Yong Vui Kong *v* Public Prosecutor and another matter [2010] SGCA 20

Case Number	: Criminal Appeal No 13 of 2008; Criminal Motion No 7 of 2010
Decision Date	: 14 May 2010
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: M Ravi (L F Violet Netto) for the appellant; Walter Woon SC, Jaswant Singh, Davinia Aziz and Chua Ying-Hong (Attorney-General's Chambers) for the respondent.
Parties	: Yong Vui Kong — Public Prosecutor

Constitutional Law

Courts and Jurisdiction

Criminal Procedure and Sentencing

International Law

Statutory Interpretation

Words and Phrases

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2009] SGHC 4.]

14 May 2010 Judgment reserved.

Chan Sek Keong CJ (delivering the judgment of the court):

Introduction

1 The appellant, Yong Vui Kong ("the Appellant"), was convicted of trafficking in 47.27g of diamorphine, a controlled drug, and sentenced to death (see *Public Prosecutor v Yong Vui Kong* [2009] SGHC 4). He appealed against the conviction and the sentence, but later withdrew that appeal. Four days before the sentence was to be carried out, he filed Criminal Motion No 41 of 2009 ("CM 41/2009") seeking leave to pursue his appeal. This court granted him leave to do so (see *Yong Vui Kong v Public Prosecutor* [2009] SGCA 64). In the present proceedings, the Appellant's counsel, Mr M Ravi ("Mr Ravi"), has confirmed that the Appellant is appealing against only his sentence, and not his conviction.

The issues raised in this appeal

2 The general issue in this appeal is whether the *mandatory* death penalty ("the MDP") is permitted by the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint). The specific issue is whether the MDP imposed under certain provisions of the Misuse of Drugs Act (Cap 185, 2001 Rev Ed), in particular, is permitted by the Constitution of the Republic of Singapore.

3 In this judgment, the cases to be considered and the legal points to be discussed relate to different revised editions of both the Constitution of the Republic of Singapore and the Misuse of Drugs Act. For simplicity, we shall hereafter refer to the particular revised edition of the statute that is relevant to the case or legal point being discussed as "the Singapore Constitution" (*vis-à-vis* the Constitution of the Republic of Singapore) and "the MDA" (*vis-à-vis* the Misuse of Drugs Act).

4 The Appellant is challenging the constitutional validity of s 33 read with the Second Schedule to the MDA (collectively referred to hereafter as "the MDP provisions in the MDA"), under which he was sentenced to suffer the MDP. This challenge against the MDP for drug-related offences is not new. It was made in 1980 before the Privy Council in *Ong Ah Chuan v Public Prosecutor* [1981] AC 648 ("*Ong Ah Chuan*") and in 2004 before this court in *Nguyen Tuong Van v Public Prosecutor* [2005] 1 SLR(R) 103 ("*Nguyen*"). In both cases, it was contended that the MDP prescribed by the MDA for the offence in question (*viz*, trafficking in controlled drugs in *Ong Ah Chuan* and importation of controlled drugs in *Nguyen*) was unconstitutional because it infringed Arts 9(1) and 12(1) of the Singapore Constitution. In both cases, the constitutional challenge to the MDP was dismissed.

5 Notwithstanding the decisions in *Ong Ah Chuan* and *Nguyen*, both of which affirm the constitutionality of the MDP provisions in the MDA, we gave leave to the Appellant in CM 41/2009 to pursue the present appeal and argue both the general issue and the specific issue delineated at [2] above because Mr Ravi said that he had new arguments based on new materials to show that both *Ong Ah Chuan* and *Nguyen* were wrongly decided at the relevant time, and that, today, this court should depart from those decisions and declare the MDP unconstitutional in view of Art 9(1) and/or Art 12(1) of the Singapore Constitution.

6 We should point out at this juncture that the issue of whether the death penalty *per se* (*ie*, the death penalty as a form of punishment for an offence) is unconstitutional does not arise in this appeal since the Appellant (as Mr Ravi has emphasised) is only challenging the constitutional validity of the MDP. It 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. This precludes the Appellant from challenging the constitutionality of the death penalty *per se* (see in this regard the observations of the Privy Council in *Ong Ah Chuan* at 672 as quoted at [20] below). The Appellant has thus chosen to argue that:

(a) as the MDP is an inhuman punishment, any legislation that prescribes the MDP as the punishment for an offence (referred to hereafter as "MDP legislation" generically) violates the right to life set out in Art 9(1) and, therefore, is not "law" for the purposes of this provision;

(b) MDP legislation is also not "law" for the purposes of Art 9(1) because the term "law" therein includes customary international law ("CIL"), which prohibits the MDP as an inhuman punishment; and

(c) the differentia employed in the MDA for determining when the MDP is to be imposed is arbitrary, thus making the MDP provisions in the MDA inconsistent with the right under Art 12(1) of equal protection of the law.

7 The Appellant's challenge to the MDP based on Art 9(1) ("the Article 9(1) challenge") is targeted at the mandatory nature of the MDP. It rests on the premise that, because MDP legislation does not give the court any discretion to decide (in view of the circumstances of the case at hand) whether or not to impose the death penalty, such legislation "treats 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" (*per* Stewart J in

Woodson et al v North Carolina 428 US 280 (1976) ("*Woodson*") at 304). From this perspective, MDP legislation is regarded as being inhuman and, thus, antithetical to the right to life set out in Art 9(1). The Article 9(1) challenge, if successful, will affect the constitutionality of not only the MDP provisions in the MDA, but also all other MDP legislation, such as:

(a) s 302 of the Penal Code (Cap 224, 2008 Rev Ed) ("the Singapore Penal Code") *vis-à-vis* the offence of murder;

(b) s 4 of the Arms Offences Act (Cap 14, 2008 Rev Ed) *vis-à-vis* the offence of using or attempting to use arms;

(c) s 4A of the Arms Offences Act *vis-à-vis* the offence of using or attempting to use arms to commit or to attempt to commit an offence listed in the Schedule to the Act; and

(d) s 58(1) of the Internal Security Act (Cap 143, 1985 Rev Ed) *vis-à-vis* the offence of having or carrying, without lawful excuse and without lawful authority, any firearm, ammunition or explosive in a security area (as defined in s 2 of that Act).

8 In contrast, the Appellant's challenge to the MDP based on Art 12(1) ("the Article 12(1) challenge"), if successful, will affect only the MDP provisions in the MDA. In other words, the Appellant's argument on Art 12(1) is specific to the MDP provisions in the MDA and does not impinge on the constitutional validity of other MDP legislation. The Appellant's submission in this regard is that the MDP provisions in the MDA, in making the quantity of controlled drugs trafficked the sole determinant of when the MDP is to be imposed, draw arbitrary distinctions between offenders who traffic in different amounts of controlled drugs. (In the case of trafficking in diamorphine specifically, the MDP provisions in the MDA state that the MDP applies so long as more than 15g of diamorphine is trafficked. For convenience, we shall hereafter refer to this criterion as "the 15g differentia".)

9 Although the Article 9(1) challenge and the Article 12(1) challenge are different in so far as they pertain to two different constitutional provisions, they are at the same time related in that the Appellant does not need to rely on the Article 12(1) challenge if he succeeds on the Article 9(1) challenge. In other words, if the MDP provisions in the MDA violate Art 9(1) because, in making the death penalty *mandatory*, they lay down an inhuman punishment, they would be unconstitutional regardless of whether or not they also, contrary to Art 12(1), draw arbitrary distinctions between offenders who traffic in different amounts of controlled drugs. For this reason, we shall address the Article 9(1) challenge first before the Article 12(1) challenge.

The Article 9(1) challenge: Whether the MDP is consistent with the right to life in Article 9(1)

10 To understand the parties' arguments on Art 9(1) of the Singapore Constitution, it is necessary to appreciate the legal context of those arguments. We shall set out this legal context first, followed by the parties' arguments and then our decision on the Article 9(1) challenge.

The legal context of the Article 9(1) challenge

11 Article 9(1) of the Singapore Constitution provides as follows:

No person shall be deprived of his life or personal liberty save in accordance with law.

The expression "law" is defined in Art 2(1) as follows:

> "law" includes 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 …

In this regard, the expression "written law" means (see likewise Art 2(1)):

> … this Constitution and all Acts and Ordinances and subsidiary legislation for the time being in force in Singapore.

1 2 *Prima facie*, the MDA, being legislation in force in Singapore, is "written law" and is thus "law" as defined in Art 2(1); the same applies to other MDP legislation currently in force in Singapore. The meaning of the term "law" was considered by the Privy Council in *Ong Ah Chuan* and by this court in *Nguyen*. Before we turn to examine these two decisions, we note in passing that, although Art 2(1) defines the expression "law" to include "custom or usage" (*per* Art 2(1)), Mr Ravi 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", that is to say, local customs and usages which are already part of our domestic law.

The decision in Ong Ah Chuan

13 In *Ong Ah Chuan*, the appellants were convicted of the offence of drug trafficking and sentenced to death. They appealed against their convictions on, *inter alia*, the ground that the rebuttable presumption of trafficking which arose under the MDA upon proof of possession of controlled drugs exceeding the stipulated quantity was a violation of due process of law and was therefore not "in accordance with law" for the purposes of Art 9(1).

14 The Prosecution in that case argued that, since the expression "law" was defined in Art 2(1) to include written law and since "written law" included all Acts of Parliament, the requirements of Art 9(1) were satisfied so long as the deprivation of life or personal liberty complained of was carried out in accordance with provisions contained in "any Act passed by the Parliament of Singapore, *however arbitrary or contrary to fundamental rules of natural justice* the provisions of such Act [might] be" [emphasis added] (see *Ong Ah Chuan* at 670). The Privy Council rejected this argument (which was characterised as "extreme" in the later Privy Council decision of *Haw Tua Tau and others v Public Prosecutor* [1981–1982] SLR(R) 133 at [7]) for the following reasons (see *Ong Ah Chuan* at 670–671):

> 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 [Singapore] Constitution that the "law" to which citizens could have recourse for the protection of fundamental liberties assured to them by the [Singapore] 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. [emphasis added]

15 Having set out its interpretation of the expression "law", the Privy Council in *Ong Ah Chuan* tested the provisions of the MDA against that interpretation to determine their constitutional validity, and held that they did not breach the fundamental rules of natural justice. Hence, the Privy Council rejected the appellants' constitutional challenge to the statutory presumption of trafficking in the MDA.

16 We should point out that, at the hearing before the Privy Council, the Board (*per* Lord Diplock) specifically asked counsel for the Prosecution whether he was contending that, so long as a statute was an Act of Parliament, it would be justified by Art 9(1), however unfair, absurd or oppressive it might be (see *Ong Ah Chuan* at 659). When counsel answered that the Prosecution was not advancing that argument and that it was unnecessary for him to rely on that argument since the Prosecution considered its case against each appellant to be plain on its facts, Lord Diplock replied (likewise at 659):

> Their Lordships cannot accept that because they will have to deal with the point. They are not disposed to find that article 9(1) justifies all legislation whatever its nature.

