

THE DEATH PENALTY IN SINGAPORE AND INTERNATIONAL LAW

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This article compares Singapore's law and practice of the death penalty with what may appear to be an emerging international consensus on the minimum standards under which capital punishment may be legitimately employed. It explores some of the difficulties that might be encountered should international law attempt to govern the use of the death penalty. It also contains some tentative observations about how certain aspects of capital punishment in Singapore may be problematic should such standards ever crystallize into customary international law.

I. AMNESTY INTERNATIONAL VS. SINGAPORE

Singapore achieved global fame (or if you like infamy), when Amnesty International reported that it had the highest per capita execution rate in the world, dwarfing the rates in rather more prominent death penalty practitioners such as Saudi Arabia, China and the United States.¹ The Singapore government issued a swift response—Singapore believes that executions are necessary for the preservation of law and order and there is nothing in international law to forbid them.² It is easy for death penalty debates to degenerate into rhetoric and the trading of assertion and counter-assertion.³ It is certainly not the intention of this modest piece to add to that kind of discourse. What follows is an attempt to discuss some of the points of contention in as dispassionate a way as is humanly possible.

One threshold question must first be answered: does international law forbid Singapore from employing the death penalty under any circumstances? Singapore is not under any relevant treaty obligation. Does customary international law forbid the death penalty? I do not think there is a convincing argument that it does.⁴ Even Amnesty International does not make that assertion.⁵ Whatever the precise nature of *opinio juris* might be, the historic and continuing use of the death penalty by a significant number of states must surely prevent

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¹ Singapore, The death penalty: A hidden toll of executions, Amnesty International Index: ASA 36/001/2004, 15 January 2004, online: Amnesty International website <<http://web.amnesty.org/library/index/engasa360012004>>.

² Ministry of Home Affairs, Press Release, “Singapore—The Death Penalty: A Hidden Toll of Executions” (30 January 2004) online: Ministry of Home Affairs, Singapore website <<http://www2.mha.gov.sg/mha/detailed.jsp?artid=990&ctype=4&croot=0&parent=0&cat=0>>.

³ Amnesty, for example, declares, *supra* note 1, in section 2, “[the death penalty] is the ultimate cruel, inhuman and degrading punishment”. The Singapore government, on the other hand, insists that, *supra* note 2, para. 4, “the death penalty has deterred major drug syndicates from establishing themselves in Singapore”. Both assertions are, of course, highly contentious.

⁴ William A. Shabas, *The Abolition of the Death Penalty in International Law* 3rd ed. (Cambridge: Cambridge University Press, 2002) at 377, says that “it is still true” that customary international law does not prohibit capital punishment”, but adds, hopefully that “trends in state practice ... and in fundamental human values suggest that it will not be true for very long”.

⁵ Amnesty, *supra* note 1, section 4, is careful to say that “[i]nternational human rights standards encourage states to move towards complete abolition of the death penalty”.

the crystallisation of such a norm.⁶ It might well be that a credible argument may be made that there is in existence a regional European customary rule against the death penalty,⁷ but the unanimity of practice within Europe does not extend to the rest of the world. The absence of such a norm in customary international law dovetails with Singapore's domestic constitutional jurisprudence—the state may not deprive someone of his or her life, “save in accordance with law”.⁸ Rendered positively, the state may deprive someone of his or her life, if it is in accordance with law. Nor is Singapore the only state to have a constitutional provision so drafted.⁹

The debate shifts to the scrutiny of the rules and practices surrounding the death penalty. In the domestic constitutional plane of jurisdictions such as the United States, India and to a lesser extent, Singapore, all the “action” has been here. Almost every conceivable stage and aspect of death penalty litigation has been tested in the Supreme Courts of the United States and of India, producing a sophisticated set of constitutional norms.¹⁰ Singapore, with its characteristic economy of constitutional litigation,¹¹ has nonetheless produced some significant decisions which we shall have occasion to look more closely at. The key issue is whether the legal activity on both the domestic and international planes has caused the creation of customary norms governing the legitimate infliction of the death penalty. What follows is far from being comprehensive, and tackles only those possibly nascent customary rules of international law in so far as they impact on significant death penalty law and practice in Singapore.

II. THE MOST SERIOUS CRIMES

One of the strongest contenders for a place in the pantheon of customary rules of international law is the injunction that the death penalty must only be inflicted for the “most serious crimes”.¹² Evidence of the norm is to be found in both the international and domestic plane.¹³ Significantly, the government of Singapore in its reply to Amnesty International not only did not deny its existence, but positively asserted that Singapore “imposes capital punishment only for the most serious crimes”.¹⁴ Here the problems begin—what is a “most serious” crime? It certainly cannot be only the worst crimes imaginable—one could keep

⁶ Roger Hood, *The Death Penalty—A Worldwide Perspective* 3rd ed. (Oxford: Oxford University Press, 2002) at 22, cautions that “it would be wrong to underestimate the level of support for capital punishment in many of the countries that retain it, notably most of the Islamic states, China and the United States of America”.

⁷ See the comments of the European Court of Human Rights in *Ocalan v. Turkey*, Application No 46221/99, 12 Mar 2003 at paras. 187-198, where the Court seems prepared to entertain the idea (although it did not wish to come to a “firm conclusion”) that “commonly accepted standards in the penal policy of member states” and the considerably evolved conceptions of inhuman and degrading treatment and punishment is now powerful enough to override the expressly permissive language of the European Convention.

⁸ *Constitution of the Republic of Singapore* (1999 Rev. Ed.), Art. 9(1). See H.F. Rawlings, “The Constitutionality of the Death Penalty” (1983) 25 Mal.L.Rev. 148.

⁹ The Constitutions of United States, India and Malaysia, and the European Convention are similarly drafted. See *ibid.*

¹⁰ The literature is legion. For a thumbnail conspectus, see the judgment of Chaskalson P. in South African Constitutional Court decision of *S. v. Makwanyane* [1995] 3 S.Afr.L.R. 391 (S.Afr.Const.Ct.).

