those subsections state as follows:

> **Mode of executing sentence of caning**
>
> **329.**—(1) The Minister may make rules to prescribe the mode of carrying out the sentence of caning.
>
> (2) Caning shall be inflicted on such part of the person as the Minister from time to time generally directs.

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8 The Respondent initially rejected the Appellant's request (and the Attorney-General evidently advised Prisons to do the same) on the basis that the rules and directions were irrelevant to the further submissions that the Appellant had been given leave to tender. The Appellant however submitted that the rules and directions *were* relevant to the issue of whether caning pursuant to a judicial sentence is implemented in a manner that constitutes torture, and asked that the Respondent be required to produce the rules and directions. In reply, the Respondent stated that no rules had been made to date under s 329(1) and (2) of the CPC, although Prisons has internal Standing Orders and Standard Operating Procedures (collectively, "Orders") which supplement the statutory provisions governing the execution of caning. The Respondent contended that these Orders should not be produced as they pertain to operational matters with security implications.

9 We invited the Respondent to consider whether he would furnish a redacted version of the Orders that excluded any portions that he thought posed a security risk. We indicated that we would otherwise proceed to decide the appeal on the basis that there were no such Orders. After consulting the Ministry of Home Affairs ("the MHA"), the Respondent replied that both he and the MHA were of the view that it would not be in the public interest to disclose the Orders. We therefore invited the Appellant to make submissions on the effect of there being no such Orders and also granted the Respondent leave to reply. Both parties have since tendered further submissions addressing us on this issue, which we will consider when we come to the issue of whether caning constitutes torture.

Issues arising in this appeal

10 The issues arising in this appeal are as follows:

(a) Does the imposition of a sentence of caning on the Appellant violate Art 9(1) of the Constitution on the basis that it amounts to torture ("the Torture Issue")?

(b) Does the imposition of a sentence of caning on the Appellant violate Art 9(1) of the Constitution on the basis that it is irrational, illogical and does not serve any lawful purpose ("the Irrationality Issue")?

(c) Does the statutory authorisation of caning violate Art 12(1) of the Constitution on the ground that it impermissibly discriminates against men aged 50 and below ("the Equal Protection Issue")?

The Torture Issue

11 The Appellant contends that caning constitutes torture. Although no express prohibition of torture exists in the Constitution or in our domestic statutes, he submits that this prohibition is imported into domestic law from international law. At the hearing of the appeal, he further submitted that such a prohibition exists at common law or as an unenumerated right in the Constitution. He contended on this basis that caning violates Art 9(1) of the Constitution, which provides that "[n]o person shall be deprived of his life or personal liberty save in accordance with law".

12 In the light of the Appellant's arguments, the following sub-issues arise for our consideration:

(a) Does caning constitute a deprivation of "life or personal liberty" within the meaning of Art 9(1)?

(b) Does the law of Singapore prohibit torture?

(c) Does caning constitute torture?

Does caning constitute a deprivation of "life or personal liberty"?

13 In order for Art 9(1) to be engaged at all, caning must involve a deprivation of "life or personal liberty". The Appellant submits that caning does involve a deprivation of personal liberty because it is administered on a prisoner while he is physically restrained. On the other hand, the Respondent contends that the words "deprivation of . . . personal liberty" in Art 9(1) refer only to unlawful incarceration or detention. The physical restraint of a prisoner while he is being caned does not count as a deprivation of personal liberty because that is not the primary object of caning but is an incidental aspect of its administration.

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14 Before we consider the construction of these words "life or personal liberty", it is helpful to note two key features of Art 9(1) which are apparent on a plain reading. First, it prohibits the State from unlawfully *depriving* an individual of his life or personal liberty, but does not impose any duty on the State to take affirmative measures to facilitate or promote a person's enjoyment of his life and personal liberty. Second, Art 9(1) contemplates that the State may deprive an individual of, or intrude upon, rights that are within the ambit of "life and liberty" but only *in accordance with law*. Thus, the provision seeks to ensure that any such deprivations or intrusions are authorised by and comply with "law". The word "law" includes legislative enactments: Art 2(1) of the Constitution. Therefore, even assuming that a particular right falls within the ambit of the words "life and personal liberty", that does not preclude Parliament from depriving a person of that right by way of a validly enacted law. In order to challenge such an enactment, a litigant must not only show that it deprives or threatens to deprive him of his right to life and personal liberty; he must go further and establish that the enactment is void and/or inconsistent with another law that takes precedence over it.

15 In sum, the object and purpose of Art 9(1) is to ensure that the Government acts in accordance with valid laws when depriving a person of his life or personal liberty. In these circumstances, it might be thought surprising if Art 9(1) protected a person only from unlawful execution, incarceration or detention. Such a parsimonious reading would mean that there is no constitutional safeguard against other forms of criminal punishment that entail improper interference with a person's bodily integrity or personal liberty.

16 In order to determine the correct interpretation of Art 9(1), it is necessary to go back in history and consider how its predecessor provisions were understood. Art 9(1) of the Constitution is a precise reproduction of Art 5(1) of the 1957 Constitution of the Federation of Malaya ("the Malayan Constitution"), which in turn was modelled on Art 21 of the 1950 Constitution of India ("the Indian Constitution"). Art 21 of the Indian Constitution in turn was based on the Due Process Clause in the Fifth and Fourteenth Amendments of the US Constitution, which themselves had their roots in cl 39 of the Magna Carta which King John was forced by his barons to sign in 1215 (Ryan C Williams, "The One and Only Substantive Due Process Clause" (2010) 120 Yale LJ 408 at p 428). Clause 39 stated (English translation provided by the British Library at http://www.bl.uk/magna-carta/articles/magna-carta-english-translation (last accessed on 10 February 2015)):

> No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

17 It is evident that cl 39 of the Magna Carta encompassed more than just the right not to be unlawfully incarcerated; it also protected a person from the unlawful seizure of his property and the unlawful use of force against him. This scope was necessary because the chief grievance that cl 39 sought to redress was King John's practice of "attacking his barons with forces of mercenaries, seizing their persons, their families and property, and otherwise ill-treating them, without first convicting them of some offence in his *curia*" (C H McIlwain, "Due Process of Law in Magna Carta" (1914) 14 Columbia L Rev 27 at p 41).

18 Did the ambit of the protection embodied in cl 39 of the Magna Carta change when it was adapted into the constitutions of other countries? Certainly there is no evidence that the framers of the Due Process Clauses in the US Constitution, by distilling the acts listed in cl 39 of the Magna Carta into the phrase "[the deprivation of] life, liberty, or property", intended to narrow the scope of protection conferred. In this regard, they were probably influenced by the ideas of their contemporary, Sir William Blackstone ("Blackstone"), who wrote in his *Commentaries on the Laws of England*, Book I (Clarendon Press, 1765) at pp 125–134:

> [The rights of the people of England] may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty; and the right of private property: because as there is no other known method of compulsion, or of abridging man's natural free will, but by an infringement or diminution of one or other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense.
>
> I. The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.

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> . . .
>
> 3. Besides those limbs and members that may be necessary to man, in order to defend himself or annoy his enemy, *the rest of his person or body is also entitled by the same natural right to security from the corporal insults of menaces, assaults, beating, and wounding; though such insults amount not to destruction of life or member*.
>
> . . .
>
> II. Next to personal security, the law of England regards, asserts, and preserves the personal liberty of individuals. This personal liberty consists in the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law.
>
> . . .
>
> III. The third absolute right, inherent in every Englishman, is that of property; which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. . . .
>
> [emphasis added]

19 In the case of Art 21 of the Indian Constitution, however, the drafters evinced a clear intention to depart from the US Due Process Clauses in three respects. First, the word "property" was excised and dealt with under a separate article (Art 31). The fear, apparently, was that subjecting the deprivation of property to the requirements of due process might result in the invalidation of beneficial socio-economic legislation (Vijayashri Sripati, "Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back To See Ahead (1950-2000)" (1998) 14 Am U Intl L Rev 413 at p 435). Second, the word "liberty" was qualified by the word "personal". The reason given by the Drafting Committee was that otherwise the word "liberty" might be construed very widely to include the freedoms already covered under Art 19of the Indian Constitution (which deals with, among other things, the freedom of speech and assembly) (H M Seervai, *Constitutional Law of India* vol 1 (Tripathi, 3rd Ed, 1983) at p 692). Third, the phrase "without due process of law" was changed to "except according to procedure established by law" in order to avoid the expansive interpretation given to that phrase by the US Supreme Court, which saw it infused with *substantive* content (*Ibid* at pp 692–693).

20 As for the Malayan Constitution, that was based on the recommendations of the constitutional commission chaired by Lord Reid ("the Reid Commission"). In its report, the Reid Commission dealt with the issue of fundamental rights rather briefly, as it appeared to regard those rights as being clear and settled (*Report of the Federation of Malaya Constitutional Commission 1957* (11 February 1957) at pp 72 and 95):

> 161. A Federal constitution defines and guarantees the rights of the Federation and the States: it is usual and in our opinion right that it should also define and guarantee certain fundamental individual rights which are generally regarded as essential conditions for a free and democratic way of life. The rights which we recommend should be defined and guaranteed are all firmly established now throughout Malaya and it may seem unnecessary to give them special protection in the Constitution. But we have found in certain quarters vague apprehensions about the future. We believe such apprehensions to be unfounded but there can be no objection to guaranteeing these rights subject to limited exceptions in conditions of emergency and we recommend that this should be done.
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> . . .
>
> 162. Our recommendations afford means of redress readily available to any individual, against unlawful infringements of personal liberty in any of its aspects. . . .
>
> . . .
>
> 70. Fundamental rights should be guaranteed in the Constitution and the courts should have the power and duty of enforcing these rights. The rights guaranteed should be freedom from arrest and detention without legal authority, freedom from slavery or enforced labour and should include provisions against banishment and restriction of freedom of movement of citizens. . . .

We note that the Reid Commission referred only to unlawful arrest and detention and did not mention other forms of deprivation of life and liberty. However, in the absence of clear words signifying an intention to depart from

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the traditional understanding of "life and personal liberty", little weight can be placed on this omission. Indeed, the Reid Commission did not refer to the right to life either; yet it is beyond dispute that this right is also protected by Art 5(1) of the Malayan Constitution.

21 Finally, we turn to the adoption of Art 9(1) in our Constitution. Again, there is no evidence of any intention to adopt a narrower meaning of the phrase "life and personal liberty", although the right to property was expressly excluded to avoid litigation over the adequacy of compensation for compulsory land acquisitions (*Singapore Parliamentary Debates, Official Report* (22 December 1965) vol 24 at col 435 (Lee Kuan Yew, Prime Minister)):

> Part II deals with fundamental liberties. Article 5, liberty of the person; Article 6, slavery and enforced labour prohibited; Article 7, protection against retrospective criminal laws and repeated trials; Article 8, equality; Article 9, prohibition of banishment and freedom of movement; Article 10, freedom of speech, assembly and association; Article 11, freedom of religion; Article 12, rights in respect of education. *These fundamental liberties will continue as part of our Constitution.*
>
> . . .
>
> Clause 13 - we have specifically set out to exclude. The reason is quite simple. This Constitution was drawn up by five eminent jurists from five of the major Commonwealth countries for the old Federation of Malaya. It is, in form, modelled upon a similar provision in the Constitution of the Republic of India. Since the passage of that section in the Indian Constitution, amendments have had to be introduced because land reforms were not possible, if the strict tenor of the words were to be complied with. In other words, in clause 2, once we spell out that no law shall provide for the compulsory acquisition or use of property without adequate compensation, we open the door for litigation and ultimately for adjudication by the Court on what is or is not adequate compensation.
>
> [emphasis added]

22 The lineage of Art 9(1) makes the following propositions clear:

(a) to the extent specific rights are dealt with elsewhere, for instance the prohibition of forced slavery and labour in Art 10, or of banishment and curtailment of freedom of movement in Art 13, these would not be included within the ambit of the protection conferred by Art 9;

(b) to the extent potential rights were considered and excluded, for instance the right to property, these also would not be included in Art 9;

(c) beyond this, Art 9 does not protect only against arbitrary execution or incarceration. It also prohibits the unlawful use of force against a person, including by way of amputations, mutilations, assaults, beatings, woundings, etc. Such acts would result in a deprivation of "life", according to Blackstone's definition (see [18] above).