However, beyond what was actually decided in *Ong Ah Chuan* itself, it is not clear what the Privy Council had in mind *vis-à-vis* the kind of legislation that would not qualify as "law" for the purposes of Art 9(1). Perhaps, the Privy Council had in mind colourable legislation which purported to enact a "law" as generally understood (*ie*, a legislative rule of general application), but which in effect was a legislative judgment, that is to say, legislation directed at securing the conviction of particular known individuals (see *Don John Francis Douglas Liyanage and others v The Queen* [1967] 1 AC 259 at 291), or legislation of so absurd or arbitrary a nature that it could not possibly have been contemplated by our constitutional framers as being "law" when they crafted the constitutional provisions protecting fundamental liberties (*ie*, the provisions now set out in Pt IV of the Singapore Constitution).

17 In this connection, it is useful to put in context the following statement by Yong Pung How CJ (delivering the judgment of this court) in *Jabar bin Kadermastan v Public Prosecutor* [1995] 1 SLR(R) 326 ("*Jabar*") at [52]:

> Any law which provides for the deprivation of a person's life or personal liberty … 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*. [emphasis added]

18 Upon a first reading, Yong CJ's statement may appear to contradict the Privy Council's interpretation of the expression "law" in *Ong Ah Chuan* at 670–671 (see the extract quoted at [14] above). In our view, however, there is in fact no such contradiction. Yong CJ's statement was made in the context of a case where the appellant argued, in reliance on *Earl Pratt and another v Attorney-General for Jamaica and another* [1994] 2 AC 1 ("*Pratt*"), that Art 9(1) of the Singapore Constitution was applicable to render the execution of the death sentence imposed on him unconstitutional as he had been incarcerated on death row for more than five years since his conviction. In *Pratt*, the Privy Council held that a prolonged delay in the execution of a death sentence constituted inhuman punishment and contravened s 17(1) of the Constitution of Jamaica, which stated that no person should be subjected to "torture or to inhuman or degrading punishment or other treatment". This ruling was rejected in *Jabar* by this court, which preferred the decision in *Willie Lee Richmond v Samuel A Lewis* 948 F 2d 1473 (1990). In that case, the US Court of Appeals, Ninth Circuit, held that the carrying out of a death sentence after the offender had spent 16 years on death row did not constitute cruel and unusual punishment in contravention of the Eighth and the Fourteenth Amendments to the US Constitution where the delay was occasioned by the offender initiating unmeritorious legal proceedings.

19 The issue raised in *Jabar* concerned the constitutionality of *carrying out the MDP*, given the period of time which had lapsed since the appellant's conviction, and not the constitutionality of the MDP *per se*. That was why this court held that the question of whether the relevant MDP legislation (which, on the facts of *Jabar*, was s 302 of the Penal Code (Cap 224, 1985 Rev Ed)) was fair, just and reasonable was not relevant. Yong CJ's statement should be read in this context, and not as a definitive interpretation of the term "law" in Art 9(1); otherwise, that statement would be inconsistent with the approach taken in *Nguyen*, where this court (Yong CJ presiding) affirmed (at [82]) the Privy Council's interpretation of "law" in *Ong Ah Chuan*.

20 Returning to the facts of *Ong Ah Chuan*, the appellants, apart from challenging the constitutionality of the statutory presumption of trafficking (see [13] above), also disputed the constitutionality of the MDP. The Privy Council made the following observations about the death penalty in general (at 672):

> It was not suggested on behalf of the [appellants] that capital punishment is unconstitutional per se. Such an argument is foreclosed by the recognition in article 9(1) of the [Singapore] Constitution that a person may be deprived of life "in accordance with law."

21 With regard to the MDP specifically, the Privy Council commented (at 672–673):

> As their Lordships understood the argument presented to them on behalf of the [appellants], it was that the mandatory nature of the sentence, in the case of an offence so broadly drawn as that of trafficking created by section 3 of the [MDA], rendered it arbitrary since it debarred the court in punishing offenders from discriminating between them according to their individual blameworthiness. This, it was contended, was arbitrary and not "in accordance with law" as their Lordships have construed that phrase in article 9(1); alternatively it offends against the principle of equality before the law entrenched in the [Singapore] Constitution by article 12(1), since it compels the court to condemn to the highest penalty of death an addict who has gratuitously supplied an addict friend with 15 grammes of heroin from his own private store, and to inflict a lesser punishment upon a professional dealer caught selling for distribution to many addicts a total of 14.99 grammes.
>
> *Their Lordships would emphasise that in their judicial capacity they are in no way concerned with arguments for or against capital punishment or its efficacy as a deterrent to so evil and profitable a crime as trafficking in addictive drugs. Whether there should be capital punishment in Singapore and, if so, for what offences, are questions for the legislature of Singapore which, in the case of drugs offences, it has answered by section 29 and Schedule 2 of the [MDA]. A primary object of imposing a death sentence for offences that society regards with particular abhorrence is that it should act as a deterrent; particularly where the offence is one that is committed for profit by an offender who is prepared to take a calculated risk. There is nothing unusual in a capital sentence being mandatory. Indeed its efficacy as a deterrent may be to some extent diminished if it is not*. At common law all capital sentences were mandatory; under the Penal Code of Singapore [*ie*, the Penal Code (Cap 103, 1970 Rev Ed)] the capital sentence for murder and for offences against the President's person still is. If it were valid the argument for the [appellants] would apply to every law which imposed a mandatory fixed or minimum penalty even where it was not capital – an extreme position which counsel was anxious to disclaim.
>
> [emphasis added]

The decision in Nguyen

22 Moving on to *Nguyen*, the appellant in that case was convicted of importing 396.2g of diamorphine into Singapore without authorisation, an offence under s 7 of the MDA, and was, pursuant to the MDP provisions in the MDA, sentenced to suffer the MDP. He appealed against both his conviction and his sentence, contending that those provisions were unconstitutional because they violated Arts 9(1), 12(1) and 93 of the Singapore Constitution (these Articles concern, respectively, the right to life, the right to equal protection of the law and the judicial power of Singapore).

23 For present purposes, we shall examine only the appellant's argument based on Art 9(1) and this court's decision on that argument. The appellant's argument was that: (a) the MDP was arbitrary because it precluded proportional and individualised sentencing, which form of sentencing was protected by the prohibition against cruel and inhuman treatment or punishment; and (b) even if the MDP were not arbitrary, execution by hanging amounted to cruel and inhuman punishment. In making this argument, the appellant took the position that the expression "law" in Art 9(1) incorporated CIL, specifically, the CIL prohibition against cruel, inhuman, degrading or unusual treatment or punishment. (In this regard, we shall hereafter refer to such treatment or punishment as "inhuman punishment" generically since Mr Ravi has, in his arguments, emphasised the prohibition against *inhuman* treatment or punishment in particular; it should, however, be noted that the terms "cruel", "inhuman", "degrading" and "unusual" do not share the exact same meaning.)

24 The way in which the appellant in *Nguyen* framed his argument on Art 9(1) was probably influenced by post-*Ong Ah Chuan* Privy Council decisions on the constitutional validity of the MDP under the Constitutions of other Commonwealth States, principally the Caribbean States. Counsel for the appellant cited those cases in an attempt to persuade this court that either *Ong Ah Chuan* had been wrongly decided at the material time or, alternatively, the Privy Council would have decided the case differently in 2004. The decisions which counsel referred to were:

(a) *Reyes v The Queen* [2002] 2 AC 235 ("*Reyes*"), an appeal from a decision of the Court of Appeal of Belize;

(b) *Boyce and another v The Queen* [2005] 1 AC 400 ("*Boyce*"), an appeal from a decision of the Court of Appeal of Barbados;

(c) *Matthew v State of Trinidad and Tobago* [2005] 1 AC 433 ("*Matthew*"), an appeal from a decision of the Court of Appeal of Trinidad and Tobago; and

(d) *Watson v The Queen (Attorney General for Jamaica intervening)* [2005] 1 AC 472 ("*Watson*"), an appeal from a decision of the Court of Appeal of Jamaica.

25 In considering whether the MDP provided for under the MDA was arbitrary, this court affirmed in *Nguyen* (at [82]) as established law the Privy Council's decision in *Ong Ah Chuan* at 670–671 (quoted at [14] above) on the meaning of the phrase "in accordance with law" in Art 9(1). The court noted that the Privy Council had ruled in both *Watson* and *Reyes* that "the [MDP] in respect of certain classes of murder was … unconstitutional as a violation of the prohibition against cruel or inhuman treatment or punishment" (see *Nguyen* at [83]), and opined (likewise at [83]) that the Privy Council would have ruled in the same way in *Matthew* and *Boyce* "but for certain 'saving provisions' in the relevant national Constitutions which preserved pre-existing national laws".

26 In *Reyes*, the Privy Council held that the MDP was unconstitutional under s 7 of the Constitution of Belize (Laws of Belize, c 4) ("the Belize Constitution"), which specifically prohibited, *inter alia*, inhuman punishment. The Privy Council (*per* Lord Bingham of Cornhill) observed thus (at [43]):

> To deny the offender the opportunity, before sentence is passed, 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 core of the right which section 7 [of the Belize Constitution] exists to protect.

27 In *Nguyen*, this court held (at [84]) that the Privy Council's reasoning in *Reyes* as to why the MDP was unconstitutional was not applicable to Singapore because neither the Singapore Constitution nor any other Singapore statute contained an equivalent of s 7 of the Belize Constitution. The court also pointed out (at [85] of *Nguyen*) that *Reyes* was decided "in the light of the various international norms that had been 'accepted by Belize as consistent with the fundamental standards of humanity'", such as those encapsulated in the Universal Declaration of Human Rights (10 December 1948), GA Res 217A (III), UN Doc A/810 ("the UDHR") and the International Covenant on Civil and Political Rights (19 December 1966), 999 UNTS 171.