¹¹ One may speculate why. Singapore is a very small jurisdiction with about 3.5 million residents. The failure of constitutional challenges so far does not give encouragement to further challenges.

¹² The language appears in Article 6(2) of the *International Covenant on Civil and Political Rights*. Singapore is however not a party to this and is not bound to it as a treaty obligation. See also Art. 1 of the 1984 Resolution of the United Nations Economic and Social Council on Safeguards Guaranteeing Protection of the Rights of those facing the Death Penalty.

¹³ See *supra* note 12, and, for example, the Indian Supreme Court, in the context of capital sentencing for murder, uses language like “exceptionally depraved and heinous and constitutes ... a source of grave danger to the society at large”: *Bachan Singh v. State of Punjab* [1980] A.I.R.S.C. 898 at 936.

¹⁴ *Supra* note 2 at para. 3. The same statement, at para. 11, somewhat fudged this by using the phrase “very serious crimes”.

on imagining more and more horrendous crimes. One could also safely say that uncontroversially trivial crimes cannot be punished with death, but it is not easy to conceive of governments willfully doing such a thing. In the vast borderland between “most serious” and “serious but not most serious”, differences of opinion are inevitable.¹⁵ The US Supreme Court drew the line above rape—the death penalty in the United States cannot be inflicted for the crime of rape, no matter how aggravated—¹⁶ it is a serious, but not “most serious” crime. This ruling is clearly not uncontroversial.¹⁷ The courts of Singapore have not been squarely faced with this issue. It might be fruitful to see how Singapore’s death penalty laws measure up to some sort of “most serious crimes” standard.

That murder, as it is commonly understood, is a “most serious crime” cannot be in doubt. Intentional killing is the classic capital crime. Such is the retributive appeal of the exaction of life for life. Singapore imposes a mandatory sentence of death for murder and has done so for more than a century.¹⁸ The story does not end there, for surely it must matter how murder is defined in Singapore law. It is not commonly known outside the small circle of criminal lawyers that murder in Singapore extends beyond intentional killing.¹⁹ What is affectionately known as “300(c) murder”, practically the only kind of murder the prosecution uses nowadays,²⁰ makes it murder to cause death with the intention of causing merely an injury, which is objectively established to be sufficient in the ordinary course of nature to cause death. The crux of the matter is that it is irrelevant to this kind of murder whether or not the accused intended death or knew that death was likely. The governing *mens rea* is the intention to cause injury, nothing more.²¹ This expanded meaning of murder does not comport easily with the popular idea of what murder is and it is certainly qualitatively less serious than intended killing. That it should be a crime is not in doubt, but is it a “most serious crime” for the purposes of a possibly nascent rule of customary international law? I do not think that intended wounding plus (objectively) fatal consequences qualifies to be a “most serious crime”. If, for some reason, the victim had not died, the only offence would have been voluntarily causing grievous hurt, a crime with a sentence level way below that of the death penalty.²² The role of luck in criminal law is as intractable as it is interesting, but whatever it might be, it surely should not be allowed to determine the infliction of the death penalty under these circumstances. I do not say that accused persons who satisfy only the requirements of 300(c), and not those of intended killing, are being executed in Singapore—it is possible that the facts often also establish an intention to kill, but the prosecutor chooses to prefer a 300(c) charge.²³ Yet the existence of such a thing as 300(c) murder gives rise to the possibility that someone who has caused death unintentionally and unknowingly faces mandatory execution. The substantive criminal law of 300(c) has the potential of diverting the attention of prosecutors, courts and pardon officials away from

¹⁵ For a discussion of attempts to flesh out the meaning of this term, see generally, Hood, *supra* note 6, pg 75-77.
¹⁶ *Coker v. Georgia (State of)* (1977) 433 U.S. 584.

¹⁷ The United States Supreme Court seemed to have based its judgment on the particular retributive belief that only the taking away of death deserves death. These are sensibilities which are probably contestable even within the United States and might well not be shared by people outside of it.

¹⁸ *Penal Code* (Cap. 224, 1985 Rev. Ed. Sing.), section 302 (first enacted in 1871).

¹⁹ See Victor Vridar Ramraj, “Murder Without an Intention to Kill” [2000] Sing.J.L.S. 560.

²⁰ There are other alternative kinds of murder—for example section 300(a) which requires an intention to cause death, but they have fallen into disuse.

²¹ For a recent pronouncement, see the Court of Appeal judgment in *Tan Chee Wee v. P.P.* [2004] 1 Sing.L.R. 479 at para. 42, “There is no necessity for the accused to have considered whether or not the injury to be inflicted would have such a result. It is in fact irrelevant whether or not the accused did intend to cause death.”

²² Section 325, *Penal Code*, sets a sentencing maximum of 7 years plus fine and caning.

²³ If the argument is that all murder charges are now being preferred only if the prosecutor is convinced that there was an intention to cause death, then surely section 300(c) would no longer be necessary.

what is truly “most serious” about the crime of murder—that of the intentional causing of death.²⁴

Also little known in the popular domain is the existence of a cluster of provisions which have the effect of imposing the death penalty for murder through constructive means.²⁵ Most prominent is the doctrine of “common intention” which is best described by a factual example—if two people combine to commit a crime, say robbery, and in the course of the robbery, one of them commits murder, the other confederate is liable for murder if the killing was done “in furtherance of” the common intention.²⁶ Singapore courts have been and continue to be annoyingly vague about what this means precisely and several *mens rea* possibilities have emerged: actual foresight (on the part of the confederate), objective foreseeability, strict liability (depending on whether the killer killed to further the robbery).²⁷ The courts have rejected a proposed requirement that there must be a common intention to kill,²⁸ but has refused to decide with finality what stands in its place. The lower one goes down the culpability ladder, the more the doctrine (as it applies to murder) stands in danger of imposing the death penalty on crimes which are not the most serious. Combining with another to commit robbery, in the course of which an unplanned or unexpected killing by a confederate takes place is indeed a serious crime, but not of the same order of seriousness as partaking in an intended killing.