23 There is no evidence in the historical record to indicate that this understanding of "life" had been altered by the time Art 9(1) was adopted into the Constitution of Singapore. For the avoidance of doubt, we do state that the foregoing analysis does not run contrary to the views expressed by this court in relation to the ambit of Art 9, albeit in a different context, in *Lim Meng Suang and another v Attorney General and another appeal* [2015] 1 SLR 26 ("*Lim Meng Suang*") at [44]–[49]. In our judgment, therefore, Art 9(1) is engaged by the execution (or proposed execution) of a sentence of caning on the Appellant, and in order to pass constitutional muster it has to be "in accordance with law". It is to that issue which we now turn.

Does the law of Singapore prohibit torture?

24 The Appellant argues that the prohibition of torture may be imported into domestic law from three sources: (a) international law, (b) the common law, and (c) unenumerated constitutional rights. We will consider each in turn. *International law*

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25 The Appellant rests his argument founded on international law on two bases. First, he submits that the prohibition against torture should be read into the Constitution because it has acquired the status of *jus cogens* in international law. Second, he submits that Singapore's ratification of the Convention on the Rights of Persons with Disabilities ("CRPD"), which prohibits torture in Art 15(1), allows this Court to read such a prohibition into the Constitution.

(1) *Jus cogens*

26 Peremptory norms in international law are norms that are "accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character": Art 53 of the Vienna Convention on the Law of Treaties (23 May 1969), 1155 UNTS 331 ("the VCLT"). A norm need not be accepted and recognised by all the states in the world to achieve peremptory status; it is sufficient that a very large majority do so (Summary records of the plenary meetings and of the meetings of the Committee of the Whole, United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968, *Official Records*, p 472, para 12 (Mr Yasseen); Malcolm N Shaw, *International Law* (Cambridge University Press, 7th Ed, 2014) ("*Shaw*") at p 90).

27 There is strong evidence that the prohibition against torture is now a peremptory norm of international law. The vast majority of states in the world accept that torture is contrary to international law – there are now 155 state parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984), 1465UNTS 85 ("the CAT"). Although Singapore has not ratified the CAT, ministers speaking in Parliament have endorsed the view that torture is wrong and that no one should be subjected to it: *Singapore Parliamentary Debates, Official Report* (29 July 1987) vol 49 at cols 1491–1492 (Prof S Jayakumar, Minister for Home Affairs); *Singapore Parliamentary Debates, Official Report* (21 December 1966) vol 25 at col 1053 (Mr E W Barker, Minister for Law and National Development). Numerous international courts and tribunals have also held that the prohibition of torture is a peremptory norm: see, *eg*, *Prosecutor v Anto Furundžija* IT-95-17/1-T (10 December 1998) ("*Furundžija*") at [153]; *Siderman de Blake v Argentina* 965 F 2d 699 (9th Cir, 1992) at 717; *Regina v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 3)* [2000] 1AC 147 at 198; *Al-Adsani v The United Kingdom* [2001] ECHR 761 at [61]. Significantly, the Respondent does not deny the peremptory nature of the international law prohibition against torture.

28 The issue here is whether peremptory norms of international law are automatically incorporated into the law of Singapore and take precedence over domestic legislation in the event there is an inconsistency between the two. In our judgment, the key to this issue lies in whether a "monist" or "dualist" view of international law and domestic (or municipal) law is adopted. Under the monist school of thought, international law and domestic law form part of a single legal structure, with the various national systems of law being derived by way of delegation from the international legal system. Since international law is part of the same legal order as domestic law, it can be regarded as incorporated into domestic law: *Oppenheim's International Law* vol I (Robert Jennings & Arthur Watts eds) (Longman, 9th Ed, 1992) ("*Oppenheim*") at p 54. In contrast, the dualist view regards international law and domestic law as separate legal systems, so that international law would not form part of domestic law unless expressly adopted by the domestic law of the State: *Oppenheim* at p 53.

29 It is clear from our jurisprudence that Singapore, like most other common law jurisdictions, subscribes to the dualist school of thought. In *Public Prosecutor v Tan Cheng Yew and another appeal* [2013] 1 SLR 1095 ("*Tan Cheng Yew*"), the High Court said (at [56]):

> It is trite law that Singapore follows a dualist position. In short, Singapore's international law obligations do not give rise to individual rights and obligations in the domestic context unless and until transposed into domestic law by legislation, and there is therefore no question of whether Art VII or s 17(a) should "prevail" as they exist on different planes. . . .

In our judgment, this is reflective of the law in Singapore and note that the same view has been taken recently by this court in *Lim Meng Suang* at [188] and also in *ABU v Comptroller of Income Tax* [2015] SGCA 4 at [46]–[47]. It is true that the court in *Tan Cheng Yew* was considering the domestic legal status of an international treaty (a point which we will turn to shortly) and not customary international law ("CIL"). Where CIL is concerned, this

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court held in *Yong Vui Kong (MDP)* that it would not form part of the law of Singapore "until and unless it has been applied as or definitively declared to be part of domestic law by a domestic court" (at [91]). We have also previously noted that any rule of CIL "must be clearly and firmly established before its adoption by the courts": *Nguyen Tuong Van v Public Prosecutor* [2005] 1 SLR(R) 103 ("*Nguyen Tuong Van (CA)*") at [88]. A rule of CIL therefore would not require an act of legislation in order that it be transposed into domestic law but can be recognised and declared to be part of the domestic law by the courts.

30 We pause to observe that there are two competing doctrines regarding the application of CIL in the domestic sphere. The first is the "transformation" doctrine, which states that rules of CIL do not have effect domestically until specifically adopted by the legislature or by domestic courts. The second is the "incorporation" doctrine, which states that rules of CIL are automatically incorporated into domestic law as long as they are not inconsistent with domestic legislation. The difference between the two doctrines was articulated by Lord Denning MR in *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529 at 553 as follows:

> A fundamental question arises for decision. What is the place of international law in our English law? One school of thought holds to the doctrine of incorporation. It says that the rules of international law are incorporated into English law automatically and considered to be part of English law unless they are in conflict with an Act of Parliament. The other school of thought holds to the doctrine of transformation. It says that the rules of international law are not to be considered as part of English law except in so far as they have been already adopted and made part of our law by the decisions of the judges, or by Act of Parliament, or long established custom. . . .

31 In the UK, the incorporation doctrine has become the dominant approach: *Shaw* at p 101. In Australia, however, it appears that the transformation approach holds sway: *Nulyarimma v Thompson* [1999] FCA 1192 at [23]. It appears to us that the transformation doctrine is more logically consistent with a dualist approach to international law: if international law and domestic law occupy separate domains, then it follows that a rule of international law must be expressly adopted by domestic courts before it can become part of domestic law. This court's statements in *Yong Vui Kong (MDP)* and *Nguyen Tuong Van (CA)* (which we have quoted at [29] above) also support the transformation doctrine.

32 But we would not need to settle this issue definitively if the distinction between the two doctrines were immaterial for present purposes on the basis that under either of these doctrines, valid domestic statutes would in any case prevail in the event of any inconsistency with a rule of CIL. The *locus classicus* for this principle is *Chung Chi Cheung v The King* [1939] AC 160, where Lord Atkin stated (at 167–168):

> . . . [S]o far, at any rate, as the Courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. *On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law*, ***so far as it is not inconsistent with rules enacted by statutes*** or finally declared by their tribunals. . . . [emphasis added in italics and bold italics]

This was affirmed by this court in *Nguyen Tuong Van (CA)* at [94].

33 The reason for this is obvious: a court operating in a parliamentary democracy is bound to implement the will of Parliament as embodied in domestic legislation, insofar as such legislation is not incompatible with the constitution. As Lebel J, who delivered the majority decision of the Supreme Court of Canada in *R v Hape* [2007] 2 SCR 292, explained in the context of the adoption (or incorporation) doctrine (at [39]):

> In my view, following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law *in the absence of conflicting legislation*. The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary. *Parliamentary sovereignty dictates that a legislature may violate international law, but that it must do so expressly.* Absent an express derogation, the courts may look to prohibitive rules of customary

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> international law to aid in the interpretation of Canadian law and the development of the common law. [emphasis added]

34 Thus far we have considered the domestic legal status of a normal rule of CIL and the position there is that on any view, it must yield to contrary domestic legislation. But does this analysis change where the rule in question has acquired the status of a peremptory norm? Some academics have indeed suggested that a domestic court may rely on peremptory norms to overturn parliamentary legislation (see, *eg*, CL Lim, "The Constitution and the Reception of Customary International Law: *Nguyen Tuong Van v Public Prosecutor*" [2005] SJLS 218 at p 231; Thio Li-Ann, "Reading Rights Rightly: The UDHR and its Creeping Influence on the Development of Singapore Public Law" [2008] SJLS 264 at pp 289–290; Chen Siyuan, "The Relationship Between International Law and Domestic Law: *Yong Vui Kong v PP* [2010] 3 SLR 489" [2011] 23 SAcLJ 350 at para 9; Yap Po Jen, "Constitutionalising Capital Crimes: Judicial Virtue or 'Originalism' Sin?" [2011] SJLS 281 ("*Constitutionalising Capital Crimes*") at pp 287–288). This is said to rest on the fact that such norms represent fundamental international values from which no state derogation is allowed (*Constitutionalising Capital Crimes* at 288).

35 We respectfully disagree. The fact that peremptory norms admit of no derogation in the international sphere where relations between states are concerned, says nothing about what the position should be in the domestic sphere. Under the dualist theory of international law, there is no reason why the elevation of a particular norm to the highest status under one legal system (international law) should automatically cause it to acquire the same status and take precedence over the laws that exist in another legal system (domestic law). The two systems remain separate and a court operating in the domestic system is obliged to apply domestic legislation in the event of an irreconcilable conflict between it and international law. It may well be that the consequence of this is that a state that has enacted a law that is contrary to an applicable rule of international law is in breach of its international obligations. That alone does not invalidate the domestic legislation in question. In the converse situation, if an *international* tribunal were considering an issue of international law, a state would not be able to rely on its domestic legislation to justify its actions under international law or to excuse a breach of its international obligations. This position is explained in *Oppenheim* as follows (at p 84):

> A national law which is in conflict with international law must in most states nevertheless be applied as law by national courts, which are not competent themselves to adapt the national law so as to meet the requirements of international law. On the international plane such a law will however be inapplicable as against other states, whose rights and obligations are in the first place determined by international law and not by the national law of another state, and which therefore are entitled to disregard that law and its purported consequences to the extent of its conflict with international law. . . .