28 With regard to *Watson*, this court distinguished it in *Nguyen* (at [86]) on the same grounds as those outlined in the preceding paragraph. At the same time, this court acknowledged (likewise at [86]) the following comments by Lord Hope of Craighead, who delivered the judgment of the majority in *Watson* (at [29]–[30]):

> Their Lordships consider that the mandatory death penalty which is imposed under section 3 of the Act [*ie*, the Offences against the Person Act 1864 (Laws of Jamaica, c 268), as amended by the Offences against the Person (Amendment) Act 1992 (No 14)] is open to the same constitutional objections as those that were identified in *Reyes v The Queen*. It is no longer acceptable, nor is it any longer possible to say, as Lord Diplock did on behalf of the Board in *Ong Ah Chuan v Public Prosecutor* [1981] AC 648, 674, that there is nothing unusual in a death sentence being mandatory. As Lord Bingham pointed out in *Reyes's* case [2002] 2 AC 235, 244, para 17, the mandatory penalty of death on conviction of murder long predated any international arrangements for the protection of human rights. The decision in that case was made at a time when international jurisprudence on human rights was rudimentary …
>
> The march of international jurisprudence on this issue [*viz*, the constitutionality of the MDP] began with the Universal Declaration of Human Rights which was adopted by a resolution of the General Assembly of the United Nations on 10 December 1948 (Cmd 7662). It came to be recognised that among the fundamental rights which must be protected are the right to life and the right not to be subjected to cruel, inhuman or degrading treatment or punishment: see articles 3 and 5 of the Universal Declaration; articles I and XXVI of the American Declaration of the Rights and Duties of Man which was adopted by the Ninth International Conference of American States on 2 May 1948; articles 2 and 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969); articles 6(1) and 7 of the International [Covenant] on Civil and Political Rights which was adopted by a resolution of the General Assembly of the United Nations on 16 December 1966 and [which] entered into force on 23 March 1976 (1977) (Cmnd 6702); and articles 4.1 and 5.2 of the American Convention on Human Rights which was signed on 22 November 1969 and [which] came into force on 18 July 1978. So the practice was adopted, as many of the former British colonies achieved independence, of setting out in their Constitutions a series of fundamental rights and freedoms which were to be protected under the Constitution. The history of these developments is fully set out in *Reyes* [2002] 2 AC 235. It is as relevant to the position under the Constitution of Jamaica as it was in that case to Belize. There is a common heritage. In *Minister of Home Affairs v Fisher* [1980] AC 319, 328 Lord Wilberforce referred to the influence of the European Convention in the drafting of the constitutional instruments during the post-colonial period, including the Constitutions of most Caribbean territories. That influence is clearly seen in Chapter III of the

Constitution of Jamaica.

29 Ultimately, in *Nguyen*, this court upheld the constitutionality of the MDP in view of two factors, namely: (a) the difference between the wording of the applicable constitutional provisions in *Reyes* and *Watson* and that of the relevant provisions of the Singapore Constitution; and (b) the difference between the constitutional history of the States from which those two Privy Council appeals arose (namely, Belize where *Reyes* was concerned, and Jamaica where *Watson* was concerned) and the constitutional history of Singapore. In so ruling, this court effectively distinguished *Reyes*, *Watson* and other like cases on the ground that Art 9(1) of the Singapore Constitution did not contain any words prohibiting inhuman punishment.

30 To complete this account of the decision in *Nguyen*, we should add that the basis on which this court distinguished *Reyes* and *Watson* was *in pari materia* with the basis on which the Privy Council in *Bowe and another v The Queen* [2006] 1 WLR 1623 ("*Bowe*"), an appeal from the Commonwealth of the Bahamas ("the Bahamas"), distinguished *Ong Ah Chuan*, namely, the Bahamian Constitution expressly prohibited inhuman punishment whereas the Singapore Constitution contained no such express prohibition. In *Bowe*, the Privy Council observed thus (at [41]):

> *Ong Ah Chuan* … concerned mandatory death sentences in Singapore for possession of more than 15 grammes of heroin. The constitutionality of that sentence was challenged, and in giving the judgment of the Board rejecting the challenge Lord Diplock made observations … approbatory of the mandatory death sentence for murder, while suggesting … that the moral blameworthiness of those convicted of murder might vary more widely than in the case of drug traffickers. He pointed to the prerogative of mercy as a means of mitigating the rigidity of the law. *But the [Singapore] Constitution … contained no provision comparable with section 3 of the 1963 and 1969 Constitutions [of the Bahamas], or the eighth amendment to the US Constitution, or article 3 of the European Convention[, all of which prohibit subjecting a person to torture or inhuman punishment]*. The decision … is not authority on the compatibility of a mandatory death sentence with a constitution containing such a provision, particularly where (contrary to the situation said by counsel to prevail in the case of drug traffickers in Singapore …) the sentence is frequently commuted. [emphasis added]

31 With regard to the argument by the appellant in *Nguyen* that death by hanging was inhuman punishment and that the prohibition against such punishment was incorporated in the expression "law" in Art 9(1) of the Singapore Constitution, this court said (at [91]–[92]) that while it was widely accepted that the prohibition against inhuman punishment amounted to a rule of CIL, there was insufficient evidence of state practice to demonstrate that the content of this CIL prohibition was such as to prohibit hanging as a mode of execution. This court also noted that there was no CIL prohibition against the death penalty *per se*.

32 The above summary of what was decided in *Ong Ah Chuan* and *Nguyen* forms the legal backdrop to the form and structure of the arguments advanced by Mr Ravi in this appeal. We shall now consider the Article 9(1) challenge proper.

The two limbs of the Article 9(1) challenge

33 As indicated at [6] above, there are two limbs to the Article 9(1) challenge, namely:

(a) MDP legislation is not "law" for the purposes of Art 9(1) as it prescribes the MDP, which is an inhuman punishment, as the punishment for an offence; and

(b) the MDP is prohibited under CIL, which is included in the expression "law" in Art 9(1), and, accordingly, the MDP is prohibited by Art 9(1).

For convenience, we shall hereafter refer to the first limb as "the 'inhuman punishment' limb" and the second limb as "the 'contrary to CIL' limb".

The parties' arguments on the "inhuman punishment" limb

The Appellant's submissions

34 With regard to the "inhuman punishment" limb of the Article 9(1) challenge, Mr Ravi contends that the MDP is an inhuman punishment because it has been held to be so in a long string of Privy Council cases decided post-*Ong Ah Chuan* and/or post-*Nguyen*, as well as in cases emanating from the US Supreme Court, the Supreme Court of India, the Supreme Court of Uganda and the High Court of Malawi. The cases cited by Mr Ravi in this regard (collectively, "the Appellant's Art 9(1) cases") and the constitutional provisions on which the respective decisions in these cases were based are as follows:

(a) *Reyes*, which concerned the stipulation in s 7 of the Belize Constitution that "[n]o person shall be subjected to torture or to inhuman or degrading punishment or other treatment";

(b) *Fox v The Queen* [2002] 2 AC 284, which concerned the stipulation in s 7 of the Constitution of Saint Christopher and Nevis that "[a] person shall not be subjected to torture or to inhuman or degrading punishment or other like treatment";

(c) *Regina v Hughes* [2002] 2 AC 259 ("*Hughes*"), which concerned the stipulation in s 5 of the Constitution of Saint Lucia that "[n]o person shall be subjected to torture or to inhuman or degrading punishment or other treatment";

(d) *Boyce*, which concerned the stipulation in s 15(1) of the Constitution of Barbados that "[n]o person shall be subjected to torture or to inhuman or degrading punishment or other treatment";

(e) *Watson*, which concerned the stipulation in s 17(1) of the Constitution of Jamaica that "[n]o person shall be subjected to torture or to inhuman or degrading punishment or other treatment";

(f) *Matthew*, which concerned the stipulation in s 5(2)(b) of the Constitution of Trinidad and Tobago that the Parliament could not "impose or authorise the imposition of cruel and unusual treatment or punishment";

(g) *Bowe*, which concerned the stipulation in s 3 of the 1963 and the 1969 Constitutions of the Bahamas (and, subsequently, s 17 of the 1973 Constitution of the Bahamas) that "[n]o person shall be subjected to torture or to inhuman or degrading treatment or punishment";

(h) *Bernard Coard and others v The Attorney General* [2007] UKPC 7, which concerned the stipulation in s 5(1) of the Constitution of Grenada that "[n]o person shall be subjected to torture or to inhuman or degrading punishment or other treatment";

(i) *Woodson*, which concerned the scope of the Eighth Amendment to the US Constitution prohibiting excessive bail, excessive fines and cruel and unusual punishment;

(j) *Attorney General v Susan Kigula & 417 others* Constitutional Appeal No 3 of 2006 (21 January 2009), which concerned the stipulation in Art 24 of the Constitution of Uganda that "[n]o person shall be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment";

(k) *Francis Kafantayeni and others v Attorney General* Constitutional Case No 12 of 2005 (27 April 2007), which concerned the stipulation in s 19(3) of the Constitution of Malawi that no person should be subjected to torture of any kind or to cruel, inhuman or degrading treatment or punishment; and

(l) *Mithu v State of Punjab* AIR 1983 SC 473 ("*Mithu*"), which concerned the Indian equivalent of Arts 9(1) and 12(1) of the Singapore Constitution (namely, Arts 21 and 14 respectively of the Constitution of India ("the Indian Constitution")).

It may be noted that many of the above cases were decided prior to *Nguyen*, and were considered and distinguished by this court in *Nguyen*. To this extent, Mr Ravi is traversing old ground.

35 Mr Ravi's argument before this court is that the Appellant's Art 9(1) cases cast doubt on the correctness of the decisions in *Ong Ah Chuan* and *Nguyen*, and support the view that the MDP dehumanises the offender by debarring the trial judge from considering, during the sentencing process, any and all mitigating circumstances as to why the offender should not suffer death. In this respect, three of the Appellant's Art 9(1) cases should be noted in particular.

36 The first is the Privy Council case of *Reyes*. In that case, the appellant was convicted of two counts of murder for shooting his neighbour and his neighbour's wife in a dispute over the neighbour's attempt to build a fence 2ft from the back of the appellant's house. Under s 102(3)(b) of the Criminal Code of Belize (Laws of Belize, c 84) ("the Belize Criminal Code"), murder by shooting was classified as a "class A" murder, and, under s 102(1) of the same statute, it attracted the MDP. The appellant appealed against his sentence, contending that s 102 of the Belize Criminal Code was contrary to s 7 of the Belize Constitution. The Privy Council, in allowing the appeal, made the following observations (at [43]):

> For [the] purposes of this appeal the Board need not consider the constitutionality of any mandatory penalty other than death, nor the constitutionality of a mandatory death penalty imposed for any murder other than by shooting. In the absence of adversarial argument it is undesirable to decide more than is necessary to resolve this appeal. The Board is however satisfied that the provision requiring sentence of death to be passed on the defendant on his conviction of murder by shooting subjected him to inhuman or degrading punishment or other treatment incompatible with his right under section 7 of the [Belize] Constitution in that it required sentence of death to be passed and precluded any judicial consideration of the humanity of condemning him to death. The use of firearms by dangerous and aggressive criminals is an undoubted social evil and, so long as the death penalty is retained, there may well be murders by shooting which justify the ultimate penalty. But there will also be murders of quite a different character (for instance, murders arising from sudden quarrels within a family, or between neighbours, involving the use of a firearm legitimately owned for no criminal or aggressive purpose) in which the death penalty would be plainly excessive and disproportionate. In a crime of this kind there may well be matters relating both to the offence and the offender which ought properly to be considered before sentence is passed. *To deny the offender the opportunity, before sentence is passed, 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 core of the right which*

section 7 exists to protect. [emphasis added]

37 The second case which we wish to highlight is *Woodson*, where the US Supreme Court (by a majority of 5:4) struck down MDP legislation as unconstitutional in view of the prohibition against (*inter alia*) "cruel and unusual punishments" set out in the Eighth Amendment to the US Constitution. Stewart J, who delivered the judgment of the majority, said in a passage at 303–305 (which was later cited with approval by Lord Bingham at [34] of *Reyes*):

> [D]eath is a punishment different from all other sanctions in kind rather than degree. … *A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats 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*.
>
> This Court has previously recognized that "[f]or the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Pennsylvania ex rel Sullivan* v. *Ashe*, 302 U.S. 51, 55 (1937). Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development. … While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment … requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.
>
> This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.
>
> [emphasis added]

38 It should be noted that, although Stewart J highlighted in the above passage the qualitative difference between the death sentence and a sentence of imprisonment (because of the finality of death) and the "corresponding difference in the need for reliability in the determination that death [would be] the appropriate punishment in a specific case" (see *Woodson* at 305), he did not say that the possibility of error in making this determination rendered the MDP dehumanising. Instead, he held that it was the exclusion of judicial discretion – specifically, the exclusion of "the character and record of the individual offender and the circumstances of the particular offense" (see *Woodson* at 304) from the court's consideration – which made the MDP dehumanising. Stewart J also added that if every offender convicted of murder were punished with death, the law would be treating all such offenders as "a faceless, undifferentiated mass" (see *Woodson* at 304) and would be dehumanising them; from that perspective, the MDP was an inhuman punishment.