The problem of 300(c) murder and of common intention are historical, the product of a time when subjectivity in criminal liability did not quite have the hold that it has today.²⁹ The *Penal Code*, revolutionary in its time, has been left behind. The government of independent Singapore merely inherited this from its colonial predecessors and have never (publicly, at least) made a conscious and deliberate decision to preserve them. If indeed the “most serious crimes” norm is or becomes international law, these eccentric capital crimes will have to be carefully re-examined, and either properly defended or expunged. Does the government of Singapore really believe that these are “most serious crimes” mandating the death penalty, or are the provisions preserved only by force of habit and convenience?

More difficult, in my view, are the “modern” capital offences, primarily the offence of trafficking above certain stipulated amounts of illicit drugs. The death penalty was imposed quite deliberately by the government of independent Singapore after due deliberation in Parliament and for the express purpose of deterrence.³⁰ This is where international norms, if they do exist, must firm up much more before the matter can be usefully analysed. There can be no doubt that the government of Singapore believes that these are crimes of the

²⁴ The 1984 Resolution of the United Nations Economic and Social Council on Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty actually spell it out expressly that “most serious crimes” must be “intentional crimes with lethal or extremely grave consequences”. The relevant intention must clearly be that of causing such consequences.

²⁵ For a discussion of the details, see Michael Hor, “Common Intention and the Enterprise of Constructing Criminal Liability” [1999] Sing. J.L.S. 494. The Court of Appeal in *Too Yin Sheong v. P.P.* [1999] 1 Sing.L.R. 682 at para. 29 said, “it is not incumbent upon the prosecution to show that the common intention of the accused was to commit [murder]. It is the intention of [the person who actually killed] that is in issue, and when section 34 applies, the others will be *vicariously* or *constructively* liable for the same offence [of murder]”.

²⁶ Section 34, *Penal Code*.

²⁷ This especially chilling interpretation was advanced in the High Court decision of *P.P. v. Too Yin Sheong* [1998] SGHC 286 at para. 133, “They must be held responsible for any other criminal acts committed in the course of their venture that in fact helped to further that common intention, even if those acts are done unexpectedly by one of the perpetrators in carrying out that common intention.”

²⁸ *Wong Mimi v. P.P.* [1972-74] Sing.L.R. 73.

²⁹ See M. Sornarajah, “The Definition of Murder under the Penal Code” [1994] Sing.J.L.S. 1.

³⁰ Second Schedule, *Misuse of Drugs Act* (Cap. 185, 2001 Rev. Ed. Sing.). Then Minister for Home Affairs and Education, Chua Sian Chin said, Sing., *Parliamentary Debates*, vol. 37, col. 34 (27 May 1977), “unless drug trafficking and drug addiction [are] checked, they [will] threaten our national security and viability. To do this, both punitive and preventive measures must be taken. The [Misuse of Drugs] Act was thus amended to provide enhanced penalties for traffickers, including mandatory death penalty for drug trafficking and manufacturing”.

most serious order, deserving of the death penalty and for which it is necessary to provide maximum deterrence. One can debate about the validity of either claim, but the belief is not an unreasonable one. Matters of desert are inherently subjective, measurement of the potential harm of illicit drugs to the community is incredibly complex,³¹ and many years of deterrence studies have come to the conclusion that there is evidence neither for the proposition that it deters, nor for the proposition that it does not.³² Professor H.L.A. Hart astutely observed a long time ago that the matter boils down to one of the burden of proof—if it is on proponents of the death penalty to prove it is effective, then they fail; if it is on abolitionists to prove that it is not, then they fail too.³³ It remains to be seen what shape a customary norm might take. Will customary law cast the burden on the state to prove that the death penalty will actually produce the desired amount of deterrence (perhaps out of an increasing commitment to the right to life)? Or will it say that it is for the state to decide which the most serious crimes are, and any decision honestly and not unreasonably taken is to be respected?

Easier to find fault with is a string of decisions which seem to say that a trafficking conviction is possible even if the accused is not aware that he or she is in possession of illicit drugs.³⁴ Thus if I give away white tablets thinking that they are aspirin, but which turn out to be an illicit drug, I am nonetheless liable for trafficking in them. So too am I guilty of trafficking in illicit drugs if I give away a container (with illicit drugs inside) without checking what it contains, so long as I had a reasonable opportunity to examine its contents.³⁵ There is therefore the possibility of the death penalty being imposed on a crime of either negligence or strict liability. These are surely not “most serious” crimes permitting the use of the death penalty.³⁶ It is true that professions of ignorance are often made, and made falsely, but that is a matter of evidence and proof—false claims can simply be dismissed without tampering with the substantive law. Doing away with the requirement of knowledge of possession of the illicit drug carries with it the danger of violating the “most serious crimes” norm.

³¹ The “extremely grave consequences” formula of the Economic and Social Council, *supra* note 24, take us no further than the original “most serious crimes” language. It is widely believed that the extreme stand taken by the government of Singapore stems primarily from a fear that if the use of narcotic drugs were to become widespread, the efficiency of the workforce would be seriously affected, resulting in significant damage to the national economy—there is no simple way to decide if this is prudence or hysteria.

³² See Hood; *supra* note 6, chapter 7.

³³ H.L.A. Hart, *Punishment and Responsibility—Essays in the Philosophy of Law* (Oxford: Clarendon Press, 1968) at 88-9.

³⁴ This is described in greater detail in Michael Hor, “Misuse of Drugs and Aberrations in the Criminal Law” (2001) 13 Sing.Ac.L.J. 54. See, for example, *Cheng Heng Lee v. P.P.* [1999] 1 Sing.L.R. 504 at 520, where the Court of Appeal disposed of the accused’s defence that he was an “innocent courier” on the grounds that “[the accused] should have suspected that the contents … might be illicit … and should have inspected the bags to ascertain their contents” and that “he did have the opportunity for inspection since he had the bags.” (emphasis added)

³⁵ *Tan Ah Tee v. P.P.* [1978-9] Sing.L.R. 211. For a recent pronouncement on the meaning of possession (possession for the purpose of trafficking being a capital crime), see *Shan Kai Weng v. P.P.* [2004] 1 Sing.L.R. 57 at paras. 23-4:

The position under our law, therefore, is that possession is proven once the accused knows of the existence of the thing itself. Ignorance or mistake as to its qualities is no excuse. The appellant knew that the tablet was in his car. He believed it to be a sleeping ... As such, his ignorance as to the qualities of the tablet did not provide him a defence to the charge of possession.