36 This analysis is buttressed by the nature and purpose of the concept of *jus cogens*, which was to create "a hierarchy of international legal norms" and to prevent states from agreeing by treaty to "override those higher norms which were essential to the life of the international community and were deeply rooted in the conscience of mankind" (Summary records of the plenary meetings and of the meetings of the Committee of the Whole, United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968, *Official Records*, p 296, para 23). No attempt was made during the drafting of the VCLT to extend the notion of *jus cogens* beyond the invalidation of incompatible treaties (Erika de Wet, "The Prohibition of Torture as an International Norm of *Jus Cogens* and its Implications for National and Customary Law" (2004) 15 EJIL 97 at p 99). Thus, the concept at its inception was meant to govern the *international* relations between states, and there was no suggestion that it would also have some special or extraordinary effect at the intra-state level.

37 Confronted with these analytical difficulties, the Appellant submitted that we should depart from the dualist model and adopt the monist view of international law instead. But no justification was advanced for such a radical departure. In any event, monism simply states that international and domestic law form part of the same legal system; it does not by itself answer the pivotal question of *which law should take precedence in the event of a conflict between the two*. Hans Kelsen, a leading proponent of the monist school, considered the issue of primacy to be a matter of ethical or political preference rather than of legal science (Hans Kelsen, *Principles of International Law* (The Lawbook Exchange, 1952) at pp 446–447). Thus, an acceptance of monism does not necessarily imply the supremacy of international law over domestic law.

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38 In the present case, assuming for the sake of argument that caning does amount to torture, the fact remains that it is expressly authorised (and in some cases *mandated*) by statute. The courts are bound to implement laws that have been validly passed by Parliament unless these are inconsistent with the Constitution. Thus, in order for the international law prohibition of torture to take precedence over statute law, the Appellant must not only show that it has been incorporated into domestic law but also that it has been given *constitutional* force. However, the Appellant could not provide any authority for the proposition that a peremptory norm of international law would automatically acquire the status of a constitutional norm when transposed into domestic law. Indeed, in our judgment, such a proposition would be untenable as it would mean that the content of our Constitution could be dictated by the views of other states, regardless of what the people of Singapore, expressing their will through their elected representatives, think (as we have noted earlier at [26], a peremptory norm may crystallise even if a minority of states do not accept it). In our judgment, therefore, even where a CIL rule has acquired the status of *jus cogens*, it cannot override a domestic statute whose meaning and effect is clear.

39 That said, for reasons that we explain later (see [90] below), we find that caning in Singapore does not constitute torture. Consequently, in the present case, there is no inconsistency in any event between the peremptory norm against torture and the applicable domestic legislation.

(2) The CRPD

40 Art 15 of the CRPD states:

> **Article 15 - Freedom from torture or cruel, inhuman or degrading treatment or punishment**
>
> 1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation.
>
> 2. States Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.

41 The CRPD was ratified by Singapore on 18 July 2013, and no reservations or declarations were made in relation to Art 15. The Appellant therefore contends that the prohibition against torture should be read into the Constitution because it has received express state consent.

42 In reply, the Respondent argues that treaties entered into by Singapore do not have domestic effect until Parliament enacts legislation to implement them. He further contends that Art 15 must be read in the light of the object and purpose of the CRPD, which is to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity" (Art 1). Therefore, the prohibition in Art 15 must be limited to persons with disabilities only.

43 We disagree with the Respondent's interpretation of Art 15. The phrase "No one" in Art 15 stands in stark contrast with most of the other articles of the CRPD, which make express reference to "persons with disabilities". Indeed, this was a deliberate decision as can be seen from the drafting history of Art 15 which shows that when the article was first proposed, it had in fact stated that "No person with disabilities shall be subjected to torture. . ." (*Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities on its fifth session* (23 February 2005), UN Doc A/AC.265/2005/2 at para 36):

> 36. Several delegations pointed out that draft article 11 lacked mention of the important and absolute prohibition of the use of torture, as contained in other human rights treaties. Some delegations suggested that this omission could be rectified by the inclusion of a new paragraph 1, borrowing from the first sentence of article 7 of the International Covenant on Civil and Political Rights, which reads: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". *There was general agreement to that proposal, with the use of the phrase "no person with disabilities"*. It was also agreed to add the first phrase from paragraph 2 of the Working Group's text, so that the paragraph accurately mirrored article 7 of the Covenant. New paragraph 1 of draft article 11 currently reads:

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> 1. *No person with disabilities* shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, States parties shall prohibit, and protect persons with disabilities from, medical or scientific experimentation without the free and informed consent of the person concerned.
>
> [emphasis added]

44 However, the phrase "No person with disabilities" was subsequently changed to "No one" following Uruguay's proposal that the prohibition of torture and cruel, inhuman or degrading treatment or punishment (or "inhuman punishment" for short) should apply to everyone (*Article 15 – Freedom from torture or cruel, inhuman or degrading treatment or punishment, Comments, proposals and amendments submitted electronically*, Seventh Session (Uruguay)):

> In this important article *we want to have a general prohibition to any kind of torture or cruel, inhuman or degrading treatment or punishment for everybody without distinction* and at the same time, taking into account the specific objective of this Convention, to compromise States Parties to take all effective measures to make sure that persons with disabilities are not going to be subjected to this kind of treatment. [emphasis added]

This was accepted and it is therefore clear that Art 15 was intended to apply to all persons, and not just persons with disabilities.

45 That said, we have already pointed out that Singapore is a dualist jurisdiction (see [29] above). Where a treaty is concerned (and assuming the treaty does not merely codify CIL), specific legislation must be enacted by Parliament to implement the treaty before it would have the force of law within Singapore. This is so because under the Westminster system of government, the authority to sign treaties rests with the Executive, which may commit the State to treaties without obtaining prior legislative approval. If treaties were self-executing, this would allow the Executive to usurp the legislative power of Parliament. As Quentin Loh J noted in *The "Sahand" and other applications* [2011] 2 SLR 1093 at [33]:

> . . . By virtue of Art 38 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint), the legislative power of Singapore is vested in the Legislature. It would be contrary to Art 38 to hold that treaties concluded by the Executive on behalf of Singapore are directly incorporated into Singapore law, because this would, in effect, confer upon the Executive the power to legislate through its power to make treaties. Accordingly, in order for a treaty to be implemented in Singapore law, its provisions must be enacted by the Legislature or by the Executive pursuant to authority delegated by the Legislature. In so far as a treaty is not implemented by primary or subsidiary legislation, it does not create independent rights, obligations, powers, or duties. . . .

46 The position in Singapore is consistent with that in the UK. In *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, Lord Templeman said (at 476–477):

> A treaty is a contract between the governments of two or more sovereign states. International law regulates the relations between sovereign states and determines the validity, the interpretation and the enforcement of treaties. A treaty to which Her Majesty's Government is a party does not alter the laws of the United Kingdom. A treaty may be incorporated into and alter the laws of the United Kingdom by means of legislation. Except to the extent that a treaty becomes incorporated into the laws of the United Kingdom by statute, the courts of the United Kingdom have no power to enforce treaty rights and obligations at the behest of a sovereign government or at the behest of a private individual.

47 Similarly, in *A (FC) and others (FC) v Secretary of State for the Home Department* [2006] 2 AC 221, Lord Bingham observed that "a treaty, even if ratified by the United Kingdom, has no binding force in the domestic law of this country unless it is given effect by statute or expresses principles of customary international law" (at [27]).

48 To advance his argument, the Appellant referred to the High Court decision of *Public Prosecutor v Nguyen Tuong Van* [2004] 2 SLR(R) 328, which he submitted is authority for the proposition that treaty law possesses greater force than CIL for the purposes of domestic incorporation. With respect, this is an erroneous reading of what was said in that case. There, Kan Ting Chiu J was *not* comparing treaty law with CIL but to a statement signed by various

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Chief Justices, including the Chief Justice of Singapore, at an international conference. Kan J simply observed that the statement did not have the force of a treaty or convention: (at [99]–[101]):

> 99 The statement entitled "Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region" was signed by the participants at the 6th Conference of Chief Justices of Asia and the Pacific, including the Chief Justice of Singapore, on 19 August 1995.
>
> 100 Defence counsel submitted:
>
> > The Beijing Statement adds great force to our submission and underlines the importance of the judiciary in death penalty cases.
> >
> > In the Statement, the Judiciary is described as an "institution of the highest value in every society". The statement also declared that the Judiciary is indispensable to the implementation of rights under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. One of the stated objectives and functions of the Judiciary was to promote, within the proper limits of the judicial function, the observance and attainment of human rights. Importantly, it was also stated that the Judiciary must have jurisdiction over all issues of a justiciable nature and exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
> >
> > It is submitted that the imposition of sentence is fundamentally justiciable in its nature and part of the criminal trial process and thus requires the sentence to be passed by an independent and impartial tribunal offering the accused "the equal protection of the law.
>
> 101 *I have to say that I read nothing in the Statement that relates to death sentences or mandatory death sentences. Counsel did not explain how the Statement, which does not have the force of a treaty or a convention, assists the accused's argument that mandatory death sentences are illegal.*
>
> [emphasis added]

49 The Appellant also referred to a blog post by Jaclyn Neo titled "The Status of International Human Rights Conventions under Singapore Domestic Law" (http://singaporepubliclaw.com/2013/11/26/the-status-of-international-human-rights-conventions-under-singapore-domestic-law/ (last accessed on 10 February 2015)), in which she advocated the "interpretive incorporation" of treaty law:

> A strong argument could be made for the Singapore Courts to pursue interpretive incorporation because states freely elect to enter into a treaty/convention. Common law judges in other dualist states have developed interpretive techniques to indirectly implement treaty provisions where appropriate. This entails judges referring to relevant international law when interpreting statutes or constitutional provisions, and treating international law as a relevant and legitimate source of law. Melissa Waters observes in this context that judges in many dualist countries are increasingly implementing and "entrenching their nations' international treaty obligations into domestic law, thus becoming powerful domestic enforcers of international human rights law." She calls this trend "creeping monism."
>
> Interpretive incorporation involves a range of interpretive methods. Waters identifies five of them. The first uses human rights treaties to further affirm a particular interpretation of domestic law. A second entails the courts construing ambiguous statutes in such a way that would not violate the country's human rights obligations. The third method involves updating the common law consistently with human rights standards. The fourth is applied to constitutional or bill of rights cases; it involves using international human rights treaties as persuasive sources of constitutional interpretation. Human rights treaties provide context for judicial interpretation. The fifth method also concerns the constitutional bill of rights but treats international human rights treaties as a binding normative framework.

50 Insofar as the exercise of "interpretive incorporation" entails the interpretation of domestic laws to be consistent with Singapore's international obligations as far as possible, this has in fact been accepted by this court (*Yong Vui Kong (MDP)* at [59]). But there are limits to interpretation; neither CIL nor treaty law can trump an inconsistent domestic law that is clear and unambiguous in its terms and pretending that the court is engaged in an interpretative

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exercise does not change this. As Diplock LJ said in *Salomon v Commissioners of Customs & Excise* [1967] 2QB 116 at 143:

> If the terms of the legislation are clear and unambiguous, they must be given effect to, whether or not they carry out Her Majesty's treaty obligations, for the sovereign power of the Queen in Parliament extends to breaking treaties . . . , and any remedy for such a breach of an international obligation lies in a forum other than Her Majesty's own courts. But if the terms of the legislation are not clear but are reasonably capable of more than one meaning, the treaty itself becomes relevant, for there is a prima facie presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations; and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred.

51 This principle was later reaffirmed by the House of Lords in *Regina v Secretary of State for the Home Department, Ex parte Brind and others* [1991] 1 AC 696 at 760, where Lord Ackner noted: "[I]t is a constitutional principle that if Parliament has legislated and the words of the statute are clear, the statute must be applied even if its application is in breach of international law."