39 The third of the Appellant's Art 9(1) cases which we wish to draw attention to is *Mithu*. Several extracts of the Indian Supreme Court's judgment in that case were cited in a passage at [36] of *Reyes*. That passage ("the composite passage from *Mithu*") comprises certain observations made by

Y V Chandrachud CJ (at [12] and [16]) and Chinnappa Reddy J (at [25]) on s 303 of the Penal Code 1860 (Act 45 of 1860) (India) ("the Indian Penal Code"), which imposes the MDP on a person who commits murder while under a sentence of life imprisonment. The passage reads as follows:

> 12. … [A] provision of law which deprives the Court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore, without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair. ...
>
> …
>
> 16. Thus, there is no justification for prescribing a mandatory sentence of death for the offence of murder committed inside or outside the prison by a person who is under the sentence of life imprisonment. A standardized mandatory sentence, and that too in the form of a sentence of death, fails to take into account the facts and circumstances of each particular case. It is those facts and circumstances which constitute a safe guideline for determining the question of sentence in each individual case. …
>
> …
>
> 25. … Section 303 [of the Indian Penal Code] excludes judicial discretion. The scales of justice are removed from the hands of the Judge so soon as he pronounces the accused guilty of the offence. So final, so irrevocable and so irrestitutable is the sentence of death that no law which provides for it without involvement of the judicial mind can be said to be fair, just and reasonable. Such a law must necessarily be stigmatised as arbitrary and oppressive. Section 303 is such a law and it must go the way of all bad laws. …

Mr Ravi has referred to [12] of *Mithu* in his submissions, but not to [16] and [25] of that judgment.

40 In addition to the Appellant's Art 9(1) cases, Mr Ravi has also relied on the opinions of two experts on international human rights law to contend that the MDP is an inhuman punishment. The first of these experts is Ms Asma Jilani Jahangir ("Ms Jahangir"), Special Rapporteur of the UN Commission on Human Rights on extrajudicial, summary or arbitrary executions (from August 1998 to July 2004), who, in her report to the UN General Assembly, expressed the view that "the death penalty should *under no circumstances* be mandatory, regardless of the charges involved" [emphasis added] (see *Interim Report of the Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions*, UN Doc A/55/288 (11 August 2000) at para 34). The second of the abovesaid experts is Mr Philip Alston ("Mr Alston"), the current Special Rapporteur of the UN Commission on Human Rights on extrajudicial, summary or arbitrary executions. In a critique of the decision in *Nguyen* (see "Expert on arbitrary executions calls on Singapore Government not to carry out mandatory death sentence" (15 November 2005)), Mr Alston expressed the view that, in *Nguyen*, this court failed to examine *Boyce*, where the dissenting members of the Privy Council (*viz*, Lord Bingham, Lord Nicholls of Birkenhead, Lord Steyn and Lord Walker of Gestingthorpe) accepted the submission (at [81]) that:

> No international human rights tribunal anywhere in the world has ever found a mandatory death penalty regime compatible with international human rights norms …

41 Mr Ravi argues that in view of the post-*Ong Ah Chuan* and/or post-*Nguyen* decisions from other Commonwealth jurisdictions condemning the MDP as an inhuman punishment, coupled with the opinions of Ms Jahangir and Mr Alston as mentioned in the preceding paragraph, this court should

declare that Art 9(1) of the Singapore Constitution prohibits the MDP.

The Prosecution's response

42 In response to Mr Ravi's submission that the MDP is an inhuman punishment and that MDP legislation is therefore not "law" for the purposes of Art 9(1), the then Attorney-General, Prof Walter Woon SC ("the AG"), who appeared in his capacity as the Public Prosecutor, has pointed out that the Privy Council in *Ong Ah Chuan* and this court in *Nguyen* decided otherwise. The AG submits that the position laid down in *Ong Ah Chuan* and *Nguyen* holds good, and that the Privy Council's decisions in post-*Ong Ah Chuan* and/or post-*Nguyen* cases should not be followed because the Privy Council does not dictate human rights standards for the rest of humanity.

The parties' arguments on the "contrary to CIL" limb

The Appellant's submissions

43 Turning now to the "contrary to CIL" limb of the Article 9(1) challenge, Mr Ravi's submission is that CIL is part of the expression "law" in Art 9(1). It should be noted that Mr Ravi has not cited any authority for this proposition, although, with regard to the contention that there is a CIL rule prohibiting the MDP as an inhuman punishment, he has pointed to the fact that there are a diminishing number of States which still retain the MDP for drug-related offences. According to Mr Ravi, at last count, only 14 States still retain the MDP for such offences (*cf* the figure given by the AG as to the number of States which still retain the MDP for drug-related *and other* serious offences (see [45] below)). This, Mr Ravi asserts, demonstrates the existence of a CIL prohibition against the MDP as an inhuman punishment. In our view, Mr Ravi's argument is not devoid of merit, but it does not explain why the expression "law" in Art 9(1) should be interpreted to include CIL, in particular, the CIL rule prohibiting inhuman punishment.

The Prosecution's response

44 In response to the Appellant's argument that the word "law" in Art 9(1) includes CIL, the AG has submitted that there are two possible interpretations of this word: the first is that it refers only to statutes and the common law as applied in Singapore; the second is that it also includes CIL in addition to statutes and the common law as applied locally. When asked to clarify his position as to which was the preferred interpretation, the AG said that, in principle, the expression "law" should be interpreted to include CIL. We do not think that the AG, by this reply, was conceding that the expression "law" in Art 9(1) includes CIL 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 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 (see [11] above). 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 ("*Chung Chi Cheung*"), 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 expression would include a CIL rule which had already been recognised and applied by a domestic court as part of Singapore law.

45 The AG disagrees with Mr Ravi's contention that the MDP violates the CIL prohibition against inhuman punishment. In this regard, the AG has submitted that the post-*Ong Ah Chuan* and/or post-*Nguyen* Privy Council decisions cited by Mr Ravi ("the Privy Council cases relating to Art 9(1)") merely reflect a change in the Privy Council's attitude towards the MDP and, like the rest of the

Appellant's Art 9(1) cases, do not reflect an international consensus that the MDP is prohibited as a rule of CIL. The AG has also pointed out that since there are 31 States which continue to impose the MDP for drug-related and other serious offences, the widespread state practice and the *opinio juris sive necessitatis* ("*opinio juris*") necessary to establish the prohibition of that penalty as a rule of CIL are lacking.

Our decision on the Article 9(1) challenge

The "inhuman punishment" limb

46 We shall first consider the "inhuman punishment" limb of the Article 9(1) challenge, which rests on the premise that the expression "law" in Art 9(1) should be interpreted as excluding MDP legislation because such legislation lays down an inhuman punishment (*viz*, the MDP). Article 9(1), which we set out earlier at [11] above and which we reproduce again below for ease of reference, provides as follows:

> No person shall be deprived of his life or personal liberty save in accordance with law.

47 In view of the wording of Art 9(1), the key issue in the Article 9(1) challenge is whether the MDP deprives a person of his life "in accordance with law". This, in turn, raises the question of what the word "law" as used in Art 9(1) means (in this regard, see [13]–[19] above, where we set out our local jurisprudence on the meaning of "law" in Art 9(1)). Mr Ravi accepts (in keeping with the case law which he has referred to) that any law (*ie*, any common law rule or any legislation properly enacted by the Legislature) that provides for the death penalty as a form of punishment is, *prima facie*, "law" for the purposes of Art 9(1). Hence, he accepts – correctly – that the death penalty *per se* does not violate Art 9(1) (in this regard, see also [6] above). What he argues (in reliance on the Appellant's Art 9(1) cases as defined at [34] above) is, instead, that *MDP* legislation violates Art 9(1) because such legislation prescribes an inhuman punishment (*ie*, the MDP) for an offence. As alluded to at [7] above, Mr Ravi's contention is that it is the taking away of judicial discretion as to whether or not to impose the death penalty which makes the MDP an inhuman punishment as each offender is then treated in the same way as any other offender convicted of the same offence, regardless of the circumstances in which he committed the offence and, thus, regardless of his personal culpability.

48 Significantly, all of the Appellant's Art 9(1) cases concern the offence of murder, unlike the offence in issue in this appeal, which is the offence of drug trafficking. Hence, the rationale underlying those cases has no direct application to the present appeal. In this regard, it is pertinent to note the following comments made by Lord Diplock in *Ong Ah Chuan* at 674 (these comments, although made in relation to Art 12(1), are also relevant to the present discussion on Art 9(1)):

> Wherever a criminal law provides for a mandatory sentence for an offence there is a possibility that there may be considerable variation in moral blameworthiness, despite the similarity in legal guilt of offenders upon whom the same mandatory sentence must be passed. In the case of murder, a crime that is often committed in the heat of passion, the likelihood of this is very real; *it is perhaps more theoretical than real in the case of large scale trafficking in drugs, a crime [for] which the motive is cold calculated greed*. [emphasis added]

49 With regard to the offence of drug trafficking, what is an appropriate threshold of culpability for imposing the MDP is, in our view, really a matter of policy, and it is for Parliament to decide, having regard to public interest requirements, how the scale of punishment ought to be calibrated. This is *par excellence* a policy issue for the Legislature and/or the Executive, and not a judicial issue for the Judiciary. The MDA does not recognise any gradations in culpability in drug trafficking offences except

in terms of the amount of controlled drugs trafficked. In this regard, it is a matter of common sense that the larger the amount trafficked, the greater the likelihood of harm done to society. Accordingly, even if the Appellant's Art 9(1) cases bear out the conclusion that the MDP is an inhuman punishment when it is prescribed as the punishment for murder, it does not necessarily follow that the MDP, when prescribed as the punishment for drug trafficking, is likewise an inhuman punishment. In any event, whatever might be the merits of the argument (based on the Appellant's Art 9(1) cases) that the MDP imposed for the offence of murder is an inhuman punishment and is thus unconstitutional, this argument has been foreclosed by constitutional developments in Singapore (see [61]–[72] below).

