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INSULATING THE CONSTITUTION: *YONG VUI KONG V PUBLIC PROSECUTOR* [2010] SGCA 20

ARAVIND GANESH*

A INTRODUCTION

On 14 May 2010, Chan Sek Keong CJ, sitting with Andrew Phang and VK Rajah JJA, delivered the unanimous judgment of the Court of Appeal of Singapore (the Court) in *Yong Vui Kong v Public Prosecutor*.¹ The defendant had been sentenced to death by hanging after being convicted of an offence contrary to the Misuse of Drugs Act 1973² (MDA) by trafficking 47.27 grams of diamorphine into the country. Section 33, read in conjunction with Schedule 2 of the MDA, imposes the mandatory death sentence on persons convicted of trafficking more than 15 grams of diamorphine. The defendant appealed against his sentence on the grounds that the mandatory death penalty was an unconstitutional violation of the right to life and of the right to equal protection provided under arts 9(1) and 12(1) respectively of the Constitution of the Republic of Singapore. The central argument of this comment is that the judgment of the Court is an attempt to insulate the Constitution against external elements: it shields Singaporean constitutional law, firstly from developments occurring in customary international law, and secondly from its colonial history.

The constitutionality of the mandatory death penalty had been considered by the highest courts in Singapore on previous occasions—by the Privy Council in *Ong Ah Chuan v Public Prosecutor*³ and, after appeal to the Board was abolished in 1994, by the Court of Appeal in *Nguyen Tuong Van v Public Prosecutor*.⁴ Despite *Nguyen* having been heard recently in 2004, the Court gave leave to pursue the appeal on grounds that the defendant had ‘new arguments based on new materials’ to show that both *Ong* and *Nguyen* were wrongly decided.⁵ This note will not discuss the

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¹ [2010] SGCA 20 (*Yong*).

² Cap 185 (2008 Rev Ed).

³ [1981] AC 648 (Privy Council (PC)) (*Ong*).

⁴ [2004] SGCA 47 (*Nguyen*).

⁵ *Yong* (n 1) [5]. See *Yong Vui Kong v Public Prosecutor* [2009] SGCA 64 where the Court of Appeal held that it had jurisdiction to consider the appeal on the merits.

art 12(1) equal protection issue,⁶ nor will it discuss whether or not the mandatory death penalty is actually cruel, or inhuman and degrading, or otherwise illegal. Instead, it will concentrate on the word ‘law’ in art 9(1), which provides that: ‘No person shall be deprived of his life or personal liberty save in accordance with law.’⁷ It had been submitted by the appellant, firstly, that the mandatory death penalty was a deprivation of life not ‘in accordance with law’ because it was contrary to customary international law, which must be included under ‘law’ for the purposes of art 9(1).⁸ Secondly, he argued that the mandatory death penalty was unconstitutional because the word ‘law’ in art 9(1) must be read to preclude cruel or inhuman punishments.⁹

B ON CUSTOMARY INTERNATIONAL LAW

The appellant’s argument was of considerable subtlety—he maintained that the word ‘law’ in art 9(1) included customary international law, such that norms of international law were incorporated into the right to life, which could then invalidate acts of Parliament. The Court noted that the appellant raised no authority for this proposition,¹⁰ which, in the Court’s opinion, would have turned Singapore into a monist legal system where international legal norms trumped domestic statutes. In the subsequent paragraph entitled ‘The Prosecution’s response’, the Court related how the prosecution, represented by Attorney-General Walter Woon SC, after being pressed for a clear response, agreed with the appellant that the expression ‘law’ should, in principle, be interpreted to include customary international law. In the same paragraph, the Court continued:

We [the Court] do not think that the AG, by this reply, was conceding that the expression ‘law’ includes CIL [customary international law] in the sense that ‘law’ has been defined to include CIL, with the consequence that, once it is shown that there is a rule of CIL prohibiting the MDP [mandatory death penalty] as an inhuman punishment, that CIL rule automatically becomes part of ‘law’ for the purposes of Art 9(1). Indeed, the constitutional definition of ‘law’ in Art 2(1) is quite different . . . Besides, such a concession would be contrary to the decision in *Nguyen* . . . where this court held at [94], citing (*inter alia*) the Privy Council case of *Chung Chi Cheung v The King* [1939] AC 160 . . . that in the event of a conflict between a rule of CIL and a domestic statute, the latter would prevail. From his other submissions, it seems clear enough to us that what the AG meant when he said that the expression ‘law’ should be interpreted to include CIL was that this

⁶ *Yong* (n 1) [111]–119].

⁷ Art 2(1) defines the term ‘law’ as ‘includ[ing] written law and any legislation of the United Kingdom or other enactment or instrument whatsoever which is in operation in Singapore and the common law in so far as it is in operation in Singapore and any custom or usage having the force of law in Singapore.’ The same article also defines the term ‘written law’ as ‘this Constitution and all Acts and Ordinances and subsidiary legislation for the time being in force in Singapore.’

⁸ *Yong* (n 1) [33].

⁹ *ibid* (n 1) [33].

¹⁰ *ibid* (n 1) [43].

expression would include a CIL rule which had already been recognised and applied by a domestic court as part of Singapore law.¹¹

The court repeated this reasoning almost in its entirety later in the section setting out its own determination of the issue.¹² It is understood that the respondent's initial submissions on the question were unclear,¹³ but nevertheless, this judicial 'channelling' of the prosecution's 'real' meaning must strike one as peculiar.

After reading *Chung Chi Cheung v The King*,¹⁴ the Court eventually held that '[i]n our view, a rule of CIL is not self-executing in the sense that it cannot become part of domestic law until and unless it has been applied or definitively declared to be part of domestic law by a domestic court.'¹⁵ At first glance, this might strike one as being hopelessly circular if it is read to mean 'a Singaporean court cannot apply a rule of customary international law unless and until a Singaporean court has applied that rule of customary international law.' This is probably not what the Court meant. The Court specifically and correctly acknowledged a judicial duty to interpret domestic law in conformity with international law: 'We agree that domestic law, including the Singapore Constitution, should, as far as possible, be interpreted consistently with Singapore's international legal obligations.'¹⁶ But such conform-interpretation does not endow the specific rule of customary international law with direct legal validity within the domestic legal sphere. For that, an Act of Parliament must recognise it, or a court must 'translate' it into the municipal legal order by declaring a new rule of common law. The Court then cited Lord Atkin in *Chung* as authority for its position:¹⁷

[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.¹⁸

The above dicta would have disposed of the question, but things are never quite as simple. Lord Atkin immediately goes on to say that '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.*'¹⁹

¹¹ *ibid* [44].