52 In the present case, s 33B(1)(*a*) of the amended MDA (which is the material provision here) is clear and unambiguous. It states:

> **Discretion of court not to impose sentence of death in certain circumstances**
>
> **33B.**—(1) Where a person commits or attempts to commit an offence under section 5(1) or 7, being an offence punishable with death under the sixth column of the Second Schedule, and he is convicted thereof, the court —
>
> (*a*) may, if the person satisfies the requirements of subsection (2), instead of imposing the death penalty, sentence the person to imprisonment for life and, if the person is sentenced to life imprisonment, *he shall also be sentenced to caning of not less than 15 strokes*; or
>
> . . .
>
> [emphasis added]

There is thus no room for this Court to "interpret" s 33B(1)(*a*) in a manner that would allow the Appellant to escape a sentence of caning.

53 The sum of our reasoning thus far is that international law does not provide assistance to the Appellant. Even if we accept that international law contains a prohibition on torture whether under CIL or treaty law; even if that prohibition has *jus cogens* status; and even if we operate on the premise that caning amounts to torture, the simple reality is that Singapore's dualist framework means that a domestic law *mandating* caning cannot be impugned *by reason alone* of its incompatibility with international law.

The common law

54 Unable to draw support for his position from international law, the Appellant's next line of argument places reliance on the common law prohibition on torture. He cites *A and others v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221 ("*A v Home Department (No 2)*), which was a decision of the House of Lords on whether evidence procured through torture by a foreign state (without the complicity of British authorities) was admissible in court. The House of Lords held that it was not. In the course of their speeches, a number of the law lords observed that torture is prohibited by the common law. Lord Nicholls of Birkenhead noted (at [64]):

> My Lords, torture is not acceptable. This is a bedrock moral principle in this country. For centuries the common law has set its face against torture. In early times this did not prevent the use of torture under warrants issued by the King or his Council. But by the middle of the 17th century this practice had ceased. In 1628 John Felton assassinated the Duke of Buckingham. *He was pressed to reveal the names of his accomplices.* The King's Council debated whether "by the law of the land they could justify the putting him to the rack". The King, Charles I, said that before this was done "let the advice of the judges be had therein, whether it be legal or no". The King said that if it might

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> not be done by law "he would not use his prerogative in this point". So the judges were consulted. They assembled at Serjeants' Inn in Fleet Street and agreed unanimously that Felton "ought not by the law to be tortured by the rack, for no such punishment is known or allowed by our law": *Rushworth, Historical Collections* (1721) vol 1, pp 638–639.
>
> [emphasis added]

55 In a similar vein, Lord Rodger of Earlsferry said (at [129]):

> . . . The history of the matter shows that torture has been rejected by English common law for many centuries. In Scotland, torture was used until the end of the seventeenth century. *For the most part, when used at all, torture seems to have been employed to extract confessions from political conspirators who might be expected to be more highly motivated to resist ordinary methods of interrogation.* Such confessions would often contain damning information about other members of the conspiracy. Eventually, section 5 of the Treason Act 1708 declared that no person accused of any crime can be put to torture. The provision is directed at those accused of crime, but this does not mean that Parliament would have been happy for mere witnesses to crime to be tortured. On the contrary, it is an example of the phenomenon, well known in the history of the law from ancient Rome onwards, of a legislature not bothering with what is obvious and dealing only with the immediate practical problem. By 1708, it went without saying that you did not torture witnesses: now Parliament was making it clear that you were not to torture suspects either. *So the prohibition on the torture of both witnesses and suspects is deeply ingrained in our system.* The corollary of the prohibition is that any statements obtained by officials torturing witnesses or suspects are inadmissible. . . . [emphasis added]

56 The Appellant argues that the common law prohibition of torture was imported into domestic law *via* Art 162 of the Constitution, which provides that:

> **Existing laws**
>
> **162.** Subject to this Article, all existing laws shall continue in force on and after the commencement of this Constitution and all laws which have not been brought into force by the date of the commencement of this Constitution may, subject as aforesaid, be brought into force on or after its commencement, but all such laws shall, subject to this Article, be construed as from the commencement of this Constitution with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Constitution.

57 In *Review Publishing Co Ltd and another v Lee Hsien Loong and another appeal* [2010] 1 SLR 52, this Court held (at [250]) that Art 105(1) of the Constitution of the State of Singapore set out in Schedule 3 of the Sabah, Sarawak and Singapore (State Constitutions) Order in Council 1963 (GN No S 1 of 1963), which is the predecessor of Art 162, was a "law-enacting provision". Accordingly, the Appellant contends that Parliament had expressly enacted the common law prohibition of torture.

58 We agree that there is a common law prohibition against torture, and that this prohibition has been imported into domestic law pursuant to (what is now) Art 162 of the Constitution. But there are two reasons why this proposition does not take the Appellant very far.

59 First, the common law prohibition of torture referred to by the House of Lords in *A v Home Department (No 2)* has a narrow and specific compass. As the extracts reproduced at [54]–[55] above show, the Law Lords were concerned with the practice of torturing suspects or witnesses for the purpose of extracting evidence and confessions. But this prohibition, which has an ancient pedigree, did not cover the treatment of criminals after they were found guilty of their crimes. Thus, in his historical survey of the use of torture in England, Jardine noted that the last recorded instance of the infliction of torture in England occurred in *1640*, where a royal warrant was issued authorising the Lieutenant of the Tower of London to take one John Archer to the rack, and "if upon sight of the rack he does not make a clear answer, then they are to cause him to be racked as in their discretions shall be thought fit" (David Jardine, A Reading on the Use of Torture in the Criminal Law of England (Baldwin and Cradock, 1837) at p 57). Yet excruciating methods of execution such as hanging, drawing and quartering persisted in England till the *19th century*. This point was starkly, even if acerbically, made in A Lawrence Lowell, "The Judicial Use of Torture" (1897) 11 Harvard L Rev 220 as follows (at p 290):

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> The illegality of torture in England has been a subject of boasting among Englishmen for more than five centuries, and it has been commonly attributed either to a famous clause in Magna Charta, or to a peculiar degree of humanity in the race. . . . The Great Charter has come to be popularly regarded as a kind of prophetic document, which included in its protection all the rights of Englishmen, whether known in the reign of King John or not; but the suggestion that it was intended to forbid the use of torture, or directly prevented its introduction, will hardly bear the test of historical investigation. *Nor, in the view of the barbarous methods of execution in England, can the absence of torture be ascribed to any peculiarly humane feeling. No one can read the sentence of a man for treason in the last century, with its description of the process of hanging, drawing, and quartering, or remember that the punishment of a woman for the same offence was burning alive, without recognizing that there was no great tenderness for criminals.*
>
> . . . [emphasis added]

60 It may also be noted that judicial whipping as a general sentence was only abolished in England in 1948 (by s 2 of the Criminal Justice Act 1948 (c 58) (UK)), and prison floggings in 1967 (by s 65 of the Criminal Justice Act 1967 (c 80) (UK)). It is therefore clear that the common law prohibition of torture does not prohibit caning or any other form of corporal punishment.

61 Second, even if we assumed for the sake of argument that caning falls within the scope of the common law prohibition, which was legislatively enacted into Singapore law in 1963, there still remains the question as to whether a general prohibition of torture can prevail over s 33B(1)(*a*) of the amended MDA. The Appellant suggests that the prohibition of torture should be given *constitutional* force as a fundamental rule of natural justice, so that it would take precedence over normal legislation. This argument drew its inspiration from the pronouncement of the Privy Council in *Ong Ah Chuan v PP* [1979–1980] SLR(R) 710 ("*Ong Ah Chuan*"), (at [26]) that:

> In a Constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to "law" in such contexts as "in accordance with law", "equality before the law", "protection of the law" and the like, in their Lordships' view, refer 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. It would have been taken for granted by the makers of the Constitution that the "law" to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules. . . .

62 It is sometimes suggested that the fundamental rules of natural justice contain *substantive* legal rights. This would be a mistake. As one commentator puts it (Frederick F. Shauer, "*English Natural Justice and American Due Process: An Analytical Comparison*" (1976) 18 William & Mary L Rev 47 at p 48):

> The basis of procedural protection in the English system is the concept of natural justice. Natural justice is not, despite its name, a general natural law concept; the name is a term of art that denotes specific procedural rights in the English system. The first, *audi alteram partem*, relates to the right to be heard; the second, *nemo debet esse judex in propria sua causa* or *nemo judex in re sua*, establishes the right to an unbiased tribunal. . . .

63 To similar effect, the Privy Council in *Haw Tua Tau and others v Public Prosecutor* [1981–1982] SLR(R) 133, noted (at [9]):

> It would be imprudent of their Lordships to attempt to make a comprehensive list of what constitutes fundamental rules of natural justice applicable to *procedure* for determining the guilt of a person charged with a criminal offence. . . . [emphasis added]

64 The fundamental rules of natural justice in the common law are therefore *procedural* rights aimed at securing a fair trial. Torture in its *narrow* sense (where it is used to extract evidence to be used as proof in judicial proceedings) would violate the fundamental rules of natural justice; to convict a person based on evidence procured by torture strikes at the very heart of a fair trial. But the fundamental rules of natural justice have nothing to say about the punishment of criminals after they have been convicted pursuant to a fair trial. In our judgment, therefore, even assuming the common law prohibition of torture extends to caning in the context of a punishment to be imposed

on a convicted person after trial, it would not have constitutional force because this would not come within the ambit of fundamental rules of natural justice in the sense in which it was referred to in *Ong Ah Chuan*.

65 Hence, that aspect of such a prohibition would be entitled to no greater weight than any other law. To resolve an inconsistency between such a prohibition and statutory provisions that mandate caning, it would be necessary to apply the principles of statutory interpretation, such as the principle that a later law abrogates earlier contrary laws (*leges posteriores priores contrarias abrogant*) and the principle that a general provision does not derogate from a special one (*generalia specialibus non derogant*) (Oliver Jones, *Bennion on Statutory Interpretation* (LexisNexis, 6th Ed, 2013) at pp 279–282). Clearly, s 33B of the amended MDA, which was enacted later and which governs the specific situation before us, would override any prior enactment of the general common law prohibition of torture insofar as caning is concerned.

66 The distinction between the fairly narrow concept of torture prohibited by the common law (as described at [59] above) and the broader meaning that the term ordinarily bears also addresses a passage in *Yong Vui Kong (MDP)* which the Appellant placed repeated emphasis on. In that case, this court held that the Government's decision to reject a proposed constitutional provision prohibiting inhuman punishment (among other things) meant that such a prohibition could not be read into the Constitution (at [74]). But this Court went on to observe (at [75]):

> 75 This 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). Currently, no domestic legislation permits torture. In any case, torture is not the issue before us. . . .

67 In our judgment, this passage when read in context cannot be read as an implicit endorsement of the view that the broad international law norm against torture has constitutional force in Singapore. It is correct to say that the first of these three sentences suggests that any piece of legislation permitting torture would not be "law" within the meaning of Art 9. But it should not be assumed that the Court there was referring to torture in the broad sense in which it is commonly used. The more plausible view is that the court was referring to the narrower common law prohibition of torture as defined in [59] above (which, as we have held, constitutes a fundamental rule of natural justice that cannot be abrogated by ordinary legislation). In any event, regardless of which definition of torture was being applied, the court in that case clearly did not think that caning was torture because it was aware that caning is permitted under Singapore law (see *Yong Vui Kong (MDP)* at [69]) and it then went on to say that currently, no domestic legislation permits torture. It therefore follows that the above passage in *Yong Vui Kong (MDP)* is of no assistance to the Appellant insofar as caning is concerned.