50 It should also be noted that the Appellant's Art 9(1) cases (leaving aside *Mithu*) were decided in a different *textual* context. All of those cases (save for *Mithu*) involved Constitutions which *expressly* prohibited inhuman punishment. The key issue in those cases was thus interpretative in nature, *ie*: in relation to the constitutional prohibition against inhuman punishment, was the MDP an inhuman punishment? The decisions in the Appellant's Art 9(1) cases (apart from *Mithu*) are therefore technically decisions on the question of what kind of punishment would constitute inhuman punishment and, strictly speaking, are *not* relevant to the meaning of the expression "law" in Art 9(1) of the Singapore Constitution. Hence, these cases are not direct authority on the question of whether the MDP provisions in the MDA constitute "law" for the purposes of Art 9(1).

51 That the Appellant's Art 9(1) cases (other than *Mithu*) concern interpretative issues can be seen from the following comments by Lord Bingham in *Reyes*:

> 25 In a modern liberal democracy it is ordinarily the task of the democratically elected legislature to decide what conduct should be treated as criminal, so as to attract penal consequences, and to decide what kind and measure of punishment such conduct should attract or be liable to attract. The prevention of crime, often very serious crime, is a matter of acute concern in many countries around the world, and prescribing the bounds of punishment is an important task of those elected to represent the people. *The ordinary task of the courts is to give full and fair effect to the penal laws which the legislature has enacted. This is sometimes described as deference shown by the courts to the will of the democratically-elected legislature. But it is perhaps more aptly described as the basic constitutional duty of the courts which, in relation to enacted law, is to interpret and apply it*.
>
> 2 6 *When (as here) an enacted law is said to be incompatible with a right protected by a Constitution, the court's duty remains one of interpretation*. If there is an issue (as here there is not) about the meaning of the enacted law, the court must first resolve that issue. Having done so it must interpret the Constitution to decide whether the enacted law is incompatible or not. … As in the case of any other instrument, the court must begin its task of constitutional interpretation by carefully considering the language used in the Constitution. But it does 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. *The court has no licence to read its own predilections and moral values into the Constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society …*
>
> [emphasis added]

52 In this appeal, Mr Ravi is arguing that, as a matter of interpretation, Art 9(1) of the Singapore Constitution should be read as incorporating some form of prohibition against inhuman punishment similar to the prohibition expressed in the various Constitutions at issue in the Appellant's Art 9(1)

cases (apart from *Mithu*). In other words, what Mr Ravi is seeking to argue is that the expression "law" in Art 9(1) *excludes* a law that provides for an inhuman punishment. We must emphasise that Mr Ravi is not arguing that Art 9(1) *expressly* prohibits inhuman punishment. He cannot make that argument on the face of Art 9(1) without asking the court to (in effect) legislate those words into Art 9(1). What he is arguing, instead, is that Art 9(1) should be interpreted generously to prohibit a law that prescribes an inhuman punishment because human values have changed and legal norms should also change to reflect such changed human values. Mr Ravi's argument, really, is that the world has changed and so have the civilised norms of humanity, with the result that the MDP is no longer acceptable, and, thus, this court should depart from *Ong Ah Chuan* and *Nguyen*.

53 Indeed, Mr Ravi has argued that the world had already changed by the time *Ong Ah Chuan* was decided in 1980, with the MDP being widely recognised by then as an inhuman punishment which was not "in accordance with law" for the purposes of Art 9(1), but the Privy Council in *Ong Ah Chuan* failed to recognise or understand this. In this connection, Mr Ravi has referred to *Bowe*, where the Privy Council held that the Bahamian courts had made a similar mistake in failing to recognise, prior to the coming into force of the 1973 Constitution of the Bahamas, the incompatibility of the MDP with the constitutional prohibition against (*inter alia*) inhuman punishment (this prohibition was first set out in s 3 of the 1963 Constitution of the Bahamas; it was subsequently reproduced as, respectively, s 3 of the 1969 Constitution of the Bahamas and s 17 of the 1973 Constitution of the Bahamas). Lord Bingham said (at [42]):

> It is … clear that it took some time for the legal effect of entrenched human rights guarantees to be appreciated, not because the meaning of the rights changed but because the jurisprudence on human rights and constitutional adjudication was unfamiliar and, by some courts, resisted. The task of the court today is not to conduct a factual inquiry into the likely outcome had the present challenge been presented on the eve of the 1973 Constitution [when the 1969 Constitution of the Bahamas was still in force]. That would be an inappropriate exercise for any court to adopt, perhaps turning on personalities and judicial propensities. The task is to ascertain what the law, correctly understood, was at the relevant time, unaffected by later legal developments, since that is plainly the law which should have been declared had the challenge been presented then. As it is, all the building blocks of a correct constitutional exposition were in place well before 1973. It matters little what lawyers and judges might have thought in their own minds: in the context of a codified Constitution, what matters is what the Constitution says and what it has been interpreted to mean. In 1973 there was no good authority contrary to the appellants' argument [*viz*, that the MDP was an inhuman punishment and thus contravened the constitutional prohibition against such punishment], and much to support it. In the final resort, the most important consideration is that those who are entitled to the protection of human rights guarantees should enjoy that protection. The appellants should not be denied such protection because, a quarter century before they were condemned to death, the law was not fully understood.

54 We do not accept Mr Ravi's criticism of *Ong Ah Chuan*. There may be good reasons why Lord Bingham held in *Bowe* that the Bahamian courts had made the mistake outlined in the preceding paragraph (we should add that his Lordship's holding was based on the constitutional development of the Bahamas from colonial times until the Bahamas became an independent State in 1973 (see [13]–[21] of *Bowe*)). But, where the Singapore Constitution is concerned, Mr Ravi's criticism of *Ong Ah Chuan* borders on the fanciful as it suggests *incorrectly* that: (a) Lord Diplock did not understand the nature of the MDP and thus failed to recognise it as an inhuman punishment (when his Lordship had specifically said (at 673 of *Ong Ah Chuan*) that there was nothing unusual about a capital sentence being mandatory and that the efficacy of a capital sentence as a deterrent might to some extent be diminished if it were not mandatory); and (b) our courts (in post-*Ong Ah Chuan* decisions) did not

understand the term "law" as interpreted by the Privy Council in *Ong Ah Chuan*.

55 Mr Ravi has made much of the Privy Council cases relating to Art 9(1) (as defined at [45] above) in attempting to buttress his case that Art 9(1) should be read as prohibiting inhuman punishment, including the MDP. His argument implies that even though there is no express prohibition against inhuman punishment in the Singapore Constitution, it does not follow that Art 9(1), which sets out the right to life, cannot be interpreted as prohibiting such punishment. In this regard, Mr Ravi points to *Reyes*, where the Privy Council stated that, given its decision that the MDP provided for under s 102(1) of the Belize Criminal Code *vis-à-vis* the offence of "class A" murder violated s 7 of the Belize Constitution, it was unnecessary to analyse the compatibility of that provision with ss 3 and 4 of the Belize Constitution (apropos the right to life), but "[that] should not … be taken as a rejection of the defendant's arguments based on those sections" (at [48]). Another case which Mr Ravi has relied on is *Matthew*, where the Privy Council, although focusing its analysis on the issue of whether the MDP was cruel and unusual punishment and, thus, inconsistent with the prohibition against such punishment in s 5(2)(b) of the Constitution of Trinidad and Tobago, also stated (in addition to finding that the MDP was inconsistent with that constitutional provision) that the MDP was inconsistent with s 4(a) of the Constitution of Trinidad and Tobago (which sets out "the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by *due process of law*" [emphasis added]).

56 Mr Ravi has further submitted that international human rights norms are relevant in interpreting the Singapore Constitution as our courts, to the extent that is permitted by the language of the Singapore Constitution, will be slow to interpret constitutional provisions as being inconsistent with Singapore's international legal obligations. In this regard, Mr Ravi argues that, even though the Singapore Constitution does not expressly prohibit inhuman punishment, this court should, following the path made on Caribbean soil by the Privy Council in cases such as *Reyes* and *Matthew*, likewise read the moral bases of human rights – which include the right to be protected from inhuman punishment – into the expression "law" in Art 9(1). This right (*ie*, the right to be protected from inhuman punishment), Mr Ravi emphasises, is recognised in, *inter alia*, Art 5 of the UDHR, which provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment", and Art 3 of the European Convention on Human Rights (4 November 1950), 213 UNTS 221 ("the ECHR"), which provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment".

57 In his book *The Idea of Justice* (Allen Lane, 2009), Prof Amartya Sen ("Prof Sen") points out (at p 359):

> The framers of the [UDHR] in 1948 clearly hoped that the articulated recognition of human rights would serve as a kind of a template for new laws that would be enacted to legalize those human rights across the world. The focus was on fresh legislation, and not just on more humane interpretation of existing legal protections.

58 In this regard, Prof Sen agrees (at p 363) with Herbert Hart's view that moral rights (which would include human rights) should be seen as "*parents of law*" [emphasis in original] – *ie*, as motivators of specific legislation – rather than as "child[ren] of law" (see, likewise, p 363), which was Jeremy Bentham's view. This observation has resonance in the following comments by Lord Bingham in *Reyes* at [27]–[28] (although it should be noted that his Lordship's comments were made for a different purpose):

> 27 In considering what norms have been accepted by Belize as consistent with the fundamental standards of humanity, it is relevant to take into account the international

instruments incorporating such norms to which Belize has subscribed … By becoming a member of the Organisation of American States Belize proclaimed its adherence to rights which, although not listed in the Charter of the Organisation, are expressed in the Declaration [*ie*, the American Declaration of the Rights and Duties of Man adopted in 1948 at the Ninth International Conference of American States]. With some differences of wording, all these instruments prohibit "cruel, inhuman or degrading treatment or punishment", words equivalent in meaning to those used in this Constitution [*ie*, the Belize Constitution]. As more fully discussed below, the requirement of humanity has been read as incorporating the precept that consideration of the culpability of the offender and of any potentially mitigating circumstances of the offence and the individual offender should be regarded as a sine qua non of the humane imposition of capital punishment.

28 In interpreting the Constitution of Belize it is also relevant to recall that for 28 years preceding independence the country was covered by the [ECHR], the provisions of which were in large measure incorporated into Part II of the [Belize] Constitution … [But this] does not mean that in interpreting the Constitution of Belize effect need be given to treaties not incorporated into the domestic law of Belize or non-binding recommendations or opinions made or given by foreign courts or human rights bodies. *It is open to the people of any country to lay down the rules by which they wish their state to be governed* and they are not bound to give effect in their Constitution to norms and standards accepted elsewhere, perhaps in very different societies.

[emphasis added]

59 We agree that domestic law, including the Singapore Constitution, should, as far as possible, be interpreted consistently with Singapore's international legal obligations. There are, however, inherent limits on the extent to which our courts may refer to international human rights norms for this purpose. For instance, reference to international human rights norms would not be appropriate where the express wording of the Singapore Constitution is not amenable to the incorporation of the international norms in question, or where Singapore's constitutional history is such as to militate against the incorporation of those international norms (in this regard, see further [61]–[72] below). In such circumstances, in order for our courts to give full effect to international human rights norms, it would be necessary for Parliament to first enact new laws (as the drafters of the UDHR hoped States would do) or even amend the Singapore Constitution to expressly provide for rights which have not already been incorporated therein. Both of these measures are, as Lord Bingham observed in *Reyes* at [28] (reproduced in the preceding paragraph), well within the prerogative of a sovereign State. In short, the point which we seek to make is this: where our courts have reached the limits on the extent to which they may properly have regard to international human rights norms in interpreting the Singapore Constitution, it would not be appropriate for them to legislate new rights into the Singapore Constitution under the guise of interpreting existing constitutional provisions.