¹² *ibid* [87]–[99].

¹³ *ibid* [44].

¹⁴ [1939] AC 160 (PC) (*Chung*).

¹⁵ *Yong* (n 1) [91].

¹⁶ *ibid* [59].

¹⁷ *ibid* [89].

¹⁸ *Chung* (n 14) 167–68. *Yong* also cites *Colleo Dealings Ltd v Inland Revenue Commissioners* [1962] AC 1 (House of Lords (HL)); Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 44; Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law, Volume 1: Peace* (9th edn, Longman 1992) 56; Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn, Routledge 2007) 69.

¹⁹ *Chung* (n 14) 168 (emphasis added).

To be sure, the first passage asserts that customary international law is not law, which is the opposite of what the Attorney-General (speaking for himself) argued, and is in line with the Court's interpretation of his submissions, as well as its own holding. However, as shall be explained shortly, the last excerpt appears to contain something more than a requirement of conform-interpretation.

Conform-interpretation, properly understood, is the creative reading of a domestic legal text to attain congruence with a non-domestic text, and ambiguities in the domestic text are exploited for this purpose. The best-known illustrations of this legal technique are to be found in the law of the European Union (EU) pertaining to the indirect effect of EU Directives. In general, EU Directives are a form of secondary legislation, which, if not translated into the legal orders of the Member States by appropriate implementing measures, lack full direct effect.²⁰ Although the Member State is estopped from relying on its failure to implement the Directive,²¹ an unimplemented Directive may not be invoked by a private individual against another private individual.²² To address this loophole, the ECJ developed the doctrine of indirect effect in *Von Colson*,²³ and in *Marleasing*,²⁴ where it held that:

in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter.²⁵

It may be interposed that conform-interpretation in public international law differs from the same under EU law, as the former places greater emphasis upon the sovereignty of independent States, while the latter may be an incipient constitutional order. For instance, a British judge interpreting domestic law in conformity with a rule of public international law will be more reticent than if he were interpreting to attain conformity with EU law, because of national sovereignty concerns. While it is perhaps true that public international law and EU law derive from qualitatively very different doctrines, it is difficult to discern any such qualitative difference at the level of the specific legal techniques of conform-interpretation. The difference between the two types of conform-interpretation is

²⁰ Case 148/78 *Publico Ministero v Ratti* [1979] ECR 1629 [18]–[24] (European Court of Justice (ECJ)).

²¹ *ibid* [24]. See also Case 152/84 *Marshall v Southampton Area Health Authority* [1986] ECR 723. The applicability of the unimplemented Directive against public bodies has come to be known as 'vertical' direct effect.

²² *Duke v GEC Reliance* [1987] UKHL 10. The facts of this case were substantially similar to those in *Marshall*, except that whereas the employer in *Marshall* was a public employer, the employer in *Duke* was a private corporation. The unimplemented Council Directive 76/207/EEC ([1976] OJ L039) on equal treatment of the sexes was held to be applicable against the employer in the former, but not in the latter.

²³ Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891 [26].

²⁴ Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4135.

²⁵ *ibid* [8].

purely one of degree, rather than kind. As long as the British judge mentioned above has not yet reached the limit demanded by sovereignty, the process of conform-interpretation of domestic legislation to, say, an international treaty, would be just as teleological as if it were to an EU Directive. Of course, the limits upon the potential for such creative reading differ: in conform-interpretation with EU law, the limit is reached when the language of the domestic text cannot be strained any further, whereas in conform-interpretation with public international law, the limit is reached when national sovereignty is unacceptably curtailed. However, until this limit is reached, the process of conform-interpretation is exactly the same in both cases.

Lord Atkin appears to call for something quite different from conform-interpretation by the use of the word ‘incorporation’. The rule in *Chung* points not merely towards the resolution of ambiguities in favour of a rule of international law in a specific case, but positively treats that rule as part of English law, unless and until a domestic statute or judge-made rule un-incorporates it by clearly providing otherwise. According to *Chung*, a rule of international law does not need to latch onto any already existing domestic law rule for it to be ‘treated as incorporated’. *Yong*, on the other hand, provides that a rule of customary international law is unincorporated unless and until a statute or a judge clearly incorporates it. There is indeed a jarring dissonance between the first line of paragraph 89 of *Yong*: ‘Ordinarily, in common law jurisdictions, CIL is incorporated into domestic law by the courts as part of the common law in so far as it is not inconsistent with domestic rules which have been enacted by statutes or finally declared by the courts’; and the very next paragraph: ‘The principle enunciated . . . in *Chung Chi Cheung* entails that, at common law, a CIL rule must first be accepted and adopted as part of our domestic law before it is valid in Singapore’.²⁶

The difficulty with the rule in *Chung* is that it is confused. It begins by instructing that customary international law has no domestic legal validity, and ends with an admonition to treat it as legally valid anyway. This is perhaps why it is capable of being pressed into service on both sides of the argument: Lord Bingham’s speech in *R v Jones*²⁷ cites *Chung* as among other ‘old and high authority’ for the exact opposite proposition that ‘[c]ustomary international law is (without the need for any domestic statute or judicial decision) part of the domestic law of England and Wales.’²⁸ Perhaps the only way of making sense of this apparent contradiction is to say that where customary rules of law are incorporated into the common law, such incorporation is carried out by domestic judges, and not by virtue of international law. Be that as it may, there must be some principle governing when and how judges

²⁶ *Yong* (n 1) [90].

²⁷ [2006] UKHL 16.

²⁸ *ibid.* The other authorities cited for the proposition were *Triquet v Bath* (1764) 3 Burr 1478, 1481; 96 ER 273; 4 BI Comm 67; *Duke of Brunswick v King of Hanover* (1844) 6 Beav 1, 51–52; 49 ER 724; *Emperor of Austria v Day* (1861) 2 Giff 628, 678; 66 ER 263; *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529, 554 (Court of Appeal (CA)); *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1989] Ch 72 207 (CA).

may incorporate customary international law, and *Chung* says such incorporation is automatic, except where existing rules of statute and common law contradict.