Although this particular case was not on a capital charge, but only for unlawful possession, the authorities cited by the court for this proposition were concerned with capital charges.

³⁶ If the “intentional crimes” formula of the Economic and Social Council were to become customary law, *supra* note 24, this expansive interpretation of the meaning of possession is probably in violation of it.

III. MANDATORY AND DISCRETIONARY DEATH

More than 20 years ago, the Privy Council in an appeal from Singapore expressly approved of the constitutionality of the mandatory death penalty for trafficking in illicit drugs.³⁷ A mandatory death penalty based on the amount of drugs bears a reasonable relationship with the purpose of the legislation—the greater the amount of drugs being trafficked the greater is the culpability of the offender and the harm caused to the community.³⁸ Recently, that august Council in an appeal from the Caribbean abandoned its earlier decision and held that virtually any mandatory sentence of death is unconstitutional and violates the inherent dignity of the individual in that he or she cannot be deprived of the right to have a court take into account all mitigatory circumstances in pronouncing a sentence of death.³⁹ There is no doubt that there has been a distinct movement against the mandatory imposition of the death penalty.⁴⁰ The question is whether it has developed, or is likely to develop, into customary international law. Is the case against mandatory death penalties so clear as to demand global, or near global, acceptance? It is noteworthy that the Privy Council itself backed down from actually abolishing mandatory death penalties in totality in the Caribbean, relying on a saving of historical laws clause in some of the jurisdictions.⁴¹ The attraction of a mandatory penalty to retentionist jurisdictions like Singapore is simple—if the purpose of the death penalty is maximum deterrence, then to make the penalty discretionary would be likely to dilute the expected deterrence. Again, one may argue about the precise diminution in marginal deterrence between discretionary and mandatory penalties, and about whether or not the likely gain in deterrence is worth the cost of mandatory penalties, but the albeit simplistic deterrence logic is not one which is inherently irrational. The Privy Council's latest stand is perhaps simply this—whatever the deterrent effects might or might not be, it is simply inhuman and unconstitutional to impose a mandatory death penalty. Jurisdictions like Singapore disagree with this—a mandatory death sentence is justified by its potential deterrent effects in the context of very grave crimes.⁴²

It is also possible to see the rejection of the mandatory imposition of death as an off-shoot of the nascent rule that the death penalty is only to be inflicted for the most serious crimes.

³⁷ *Ong Ah Chuan v. P.P.* [1980-81] Sing.L.R. 48, [1981] A.C. 648.

³⁸ *Ibid.* at paras. 31-40. The Privy Council said, at para. 38: “The social evil caused by trafficking ... is broadly proportionate to the quantity of addictive drugs brought on to the illicit market”.

³⁹ *Reyes v. The Queen* [2002] 2 A.C. 235. The core of this judgment was the realization, at para. 43, that:

To deny the offender the opportunity ... to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate is to treat him as no human being should be treated and thus to deny his basic humanity.

The earlier decision of *Ong Ah Chuan*, *supra* note 37, was dismissed summarily, para. 45, in that it was “made at a time when international jurisprudence on human rights was rudimentary and the Board found little assistance in such authority as there was”.

⁴⁰ A large part of the decision in *Reyes*, *ibid.*, is devoted to a description of this trend. The Privy Council did not, however, wish to say categorically that there can never be a set of rules providing for a mandatory death penalty so carefully drafted as to avoid inhumanity: *Reyes*, *ibid.*, para. 43. See also Article 1(2) of the *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty* which states that “each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction”.

⁴¹ *Boyce v. R. (Barbados)* [2004] UKPC 32 (7 July 2004) provoking a dissent from 4 of the 9 Judges hearing the appeal.

⁴² *Reyes*, *supra* note 39, was pressed upon a Singapore court in *P.P. v. Nguyen Tuong Van* [2004] 2 Sing.L.R. 328, a decision which acquired some prominence because the accused was an Australian national, only to be dismissed with the terse observation that Singapore’s Constitution did not have a clause prohibiting torture or inhuman or degrading punishment. The High Court did not seem to have considered the possibility that such a norm might be implied into the right not to be deprived of life “save in accordance with law” (Article 9), which is in the Singapore Constitution. An appeal to the Court of Appeal has been argued, but at the time of writing, no decision has been issued.

Any definition of a crime encompasses circumstances of widely differing culpability—one can always imagine the most sympathetic offender on the one hand, and the most inexcusable one on the other. It is possible to fashion an argument that mandatory death penalties result in the most sympathetic offenders, not being guilty of the most serious offences, being punishable with death. The ambiguity of the phrase “most serious offences” returns to haunt us. There is certainly a huge difference between the petty courier who traffics in just over 15 gm. of heroine in order to make ends meet, and the multi-millionaire drug kingpin who orchestrates mass shipments of the drug all over the world out of greed—but does this necessarily mean that the smaller scale trafficker is not guilty of a “most serious crime”? Sentencing law and practice has never quite worked out the precise relationship between offence and offender characteristics and exactly what should be considered mitigatory. The most difficult situations are with aggravated offence characteristics (where serious harm is done) coupled with mitigatory offender characteristics (where there are sympathetic personal circumstances or motivation)—courts and judges have never been able to resolve the conflicting push and pull. The Singapore Legislature has decided that for certain drug offences, no mitigatory circumstances can ever make the offence not serious enough to be punished with death—is it clearly wrong in this determination?