An unenumerated constitutional right

68 Having failed on both the first two grounds, the Appellant then submitted that a prohibition against torture and inhuman punishment should be read into the Constitution because such practices violate "first principles of natural law". In this regard, the Appellant placed reliance on the High Court decision of *Mohammad Faizal bin Sabtu and another v Public Prosecutor and another matter* [2012] 4 SLR 947 ("*Mohammad Faizal*"), which he submitted stands for the proposition that certain unenumerated rights might exist in the Constitution. In *Mohammad Faizal*, Chan Sek Keong CJ (sitting in the High Court) held that the principle of separation of powers is part of the "basic structure" of the Constitution (at [11]):

> The Stated Question must be analysed against the backdrop of Singapore's constitutional framework. The Singapore Constitution is based on the Westminster model of constitutional government ("the Westminster model"), under which the sovereign power of the State is distributed among three organs of state, *viz*, the Legislature, the Executive and the Judiciary. In the UK (where the Westminster model originated), the Legislature is the UK parliament (comprising the House of Commons and the House of Lords), the Executive is the UK government and the Judiciary consists of the UK judges. Likewise, under the Singapore Constitution, the sovereign power of Singapore is shared among the same trinity of constitutional organs, *viz*, the Legislature (comprising the President of Singapore and the Singapore parliament), the Executive (the Singapore government) and the Judiciary (the judges of the Supreme Court and the Subordinate Courts). *The principle of separation of powers, whether conceived as a sharing or a division of sovereign power between these three*

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> *organs of state, is therefore part of the basic structure of the Singapore Constitution.* . . . [emphasis added]

69 The basic structure doctrine postulates that there are certain fundamental features of a constitution that cannot be amended by Parliament. It derives from the decision of the Supreme Court of India in *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461 ("*Kesavananda*"), where the court held that "every provision of the Constitution can be amended provided in the result the basic foundation and structure of the Constitution remains the same" (at [316]). An example of a feature that is part of the basic structure of the Constitution is the separation of powers (as was held in *Mohammad Faizal*). Another example is possibly the right to vote. This right cannot be found in the Constitution; indeed, like the prohibition against inhuman punishment it was one of the rights which the constitutional commission chaired by Wee Chong Jin CJ recommended to be included in the Constitution (*Report of the Constitutional Commission 1966* (27 August 1966) at para 43), but which ultimately was not adopted by the Government. Nonetheless, in relation to the right to vote, the Government acknowledged in 2001 that this is part of the basic structure of the Constitution (*Singapore Parliamentary Debates, Official Report* (16 May 2001) vol 73 at col 1726 (Wong Kan Seng, Minister for Home Affairs and Leader of the House)):

> *While the Constitution does not contain an expressed declaration of the right to vote, I have been advised by the Attorney General, even before today, that the right to vote at parliamentary and presidential elections* ***is implied within the structure of our Constitution***. We have a parliamentary form of government. The Constitution provides for regular general elections to make up Parliament and establishes representative democracy in Singapore. So the right to vote is fundamental to a representative democracy, which we are, and that is why we have the Parliamentary Elections Act to give effect to this right. [emphasis added in italics and bold italics]

70 Likewise, in *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1, we located the philosophical underpinnings of the right to vote in the Westminster model of government set up by the Constitution (at [79]):

> At this juncture, it is vital to remind ourselves that the form of government of the Republic of Singapore as reflected in the Constitution is the Westminster model of government, with the party commanding the majority support in Parliament having the mandate to form the government. The authority of the government emanates from the people. Each Member represents the people of the constituency who voted him into Parliament. The voters of a constituency are entitled to have a Member representing and speaking for them in Parliament. The Member is not just the mouthpiece but the voice of the people of the constituency. . . .

71 These examples show that in order for a feature to be considered part of the basic structure of the Constitution, it must be something fundamental and essential to the political system that is established thereunder. As observed in Calvin Liang and Sarah Shi, "The Constitution of Our Constitution, A Vindication of the Basic Structure Doctrine" *Singapore Law Gazette* (August 2014) 12 at paras 38 and 46:

> The basic structure is intrinsic to, and arises from, the very nature of a constitution and not legislative or even judicial fiat. At its uncontentious minimum, a constitution sets out how political power is organised and divided between the organs of State in a particular society. In other words, the constitution is a power-defining and, therefore, power-limiting tool. . . .
>
> . . .
>
> . . . the basic structure is a limited doctrine. It is arguable that fundamental rights are not a necessary part of the basic structure of a constitution. This is because fundamental rights relate to rights and liberties of citizens and do not define the limits to the powers of and checks on each organ of the State. What is not fundamental to a constitution cannot form part of its basic structure. . . .

72 We have outlined the contours of the basic structure doctrine above only to show that it is inapplicable in the present case: clearly, there is nothing inherent in the system of government set up by our Constitution which requires a finding that the prohibition against torture forms part of its basic structure. However, this also means that it is unnecessary in this case for us to reach the question of whether such a doctrine as was set down in *Kesavananda* is or is not a part of our law, nor, if it were, what its extent or effect might be. *Kesavananda* holds that the basic structure of a constitution may not be amended even by a validly passed constitutional amendment. In *Teo Soh Lung*

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v Minister for Home Affairs and others [1989] 1 SLR(R) 461 (at [47]), F A Chua J held that the basic structure doctrine does not apply in Singapore; on appeal, this Court considered it unnecessary to decide the issue definitively (*Teo Soh Lung v Minister for Home Affairs and others* [1990] 1 SLR(R) 347 at [44]). Similarly, since we are not considering the validity of a constitutional amendment, this issue does not arise for our decision here and we therefore express no view on this.

73 Moving away from the basic structure doctrine, the Appellant has not supplied any other legal basis to justify reading a prohibition against torture into the Constitution aside from a general invocation of "natural law". In our judgment, where a right cannot be found in the Constitution (whether expressly or by necessary implication), *the courts do not have the power to create such a right out of whole cloth simply because they consider it to be desirable* or perhaps to put in terms that might *appear* more principled, to be part of natural law. We note that even among natural law theorists, there is no consensus on what natural law requires of judges. Some have contended that natural law in fact requires judges to respect the boundaries of the authority conferred upon them by the Constitution. As argued in Robert P George, "The Natural Law Due Process Philosophy" (2001) 69 Fordham L Rev 2301 at pp 2303–2304:

> Indeed, someone who accepts "natural law" in Finnis' sense and mine can without logical inconsistency reject what Black denounced as "the natural law due process philosophy" of judging – that is, the idea that judges are empowered as a matter of natural law, to invalidate legislation as "unconstitutional" even where that legislation does not violate any norm fairly discoverable in the constitutional text, or, I would add, its structure, logic, or original understanding, on the basis of the judges' personal – and, in that sense, one might say (without suggesting anything about their metaethical status) "subjective" – beliefs about natural law and natural rights.
>
> As I argued in my paper, the issue of the scope and limits of judicial power is not resolved by natural law; it is settled, rather, by the positive law of the Constitution. And, entirely compatibly with the requirements of natural law, it may reasonably be settled differently, by way of different constitutional arrangements, in different societies. There is nothing in principle unjust or otherwise immoral about a constitution that vests a significant measure of law-making authority in courts as a check on legislative power; but there is nothing unjust or otherwise immoral about a constitution that does not confer upon courts even a limited power of judicial review. *Among the things natural law requires of judges and other officials of a basically just regime is that they respect the limits of their own authority under the Constitution, whatever those limits are, and avoid usurping authority settled by the Constitution on others.*
>
> [emphasis added]

74 Another academic has pointed out that natural law and natural rights were not originally understood (in the American context) as a source of constitutional rights. To the contrary, it was used to explain why individuals gave up some of their natural rights to civil government, with written constitutions serving as a record of which rights were retained (Phillip A Hamburger, "Natural Rights, Natural Law, and American Constitutions" (1993) 102 Yale LJ 907 at p 956):

> . . . Contrary to the assumptions of many modern scholars, natural rights and natural law typically were considered compatible with the notion of a written constitution. Americans usually assumed that the people sacrificed some of their natural rights – that is, some of their natural freedom – in order to preserve the remainder, and these Americans understood written constitutions to be documents in which the extent of the sacrifice was recorded. *Natural law was not a residual source of constitutional rights but rather was the reasoning that implied the necessity of sacrificing natural liberty to government in a written constitution. . . .* [emphasis added]

75 Further, reading unenumerated rights into the Constitution would entail judges sitting as a super-legislature and enacting their personal views of what is just and desirable into law, which is not only undemocratic but also antithetical to the rule of law. In our judgment therefore, there is no basis for reading rights into the Constitution on the basis of natural law, and we reject the Appellant's arguments under this rubric.

Does caning constitute torture?

76 This is sufficient to dispose of the appeal since we have held that caning is not covered by the common law conception of torture (see [59] above), and further, that even if caning does constitute torture under international

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law, domestic statutes would take precedence over any international law norms in the event of any inconsistency between the two (see [38] above). As caning is specifically mandated by statute and there is nothing to invalidate it, the challenge under Art 9(1) must fail. However, the parties have made extensive submissions on whether caning falls within the international law definition of torture and we will therefore turn to consider this issue.

77 The Appellant argues that we should refer to the Geneva Conventions Act (Cap 117, 1985 Rev Ed) ("the GCA") as it is the only domestic statute that includes a definition of torture. Article 87 of the Third Schedule to the GCA (which enacts the Third Geneva Convention) states:

> Prisoners of war may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts.
>
> When fixing the penalty, the courts or authorities of the Detaining Power shall take into consideration, to the widest extent possible, the fact that the accused, not being a national of the Detaining Power, is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will. The said courts or authorities shall be at liberty to reduce the penalty provided for the violation of which the prisoner of war is accused, and shall therefore not be bound to apply the minimum penalty prescribed.
>
> *Collective punishment for individual acts*, ***corporal punishment***, *imprisonment in premises without daylight and, in general, any form of torture or cruelty, are forbidden.*
>
> No prisoner of war may be deprived of his rank by the Detaining Power, or prevented from wearing his badges.
>
> [emphasis added in italics and bold italics]

The Appellant argues that the italicised portion of the foregoing provision indicates that corporal punishment is a form of torture.

78 We find no force in this argument at all. In the first place, we do not read Art 87 as saying that the specifically prohibited acts constitute instances of torture. Examples such as imprisonment in premises without daylight appear to fall well short of that threshold. In our judgment, a more plausible interpretation is that those acts were mentioned precisely because the drafters wished to make it clear that they were prohibited even though they might not necessarily rise to the level of torture. More importantly, the Third Geneva Convention is concerned with the treatment of prisoners of war and its provisions were aimed at curbing abuses commonly experienced by them. It does not purport to lay down a definition of torture that is of general application to everyone. As noted in Jean Pictet, *Commentary on the Geneva Conventions of 12 August 1949* vol III (International Committee of the Red Cross, 1960) at pp 432, the Third Geneva Convention might sometimes result in prisoners of war being accorded better treatment than members of the Detaining Power's armed forces:

> The prohibition of corporal punishment sometimes places prisoners of war in a privileged position as compared with members of the armed forces of the Detaining Power. It has been justified since 1929, however, because of the abuses committed during the First World War.

79 Next, the Appellant referred to the definition of torture in Art 1 of the CAT, which states as follows:

> For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

It has been held that this definition of torture reflects the definition of torture in CIL as well (*Furundžija* at [160]–[161]).