Certainly, a rule denying any effect of customary international law within the Singaporean municipal legal sphere would be plausible in the same way as the decision of the Federal Court of Australia in *Nulyarimma v Thompson*.²⁹ A credible argument can be made that a democracy should not give direct effect to any rule of international law, because all necessary democratic legislative procedures must be followed before ordinary private relations can be controlled by a rule created by the executive. It can be argued that the English common law ‘treated as incorporated’ customary international law only because it was safely presumed that in order for a body of State practice sufficiently ‘extensive and virtually uniform’ to have come into being,³⁰ Britain, possessing an empire covering most of the globe, must have itself given rise or consented to it.³¹ The Republic of Singapore, on the other hand, covering an area of 625 square kilometres and fitting snugly inside the M25 ring road, cannot be so readily presumed to have done the same. Nevertheless, such a judicial development would not be uncontroversial. Singaporean constitutional scholars appear to have thought, until now at least, that while the ‘Singaporean Constitution contains no express provision regulating the reception of international law or establishing the hierarchical ordering of international and domestic law’ the Singapore courts ‘generally [follow] UK practice on the domestic reception of international law.’³² The House of Lords in recent and empire-less times has held, in *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No 3)*³³ and *Jones*³⁴ respec-

²⁹ (1999) 96 FCR 153. The Court held that rules of customary international law prohibiting genocide could not apply in Australia unless they had been incorporated by statute. See also *Jones* (n 27) [23]–[29]: that whereas customary international civil law rules would be incorporated immediately into UK law, such rules setting out international crimes could not. At no point does *Nulyarimma* state that a judge may of his or her own volition incorporate a rule of customary international law into domestic law.

³⁰ *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* [1969] ICJ 3.

³¹ *West Rand Central Gold Mining Co v R* [1905] 2 KB 391, 406–07 (Lord Alverstone CJ):

It is quite true that whatever has received the common consent of civilized nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant.

³² Li-ann Thio, ‘The Death Penalty as Cruel and Unusual Punishment Before the Singapore High Court? Customary Human Rights Norms, Constitutional Formalism and the Supremacy of Domestic Law in *Public Prosecutor v. Nguyen Van Tuong*’ (2004) 4 Oxford University Commonwealth Law Journal 1, 10–11. See also C L Lim, ‘The Constitution and the Reception of Customary International Law: *Nguyen Tuong Van v Public Prosecutor*’ [2005] Singapore Journal of Legal Studies 218, 228 citing Thio’s view as the ‘one thing’ commentators are agreed on.

³³ [2000] 1 AC 147 (HL).

³⁴ It must be observed that Lord Bingham in *Jones* (n 27) only accepted automatic domestic legal validity of customary international law because it was not necessary to dispose of the question, and actually expressed considerable reservation about the substance of the doctrine. At [11], Lord

tively, that rules of customary international law could narrow the application of contrary legislation and common law, and that such rules formed part of the domestic civil law of England and Wales. As such, the first criticism of the Court's holding on the reception of customary international law into the domestic legal order is that it is insufficiently defended.

Another criticism might be that such a rule is imprudent, because of the practical need to adapt to emerging norms as quickly as possible; ie, without having to pass a statute which in any case cannot be applied retroactively. Instead, it might be wiser to stay with *Chung*, and declare rules of customary international law automatically part of domestic Singaporean law unless they contradict statutes, constitutional rules, important and fundamental rules of common law,³⁵ or strong public policy imperatives. In fact, one expects something of the kind to be the real description of how the law will develop subsequent to this decision. Consider a future civil litigation between two private parties coming before the court, with one litigant invoking a widely-followed rule of customary international law not yet translated into the domestic law by statute or previous judicial decision. Failure to follow the new rule of customary law would disturb the expectations of very many commercial actors. One imagines that a Singaporean judge would most probably apply that rule. It would be a misuse of language to say that, when she finds a rule where previously there was none, the judge is merely engaging in conform-interpretation. Either we must say that the judge is making law (which the Court rejects as illegitimate in other parts of the judgment³⁶), or we must say that customary international law has some legal validity in the domestic sphere. It may be very low on the hierarchy of norms, being easily displaced by contrary statutes or even rules of common law, but it nevertheless has some legal validity.

The above description of customary international law as sitting within a hierarchy of norms would accordingly be a more accurate description of the status of customary international law in Singapore, and would also have allowed the Court to avoid a situation where rules of customary international law trump acts of Parliament. The appellant arguably went too far by submitting that international law could be 'constitutionalised' so as to trump domestic statutes. But the Court conversely did nowhere near enough in terms of defending its

Bingham states that there 'seems to be truth in Brierley's contention ("International Law in England" (1935) 51 LQR 24, 31) . . . that international law is not a part, but is one of the sources, of English Law.'

³⁵ See *Nulyarimma* (n 29) [26] (Wilcox J): that at a minimum, rules of international law creating international crimes could not translate directly into the domestic legal sphere because of the fundamental constitutional rule of *nullum crimen sine lege*; approved in *Jones* (n 27) [23] (Lord Bingham). See also Martin Dixon, *Textbook on International Law* (OUP 2007) 104–05: 'Thus it may be more accurate to say that incorporation can occur automatically only if it is of a type that can be made justiciable in the national legal system and is of a kind where automatic implementation would not offend a basic constitutional precept of that system.'

³⁶ *Yong* (n 1) [72] (holding that the Court may not read a right against inhuman punishment into the right to life in art 9(1)), and [113] (holding that courts may not question Parliament's determination of 15 grams as the threshold after which the mandatory imposition of the death penalty is merited).

reasoning. It is not sufficient for the Court to rest its entire reasoning on *Chung*—that case simply does not mean what the Court thinks it does. Nevertheless, for the moment at least, the Singaporean domestic legal order is insulated from customary international law. However, the issues identified above give one reason to suspect that we have yet to hear the final word on the reception of customary international law within the Singaporean legal order.

C ON THE MEANING OF ‘LAW’: INHUMAN PUNISHMENT

The Court gave three reasons for rejecting the contention that rules establishing inhuman punishments were not ‘law’ for the purposes of art 9(1). First, the Constitution lacks an express provision prohibiting inhuman punishments in the manner of the Eighth Amendment to the United States Constitution.³⁷ There is therefore no explicit textual authority for the Court to invalidate the mandatory death penalty. Second, very early in its history, the Singaporean government declined to adopt precisely such a constitutional provision, even though it had been recommended by a commission headed by Wee Chong Jin CJ in 1966 (the Wee Commission).³⁸ The duty of deference owed to the legislature therefore prevents Singaporean judges from reading into the right to life in art 9(1) a right against inhuman punishment. The third plank of the Court’s reasoning concerned the judgment in *Mithu v State of Punjab*,³⁹ where the Indian Supreme Court held that the Indian Constitution, which similarly lacks a clear textual prohibition against inhuman punishments, nevertheless includes a prohibition in the right to life enshrined in art 21 thereof, which was then invoked to find the mandatory death penalty unconstitutional.