Or is the issue one of the separation of powers and the independence of the judiciary? It is axiomatic that it is for the courts to adjudge guilt and pronounce sentence on those found guilty—but the line between legislative and judicial competence has never been completely clear. The Legislature in determining the ingredients of the offence is, in a sense, interfering with the finding of guilt. Similarly, the Legislature in providing for sentencing ranges and options is significantly affecting the sentencing decision. It is clear that the Legislature may not say—if Mr or Ms X is found to have committed Y, then Z shall be the sentence; but for anyone else the sentence shall be A. But as the level of generality of the class of singled-out offenders increase, the matter becomes much more difficult.⁴³ Apart from the easy case of targeting highly particularized offences or offenders, the line between legislative and judicial competence is not a simple matter. The debate shifts from one of separation of powers to that of equal protection—is the legislative classification unfair discrimination?

The most important determination in equal protection analysis is the level of scrutiny with which the legislative classification is to be subjected to. If it is the lower rational nexus we are looking for, then as the Singapore Privy Council says, singling out drug traffickers who possess above a certain amount of drug, not ridiculously small, is rational.⁴⁴ The more you traffic, the greater the harm and the higher the culpability. It may not be a perfect fit, but that is not what rational nexus is about. If it is some sort of heightened scrutiny,⁴⁵ then the simplistic categorisation of offenders who traffic above a certain amount of drug might fail the test—15 gm. of heroine is in a sense arbitrary because harm and culpability might mean much more than how much drug one is purveying. This is what it boils down to—is the infliction of death something which is to be subjected to heightened scrutiny? The Privy Council in the Caribbean decision clearly thinks so—probably grounding the approach on the right to life and human dignity, which can only be taken away if the state manages to prove that it has very good reasons to do so. The Privy Council in the Singapore decision did not, reasoning that it is for the Legislature to decide how to deal with the problem of trafficking in illicit

⁴³ See the Privy Council’s observations in *Liyanage v. The Queen* [1967] 1 A.C. 259; *Hinds v. The Queen* [1977] A.C. 195.

⁴⁴ *Ong Ah Chuan*, *supra* note 37.

⁴⁵ The question of distinct levels of scrutiny found, for example, in United States Supreme Court jurisprudence, has never been squarely pronounced upon by Singapore courts. The Singapore Constitution does have an equal protection clause (Article 12). The cases so far have spoken only of the rational nexus test: e.g., *P.P. v. Taw Cheng Kong* [1998] 2 Sing.L.R. 410.

drugs so long as it does not resort to anything “purely arbitrary”.⁴⁶ How will customary international law adjudicate between these contrasting postures? The amount of justification needed for the deprivation of life by the state does not lend itself to an obvious answer, depending on a number of highly subjective, and perhaps culturally relativistic, factors like the value of life itself, and attitudes towards the need for retribution and the effectiveness of deterrence. Unless there is a radical convergence of opinion on these matters, it is not easy to see how a norm of customary international law can emerge anytime soon.

There is one other complication to any proposed rule against mandatory death penalties, and this has to do with the assumption that a discretionary system is likely to be better. Just as rules may cause arbitrariness in that legislative classifications adopted to formulate rules are inevitably arbitrary to some degree, a regime of discretion is also subject to criticism in that the exercise of discretion may well produce arbitrariness as well. One judge may give rather more weight to a mitigating factor than another, resulting in the death penalty for one offender and not for another, although both offenders are similarly situated. And if the courts try to prevent this kind of arbitrariness, they will have to fashion “guidelines” which, if enforced consistently, will morph into *de facto* rules. Indeed the concern for some time in the common law world was that the highly discretionary system of sentencing it ascribed to was producing too much arbitrariness in result. It is now well known that the United States Supreme Court in its death penalty jurisprudence has attempted for years to steer a course between not enough discretion and too much discretion. It is not clear at all that the resulting body of law, essentially some sort of guided discretion, is coherent enough to command global respect, let alone become the nucleus of a norm of customary international law.⁴⁷ Disenchanted with the apparently impossible task of decanting just the right amount of discretion, the South African Constitutional Court decided to outlaw the death penalty *in toto*.⁴⁸ The government of Singapore is likely to draw quite the opposite conclusion—that there cannot be any norm prohibiting mandatory penalties, as even a discretionary system cannot be said to be significantly less arbitrary.⁴⁹

One might think that at the very least a rule against mandatory death penalties will result in fewer executions. Not necessarily, for it could be that a Legislature, realising that it can only impose discretionary death penalties, might choose to broaden the offence definition⁵⁰ on the reasoning that judicial discretion is available to sort out the cases really deserving of the death penalty. So, for example, if the trafficking provision were discretionary, the Legislature might well reason that a lower amount of drugs should trigger the possibility of the death penalty. If this comes to pass, offenders otherwise not liable for the death penalty will now face that possibility. There is no guarantee that judicial discretion to hand down a death sentence will inevitably be exercised parsimoniously. Indeed in at least one recent Singapore decision on how a discretionary death penalty is to be handled, there is a perceptible shift towards greater use of the death penalty.⁵¹

⁴⁶ The Privy Council in a decision from Malaysia, *Teh Cheng Poh v. P.P.* [1980] A.C. 458 extended this lower level of scrutiny to the exercise of prosecutorial discretion in preferring capital charges, a decision embraced in Singapore: *Thiruselvam s/o Nagaratnam v. P.P.* [2001] 2 Sing.L.R. 125.

⁴⁷ It has become customary to quote the words of United States Supreme Court Justice Harry Blackmun, *Callins v. Collins* (1994) 510 U.S. 1141 : “It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies”.

⁴⁸ *Makwanyane, supra* note 10, at para. 56, where Chaskalson P. says: “we should not follow this route”.

⁴⁹ The contrasting view of United States Supreme Court Justice Antonin Scalia in *Callins v. Collins, supra* note 47, to the effect that the court must either abandon its prohibition on mandatory death penalties, or its distaste for discretion, is likely to find favour in Singapore courts:

⁵⁰ Of course, offence definitions cannot be broadened indefinitely without infringing the “most serious crimes” rule—but there is surely a borderland where the legislature has some latitude.