60 Where the Singapore Constitution is concerned, we are of the view that it is not possible to incorporate a prohibition against inhuman punishment through the interpretation of existing constitutional provisions (in this case, Art 9(1)) for two reasons.

61 First, unlike the Constitutions of the Caribbean States, the Singapore Constitution does not contain any express prohibition against inhuman punishment. Our constitutional history is quite different from that of the Caribbean States. Belize and the other Caribbean States modelled their Constitutions after the ECHR, whereas the Singapore Constitution – specifically, Pt IV thereof on fundamental liberties – was derived (albeit with significant modifications) from Pt II of the 1957 Constitution of the Federation of Malaya ("the 1957 Malayan Constitution"), which formed the basis of

what we shall hereafter refer to as "the 1963 Malaysian Constitution" (*viz*, the Constitution of Malaysia that came into effect when Malaysia (comprising the Federation of Malaya, Singapore, Sabah and Sarawak) was formed on 16 September 1963). It is a 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 (see Karel Vasak, "The European Convention of Human Rights Beyond the Frontiers of Europe" (1963) 12 ICLQ 1206 at p 1210). The ECHR ceased to apply in the respective British colonies upon their independence (in the case of Singapore, the ECHR ceased to apply when we became a constituent State of Malaysia in 1963), but Belize and many other former British colonies (especially those in the Caribbean) modelled their Constitutions after the ECHR. As a result, the Constitutions of these countries included a prohibition against inhuman punishment. This was not the case for either Malaysia or Singapore.

62 When the 1957 Malayan Constitution was drafted (pursuant to advice from the Federation of Malaya Constitutional Commission chaired by Lord Reid ("the Reid Commission")), no reference was made to a prohibition against inhuman punishment in any provision of the draft Constitution; *ie*, the Reid Commission did not recommend the incorporation of such a prohibition. Given that the Reid Commission's report (*viz*, *Report of the Federation of Malaya Constitutional Commission 1957* (11 February 1957)) was published in 1957 when the prohibition against inhuman punishment already existed in the ECHR (which applied to the Federation of Malaya prior to its independence), the omission of a similar prohibition from the 1957 Malayan Constitution was clearly not due to ignorance or oversight on the part of the Reid Commission. The prohibition against inhuman punishment was likewise omitted from the 1963 Malaysian Constitution.

63 When Singapore separated from Malaysia and became an independent sovereign republic on 9 August 1965, we inherited a state Constitution (*ie*, the Constitution of the State of Singapore set out in Schedule 3 to the Sabah, Sarawak and Singapore (State Constitutions) Order in Council 1963 (GN No S1 of 1963)) and many provisions of the 1963 Malaysian Constitution, including (*inter alia*) the provisions on fundamental liberties that are now Arts 9–16 in Pt IV of the Singapore Constitution. As a result of the aforesaid developments in our constitutional history, the Singapore Constitution, unlike many other Commonwealth Constitutions, is not modelled after the ECHR and does not contain an express prohibition against inhuman punishment. This weakens Mr Ravi's contention that the Singapore Constitution should be read as incorporating an implied prohibition to this effect.

64 The second and more important reason why it is not possible to interpret the Singapore Constitution as incorporating a prohibition against inhuman punishment is that a proposal to add an *express* constitutional provision to this effect was made to the Government in 1966 by the constitutional commission chaired by Wee Chong Jin CJ ("the Wee Commission"), but that proposal was ultimately rejected by the Government. The Wee Commission was appointed to look into (among other things) the protection of minority rights in Singapore after we became an independent sovereign republic. To this end, the Wee Commission studied the constitutional texts of some 40 different British colonies and dominions and newly independent nations as well as non-Commonwealth Constitutions (see *Evolution of a Revolution: Forty years of the Singapore Constitution* (Li-ann Thio & Kevin Y L Tan eds) (Routledge Cavendish, 2009) at pp 11–12), and, in its written report (*viz*, *Report of the Constitutional Commission 1966* (27 August 1966) ("the 1966 Report")), went out of its way to recommend, *inter alia*, the inclusion of a constitutional provision prohibiting torture or inhuman punishment.

65 The Wee Commission gave the following reasons for its recommendation (see the 1966 Report at para 40):

> In looking at other written Constitutions[,] we find a *fundamental human right* which is acknowledged and protected in all of them but which is not written into the Constitution of Malaysia [*ie*, the 1963 Malaysian Constitution, certain provisions of which continued in force in Singapore after 9 August 1965 by virtue of the Republic of Singapore Independence Act 1965 (Act 9 of 1965)]. This is the right of every individual not to be subjected to torture or inhuman treatment. We think it is beneficial if this right is written into the Constitution of Singapore as a fundamental right and accordingly we recommend a new Article as follows —
>
> > "13.—(1) *No person shall be subjected to torture or to inhuman or degrading punishment or other treatment*.
> >
> > (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that the law in question authorises the infliction of any punishment or the administration of any treatment that was lawful immediately before the coming into force of this Article."
>
> [emphasis added]

For convenience, we shall hereafter refer to the new Article proposed by the Wee Commission as "the proposed Art 13", and to the two subsections of this proposed Article as, respectively, "the proposed Art 13(1)" and "the proposed Art 13(2)".

66 Three things may be noted about the proposed Art 13. The first is that the proposed Art 13(1) is effectively word for word the same as both Art 3 of the ECHR and s 7 of the Belize Constitution (which was the subject matter of the decision in *Reyes*). The second is that the proposed Art 13(1) and the proposed Art 13(2) are *in pari materia* with: (a) ss 15(1) and 15(2) respectively of the Constitution of Barbados (which provisions were commented on by the Privy Council in *Boyce* at, *inter alia*, [28]); and (b) ss 17(1) and 17(2) respectively of the Constitution of Jamaica (which Constitution was construed in *Pratt*, a decision rejected by this court in *Jabar* (see [18] above)). Third, the proposed Art 13(2), which is essentially a savings clause to preserve the validity of *punishments* existing before the coming into force of the proposed Art 13 (regardless of whether or not such punishments are inhuman), is also substantially the same as para 10 of Schedule 2 to the Saint Lucia Constitution Order 1978 (SI 1978/1901) ("the Saint Lucia savings clause").

67 The Saint Lucia savings clause reads as follows:

> Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of section 5 of the Constitution [of Saint Lucia] to the extent that the law in question authorises the infliction of any description of punishment that was lawful in Saint Lucia immediately before 1 March 1967 (being the date on which Saint Lucia became an associated state).

68 In *Hughes*, the Privy Council held that the above clause was inadequate to save the MDP imposed for murder under s 178 of the Criminal Code of Saint Lucia as revised in 1992 ("Saint Lucia's Criminal Code") from unconstitutionality (in terms of violating the constitutional prohibition against inhuman punishment set out in s 5 of the Constitution of Saint Lucia). The Privy Council, relying on the word "authorises" (which is also used in the proposed Art 13(2)), stated (at [47] of *Hughes*):

> [T]here is a world of difference between a law that *requires* a judge to impose the death penalty in all cases of murder and a law that merely *authorises* him to do so. More particularly, it is because the law requires, rather than merely authorises, the judge to impose the death sentence

that there is no room for mitigation and no room for the consideration of the individual circumstances of the defendant or of the murder. [emphasis added]

Proceeding on this basis, the Privy Council held that s 178 of Saint Lucia's Criminal Code fell outside the scope of the Saint Lucia savings clause "to the extent that it … require[d] the infliction of the death penalty in all cases of murder" (at [48]). In other words, the Saint Lucia savings clause saved only the discretionary death penalty, but not the MDP.

69 Since the proposed Art 13 is not part of the Singapore Constitution, the Privy Council's decision in *Hughes*, which turned on the interpretation of the word "authorises" in the Saint Lucia savings clause, is not relevant in the present appeal. Nevertheless, we wish to add that, whatever the legislative intent of the Saint Lucia savings clause was, we find it difficult to believe that when the Wee Commission raised the proposed Art 13(2) for the Government's consideration, it intended to exclude from the protection of this provision all punishments "required" by law, such as the MDP for murder, mandatory caning for other offences as well as the various mandatory minimum punishments prescribed under the then existing criminal statutes (for example, the Vandalism Act 1966 (Act 38 of 1966), which came into force on 16 September 1966). It seems to us that the converse was more likely, *ie*, the Wee Commission intended the proposed Art 13(2) to prevent the raising of any argument that any pre-existing lawful punishment of whatever nature would be in violation of the proposed Art 13 (1) upon the proposed Art 13 taking effect.

70 In this regard, we note that the word "requires" was not used in the proposed Art 13(2). The word used was, instead, "authorises". It is an established principle of interpretation that the meaning of a word is derived from the context in which that word is used. The purpose of a savings clause in the nature of the proposed Art 13(2) is clearly to save from possible unconstitutionality all existing punishments that were lawful prior to the coming into effect of a new constitutional right (such as that set out in the proposed Art 13(1)). If the word "authorises" in such a savings clause is indeed intended to exclude existing punishments that are "required" to be imposed (*ie*, mandatory punishments such as the MDP), it would be far easier to simply abrogate all those punishments so as to conform to the new constitutional right in question, instead of leaving the constitutional validity of those punishments in doubt until a court decides, long after the event, which of the "required" punishments are saved and which are not. It seems to us rather surprising that a punishment which the court is "required" to impose for a particular offence (*eg*, the MDP) can be construed as falling outside the ambit of "authorised" punishments. This is because, if the court is "required" to inflict a particular punishment, it is *a fortiori* authorised to inflict that punishment.

71 Returning to the Wee Commission's recommendations as set out in the 1966 Report, the Government accepted many of those recommendations in their entirety. There were other recommendations which the Government agreed to in principle, but not with regard to the details; and there were yet other recommendations which the Government found to be unacceptable. In respect of the proposed Art 13, the Government accepted *in principle* that no individual should be subjected to torture, but it omitted any reference to protection from inhuman punishment (see *Singapore Parliamentary Debates, Official Report* (21 December 1966) vol 25 at cols 1052–1053) (Mr E W Barker, Minister for Law and National Development)). Ultimately, the Government did not include the proposed Art 13 in the amendments to the Singapore Constitution, and the Constitution (Amendment) Act 1969 (Act 19 of 1969), which was passed to give effect to provisions of the 1966 Report that the Government accepted, provided for only the establishment of what is now the Presidential Council for Minority Rights to, *inter alia*, serve as "an additional check on … matters which might affect the minorities" (see the 1966 Report at para 16).