In essence, the Court rehearsed its argument in *Nguyen*, where it dismissed as irrelevant the post-*Ong* Privy Council cases of *Reyes v The Queen*⁴⁰ and *Watson v The Queen (A-G for Jamaica intervening)*,⁴¹ which held the mandatory death penalty unconstitutional, on the grounds that the Board in those cases relied upon roughly identical express constitutional prohibitions on inhuman or degrading punishments: ie ss 7 and 17(1) of the Belize and Jamaican Constitutions respectively.⁴² This position, intellectually indefensible as it may ultimately be (for reasons that will soon become clear⁴³), has a veneer of plausibility because the Privy Council also distinguished *Ong* on this basis in *Bowe v The Queen*,⁴⁴ and for similar textual reasons failed to find unconstitutional the mandatory death penalty in *Boyce v The*

³⁷ *ibid* [61].

³⁸ *ibid* [62].

³⁹ [1983] 2 SCR 690 (*Mithu*).

⁴⁰ [2002] UKPC 11.

⁴¹ [2004] UKPC 34.

⁴² *Nguyen* (n 4) [84].

⁴³ See text accompanying nn 68–73.

⁴⁴ [2006] UKPC 10 [41].

*Queen*⁴⁵ and *Matthew v State of Trinidad and Tobago*.⁴⁶ Less understandable, however, is the Court's attempt to distinguish *Reyes* and *Watson* on the grounds that they concerned mandatory death sentences for murder, rather than for trafficking.⁴⁷ The real issue here was whether the right to life in art 9(1) could be interpreted to include a prohibition on inhuman or cruel punishment.

That very question had been canvassed before the Privy Council in *Ong*, where the prosecution had argued that art 9(1) sanctioned any deprivation of life and liberty according to 'any Act passed by the Parliament of Singapore, however arbitrary or contrary to fundamental rules of natural justice'.⁴⁸ Lord Diplock rejected this submission, observing 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 [Singapore] 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*. If it were otherwise it would be [a] misuse of language to speak of law as something which affords 'protection' for the individual in the enjoyment of his fundamental liberties, and the purported entrenchment (by Article 5) of Articles 9(1) and 12(1) would be little better than a mockery.⁴⁹

Two international treaty provisions were raised in support of incorporating the right against inhuman punishment into art 9(1): art 5 of the Universal Declaration of Human Rights (UDHR)⁵⁰ and art 3 of the European Convention on Human Rights (ECHR).⁵¹ The Court disposed of this argument by holding that although Singaporean courts are under a duty to interpret Singaporean law consistently with Singapore's international legal obligations⁵² such as those arising under the UDHR, such conform-interpretation could not avail where 'the express wording

⁴⁵ [2004] UKPC 32 (Lord Bingham, Lord Nicholls of Birkenhead, Lord Steyn and Lord Walker of Gestingthorpe dissenting).

⁴⁶ [2004] UKPC 33.

⁴⁷ *Tong* (n 1) [49].

⁴⁸ *Ong* (n 3) 670.

⁴⁹ *ibid* 670–71 (emphasis added).

⁵⁰ Adopted 10 December 1948, United Nations General Assembly Res 217 A(III). Singapore is a party to the UDHR, but not to the International Covenant on Civil and Political Rights (opened for signature 16 December 1966, entered into force 23 March 1976, 999 UNTS 171) (ICCPR), or to the International Covenant on Economic, Social and Cultural Rights (opened for signature 16 December 1966, entered into force 3 January 1976) (ICESCR), which render justiciable the rights contained in the UDHR.

⁵¹ Opened for signature 4 November 1950, entered into force 3 September 1950, ETS 5. Singapore is not a party to the ECHR, but has been covered by it in the past. See text accompanying nn 56–57.

⁵² *Tong* (n 1) [59].

of the Singapore Constitution is not amenable . . . or where Singapore's constitutional history is such as to militate against the incorporation of those international norms.⁵³ The Court then held that such incorporation into art 9(1) was impossible, first, because 'unlike the Constitutions of the Caribbean States, the Singapore Constitution does not contain any express prohibition against inhuman punishment',⁵⁴ and has a different constitutional history.⁵⁵ The second reason was the failure by the government to act on the recommendations of the Wee Commission 1966 to amend the Constitution to include just such a provision.

1 Singaporean Constitutional History and the ECHR

The paragraphs of the judgment that discuss the history and formation of the Singaporean Constitution are truly fascinating because they acknowledge, for the first time in a judicial setting, the 'little known legal fact that the ECHR was made applicable to Singapore and the Federation of Malaya in 1953 just as it was made applicable to Belize and several other British colonies by virtue of the UK's declaration under Art 63 of the ECHR.'⁵⁶ As Lord Bingham noted in *Reyes*,⁵⁷ the later Belize and other Caribbean constitutions were modelled closely on the ECHR to provide for prohibitions against inhuman punishments. On the other hand, in the Court's judgment, the Malaysian Constitution of 1957, whose provisions on fundamental rights Singapore eventually inherited upon independence from Malaysia in 1965, were not modelled on the ECHR. The Court based this determination solely on the fact that the Malaysian Constitutional Commission chaired by Lord Reid in 1957 omitted to recommend the incorporation of such a provision in its report.⁵⁸ Particularly conclusive in the Court's eyes was the fact that the report was published in 1957, four years after the ECHR had come into existence,⁵⁹ which meant, in its view, that the Reid Commission must have intended to exclude a right against inhuman treatment or punishment.

With respect to the argument relating to the Wee Commission, the Court held that:

The Government's rejection of the proposed Art 13 [the right against inhuman punishment recommended by the Wee Commission] was unambiguous, whatever the reasons for such rejection were. This development, in our view, forecloses [the appellant's] argument that it is open to this court to interpret Art 9(1) . . . as incorporating a prohibition against inhuman punishment . . . It is not legitimate for this court to read

⁵³ *ibid* [59].

⁵⁴ *ibid* [61].

⁵⁵ *ibid* [61]–[63].