⁵¹ *Panya Martmontree v. P.P.* [1995] 3 Sing.L.R. 341, where a discretionary death penalty was imposed for conjointly committing gang robbery in course of which murder is committed by one or more members of the gang (section 396, Penal Code), under circumstances which were hardly exceptional. This might be compared with the earlier decision of *Sia Ah Kew v. P.P.* [1972-74] Sing.L.R. 208 where a high degree of parsimony was

IV. DUE PROCESS

Whatever one might feel about the execution of the guilty, there must be unanimous agreement that the execution of the innocent is unacceptable. This principle might perhaps already be customary international law.⁵² Due process is about the accurate determination of guilt.⁵³ In the real world there are few criminal justice systems with no due process features at all, nor is it very likely that there are systems with perfect due process. The question is whether Singapore accords sufficient due process to persons charged and tried for capital offences. The debate over due process is best illustrated by the use of presumptions in the context of capital crimes. In both capital drug trafficking and arms offences, there exist presumptions which, upon proof by the prosecution of certain facts (normally the *actus reus*) *mens rea* is presumed unless disproved by the accused.⁵⁴ Thus, possession for the purpose of trafficking is a capital offence, but on proof by the prosecution of possession above a certain stipulated amount, the purpose of trafficking is presumed unless disproved by the accused.⁵⁵ Does this give rise to an unacceptable risk that innocent persons might be found guilty and executed? No, says the government of Singapore, for the fact of possession of, say, 2 gm. of heroine is strong evidence of trafficking, that amount being many times the estimated average dose. In any event, it is argued, the accused is at liberty to rebut the presumption by proving that it was for his own use and not for trafficking. This has the backing of no less than a decision of the Privy Council.⁵⁶ The crux of the matter is the meaning of innocence and guilt. If by guilt it is meant that there must be evidence of all elements of the crime beyond reasonable doubt, then in a case where the presumption is employed, there is insufficient evidence of guilt—for if there is sufficient evidence without the presumption, there is no need for the presumption.⁵⁷ Where the presumption is employed there can be no doubt that it is possible that an accused person can be found guilty and executed in the absence of proof beyond reasonable doubt—the accused is guilty because of a failure to disprove the purpose of trafficking, not because there is positive proof of such purpose. The more general issue of the justifiability of presumptions in criminal cases generally has exercised judicial minds the world over with no particular resolution in sight—simply, by the practice of most courts, it is sometimes justifiable and sometimes not.⁵⁸ The issue for us here is whether the death penalty changes the equation in any way. Is due process different for capital cases? Death is different, but is it sufficiently different to demand a higher standard of due process

used in the context of the discretionary death penalty for kidnapping under section 3 of the *Kidnapping Act* (Cap. 151, 1999 Rev. Ed. Sing.).

⁵² The United Nations Economic and Social Council resolution on the death penalty, *supra* note 24, requires that the death penalty can only be carried out after a “fair trial”. The Singapore government’s response to Amnesty International, *supra* note 2, is anxious to point out that “Singapore has one the most fair and transparent legal systems in the world”. See also Article 6(2) of the *International Covenant on Civil and Political Rights* which allows for the death penalty to be imposed only if it is “not contrary to the provisions of the present Covenant”. According to the Human Rights Committee’s General Comment 6(16), this adds “[t]he procedural guarantees” in Article 14 to Article 6 by reference, which includes “the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal”. It is interesting that Article 14 (due process) is derogable, but Article 6 (death penalty) is not. It is not entirely clear if the conjunction of the two articles mean (a) that for death penalty cases in particular, due process rights become non-derogable, or (b) that death penalty cases are entitled to regular (derogable) due process rights.

⁵³ It may also be about non-instrumental values, but that is rather more contentious—see, e.g., the sad fate of the privilege against self-incrimination in the Privy Council decision (on appeal from Singapore) of *Haw Tua Tau v. P.P.* [1982] A.C. 136.

⁵⁴ E.g., section 4(2), *Arms Offences Act* (Cap. 14, 1998 Rev. Ed. Sing.).

⁵⁵ Section 17, *Misuse of Drugs Act* (Cap. 185, 2001 Rev. Ed. Sing.).

⁵⁶ *Ong Ah Chuang*, *supra* note 37.

⁵⁷ For a more detailed treatment, see Michael Hor, “The Presumption of Innocence—A Constitutional Discourse for Singapore” [1995] Sing.J.L.S. 365.

⁵⁸ Discussed in Michael Hor, *ibid*.

in customary international law?⁵⁹ The Privy Council in that Singapore decision more than 20 years ago did not think so—the spectre of the death penalty did not seem to have moved that court at all.⁶⁰ Have matters changed so significantly around that world that we can now say that there might be a customary rule against presumptions in capital cases, especially where the death penalty is mandatory? There is an arguable case. In both the United States and India, there are no presumptions for capital cases. In Singapore itself the use of presumptions in capital cases is a relatively modern phenomenon, introduced in the 1970s for drug trafficking. The traditional capital offence of murder does not have presumptions. More work will have to be done on the use or non-use of presumptions in capital cases in retentionist states, but except for Malaysia,⁶¹ it is not easy to think of another jurisdiction which does employ them where the death penalty is involved.

If indeed there is a customary norm that there is some sort of heightened requirement for due process in death penalty cases, then a number of other procedural and evidential rules which now seem to apply in Singapore will be called into question. Each deserves more detailed treatment than it will get here, but I shall list a few of them to give a flavour of how far reaching such a norm might be. There is a constitutional right to counsel in Singapore, but judicial decisions have interpreted that right to allow for lengthy delays (of up to 2 weeks) to the exercise of that right in the context of pre-trial detention and interrogation.⁶² It is not a secret that the principle reason for the delay is to enable the police to extract incriminatory statements from the accused undisturbed by any advice to the contrary by his or her lawyer. Whatever might be one's view of due process in non-capital cases, such a delay could well affect, and perhaps to an unacceptable degree, the ability of the accused person to defend himself with the aid of counsel against a capital charge.⁶³ The significance of incriminatory statements wrought from pre-trial interrogation cannot be over-emphasised for it is also the jurisprudence of the court that a conviction may be legitimately based solely on them, without corroborating or supporting evidence of any kind.⁶⁴ This throws the spotlight on the rules which govern police interrogation.⁶⁵ There is indeed a rule that involuntary statements are inadmissible, but proof of exactly what happened in the interrogation room and of exactly how statements are obtained depends entirely on witness testimony of the police and of the accused. There is no requirement of recording of any kind, and as we have seen, defence counsel does not even come into the picture at this stage. The significance of what goes on in the interrogation room can only be fully appreciated when one realises that it is not only the statements of the accused person that we ought to be concerned with,

⁵⁹ The United Nations Economic and Social Council seems to think so, *supra* note 24, holding that there must be “clear and convincing evidence leaving no room for an alternative explanation of the facts”. Presumptions are for the express purpose of ignoring certain alternative, and perhaps reasonable, explanations.