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80 There are two important points to note about the CAT's definition of torture. First, it excludes pain and suffering arising only from "lawful sanctions". Might it be argued that caning is a lawful sanction that falls within this exception? On the one hand, it appears that the phrase "lawful sanctions" was deliberately left vague when the CAT was drafted so as to bring more states on board. Fuzziness might be thought to have its virtues. When states were invited to comment on the draft convention, many of them noted that it was a compromise text that was not fully satisfactory. A number of states (including Italy, the Netherlands, the UK and the US) commented specifically on the phrase "lawful sanctions", saying that a sanction must be lawful under both national and international law to fall within this exception (*Report of the Secretary-General*, Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, 2 October 1984, UN Doc A/39/499 at pp 11, 13, 19and 21). In a 1995 report, the Special Rapporteur to the UN Commission on Human Rights addressed this issue and opined that the lawful sanctions exclusion "must necessarily refer to those sanctions that constitute practices widely accepted as legitimate by the international community, such as deprivation of liberty through imprisonment" (Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in particular Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *Report of the Special Rapporteur*, Nigel S Rodley, submitted pursuant to Commission on Human Rights resolution 1995/37B, 10 January 1997, UN Doc E/CN.4/1997/7 at para 8). Likewise, in a meeting to discuss a report submitted by Kuwait under Art 19of the CAT, the Chairman noted that for a sanction to be lawful under Art 1, it must be lawful not only under domestic law "but also in terms of basic internationally recognized norms" (Committee against Torture, 20th Session, *Summary Record of the Public Part of the 334th Meeting*, Consideration of Reports Submitted by States Parties under Article 19 of the Convention, 19 October 1998, UN Doc CAT/C/SR.334 at para 18).

81 On the other hand, this view of the "lawful sanctions" exceptions would seem to rob the exception of any meaningful content. The exception was meant to take certain types of conduct outside the ambit of the prohibition on torture. In other words, conduct causing pain and suffering that would or might otherwise be caught by the prohibition of torture would not be caught by it if the pain and suffering was inherent in or incidental to lawful sanctions. This would be workable if the lawfulness of such sanctions were to be judged as a matter of domestic law only. Once this was extended to international law however, the exception would become meaningless because in such a situation:

(a) either the conduct in question does not on any view constitute torture, in which case there would be no need or occasion to invoke the "lawful sanctions" exception at all since the conduct would not be caught by the prohibition to begin with; or

(b) the conduct in question does in principle fall within the definition of torture but in such a case, it would seem that the exception cannot then be invoked at all because it would be considered unlawful under international law.

82 If this analysis is right, then the fuzziness would appear to have been calculated and the "lawful sanctions" exception was devised as a meaningless gesture made to secure the necessary support. We are doubtful this can be right but, given the views to the contrary that we have referred to at [80] above, we prefer not to place reliance on the "lawful sanctions" exception in deciding whether caning constitutes torture.

83 The second point to note in relation to the definition of torture in the CAT is that international law draws a distinction between torture and inhuman punishment. This distinction is enunciated in Art 1 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 9 December 1975, A/RES/3452(XXX), which states that torture constitutes "an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment". The same distinction is made in Art 16 of the CAT, which refers to "acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in [Art 1]". In *Ireland v The United Kingdom* [1978] ECHR 1 at [167], the European Court of Human Rights ("ECHR") explained that the distinction between torture and inhuman punishment "derives principally from a difference in the intensity of the suffering inflicted". This court has held in *Yong Vui Kong (MDP)* (at [72]) that there is no prohibition against inhuman punishment in Singapore law, the Appellant would therefore have to establish that caning does not merely constitute inhuman punishment but crosses into the realm of torture.

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84 In this regard, it is helpful first to consider the types of conduct that international courts have found to constitute torture. The Respondent has tendered a number of such cases which illustrate the severity and brutality of the conduct that is required to breach this threshold. We cite a few examples below:

(a) In *Korobov v Ukraine* (Application No 39598/03, Judgment of 21 July 2011), the victim was beaten up and repeatedly shocked with electricity by the police while in custody. He suffered serious injuries including two broken ribs, a kidney contusion and haematuria (red blood cells in his urine). Although he was unable to furnish medical records to prove that his injuries were sustained while in custody, the ECHR considered it the Government's duty to conduct a proper medical examination after arresting him (at [68]–[70]) and held that the victim's injuries were sufficiently serious to amount to torture under Art 3of the European Convention on Human Rights (at [73]–[74]).

(b) In *Aksoy v Turkey* (Application No 21987/93, Judgment of 18 December 1996), the victim claimed to have been suspended from his arms, which were tied together behind his back (a form of treatment know as a "Palestinian hanging"); to have been given electric shocks, which were exacerbated by throwing water over him; and to have been subjected to beatings, slapping and verbal abuse. There was medical evidence showing that the victim had suffered radial paralysis of both arms consistent with Palestinian hanging. Noting that "the special stigma of 'torture' [would] attach only to deliberate inhuman treatment causing very serious and cruel suffering", the ECHR held that Palestinian hanging was of such a serious and cruel nature that it could only be described as torture (at [63]–[64]).

(c) In *El-Masri v The Former Yugoslav Republic of Macedonia* (Application No 39630/09, Judgment of 13 December 2012), the victim was beaten severely by several men, stripped, and sodomised with an object. He was then shackled and hooded and marched to an airplane. When on the plane, he was thrown to the floor, chained down and forcibly tranquilised. The ECHR held that such treatment amounted to torture (at [211]).

(d) In *Prosecutor v Miroslav Kvocka et al* (Case No IT-98-30/1, Judgment of 2 November 2001), the victims were held in detention camps. They were not allowed to use toilet facilities and were given rotten food and insufficient drinking water. They were also routinely beaten with army boots, rifle butts, hands and fists. The vast majority of detainees received no medical care for their wounds or ailments, and dead bodies were left outside to fester for days at a time. The Trial Chamber of the International Criminal Tribunal for the former Yugoslavia held that the victims had been subjected to torture (at [158]).

(e) In *Husayn (Abu Zubaydah) v Poland* (Application No 7511/13, Judgment of 24 July 2014), the applicant was subjected to brutal interrogation techniques which included beating and kicking, confinement in a box, exposure to cold temperature, food deprivation, and at least 83 sessions of waterboarding. These were carried out by the US Central Intelligence Agency for the purpose of extracting information from the applicant. The ECHR held that such treatment amounted to torture (at [511]).

85 These and the other cases tendered by the Respondent share a number of notable features. First and foremost, these and indeed the substantial majority of all the cases concerned extra-legal acts of abuse committed by public officers to extract information from individuals in custody or war crimes committed by military officers during times of civil upheaval. None of them concerned the execution of a punishment prescribed by law and implemented in accordance with legal requirements. Second, the victims in those cases underwent severe levels of physical and serious physical injuries and mental suffering that seemed to us to far exceed that caused by a sentence of caning.

86 Some cases were cited that dealt with judicial corporal punishment imposed as a sanction by the courts but these evince no consensus on whether this amounts to torture. Although corporal punishment has been ruled unconstitutional in a number of countries, those rulings were made pursuant to constitutions which outlawed inhuman punishment in addition to torture (see, *eg*, *Ncube v The State* [1988] LRC (Const) 442 (Supreme Court of Zimbabwe); *In re Corporal Punishment By Organs of State* [1991] NASC 2 (Supreme Court of Namibia); *S v Williams and Others* [1995] ZACC 6 (Constitutional Court of South Africa); *Banda v The People* (2002) AHRLR 260 (High Court of Lusaka in Zambia)). The courts in those cases appeared to regard corporal punishment as a form of inhuman punishment, but stopped short of calling it "torture". Thus, in *Tyrer v The United Kingdom* [1978] ECHR 2 ("*Tyrer*"),

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the ECHR found that the practice of juvenile birching (which involves the whipping of the clothed posterior of boys with either a light cane or a birch rod) did *not* constitute torture but rather amounted to "degrading punishment".

87 Of the many authorities that were brought to our attention, in only one case was corporal punishment expressly held to constitute torture. This was in *Caesar v Trinidad and Tobago* (Series C, No 123, Judgment of 11 March 2005) ("*Caesar*"). In that case, the victim was lashed 15 times across his back with a cat-o'-nine tails (which consisted of a plaited rope instrument made up of nine knotted thongs of cotton cord, 30 inches long and less than one quarter of an inch in diameter each, attached to a handle) as part of a sentence of flogging. The flogging was carried out 23months after the victim was sentenced, and before it took place, he was deliberately forced to witness the effects of flogging on other prisoners on three or four separate occasions. After the flogging, he remained in the infirmary for two months where the only medical treatment given to him consisted of painkillers. The Inter-American Court of Human Rights held that this form of corporal punishment constituted a form of torture under Art 5(2) of the American Convention on Human Rights (at [73]). We note in passing that in Singapore, the use of the cat-o'-nine-tails as an instrument of punishment was abolished in 1954 by the Criminal Justice (Punishment – Amendment) Ordinance (No 20of 1954).

88 The parties also referred us to *Curtis Francis Doebbler v Sudan* (2003) AHRLR 153 (ACHPR 2003) ("*Doebbler*"). That case concerned the practice of lashing which was a form of corporal punishment authorised by the criminal law of Sudan. The victims were female students who were convicted of offences involving supposedly immoral conduct such as talking with boys and wearing trousers. They were sentenced to fines and between 25–40 lashes each, which were carried out in public on their bare backs. The instrument used was a wire and plastic whip which was not clean, and no doctor was present to supervise the execution of the punishment, thereby exposing the victims to the risk of infection. The African Commission on Human and Peoples' Rights held that this punishment violated Art 5of the African Charter on Human and Peoples' Rights, which prohibited "torture, cruel, inhuman or degrading punishment and treatment". However, it appears that the Commission in that case did not draw any distinction between inhuman punishment and torture, and indeed used the language of inhuman punishment rather than torture throughout most of its decision (see [35]–[38]).

89 It is evident from the preceding authorities that to determine whether particular conduct constitutes torture entails a fact-sensitive inquiry that requires a holistic analysis of the purpose of the conduct, the manner of its execution and its effect on the recipient. In Singapore, the features of caning, which may be administered in private and only as punishment and not for other extraneous purposes, are as follows:

(a) it is carried out using a rattan cane of not more than 1.27 centimetres in diameter (s 329(3) CPC);

(b) it is not to be carried out in instalments (s 330(1) CPC), thereby ensuring that prisoners sentenced to caning are done with it in a single session and do not have to go through the process repeatedly even if the full sentence might not have been administered for medical reasons;

(c) the maximum number of strokes that can be inflicted on the offender at any one time is 24 strokes in the case of an adult regardless of the number of charges the offender has been convicted of and what the actual cumulative prescribed punishment might be (s 330(2) CPC);

(d) caning may be inflicted only if a medical officer is present and certifies that the offender is in a fit state of health to undergo such punishment, and must be stopped if, during the execution of the sentence, the medical officer certifies that the offender is not fit to undergo the rest of the sentence (s 331(1) CPC); and

(e) women, men above the age of 50, and men sentenced to death whose sentences have not been commuted may not be punished with caning (s 325(1) CPC).

90 Having regard to these features, we are satisfied that while caning in Singapore is a more severe form of punishment than the juvenile birching that was in issue in *Tyrer*, it is less severe than the flogging in *Caesar* and quite different from the public lashing of the female students in *Doebbler*.

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91 It is undeniably the case that caning inflicts a considerable level of pain and suffering. But it is evident from the cases we have referred to above that the "special stigma" of torture has been reserved by international courts and tribunals for instances of severe and indiscriminate brutality (such as those described in [84] above), and this is simply not the case with caning that is administered in Singapore as a punishment for selected crimes.