⁵⁶ *ibid* [61] referring to Karel Vasak, 'The European Convention of Human Rights Beyond the Frontiers of Europe' (1963) 12 *International and Comparative Law Quarterly* 1206, 1210. Art 63 of the ECHR has since been renumbered to art 56.

⁵⁷ *Reyes* (n 40) [28].

⁵⁸ Report of the Federation of Malaya Constitutional Commission (11 February 1957).

⁵⁹ *Yong* (n 1) [62].

into Art 9(1) a constitutional right which was decisively rejected by the Government in 1969, especially given the historical context in which that right was rejected.⁶⁰

The Court then recalled Lord Nicholls' remarks in *Matthew*, that '[i]f departure from fundamental rights is desired . . . The Constitution should be amended explicitly'.⁶¹ The Court of Appeal then found that '[t]here is, in substance, no difference between repealing an existing constitutional provision prohibiting inhuman punishment and deliberately deciding not to enact such a constitutional provision in the first place'.⁶² Accordingly, there is no constitutional protection against greatly disproportionate punishments, or even against inhuman, degrading or cruel treatment by the State, except possibly those measures that are so objectionable that no rational legislator could have enacted them.

2 Cruelty, Inhuman and Degrading Treatment and the Common Law

Few things can be less controversial or more banal than the assertion that among those 'fundamental rules of natural justice that had formed part and parcel of the common law of England' is included a unique aversion to cruelty. With respect to the pre-conviction stages of the common law criminal process, the late Lord Bingham describes how, in the wake of the papal bull declaring trial by ordeal to be cruel, the English common law invented the mechanism of the jury to determine factual matters, while the continent preferred the use of torture to obtain confessions.⁶³ Blackstone was famously proud of the refusal of the English judiciary to torture the assassin of the Duke of Buckingham, and of the traditional refusal to execute idiots and lunatics because:

The execution of the offender is for example, *ut poena ad paucos, metus ad omnes perveniat* [that few may be punished, and that a fear of punishment may operate on all]; but so it is not when a madman is executed; but should be a miserable spectacle, *both against law, and of extreme inhumanity and cruelty, and be not an example to others*.⁶⁴

One might pause at this point, and say that this is a highly selective and sentimental whitewashing of English legal history which conveniently omits mention of such practices as pressing to death those who refused consent to trial by jury.⁶⁵ Indeed, as both the Court of Appeal in *Yong* and the Privy Council in

⁶⁰ *ibid* [72].

⁶¹ *Matthew* (n 46) [74].

⁶² *Yong* (n 1) [74].

⁶³ Reliance on torture became necessary because of the Roman law's requirement of either a confession or the corroborating testimony of two witnesses in order to secure a conviction. Witnesses were difficult to find, and defendants reluctant to confess of their own accord, so torture was carried out to supply the necessary persuasion: Lord Bingham, *The Rule of Law* (Penguin Books 2010) 14–17. On the logic of torture in the early modern French law of proofs, see Michel Foucault, *The Spectacle of the Scaffold* (Penguin Books 2008) 43–54.

⁶⁴ 2 BI Comm 25 citing 3 Co Inst 6 (emphasis added).

⁶⁵ AWB Simpson, *Human Rights and the End of Empire* (OUP 2001) 24.

Ong observe, mandatory sentencing was the norm when it came to the death penalty for most of the life of the common law.⁶⁶

In addition, whatever may be said about the methods and process of execution, it may be argued that the English law was particularly bloodthirsty in terms of the alacrity with which it imposed the death penalty for countless offences. The problem with these scattered objections is that they merely point out instances of specific rules of law. Lord Diplock's dicta do not speak of specific rules, but of 'a system of law' seen as a whole. Courts often deal with rules of law, many of which have existed for centuries, which on examination are found to be entirely incompatible with the general 'system of law'. Many American States had long-standing laws which outlawed contraception, abortion, homosexuality, and suicide, which were only much later discovered to be in violation of both the general system of American law, and of fundamental principles of liberty and equality. At any rate, the very existence of the ECHR makes it impossible to argue that the system of English law in 1963 had not recognised a prohibition against inhuman punishments as one of its fundamental rules of natural justice. As a recent pamphlet by two conservative writers notes:

. . . the Convention was framed by British jurists, working within a common law legal tradition stretching back past the US Bill of Rights 1791 to encompass our own Bill of Rights 1689, and the Petition of Right 1628. So it is not surprising that its essential principles—including the right to fair trial, the right not to be held without charge, and *the right not to be subject to cruel and unusual punishment*—are manifestations of the English common law as it took shape during a centuries-long jostling for power between the different estates of the realm . . . *The ECHR thus marks a vital codification of the common law, not its repudiation.*⁶⁷

Accordingly, if *Ong* is to be taken seriously, references to the word 'law' in the Singapore Constitution must be read to imply a prohibition against cruel, inhuman or degrading treatment, notwithstanding the lack of an explicit textual provision.

3 The Requirement of Clear Words

The premise of the first reason for the holding is evidently absurd for one additional and very obvious reason: if there already was an express constitutional provision against inhuman punishment, there would be no need to interpret another constitutional provision to contain one. As a matter of constitutional interpretation, the Court appears to have misconstrued Lord Nicholls' statements in *Matthew*. The Court interpreted those dicta to emphasise the widely accepted ability of the legislature to amend the Constitution to remove constitutional

⁶⁶ *Yong* (n 1) [21] quoting Lord Diplock in *Ong* (n 3) 672–73.

⁶⁷ Jesse Norman and Peter Osborne, *The Conservative Case for the Human Rights Act* (Liberty 2009) 7–8 (emphasis added).

rights.⁶⁸ But, by doing so, it modified the requirement that such a thing be done ‘explicitly’: any departure from a fundamental right has to be made clearly and openly, so that the electorate knows exactly what is being done. The legislature or the constitutional convention must have the courage of its convictions. Of course, this principle is neither new nor controversial—we find it being enunciated throughout the history of the common law, and in cases no less important than *Somerset v Stewart*,⁶⁹ in which Lord Mansfield considered whether slavery was permitted under English law. He held, famously, that ‘[t]he state of slavery is of such a nature, that it is incapable of being introduced on any reasons . . . but only [by] positive law . . . [It is] so odious, that nothing can be suffered to support it, but positive law.’⁷⁰ As Waldron notes:

Lord Mansfield was not denying that there could be a valid law in England establishing slavery . . . If Parliament established slavery, then slavery would be the law . . . [but] any attempt to bring it—or its effects, so far as liberty is concerned—in by the back door . . . would have to be resisted.⁷¹