⁶⁰ The Privy Council in *Ong Ah Chuan*, *supra* note 37, para. 28, seemed impressed with the fact that “[p]resumptions of this kind are a common feature of modern legislation concerning the possession and use of things that present danger to society”. Presumably the Privy Council is not saying that the death penalty is a common feature.

⁶¹ Section 37 of *Dangerous Drugs Act of 1952* (Revised 1980) [Reprint 2000], Act 234, Law of Malaysia. Malaysia is a jurisdiction which has very close historical links with Singapore—indeed Singapore was for a short time part of Malaysia.

⁶² *Jasbir Singh v. P.P.* [1994] 2 Sing.L.R. 18. There is also authority in Singapore that an accused person, presumably in a capital case or otherwise, does not have the right to be informed of the right to counsel: *Rajeevan Edakalavan v. P.P.* [1998] 1 Sing.L.R. 815,

⁶³ The United Nations Economic and Social Council in a 1989 resolution on the death penalty declared that death penalty process must allow “adequate assistance of counsel at every stage of the proceedings”. If this resembles customary international law in any way, then Singapore case law is in danger of breaching such a standard.

⁶⁴ *Ismail bin U K Abdul Rahman v. P.P.* [1972-74] Sing.L.R. 232.

⁶⁵ This is examined in some detail in Michael Hor, “The Confessions Regime in Singapore” [1991] 3 Mal.L.J. lvii.

but the statements of persons jointly tried with him,⁶⁶ and of accomplices incriminating the accused;⁶⁷ both of which are fully admissible against the accused and capable of grounding a conviction without more, even if the statements are subsequently retracted at the trial. What is more, there is no right of pre-trial discovery for any of these statements.⁶⁸ Again, whatever one thinks about due process for criminal trials in general, all these rules and practices taken together must at least cast some doubt on whether there is sufficient due process for the conduct of capital cases.

There is one due process matter which has come before the Singapore court squarely and this has to do with the possible customary rule that someone who has been kept on death row for an unconscionable amount of time has been denied due process and cannot therefore be executed. The inspiration for this piece of litigation was again a Privy Council decision from the Caribbean.⁶⁹ The Singapore Court of Appeal would not hear of such a thing.⁷⁰ The case itself was not particularly fertile ground for raising the issue – there had been a delay of a little over 5 years, but that was because either the accused or his counsel had delayed the process of appeal and clemency, and the prison authorities were merely being patient, affording as much time as possible for the accused to pursue these petitions.⁷¹ There simply was no unconscionable delay, but the court went out of its way to make some rather unnecessarily sweeping pronouncements: that due process meant only process according to whatever the law says it should be;⁷² and that under no circumstances can the court intervene, even if there was unconscionable delay.⁷³ If the court had been given the opportunity to persist in these views, then there might be reason believe that the constitutional law of Singapore might well be in breach of some customary norm of international law—to keep someone on death row for a lengthy period of time without good reason or justification, and then to execute him or her must surely be beyond the pale, either as torture or as inhuman treatment.

V. THE SIGN OF THE TIMES

In fact, the problem proved to be quite the reverse—there is no death row phenomenon in Singapore because executions are carried out with wonderful efficiency.⁷⁴ One begins to wonder whether executions are being carried out too quickly and at too great a cost. The single most significant development in this regard was the change from a two judge court to a single judge court.⁷⁵ When Singapore abolished jury trials for capital cases, the trade-off was for capital cases to be heard before two High Court judges. If they disagreed, the benefit of the doubt would accrue to the accused. Faced with a huge backlog of capital trials, caused

⁶⁶ *Chin Seow Noi v. P.P.* [1994] 1 Sing.L.R. 135, discussed in detail in Michael Hor, “The Confession of a Co-Accused” (1994) 6 Sing.Ac.L.J. 366.

⁶⁷ *P.P. v. Sng Siew Ngoh* [1996] 1 Sing.L.R. 143, discussed in Michael Hor, “Prior Inconsistent Statements—Fairness, Statutory Interpretation and the Future of Adversarial Justice” (2002) 14 Sing.Ac.L.J. 248.

⁶⁸ *Rosli bin Osman v. P.P.* [2001] 3 Sing.L.R. 587.

⁶⁹ *Pratt v. A.G. for Jamaica* [1994] 2 A.C. 1.

⁷⁰ *Jabar v. P.P.* [1995] 1 Sing.L.R. 617.

⁷¹ *Ibid.* at para. 64.

⁷² *Ibid.* at para. 53: “Any law which provides for the deprivation of a person’s life ... is valid and binding so long as it is validly passed by Parliament. The Court is not concerned with whether it is also fair, just and reasonable as well”. This surprising assertion flies in the face of established authority which says otherwise: *Ong Ah Chuan*, *supra* note 37, and *Haw Tua Tau*, *supra* note 53, without a shred of discussion of these earlier cases.

⁷³ *Ibid.* at para. 59, the court held that it was “functus officio” once “the judicial process is concluded”.

⁷⁴ E.g., Vignes s/o Mourthi was arrested on a capital drug charge on 20 Sept 2001, tried, sentenced to death, and hanged on 26 Sept 2003: “Malaysian Executed in Singapore for Drug Trafficking” AFP (26 September 2003) online: Singapore Window website <<http://www.singapore-window.org/sw03/030926a3.htm>>.