92 The Appellant submitted that the CPC provisions do not address important aspects of the execution of caning, such as whether the rattan cane should be sterilised, the characteristics of the caner, the positioning of the prisoner, the process of caning itself, and its aftermath. He argues that without clear rules governing these aspects of caning, there are no safeguards to ensure that it is not administered in a manner that amounts to torture. The Appellant further contends that the Commissioner of Prisons ("the Commissioner") has no authority to fill in these gaps and determine the mode of executing a sentence of caning by himself. Consequently, any act of purported caning by the Commissioner would be *ultra vires* the CPC and unlawful.

93 We disagree with the Appellant's argument on the Commissioner's authority. Under s 317 of the CPC, the Commissioner or the officer appointed by him is given "full authority" to carry out a sentence of caning on a prisoner upon receiving the relevant warrant forwarded by the court. In our judgment this authority must plainly include the power to determine the manner in which caning is to be carried out. Without this power, the Commissioner would be unable to perform his statutory duty. As stated in s 29(1) of the Interpretation Act (Cap 1, 2002 Rev Ed) ("IA"):

> **Construction of enabling words**
>
> **29.**—(1) Where a written law confers powers on any person to do or enforce the doing of any act or thing, such powers shall be understood to be also conferred as are reasonably necessary to enable the person to do or enforce the doing of the act or thing.

94 In *Public Prosecutor v Li Weiming and others* [2014] 2 SLR 393, a similar issue arose in relation to s 160(1) of the CPC, which states:

> **Criminal case disclosure conference**
>
> **160.**—(1) The prosecution and the accused shall attend a criminal case disclosure conference as directed by a court in accordance with this Division for the purpose of settling the following matters:
>
> (*a*) the filing of the Case for the Prosecution and the Case for the Defence;
>
> . . .

95 The issue was whether the Magistrate or District Judge presiding over a criminal case disclosure conference has the power to order the Prosecution to furnish additional particulars in the summary of facts in support of the charge filed and served as part of the Case for the Prosecution. This power was not expressly provided for in the CPC. Nonetheless, this Court held that these powers were conferred by s 160(1) as powers that were necessary or ancillary to the court's power to settle matters relating to the Case for the Prosecution (at [60]):

> As we have considered above (at [41]), ss 160(2) and 404 are predicated on the assumption that the court may make orders in the course of a CCDC hearing relating to the matters enumerated in s 160(1), although s 160 understandably does not set out an extensive list of the precise types of orders that may be made. To the extent that these orders or directions do not impose additional legal obligations or subject parties to substantive legal disabilities that are not otherwise prescribed under the CPC 2010 or another written law, we consider that the powers to make such orders are conferred by s 160(1) as powers that are necessary or ancillary to "settling [such] matters". Under s 29(1) of the Interpretation Act (Cap 1, 2002 Rev Ed), a written law conferring powers to do any act or thing shall be understood to confer powers that "are reasonably necessary to enable the person to do . . . the act or thing". *The term "settling" is a broad one and ordinarily refers to the resolving of matters in dispute and/or which have not been agreed upon. It is implicit that a power of the presiding judicial officer to settle must incorporate the power to do what is necessary to achieve that objective. In our view, this must necessarily include directions to parties on the timelines for filing and service, as well as orders to provide further particulars or information to fully comply with the requirements for the contents of the Cases under ss 162 and 165.* In the light of the foregoing analysis, it is not necessary for us to have recourse to the court's power under s 6 of the CPC

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> 2010 to adopt a procedure as the justice of the case may require or to invoke the court's inherent powers. [emphasis in original omitted; emphasis added in italics]

96 The Appellant sought to distinguish this and other similar cases cited by the Respondent on the basis they were not concerned with the deprivation of life and personal liberty. In this regard, he referred us to the case of *Entick v Carrington* (1765) 19 Howell's State Trials 1029, which held that every invasion of private property must be authorised by some positive law. He contended that this must apply with even greater force to deprivations of life and liberty. We are unable to see how this case assists the Appellant. It bears noting first, that s 29(1) of the IA is phrased as a general rule of interpretation that applies to every "written law", regardless of whether that law authorises the deprivation of life and personal liberty. The Appellant's argument that a different rule should apply to statutory provisions authorising caning is therefore unsustainable. Moreover, it is undisputed in the present context that s 317 of the CPC grants the Commissioner the authority to carry out sentences of caning. The fact that no rules or directions have been issued under ss 329(1) or (2) of the CPC prescribing the mode of caning cannot in and of itself deprive the Commissioner of the authority that has been granted to him. In the absence of such regulations, it must be assumed that the Minister had intended to leave this to the discretion of the Commissioner.

97 This of course does not mean that the Commissioner's discretion to determine the mode of caning is unfettered. This brings us to the Appellant's argument on the absence of provision in the CPC as to specific aspects of the execution of caning. As we understand it, the Appellant's contention is this. Even if, as we have held (at [90]–[91] above), caning that is in accordance with ss 325–331 of the CPC does not constitute torture, granting the Commissioner such wide authority to execute the punishment means that he may well comply with ss 325–331 of the CPC and yet perform the caning in a manner that amounts to torture. As to this we have three observations. First, there is a requirement for caning to be administered in the presence of a medical officer who must assess and certify the convicted person's fitness to undergo the sentence throughout its administration. This in itself would address a number of the concerns raised by the Appellant including as to the risk of infection.

98 Second, on any basis, it must follow that the Commissioner must exercise his discretion as to the precise mode of caning in a *lawful* manner. This obligation means that, absent express legislative provision, he must not adopt a mode of caning that would constitute torture. This is because all statutes should be interpreted in a manner that is consistent with Singapore's international law obligations as far as possible, and there is no indication that Parliament, by authorising the Commissioner to carry out sentences of caning, had intended to authorise a violation of the international law prohibition against torture. But the burden is on the Appellant to establish that the Commissioner has exercised his discretion in an unlawful manner. As this Court noted in *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [47], a presumption of legality attaches to the acts of public officials. Much was made of the Respondent's refusal to disclose the Orders (see [9] above) but beyond raising areas where the Appellant said it might *theoretically* be possible for caning to be administered in a torturous manner, not a shred of evidence was put forward to warrant a finding that this *was or might plausibly be the case* here. It is an unwarranted leap to jump from saying that because there are no rules spelling out exactly how caning is to be administered, the Commissioner must be taken to be administering it in an unlawful manner.

99 Third, even on the Appellant's own account of caning (which he apparently based on media and public reports and accounts), we do not consider that the mode of caning that is said to be adopted by Prisons constitutes torture. Caning is administered on the prisoner's buttocks (unlike the flogging in *Caesar* and the lashing in *Doebbler*), thereby minimising the risk of any injury to the prisoner's bones and organs. It is carried out in private and out of sight of other prisoners. Before the caning, the rattan cane is soaked in water to prevent it from splitting and shearing the skin, and is also treated with antiseptic. The strokes of the cane are meted out in a measured and controlled manner at regular intervals, rather than in a haphazard and capricious fashion. There is constant medical supervision throughout the entire process, and the caning will be stopped if the medical officer is of the view that the prisoner is unfit to continue undergoing the sentence. In our judgment, these safeguards ensure that the present practice of caning does not breach the high threshold of severity and brutality that is required for it to be regarded as torture. In the premises, on this ground also, the Appellant fails on the torture issue.

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The Irrationality Issue

100 We deal with this ground of appeal very briefly because in our judgment, it is plainly without merit. The Appellant's argument is that statutory provisions authorising caning are so irrational and arbitrary that they do not even constitute "law". He contended that this is so because there is no evidence to show that caning has any deterrent effect on its recipients or on the public in general. In this regard, the Appellant cited the following passage from a 1938 report by the UK Home Department recommending the abolition of corporal punishment in the UK (*Report of the Departmental Committee on Corporal Punishment* (Cmd 5684, His Majesty's Stationery Office, 1938) at p 82):

> The results of this analysis lend some support to the view, expressed to us by probation officers and prison officials, that corporal punishment is apt to produce feelings of resentment and bitterness which may make the offender more anti-social and more, rather than less, likely to commit other offences. It is essentially an unconstructive penalty. At the best, it can exercise no positive reformative influence: at the worst, it may produce reactions which make the individual who receives it less willing, or less able than he was before to lead an honest and useful life in the community. . . .

101 The simple answer to this argument is that sentencing policy is a matter for the legislature and it is not the role of the courts to pass judgment on whether a particular type of sentence prescribed by Parliament is justified as a matter of deterrence or otherwise. We also note that the Appellant is running once again the arguments that this court had already rejected in *Yong Vui Kong (MDP)* (in the context of the mandatory death penalty). We can do therefore no better than to repeat the comments made by Chan Sek Keong CJ in that case (at [117]–[118]):

> 117 It is not within the purview of this court to determine the efficacy or otherwise of the MDP as a deterrent *vis-à-vis* the offence of drug trafficking. In *Ong Ah Chuan* ([4] supra), the Privy Council addressed this very point when it said (at 672-673):
>
> > Their Lordships would emphasise that in their judicial capacity they are in no way concerned with arguments for or against capital punishment or its efficacy as a deterrent to so evil and profitable a crime as trafficking in addictive drugs.
>
> 118 We would add that, although there is room for arguing that there is insufficient evidence that the MDP deters serious offences like murder, it can equally be said that there is insufficient evidence that the MDP does not have such a deterrent effect. *Surveys and statistical studies on this issue in one country can never be conclusive where another country is concerned. The issue of whether the MDP has a deterrent effect is a question of policy and falls within the purview of Parliament rather than that of the courts. . . .*
>
> [emphasis added]

The Equal Protection Issue

102 We come finally to the Appellant's arguments relating to Art 12(1) of the Constitution. Article 12(1) provides as follows:

> **Equal protection**
>
> **12.**—(1) All persons are equal before the law and entitled to the equal protection of the law.

103 The Appellant sought to challenge the constitutionality of the following two differentiating measures found in s 325(1) of the CPC:

(a) the exclusion of women from caning (s 325(1)(a)); and

(b) the exclusion of men above 50 years old from caning (s 325(1)(b)).

He also submitted that the original legislative object of caning is racist and outdated as it was targeted at the "riffraff and scum of China".

104 Before proceeding to consider these arguments, we must state at the outset that we are not sure where these objections would take the Appellant even if they were made out. The Appellant's case, with respect, seemed to us

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to be rather confused in this regard. On the one hand, if s 325(1) were indeed inconsistent with Art 12(1) of the Constitution, then we would have to declare it void to the extent of the inconsistency. Yet the Appellant insisted that he was not saying that women or men above the age of 50 should be caned as well. Instead, his position is that the caning regime as a whole should be struck down. But we fail to see how this follows. The statutory provisions authorising caning are phrased in a general manner and do not in and of themselves discriminate against men aged 50 and below; the violation of Art 12(1), if any, stems from the enactment of s 325(1). Therefore, even if we agreed with the Appellant on the Equal Protection Issue, we have doubts whether the appropriate course would be to grant him the relief that he is seeking.

105 Turning to the substance of the Appellant's arguments, it is well-settled that the test for determining whether a law violates the equal protection clause in Art 12(1) is the "reasonable classification" test. Under this test, a differentiating measure prescribed by legislation would be consistent with Art 12(1) only if (see *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [124]):

(a) the classification is founded on an intelligible differentia; and

(b) the differentia bears a rational relation to the object sought to be achieved by the law in question.