Lord Mansfield spoke against a constitutional background of parliamentary sovereignty, and it may be argued that different principles may apply where there is a written, entrenched Constitution. This however, would be a distinction without a difference. The sovereign legislature, whose every enactment is an addition to the Constitution, is presumed in the absence of clear words not to intend the curtailment of liberties afforded by the common law. There is no reason why a constitutional convention, which drafts the new Constitution, should not be subject to the same presumption. As far as the expression of intention is concerned, there is no reason in principle to think that a constitutional convention is entitled to a measure of subterfuge not permitted to the sovereign legislature. Both are lawmakers, and must therefore be forthright. As Lord Hoffmann stated in *R v Secretary of State for the Home Department ex p Simms*:⁷²

The constraints upon [the exercise of legislative power contrary to the Human Rights Act 1998] by Parliament are ultimately political, not legal. But the *principle of legality* means that *Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words.* This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary

⁶⁸ This position is widely, but not universally, accepted by all Commonwealth Supreme Courts. The Indian Supreme Court has famously held that a constitutional amendment made in perfect accordance with all the onerous procedural and voting requirements set down by the Constitution may nevertheless be unconstitutional as a violation of the ‘basic structure’ of the Constitution: *HH Keshavananda Bharati v State of Kerala* [1973] SuppSCR 1. This line of jurisprudence was rejected by the Singapore High Court in *Teo Soh Lung v Minister for Home Affairs* [1989] SLR 499.

⁶⁹ (1772) 98 ER 499 (KB).

⁷⁰ *ibid* 500.

⁷¹ Jeremy Waldron, ‘Torture and Positive Law’ (2005) *Columbia Law Review* 1681, 1718–19.

⁷² [2000] 2 AC 115 (HL) (*Simms*).

implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.⁷³

The same can be said of the Reid Commission and the Singapore Parliament regarding the creation and amendment of the Constitution: the limits were and are purely political.⁷⁴ That said, the question whether those limits were breached is a legal one, governed by the same principle of legality expressed in *Simms*. Accordingly, if the Reid Commission and the Singaporean government are both to be found to have drafted the Constitution so as to exclude the protection against inhuman punishment afforded by the ECHR and by the English common law, then clear and unambiguous words or actions must be adduced. The Court made no reference to any such statements, let alone public ones, by the Reid Commission concerning the removal of that right. *Ong* still stands: it must be 'taken for granted' that the makers of the Constitution did not intend to curtail any common law rights against cruel, inhuman or degrading treatment.

However, with respect to the Reid Commission, there is one consideration which might pose some difficulty. If a statute of the UK Parliament is interpreted, pursuant to the abovementioned presumption, as not curtailing a common law liberty, we say that the liberty remains untouched by the statute. The statute and the common law liberty are two separate things which exist independently of each other. One does not say that the statute annexes or codifies the common law right. But that is precisely the argument being made here—that in the absence of words to the contrary, the Reid Commission must have intended a right against cruel or inhuman treatment to be included in the new Constitution. It may be argued that written constitutions intended as the supreme law in their legal systems must have been drafted extremely carefully, such that if the drafters left out some explicit textual reference to some right or other thing, they must have meant to do so. Equally, if they had meant to include the common law right against cruel and inhuman punishment in the new Constitution, they would have included an explicit clause in that Constitution. Alternatively, they could have inserted a general saving clause in providing that all common law liberties not explicitly mentioned in the Constitution are likewise to be afforded constitutional protection as rights. They did none of these things. This does not mean that the establishment of the Constitution effectively abolished the common law liberty against cruel treatment; it only means that it was not given constitutional protection. It remains a liberty only at common law. And the common law can always be repealed by statutes, such as the MDA.

It should be obvious that this argument is incompatible with *Ong*. Leaving aside this matter of legal precedent, there are a number of problems of principle with the above argument. If it were correct, we would find that constitutions must go

⁷³ *ibid* 131.

⁷⁴ Li-Ann Thio, 'Protecting Rights' in Li-Ann Thio & Kevin YL Tan (eds), *Evolution: 40 Years of the Singapore Constitution* (Routledge–Cavendish 2009) 211: 'there is no practical difference between how a UK and a constitutional court applies principles of constitutionality.'

into extremely fine detail in enumerating each and every right, among other legal concepts. Instead, we find that they are expressed at very high levels of abstraction, leaving scope for interpretation. As a practical matter, such a strict constructionist method of constitutional drafting would make constitutions brittle, ie mere lists of rules either unwieldy and unreadable, or entirely devoid of content.⁷⁵ As Lord Bingham notes in *Reyes*, courts interpreting written constitutions should not treat 'the language of the Constitution as if it were found in a will or a deed or a charterparty. A generous and purposive interpretation is to be given to constitutional provisions protecting human rights.'⁷⁶ As a matter of law and of common sense, there is no reason to think that the drafters of the Constitution, by failing to make express mention of a right, intended to exclude that right from it.

The special nature of constitutions was the precise reason provided by Lord Diplock for his rejection of the Public Prosecutor's submissions in *Ong*.⁷⁷ Nevertheless, his dicta appear to leave something unexplained. What precisely is wrong with a mere attitude towards textual interpretation, however mistaken? Why should according constitutional protection to only some of the liberties recognised by the old common law, and not others, make a 'mockery' of the whole idea of the constitutional entrenchment of rights?

We sometimes use the term 'mockery' to describe something grossly unfit or inadequate; an empty shell devoid of substance. Hart identified a 'minimum core of morality' as being an essential criterion of a legal system—if certain rules were not in place, 'there would be no point in having any other rules at all.'⁷⁸ To illustrate, one could not confidently describe as a 'system of law' one which provided painstakingly detailed rules on conveyancing but left out prohibitions against murder and theft. One could possibly argue that a system of law which does not provide for protections against cruel, inhuman or degrading treatment is deficient in precisely such a manner. But this seems far-fetched: the uncodified British constitution did not provide constitutional protections against such treatment, or any treatment at all, for that matter, but it would be difficult to say that there was no system of law in the UK.

Alternatively, one could also describe something as a mockery if it tends to insult. Dworkin argues that the first and most basic duty of a government is to assume a certain attitude of respect towards those from whom it extracts allegiance.⁷⁹ Such respect is arguably not shown when in the constitutional entrenchment of civil liberties at common law, one of the most important is silently

⁷⁵ Ronald Dworkin, *Law's Empire* (Belknap Press 1986) 355–69.