72 The Government's rejection of the proposed Art 13 was unambiguous, whatever the reasons for

such rejection were. This development, in our view, forecloses Mr Ravi's argument that it is open to this court to interpret Art 9(1) of the Singapore Constitution as incorporating a prohibition against inhuman punishment. We may reasonably assume that the Wee Commission recommended the inclusion of the proposed Art 13 in the Singapore Constitution because Art 9(1) did not deal with the same subject matter as that of the proposed Art 13(1) (*viz*, prohibition of inhuman punishment); otherwise, Art 9(1) would have been redundant. The Government's rejection of the proposed Art 13(1) – the content of which forms the basis of the ruling in the Privy Council cases relating to Art 9(1) that the MDP is an inhuman punishment – makes it impossible for the Appellant to now challenge the constitutionality of the MDP by relying on these Privy Council cases. It is not legitimate for this court to read into Art 9(1) a constitutional right which was decisively rejected by the Government in 1969, especially given the historical context in which that right was rejected. We therefore conclude that Mr Ravi's proposed interpretation of Art 9(1) as incorporating a prohibition against inhuman punishment is an interpretation which our courts are barred from adopting.

73 In this connection, we wish to highlight Lord Bingham's observation in *Reyes* at [28] (quoted at [58] above) that States are not bound to give effect in their Constitutions to norms and standards accepted elsewhere, perhaps in very different societies. It is also pertinent to refer to the judgment of Lord Nicholls in *Matthew*, where his Lordship said:

> 73 … If the requisite legislative support for a change in the Constitution is forthcoming, a deliberate departure from fundamental human rights may be made, profoundly regrettable although this may be. That is the prerogative of the legislature.
>
> 74 If departure from fundamental human rights is desired, that is the way it should be done. The Constitution should be amended explicitly. …

74 In our view, the reasoning of Lord Nicholls in the above quotation is equally apt to apply to the Government's decision in 1969 to reject the proposed Art 13, with the result that the right to freedom from inhuman punishment was not elevated to a constitutional right. There 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. On this ground alone, there is no legitimate basis for this court to now expand, via an interpretative exercise, the scope of Art 9(1) so as to include a prohibition against inhuman punishment.

75 This conclusion does not mean that, because the proposed Art 13 included a prohibition against torture, an Act of Parliament that permits torture can form part of "law" for the purposes of Art 9(1). Currently, no domestic legislation permits torture. In any case, torture is not the issue before us. All that is necessary is for us to reiterate the Privy Council's position in *Ong Ah Chuan* (at 659 (quoted at [16] above)) that Art 9(1) does not justify all legislation, whatever its nature. It also bears mention that the Government has expressed the view that torture is wrong (see *Singapore Parliamentary Debates, Official Report* (29 July 1987) vol 49 at cols 1491–1492 (Prof S Jayakumar, Minister for Home Affairs)). This explicit recognition by the Government that torture is wrong in the local context stands in sharp contrast to the absence of any statement on its part (in the context of our national policy on combating drug trafficking in Singapore) that the MDP is an inhuman punishment. In addition, torture, in so far as it causes harm to the body with criminal intent, is already criminalised under ch XVI of the Singapore Penal Code, which sets out the types of offences affecting the human body.

76 We shall now consider the Appellant's reliance on *Mithu* to support the contention that Art 9(1) of the Singapore Constitution should be read as incorporating a prohibition against inhuman punishment. Mr Ravi has submitted that, in *Mithu*, the Supreme Court of India ruled that the MDP was unconstitutional as it violated Arts 14 and 21 of the Indian Constitution (*viz*, the Indian equivalent of,

respectively, Arts 12(1) and 9(1) of the Singapore Constitution).

77 Articles 14 and 21 of the Indian Constitution read as follows:

> **14**. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.
>
> …
>
> **21**. No person shall be deprived of his life or personal liberty except *according to procedure established by law*.
>
> [emphasis added]

The issue in *Mithu* was whether s 303 of the Indian Penal Code (which, as mentioned at [39] above, lays down the MDP for the offence of murder committed by a person whilst under a sentence of life imprisonment) infringed these two Articles of the Indian Constitution. The Supreme Court of India held that s 303 infringed Art 14 as there was no rational justification for making a distinction between the punishment imposed on a person who committed murder whilst under a sentence of life imprisonment and the punishment imposed on a person who committed murder under other circumstances.

78 With regard to Art 21, the Indian Supreme Court held that the phrase "procedure established by law" meant "according to fair, just and reasonable procedure established by valid law" (see *Mithu* at [6]). On this basis, the Supreme Court held, further, that:

> (a) it was harsh, unjust and unfair to condemn a murderer to death without taking into account the circumstances in which he committed the murder (at [12]); and
>
> (b) a provision which precluded the court from exercising judicial discretion as to whether or not the MDP should be imposed was arbitrary and oppressive (at [25]).

In short, what the Indian Supreme Court objected to in *Mithu* was the fact that, under s 303 of the Indian Penal Code (at [25]):

> The scales of justice are removed from the hands of the Judge so soon as he pronounces the accused guilty of the offence [and] … the sentence of death … [is] provide[d] for … without involvement of the judicial mind …

79 In our view, there are three reasons why, contrary to what Mr Ravi advocated, we cannot apply the reasoning in *Mithu* to interpret Art 9(1) of the Singapore Constitution as prohibiting inhuman punishment generally and the MDP in particular. The first reason is that the test for the constitutional validity of laws under Art 9(1) of the Singapore Constitution is different from the test under Art 21 of the Indian Constitution. *Mithu* was not a case about inhuman punishment (*cf* the decisions in the rest of the Appellant's Art 9(1) cases), although Chandrachud CJ did say in his judgment (at [6]) that "[a] savage sentence [was] anathema to the civilized jurisprudence of Article 21" (in this regard, the learned Chief Justice gave the example of cutting off the offender's hands as a punishment for theft). The issue before the court was not whether the MDP was inhuman, but whether s 303 of the Indian Penal Code was procedurally "fair, just and reasonable" (at [6]) when it "deprive[d] the Court of the use of its wise and beneficent discretion in a matter of life and death" (at [12]). What we now have to consider is whether this test of fair, just and reasonable procedure employed by the Indian Supreme Court ("the 'fair, just and reasonable procedure' test") for the purposes of determining the

constitutional validity of laws under Art 21 of the Indian Constitution is applicable in our local context to Art 9(1) of the Singapore Constitution.

80 As stated earlier (at [11] and [46] above), Art 9(1) of the Singapore Constitution provides as follows:

> No person shall be deprived of his life or personal liberty save *in accordance with law*. [emphasis added]

Although the expression "law" may include substantive law as well as procedural law, it does not follow that any procedural law must be "fair, just and reasonable" (see *Mithu* at [6]) before it can constitute "law" for the purposes of Art 9(1). Article 9(1) contains no such qualification; nor can such a qualification be implied from its context or its wording. It must also be noted that the Privy Council in *Ong Ah Chuan* did not adopt the "fair, just and reasonable procedure" test as the criterion for determining the constitutional validity of laws under Art 9(1) (because that would have been too vague a test of constitutionality). Such a test hinges on the court's view of the reasonableness of the law in question, and requires the court to intrude into the legislative sphere of Parliament as well as engage in policy making. Thus, in *Ong Ah Chuan*, the Privy Council only required, for the purposes of Art 9(1), that any law depriving a person of his life or personal liberty must be consistent with "fundamental principles of natural justice" (at 670).

81 Our second reason for rejecting Mr Ravi's submissions on *Mithu* is that the Indian Supreme Court in that case paid no regard to the overall context of Art 21 of the Indian Constitution, which applies not only to deprivation of life, but also deprivation of personal liberty. The court declared the MDP as provided for under s 303 of the Indian Penal Code to be inconsistent with Art 21 without reference to the context of that Article, which (as just mentioned) also allows for derogation from the right to personal liberty. If the objection to the MDP is the absence of judicial discretion to calibrate the sentence according to the circumstances of the case, then all mandatory sentences (and, indeed, all fixed minimum and maximum sentences prescribed by the Legislature) will contravene Art 21. It may be that this is the law in India. But, it is not the law in Singapore. In *Ong Ah Chuan*, this was an extreme position which the appellants' counsel refrained from taking (see *Ong Ah Chuan* at 673 (as reproduced at [21] above)). Mr Ravi has also not taken this position before this court.

82 It may well be that the Indian Supreme Court in *Mithu* considered that the death penalty was qualitatively different from other punishments (a view also expressed by Stewart J in *Woodson* at 305 (quoted at [37] above)), and, thus, a *different* standard must be adhered to in terms of the *procedure* for imposing the death penalty. With respect, we do not think this reasoning is applicable to Art 9(1) of the Singapore Constitution. While we agree that it is beyond doubt that the death penalty is qualitatively different from other lesser punishments, the relevant question in this appeal is whether Parliament's power to legislate for the imposition of the death penalty as the *mandatory* punishment for a serious offence is circumscribed because of this qualitative difference. In our view, the plain wording of Art 9(1) does not support the conclusion that Parliament cannot make the death penalty mandatory. We do not think that we can give to Art 9(1) of the Singapore Constitution the same expansive interpretation as that which the Indian Supreme Court has given to Art 21 of the Indian Constitution.

83 Our third reason for not applying the reasoning in *Mithu* to Art 9(1) of the Singapore Constitution is that the Indian Supreme Court has given Art 21 of the Indian Constitution pride of place in India's constitutional framework. The expansive interpretation of Art 21 was established progressively in three cases, namely, *Smt Maneka Gandhi v Union of India and another* AIR 1978 SC 597, *Sunil Batra v Delhi Administration and others* AIR 1978 SC 1675 and *Bachan Singh v*

State of Punjab AIR 1980 SC 898. The decision in *Mithu* is entirely understandable, having regard to the economic, social and political conditions prevailing in India and the pro-active approach of the Indian Supreme Court in matters relating to the social and economic conditions of the people of India. In this regard, since its decision in *Mithu*, the Indian Supreme Court has expanded the scope of Art 21 even further to include numerous rights relating to life, such as the right to education, the right to health and medical care and the right to freedom from noise pollution (see generally *Shorter Constitution of India* (A R Lakshmanan *et al* eds) (LexisNexis Butterworths Wadhwa Nagpur, 14th Ed, 2009) at vol 1, pp 364–414).

84 In our view, it is not possible for this court to interpret Art 9(1) of the Singapore Constitution in the same way that the Indian Supreme Court has interpreted Art 21 of the Indian Constitution. Although the right to life is the most basic of human rights, Art 9(1) of the Singapore Constitution expressly allows a person's life to be taken away in accordance with law. The MDP is provided by law. With regard to the offence of murder, the MDP has been the punishment prescribed by our penal legislation since 14 March 1883, when what is now s 302 of the Singapore Penal Code was enacted via s 1 of the Penal Code Amendment Ordinance 1883 (Ordinance 2 of 1883) ("the Penal Code Amendment Ordinance"). The MDP was not abolished by the UK government during the period when the ECHR applied in Singapore (see [61] above), and it survived under the 1963 Malaysian Constitution as well as the Singapore Constitution. The constitutional validity of the MDP was affirmed by the Privy Council in 1980 in *Ong Ah Chuan* and also by this court in 2004 in *Nguyen*. Since the latter decision, there has been no change in the legal matrix (including CIL (see [87]–[99] below)) that requires this court to give a different interpretation to the expression "law" in Art 9(1) and declare that MDP legislation is not "law" for the purposes of this provision. The development in human rights jurisprudence as manifested in the Privy Council cases relating to Art 9(1) is not relevant to the interpretation of Art 9(1) as those cases all concern the meaning of express constitutional prohibitions against inhuman punishment.