106 Further, this court recently held that, in general, there is no additional test as to whether the *object* of the law itself is legitimate (see *Lim Meng Suang* at [82]). This is because the courts should not be adjudicating on controversial issues of policy, ethics or social values, which are more appropriately debated and resolved in the legislative sphere. This is subject to the important qualification that the reasonable classification test itself imports a limited requirement of legitimacy (*Ibid* at [84]) and a law which adopts a manifestly discriminatory object would not pass muster under the first limb of the test. The differentiating factor used in such a law might be intelligible in the sense that it clearly distinguishes those covered by the law from those not covered by the law; but it would be "unintelligible" in the sense that no *reasonable* person would consider such a differentiating factor to be functional as an intelligible differentia (*Ibid* at [67]).

107 We now assess the Appellant's arguments in the light of these principles.

The exclusion of women

108 In Singapore, s 325(1) of the CPC originated from s 278 of the Criminal Procedure Code 1900 (No 21 of 1900). This provision was identical to s 278 of the Criminal Procedure Code 1892 (No 7 of 1892), which was enacted but never brought into force. As these provisions were passed without legislative debate, it is necessary to go back further and consider the object of similar provisions in the law of the Straits Settlements. In the Straits Settlements, a statutory exemption of women from whipping first appeared in 1872, when amendments to s 72 A of the 1871 Penal Code were introduced by the Penal Code Amendment Ordinance 1872 (No 3 of 1872) ("the 1872 Ordinance"). As this exemption only applied to whipping imposed under the 1871 Penal Code, another exemption for whipping imposed under other statutes was enacted in the Whipping of Females Ordinance (No 3 of 1886), which made it unlawful to impose whipping on women under any laws in force in the Straits Settlements. During the Second Reading of the Whipping of Females Bill, the Colonial Secretary explained the object of the Bill as follows (*Straits Settlements Short-hand Report of the Proceedings of the Legislative Council* (21 January 1886) at pp B24–B25):

> The Government has brought [the Bill] forward . . . because it is clear that it is not to the credit of a civilised community, such as this colony claims to be, that it should, by an accident or an oversight, retain upon its statute-book a punishment which this Council could not for a moment approve, and which no civilised community could for a moment tolerate. You must remember that the moral sense of a community grows, and although a hundred years ago you would have allowed hanging for sheep-stealing, that penalty is now only allowed in cases of murder; and though flogging was once a common punishment, you would not now allow flogging to be inflicted except with circumspection and caution, and on men and men only; and although it may seem unnecessary in some respects to pass an Ordinance that the punishment of flogging is never to be inflicted upon women, *because the moral sense of the community would not allow it to be inflicted*, yet it is to the credit of the colony, and to the credit of the Council, that we should wish to bring our statute-book into conformity with the moral sense of the community . . . [emphasis added]

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109 This extract demonstrates that the abolition of female whipping (and the subsequent exemption of females from caning) was due to the "moral sense of the community" that such a punishment should not be inflicted on females. While the exact basis for this "moral sense" is left unexplained, the Respondent contended that it was probably motivated by considerations about the modesty of females and the differences in male and female physiology. On the other hand, the Appellant submitted that there is no valid justification for the differential treatment of males and females with respect to caning. For example, it is inaccurate to generalise and say that females are more fragile than males; it is patronising and outdated to regard females as the more delicate sex in need of protection; practical steps could be taken to ensure that their decency is respected during the administration of caning.

110 In our judgment, the Appellant is wrong. Insofar as the exclusion of women from caning was out of concern that in general they would be less able to withstand caning, we consider that there is a sufficient rational nexus between the differentia adopted and the object of s 325(1)(a). There are obvious physiological differences between males and females which we think Parliament was legitimately entitled to have taken into account. Although these differences might not always obtain in individual cases (thus, there may be cases where a given female is as physically robust if not even more so than a given male), the reasonable classification test does not require a *perfect* relation or *complete* coincidence between the differentia adopted by a law and the object sought to be achieved by it.

111 And insofar as the exclusion of women was due to the moral sense that it is barbaric to inflict violence upon women or that their decency would be violated, we do not think that it is appropriate for us to pass judgment on the soundness or rationality of such gendered social attitudes. As we have mentioned earlier, the courts will generally not review the legitimacy of the object of a law unless it is so manifestly discriminatory that no reasonable person would consider the differentia adopted by the law to be a valid means of differentiation. Such cases will necessarily be rare and the present case is not one of them. We further note that s 325(1)(a) was re-enacted when the CPC was amended in 2010 (*vide* Act No 15 of 2010), which suggests that our attitudes towards the relative acceptability of inflicting corporal punishment on men vis-à-vis women have yet to change. It thus cannot be said that the exemption of women from caning is a colonial relic that no longer represents prevailing opinion.

112 It also bears noting that as against the continued exemption of women from caning, there has been a clear legislative effort to inject parity into our sentencing regime in other ways. Under the 2010 amendments to the CPC, the courts now have the discretion to impose a sentence of imprisonment in lieu of caning where a person is exempted from caning under s 325(1) or because of medical reasons. Thus, if a person cannot be caned because s 325(1)(a) or (b) applies, the court may impose a term of imprisonment of not more than 12 months in lieu of the caning which it could, but for s 325(1), have ordered in respect of the relevant offences: s 325(2). This additional term of imprisonment can be imposed even if it would result in the aggregate sentence exceeding the maximum term of imprisonment prescribed for any of the accused's offences: s 325(3). The purpose of this amendment was explained by the Law Minister as follows (*Singapore Parliamentary Debates, Official Report* (18 May 2010) vol 87 at col 422 (Mr K Shanmugam, Minister for Law)):

> Another category of cases where imprisonment would be ordered in lieu of caning would be where caning is not possible from the outset (for example, male offenders who are 50 years old and those who are medically unfit). For these categories of offenders, the Court has the discretion to impose an imprisonment term of up to 12 months in lieu of the strokes which were forgone. *This will give the Court discretion in exercising parity between co-accused persons, one of whom may be caned and the other may not.* [emphasis added]

113 Therefore, the present law allows the courts to ensure that criminals of equal culpability are given sentences that reflect their culpability, even if one is exempted from caning while the other is not. Of course, there is no perfect correspondence between a sentence of caning and a sentence of imprisonment. But since views will differ on which punishment is worse and it cannot be said that one punishment is clearly worse than the other, there is no basis to conclude that males are treated in a way that is impermissibly unequal as compared to females.

The exclusion of men above 50

114 As to the exclusion of older males, there is no express mention in the parliamentary reports as to the purpose for this exemption. However, it seems obvious that this must have been out of concern that older men might be

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less able to withstand the rigours of caning. In *Ratnam Alfred Christie v Public Prosecutor* [1999] 3 SLR(R) 685, the High Court had to consider whether a sentence of caning could be executed on an offender who had exceeded 50 years of age at the time of the proposed execution of the sentence, even though he had not yet passed that age threshold at the time the sentence was imposed by the court. Yong CJ held that it could not, reasoning that the purpose of the exemption was to ensure that caning is only inflicted on males who are healthy enough to withstand the punishment (at [10]–[11]):

> 10 Section 232(1), CPC provides that a person shall not be caned unless a medical officer has certified that he is in a fit state of health to undergo such punishment. The importance of ensuring that an offender is sufficiently healthy enough, at the time of caning, to withstand such punishment is reinforced by s 232(2) which states that:
>
> > If during the execution of a sentence of caning a medical officer certifies that the offender is not in a fit state of health to undergo the remainder of the sentence the caning shall be finally stopped.
>
> 11 Bearing this in mind, *it would not be wrong to infer that the exemption from caning provided for males above the age of 50 years is intended as a presumption in law that males of that age will be unfit to withstand such punishment*. It is not really the age itself that is relevant but rather the offender's fitness of health and Parliament has deemed it appropriate to create such a presumption in law in favour of men who have attained the age of 50 years. Since the time of assessment of an offender's state of health is at the time of the execution of the sentence, this means that the proper time to determine when the offender has attained the age of 50 years, is the date on which the caning is to be carried out.
>
> [emphasis added]

115 The Appellant did not dispute that this is a perfectly legitimate statutory object. However, he submitted that the choice of 50 years of age is an arbitrary cut-off point. Further, the exemption of older men is unnecessary because all prisoners must be certified to be medically fit before a sentence of caning may be administered on them anyway.

116 In our judgment, the use of age as a convenient proxy to screen out those who are likely to be unfit for caning is plainly reasonable and passes muster under the second limb of the reasonable classification test. This is because there is an inverse relationship between one's age and one's physical condition. That this differentia might be over-inclusive (in that some males over the age of 50 might still be fit for caning) is not fatal, since – as we have stated earlier – there is no need for a perfect coincidence between the differentia used and the object sought to be achieved. As for the fact that medical certification is already required before a prisoner can be subjected to caning, it is open to Parliament to exempt older men from caning in the interests of administrative efficiency and/or out of an abundance of caution. These are policy decisions that Parliament could legitimately make and there is no basis for us to interfere.

The alleged racist origins of the caning regime

117 Finally, the Appellant submitted that caning violates Art 12(1) because its original legislative object was racist. The sole basis he supplied for this assertion is the following statement by a member of the Legislative Council during the second reading of the 1872 Ordinance (*Straits Settlements Short-hand Report of the Proceedings of the Legislative Council* (22 August 1872) at p 86 (Mr Shelford)):

> . . . all Eastern experience goes to prove that whipping is found to be a much more efficient punishment than imprisonment. . . . The retention of that punishment in Sections 144 and 148 of the Code would be of great use in cases where it often happens in Singapore that a number of people will rush out of a house and hound upon a few individuals. . . . These rioters are arrant cowards and bullies, as their acts show, and I am surprised that the Secretary of State being aware that these people are for the most part *the riffraff and scum of China*, should not have accepted the clauses as they stood. . . . *This anti-whipping feeling seems to be a feature of the sort of "man-and-brother" system that emanates from Exeter Hall, and will not conduce to the repression of crime in this part of the world.* . . . [emphasis added]

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118 Mr Shelford's reference to the "man-and-brother system" is an allusion to the famous anti-slavery slogan "Am I not a man and a brother?" by the Anti-Slavery Society operating from Exeter Hall at that time, emphasising the common humanity of persons of European descent and victims of the slave trade (who were commonly whipped by slaveowners). The Appellant says that this, coupled with the reference to the "riffraff and scum of China", shows that caning in Singapore had antiquated racist origins which are no longer acceptable in modern society.

119 In our judgment, however, this argument is a red herring. The issue here is whether caning is applied equally to all races. Clearly, the statutory provisions on caning do not discriminate on the basis of race, nor is there any suggestion by the Appellant that the caning regime is being administered in racist manner. There can therefore be no violation of equal protection under Art 12. Moreover, even assuming that corporal punishment in Singapore was motivated by racist sentiments at its inception, the fact is that the punishment has been adopted by our own Parliament since Singapore's independence, which surely cannot be accused of any intention to discriminate against the Chinese (or any other ethnic group, for that matter).

120 We therefore reject the Appellant's ground of appeal based on Art 12(1) of the Constitution.

Conclusion

121 We accept that the use of judicial corporal punishment is on the wane internationally, and there is a growing body of international opinion that it amounts to a form of inhuman punishment that is cruel and degrading. But there is, as yet, no international consensus that the use of caning as part of a regulated regime of punishment with appropriate medical safeguards constitutes *torture*. Even if there were such a consensus, this Court, operating within the domestic legal system, is obliged to apply domestic laws in the event of any inconsistency with international law norms. Furthermore, it is not within the institutional competence of this Court to adjudicate on the efficacy of caning as a mode of punishment and substitute its judgment for that of the legislature. Any campaign to abolish caning is a matter that must be taken up in the legislative sphere. The courts can and will only pronounce on the *legality* of measures adopted by the legislature to punish crimes.

122 For the foregoing reasons, we dismiss the Appellant's appeal against sentence.

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