⁷⁶ *Reyes* (n 40) [26]. See also *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 (PC) 329 (Lord Wilberforce stating that constitutions are to be read 'with less rigidity and more generosity than any other Acts').

⁷⁷ *Ong* (n 3) 669–70.

⁷⁸ HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593, 623.

⁷⁹ Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press 2006) 35.

omitted. Positive insult is paid when a government repudiates obligations to the people that were made by its predecessors: Simpson observes that the application of the ECHR to the colonies was done with the consent of the colonial governments.⁸⁰ Of course, it is true that the ECHR operated only at the international level, and that it had no direct application in the domestic legal sphere. However, one cannot get around the fact that while the colonial government was under an obligation to protect an important human right, the government of the independent republic is under none. The question is essentially this—what is the average Singaporean to make of the fact that she has fewer rights as a result of the drafting of the constitutional bill of rights? It is, in every sense of the word, a ‘mockery.’ Rules of constitutional interpretation should prevent such an unseemly result. As the late K S Rajah notes:

The provisions of the Articles [2, 3, and 6 ECHR] must in some measure be regarded as incorporated into Part IV of the Constitution. It could not have been the intention of the framers of our constitution to diminish the rights which Singaporeans as colonial subjects were entitled to enjoy, and to lose it on becoming independent citizens of a Republic with censorial power in their hands after freedom has taken into effect.⁸¹

If one accepts the immediately preceding arguments, the Court’s analysis of the Singaporean government’s reception of the Wee Commission’s recommendation will also be revealed as clearly flawed: the rejection of the proposed right against inhuman punishment was not ‘unambiguous.’⁸² To be sure, it might perhaps be excessive to require an Act of Parliament in order to justify interpreting a failure to amend the Constitution as a derogation from fundamental rights, but it is not good enough to rely upon the government’s omission to mention protections against inhuman treatment in its reception of the Wee Commission report.⁸³ Such an omission can be understood in two possible ways: it may mean, as the Court thinks, that the government opposed the idea of a right against inhuman and degrading treatment, or, it may be that the government thought an express provision to that end would be superfluous, since the right was already contained in another constitutional provision. At a minimum, there should be a clear and open official statement that a constitutional right against inhuman treatment would be undesirable; an omission to mention the subject cannot qualify as a good faith attempt to meet the political consequences of the deprivation of so fundamental a right.⁸⁴ Instead, it must be presumed as a matter of law that the

⁸⁰ Simpson (n 65) 6.

⁸¹ K S Rajah, ‘The Unconstitutional Punishment’ (2003) 2 Law Gazette (Singapore) 6.

⁸² Yong (n 1) [72].

⁸³ *ibid* [71] quoting E W Barker, Minister for Law and National Development, Singapore Parliamentary Debates Official Report, vol 25, cols 1052–53 (21 December 1966).

⁸⁴ I am open to the suggestion that a mere statement made in Parliament should not suffice in law: *Simms* (n 72) requires clear statutory language. However, Singapore has a stance perhaps unique in the common law world with respect to the use of non-statutory materials in statutory and constitutional interpretation. S 9A, Interpretation Act (Cap 1 (2002 Rev Ed)), permits the use of Parliamentary speeches and other documents even in the absence of ambiguity or inconsistency.

government was of the opinion that an explicit statement of the right was unnecessary, and that it was implicit in the right to life contained in art 9(1).⁸⁵

Curiously, the Court attempts to reassure us that while there is no right against inhuman punishment, art 9(1) might possibly contain a right against torture⁸⁶ as a result of *Ong*, which it interprets as not 'justify(ing) all legislation.' The reasoning the Court then provides for this is truly breathtaking. The Court essentially argues as follows: the constitutional amendment proposed by the Wee Commission contained a prohibition on torture alongside a prohibition against inhuman punishment. The rejection of that proposal therefore must mean there is no right against inhuman treatment. However, there may nevertheless be a right against torture, even though the government was equally silent on that issue in its response to the Wee Commission's report. The reasons given by the Court for this bizarre conclusion were, firstly, that 'no domestic legislation permits torture',⁸⁷ and, secondly, that in a speech made more than 20 years after the reception of the report, the Minister for Home Affairs 'expressed the view that torture is wrong.'⁸⁸ Accordingly, Executive conduct decades after the constitutional changes recommended by the Wee Commission is of value in discovering precisely what was adopted and what was not. If this is the case, it would appear that a speech by a minister in Parliament deploring inhuman treatment would go some way towards creating such a constitutional right against inhuman treatment. Conversely, a statute providing for torture would squash any embryonic right against torture: the existence of the statute will itself be proof of its constitutionality. In any case, the Court declined definitively to declare that there was a right against torture, on the grounds that the issue was not before it. As such, it is still an open question as to whether there is a right against torture in the Singaporean Constitution, and the Court's methods of answering that question appear in danger of being better described as divination than judicial determination.

4 *Mithu v State of Punjab*

As mentioned, the Court held that *Mithu* was not applicable. Certainly, the texts of art 9(1) of the Singaporean Constitution and art 21 of the Indian Constitution are slightly different. Whereas the Singaporean Constitution prohibits the deprivation of life and liberty 'save in accordance with the law', art 21 of the

⁸⁵ It is submitted that this proposed requirement of a good faith attempt at meeting political consequences is not incompatible with the attitude of the Constitutional Tribunal in *Constitutional Reference No 1* [1995] 2 SLR 201, which called for a purposive approach towards interpreting the Constitution to give effect to Parliament's intentions. This is because Parliament's intention is precisely the question raised here, and it must be strongly presumed that it does not intend to deprive or deny fundamental rights.

⁸⁶ *Tong* (n 1) [75].

⁸⁷ *ibid.*

⁸⁸ *ibid.*, quoting Professor S Jayakumar, Minister for Home Affairs, Singapore Parliamentary Debates Official Report, vol 49, cols 1491–92 (29 July 1987).