⁷⁵ *Criminal Procedure Code (Amendment) Act* (No.13 of 1992, Sing.) See the discussion in Sing., *Parliamentary Debates*, vol. 59, col. 1291 (19 March 1992).

primarily by a great increase in drug trafficking cases, the Judiciary proposed to economise by cutting down the two judges to one—cases could then be heard at twice the pace. This proposal was accepted by the Legislature. In compensation, an additional prosecutor and defence counsel were put in place. This was an odd exchange indeed. Most death penalty cases in Singapore, and especially the drug trafficking ones, are not particularly complex. The role of a judge, an adjudicator of fact and law, and that of prosecutorial or defence counsel is quite different and it is not easy to see how one makes up for the other. For example, many cases turn on whether or not a particular statement was given voluntarily in the course of police investigation. The crucial person is the judge who has to decide who to believe—it matters not if there is another prosecutor or defence counsel. Where there are two judges, both must be in agreement. Where there is only one judge who disbelieves the accused, the accused is prejudiced in the sense that in the past the other judge might have believed him. Indeed a question was asked in Parliament about how many of such judicial disagreements there have been in the past—the sponsoring Minister did not have the statistics.⁷⁶ The change was perhaps explicable only on crude economic terms—it is cheaper to pay for a prosecutor and a defence counsel than to hire a High Court Judge or Judicial Commissioner.

While I do not think it is possible to argue that there is some norm of international law requiring two judges to hear a capital case,⁷⁷ changes such as these raise an issue which is not strictly legal, but which is nonetheless significant—do death penalty trends in Singapore run against what is widely perceived to be a strong move in the international community, if not to abolish the death penalty, then to use it more parsimoniously and with greater due process rights than is usual. Although it would be grossly unfair to say that Singapore has been “trigger happy” with the death penalty, virtually every change in the law surrounding and impacting on the death penalty in Singapore has gone in the other direction. Since independence Singapore has introduced 3 new sets of capital offences—kidnapping,⁷⁸ drug trafficking⁷⁹ and arms offences.⁸⁰ As we have seen, presumptions were used for the first time for capital offences in the context of drug trafficking and arms offences. The substantive requirements of both drug trafficking and arms offences have been made progressively easier to prove. It was originally a capital offence to discharge a firearm with intent to wound—that was subsequently amended to discharging a firearm per se, whether or not there was an intention to wound.⁸¹ It was once a capital offence to traffic in certain amounts of illicit drugs—it now has become a capital offence merely to possess such drugs for the purpose of trafficking.⁸² We have seen the capital trial court reduced from two judges to one. We have also briefly run through the various rules and practices of evidence and procedure which make it easier for the prosecution to establish its case—developments which admittedly were not peculiar to death penalty cases, but which nevertheless affect them profoundly.

It is not possible to say with any degree of certainty that any one of these changes, or even all of them is contrary to any particular rule of customary international law—such is the state of international law at this point in time. What one can say is that there is a perceptible trend or movement in international practice to reduce or do away with the death penalty, and where it is retained, to afford higher standards of due process than is given to normal

⁷⁶ *Ibid.* at col. 1309.

⁷⁷ There is United States Supreme Court jurisprudence on what must be decided by the judge, and what by the jury: see e.g., *Ring v. Arizona* (2002) 536 U.S. 584. It would however be a little far fetched to argue that there is a rule of customary international law requiring a jury to make certain death penalty decisions—jury trials are on the wane the world over, and many jurisdictions have never had them.

⁷⁸ *Supra* note 51, introduced in 1961.

⁷⁹ *Supra* note 30, introduced in 1975.

⁸⁰ *Supra* note 54, introduced in 1973.

⁸¹ *Armed Offences (Amendment) Act* (No. 30 of 1993, Sing.). See the discussion in Sing., *Parliamentary Debates*, vol. 61, col. 418 (30 Aug 1993).

⁸² *Misuse of Drugs (Amendment) Act* (No. 40 of 1993, Sing.).

trials. A legal claim against Singapore for breach of international law in the conduct of death penalty cases is unlikely to happen, and if it happens success is not at all clear given the present state of customary international law. But if I am correct about the international trend, then there might well come a time when custom crystallises leaving Singapore in the cold.⁸³ In the meantime, pressures are already being made to bear on the death penalty, for if Singapore desires to extradite someone from a state which has abolished the death penalty, it is likely that extradition will be refused unless an assurance is given that the accused will not be executed if found guilty.⁸⁴ At the very least the fact that so many other states of all persuasions (and they are not all Western liberal democracies) are not willing to execute, or execute so often, in exchange for whatever deterrence effect the death penalty is thought to have should cause decision makers to pause to reconsider what the value of life is in Singapore.

⁸³ There is however unlikely to be any abolitionist or restrictive regional custom or pressure in Southeast Asia in the near future. Many Southeast Asian nations (*e.g.* Malaysia, Indonesia, the Philippines) retain the death penalty, and the principle of non-interference in “domestic affairs” amongst ASEAN (Association of Southeast Asian Nations) is strong. In contrast, all new members of the Council of Europe, as a condition of admission, are required to ratify *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedom Concerning the Abolition of the Death Penalty (European Convention on Human Rights)*, which abolishes the death penalty in peacetime.

⁸⁴ See the drawn out Australian extradition proceedings in the case of Michael McCrea: online: BBC website <<http://news.bbc.co.uk/1/hi/world/asia-pacific/3242534.stm>>, notwithstanding assurances by the Singapore government that the accused, if convicted, will not be executed. See also, Art. 19(2) of the *Charter of Fundamental Rights of the European Union* which forbids the extradition of offenders to a state where “there is a serious risk of that he or she would be subjected to the death penalty”, and the decision of the Supreme Court of Canada to the same effect in *United States v. Burns* [2001] 1 S.C.R. 283 (in the course of which the Court over-turned its own 10-year-old decision to the contrary).