Indian Constitution provides that ‘No person shall be deprived of his life or liberty except according to procedure established by law.’ Accordingly, the Court found three reasons to distinguish *Mithu*. First, the main issue in *Mithu* was not about inhumanity or cruelty, but about whether life is deprived according to ‘fair, just and reasonable procedure.’⁸⁹ Art 9(1) on the other hand requires only that the deprivation be in ‘accordance with law’, and although ‘law’ may include procedural as well as substantive law, there was no requirement that such procedure be ‘fair, just and reasonable.’⁹⁰ The Court then noted that *Ong* did not enunciate the requirement that law be ‘fair, just and reasonable’, but only that it meet the apparently different standard of consistency with ‘fundamental principles of natural justice.’⁹¹ The subtlety of the latter distinction in particular has so far been beyond the poor ability of this author to fathom. The second reason the Court gave was essentially the same one Lord Diplock offered in *Ong*, ie that a ban on the mandatory death penalty would also take down with it other mandatory punishments, such as fines or minimum or maximum limits on sentences.⁹² The Court, anticipating the argument that a mandatory death sentence is qualitatively different from a minimum fine, says that although this might be the case, the ‘plain wording of Art 9(1) does not support the conclusion that Parliament cannot make the death penalty mandatory.’⁹³ As such, the very contention that is being disputed is raised in its own support. Thirdly, the Court says that *Mithu* is understandable only in India’s specific economic, social and cultural context, and because of India’s unique habit of giving the right to life ‘pride of place in (its) constitutional framework.’⁹⁴ The Court then defends this statement with reference to the fact that the mandatory death penalty has featured in Singapore’s criminal law throughout its history.⁹⁵ It was present in the first Penal Code of 1871⁹⁶ (based on the Indian Penal Code, which also contained such provisions), was applied by the British even during the period when Singapore was covered by the ECHR, affirmed by the Privy Council in *Ong*, and affirmed by the Singapore Court of Appeal in *Nguyen*. Again, the very practices and precedents in dispute are used as arguments in their own support.

D CONCLUSION

The most curious thing about the holding on the status of customary international law in the Singaporean legal sphere is that it was not necessary to reach the

⁸⁹ *Mithu* (n 39) [6].

⁹⁰ *Yong* (n 1) [80].

⁹¹ *Ong* (n 3) 670.

⁹² *Yong* (n 1) [81].

⁹³ *ibid* [82].

⁹⁴ *ibid* [83].

⁹⁵ *ibid* [84].

⁹⁶ The Penal Code (Ordinance 4 of 1871) (Singapore).

judgment. The Court could simply have said, as it eventually did, that there was insufficient state practice to give rise to such a rule.⁹⁷ Indeed, apart from the section on the possible right against torture,⁹⁸ the judgment seems quite unblemished by excessive judicial parsimony. We have already considered the Court's venturing to speak for the prosecution, and then accepting an argument that it not only never actually made, but was the exact opposite of the one it did make. On a number of instances the Court pre-emptively rejects arguments that the defence never made. For instance, the defence never argued that the right to life under art 9(1) prohibits the entire death penalty. Nonetheless, the Court offers that '(i)t is not surprising that the Appellant has adopted this stance because Art 9(1) expressly allows a person to be deprived of his life "in accordance with law"; ie it expressly sanctions the death penalty.'⁹⁹ A little further on, we see the Court

note in passing that, although Art 2(1) defines the expression 'law' to include 'custom or usage' . . . [counsel for the appellant] has not argued that these words are intended to include CIL. If such an argument had been made, we would have rejected it because, in our view, the phrase 'custom or usage' in Art 2(1) refers to local customs and usages which (in the words of this provision) '[have] the force of law in Singapore'.¹⁰⁰

Of course, judicial parsimony alone would not have salvaged the section of the judgment dealing with inhuman punishments. The intellectual planks behind the Privy Council's sanctioning of the mandatory death penalty have eroded steadily since *Ong* in a fashion not dissimilar to Lord Diplock's justifications of other practices associated with the death penalty.¹⁰¹ A considerable body of jurisprudence exists to the effect that the mandatory death penalty is inhuman, cruel and degrading in a way incompatible with a belief in basic human dignity. Apart from the Caribbean and the Indian cases mentioned above, Stewart J in the US Supreme Court case of *Woodson v North Carolina*¹⁰² held that mandatory death sentences 'treat(ed) all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.'¹⁰³ As such, it was

⁹⁷ *Yong* (n 1) [96]–[98].

⁹⁸ *ibid* [75]. See text accompanying nn 74–77.

⁹⁹ *Yong* (n 1) [6].

¹⁰⁰ *ibid* [12].

¹⁰¹ See *Pratt v A-G for Jamaica* [1994] 2 AC 1 (PC) overruling *Abbott v A-G of Trinidad and Tobago* [1979] 1 WLR 1342, 1345 (PC) where Lord Diplock had held that it was constitutionally permitted to hold prisoners on death row for years on end before they are eventually executed, because 'while there's life, there's hope', and that a death row appellant could not complain of delay when he himself brought the appeal proceedings. Instead, Lord Bingham held at 786 that:

It is part of the human condition that a condemned man will take every opportunity to save his life through the use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner . . . The death row phenomenon must not become established as part of our jurisprudence.

¹⁰² (1976) 428 US 280.

¹⁰³ *ibid* 304.

necessary to settle the issue of whether or not there was a right against cruel, inhuman or degrading treatment or punishment.

Whatever may be said about the reasoning, the practical effect of the judgment in *Yong* is to insulate the Constitution from all external stimuli: customary international legal developments, and even developments in domestic attitudes towards the infliction of the death penalty which will simply glance off it. For Singaporean lawyers, the judgment is likely to be a source of confusion, especially regarding the holding on the effect of customary international law in the domestic legal sphere. For the Singaporean citizen the most worrying aspect of the judgment must be its account of what transpired at the Reid Commission, and how the rights provided by the ECHR were lost upon independence. As against Singapore's colonial history under the ECHR, the insulation is total. Certainly, the colonial authorities in Malaya and Singapore cannot be accused of having fulfilled their obligations under the ECHR with distinction. Simpson relates how a notice of derogation from their treaty obligations pursuant to art 15 ECHR¹⁰⁴ was filed in Strasbourg in 1954, hardly a year after the ECHR was extended to those territories, and how the reasons for the declaration of emergency were communicated to Strasbourg in a cryptic and grudging fashion. Even worse, when the emergency measures which had necessitated the original derogation were renewed in 1955, the Colonial Office simply chose not to inform Strasbourg, let alone file another derogation notice. That said, whereas Singaporeans as colonial subjects definitely had some rights against inhuman and degrading treatment under art 3 ECHR which the colonial government was obligated to protect, if only nominally, the Court makes it clear that as citizens of an independent republic, they have nothing. For this reason more than any other, *Yong* represents a mistake of quite some consequence.

¹⁰⁴ CO 936/494 (UK Colonial Office), see Simpson (n 65) 878.