85 For the foregoing reasons, we reject Mr Ravi's submissions on *Mithu* and, in turn, the Appellant's argument on the "inhuman punishment" limb of the Article 9(1) challenge.

86 We would add that, in so far as this limb of the Article 9(1) challenge rests on the argument that the objectionable element in MDP legislation is the absence of judicial discretion in imposing the punishment prescribed by law (from the viewpoint that MDP legislation requires the courts to impose the MDP in an arbitrary, absurd or mindless manner on different offenders regardless of the different circumstances of each offender's case), it raises an issue which is, in essence, no different from the question of whether MDP legislation is consistent with the right under Art 12(1) of the Singapore Constitution, *ie*, the right to equal protection of the law. In other words, Mr Ravi's objection to the MDP provisions in the MDA on the ground that these provisions are arbitrary and thus inconsistent with Art 12(1) overlaps with the objection based on Art 9(1) (*viz*, that Art 9(1) does not sanction an arbitrary law that takes away an individual's life). In the context of Art 9(1), the argument is that the MDP provisions in the MDA impose the MDP on convicted drug traffickers in so arbitrary and absurd a manner that these provisions cannot constitute "law". In the context of Art 12(1), the argument is that the MDP provisions in the MDA, which make the 15g differentia the only criterion, to the exclusion of all other considerations, for determining whether or not the MDP is to be imposed for trafficking in diamorphine, are arbitrary and thus do not accord to convicted drug traffickers equal protection of the law. We shall address this point below (at [111]–[119]) when we consider the Article 12(1) challenge.

The "contrary to CIL" limb

87 We now turn to the "contrary to CIL" limb of the Article 9(1) challenge, which is based on the

proposition that CIL prohibits the MDP as an inhuman punishment and, because CIL is "law" for the purposes of Art 9(1) of the Singapore Constitution, the MDP is unconstitutional. This limb of the Article 9(1) challenge is quite different from the "inhuman punishment" limb, which centres on interpreting the expression "law" in Art 9(1) to exclude any law providing for inhuman punishment. On his part, the AG expressed his agreement that the expression "law" should be given a liberal, rather than a restrictive, interpretation to include CIL (see [44] above). However, as we pointed out earlier (likewise at [44] above), we do not think that the AG meant to agree that so long as it can be shown to the satisfaction of the court that a particular rule has become part of CIL, that rule automatically becomes "law" for the purposes of Art 9(1) in the sense that it becomes part of Singapore law by operation of either the common law or Art 9(1) itself. Be that as it may, even if the AG did agree with Mr Ravi's proposition that "law" in Art 9(1) includes CIL, this court is free to reject this submission. As a general principle, the court is not obliged to accept as the law what the parties agree should be the law, even in a case such as the present, where one of the parties concerned is the AG acting in his capacity as the Public Prosecutor. Thus, in the present case, we can – and, indeed, must – still consider whether the interpretation advanced by Mr Ravi (*viz*, that CIL is part of "law" for the purposes of Art 9(1)) is an interpretation which is legally correct.

88 Let us first consider the effect of the proposition that the expression "law" in Art 9(1) includes CIL. If this proposition were accepted, it would mean that any rule of CIL would be cloaked with constitutional status and would override any existing MDP legislation, such as s 302 of the Singapore Penal Code, which, as mentioned at [84] above, can be traced back to 1883 (see s 1 of the Penal Code Amendment Ordinance).

89 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. (A rule of CIL may, of course, also be incorporated by statute, but, in that situation, the rule in question will become part of domestic legislation and will be enforced as such; *ie*, it will no longer be treated as a rule of CIL.) The classic exposition of the principle delineating when a CIL rule becomes part of domestic common law is set out in the Privy Council case of *Chung Chi Cheung* (cited by this court in *Nguyen* at [94]), where Lord Atkin explained (at 167–168):

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

Other authorities which illustrate this principle include *Collco Dealings Ltd v Inland Revenue Commissioners* [1962] AC 1 (likewise referred to in *Nguyen* at [94]); Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 7th Ed, 2008) at p 44; *Oppenheim's International Law, Volume 1: Peace* (Robert Jennings & Arthur Watts eds) (Longman, 9th Ed, 1992) at p 56; and Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (Routledge, 7th Rev Ed, 1997) at p 69.

90 The principle enunciated by Lord Atkin 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 – *ie*, a Singapore court would need to determine that the CIL rule in question is consistent with "rules enacted by statutes or finally declared by [our] tribunals" (*per* Lord Atkin in *Chung Chi Cheung* at

168) and either declare that rule to be part of Singapore law or apply it as part of our law. Without such a declaration or such application, the CIL rule in question would merely be floating in the air. Once that CIL rule has been incorporated by our courts into our domestic law, it becomes part of the common law. The common law is, however, subordinate to statute law. Hence, ordinarily, CIL which is received via the common law is subordinate to statute law. If we accept Mr Ravi's submission that the expression "law" in Art 9(1) includes CIL, the hierarchy of legal rules would be reversed: any rule of CIL that is received via the common law would be cloaked with constitutional status and would nullify any statute or any binding judicial precedent which is inconsistent with it.

91 In 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 as or definitively declared to be part of domestic law by a domestic court. The expression "law" is defined in Art 2(1) to include the common law only "in so far as it is in operation in Singapore". It must therefore follow that until a Singapore court has applied the CIL rule prohibiting the MDP as an inhuman punishment (if such a rule exists) or has declared that rule as having legal effect locally, that rule will not be in operation in Singapore. In the present case, given the existence of the MDP in several of our statutes, our courts cannot treat the alleged CIL rule prohibiting inhuman punishment as having been incorporated into Singapore law, and, therefore, this alleged CIL rule would not be "law" for the purposes of Art 9(1). We might add that (as noted at [44] above), in *Nguyen*, this court held (at [94]) that in the event of any conflict between a rule of CIL and a domestic statute, the latter would prevail.

92 There is an even stronger reason why, even if we accept that "law" in Art 9(1) includes CIL, the specific CIL rule prohibiting the MDP as an inhuman punishment (assuming there is such a rule) cannot be regarded as part of "law" for the purposes of this provision. As mentioned earlier (at [64]–[65] and [71] above), the Wee Commission had in 1966 recommended adding a prohibition against inhuman punishment (in the form of the proposed Art 13) to the Singapore Constitution, but that recommendation was rejected by the Government. Given that the Government deliberated on but consciously rejected this suggestion of incorporating into the Singapore Constitution an express prohibition against *inhuman punishment generally*, a CIL rule prohibiting such punishment – let alone a CIL rule prohibiting *the MDP specifically* as an inhuman punishment – cannot now be treated as "law" for the purposes of Art 9(1). In other words, given the historical development of the Singapore Constitution, it is not possible for us to accept Mr Ravi's submission on the meaning of the expression "law" in Art 9(1) without acting as legislators in the guise of interpreters of the Singapore Constitution.

93 In any event, there is one other crucial threshold which Mr Ravi must cross before he can make out a case that "law" in Art 9(1) includes the CIL prohibition against the MDP (assuming this prohibition does indeed exist), namely, he must show that the content of the CIL rule prohibiting inhuman punishment is such as to prohibit the MDP specifically. To this question, we now turn.

94 In attempting to show that the prohibition against the MDP has become part and parcel of the CIL rule prohibiting inhuman punishment, Mr Ravi has relied on the following evidence:

(a) first, the fact that only 14 countries in the world (*ie*, approximately 7% of the countries in the world) still retain the MDP for drug-related offences;

(b) second, the plethora of decisions (including the Privy Council cases relating to Art 9(1)) which hold the MDP to be an inhuman punishment; and

(c) third, the opinions of Ms Jahangir and Mr Alston on the status of the MDP (see [40] above).

By way of rebuttal, the AG has pointed out that there are in fact 31 States which still retain the MDP for drug-related and other serious offences (see [45] above).

95 In an extensive survey of the status of the death penalty worldwide, Roger Hood and Carolyn Hoyle, the learned authors of *The Death Penalty: A Worldwide Perspective* (Oxford University Press, 4th Ed, 2008) ("*The Death Penalty*"), make the following observations on the MDP in relation to drug-related offences specifically (at pp 137–138):

> Many countries in Asia, the Middle East, and North Africa, and in a few other parts of the world, have responded to international concern about the growth of illicit trafficking in 'dangerous' drugs by introducing the death penalty for both importation and 'possession for sale' of certain amounts of such drugs, or by making the death penalty mandatory for such offences where it was previously optional. According to a survey in 1979, the death penalty could be imposed for drug trafficking in 10 countries. Just six years later, in 1985, a United Nations survey revealed that such offences could, in certain circumstances, be punished by death in 22 countries. By the end of 2006 the number was at least 31. …
>
> … A number of these countries have made the death penalty mandatory, especially for recidivist drug offenders and trading on a large scale. Others, such as Iran (1969), Thailand (1979), Singapore (1975 and 1989), and Malaysia (1983) have made capital punishment mandatory for possession of even relatively small amounts. …

The learned authors then continue as follows (at pp 279–280):

> The death penalty is still mandatory for some crimes in less than a third (31) of the 95 retentionist and abolitionist *de facto* countries that at present (December 2007) retain the death penalty on their statute books, even if no persons have been, or are very rarely, executed for them. Whilst it is usually only mandatory for 'capital murder', it is still the only sentence available for armed robbery in several African countries, including Kenya (ADF [abolitionist *de facto*]), Nigeria, Tanzania (ADF), and Zambia. Further, 12 of the 26 countries which introduced the death penalty for producing, or trading in, illicit drugs have made it mandatory on conviction of possessing quantities over certain prescribed (and sometimes relatively modest) amounts. This is the case in Brunei Darussalam (ADF), Egypt, Guyana (ADF), India, Iran, Jordan, Malaysia, Qatar, Saudi Arabia, Singapore, Thailand and the United Arab Emirates …

96 Of the States referred to in the two passages quoted above, the practice in India is inconclusive. Despite the Supreme Court of India's decision in *Mithu* (discussed at [76]–[85] above) that s 303 of the Indian Penal Code was unconstitutional, subsequent to that decision, the Indian legislature passed the Narcotics Drugs and Psychotropic Substances Act 1985 (Act 61 of 1985) (India) and the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act 1989 (Act 33 of 1989) (India), both of which provide for the MDP. Also, some of the other States referred to in the above extracts from *The Death Penalty* are abolitionist *de facto*, which means that they retain the MDP on their statute books, but in practice do not carry out that penalty. Leaving aside those States and India, this still leaves a significant number of States which impose, both in law and in practice, the MDP for drug-related and other serious offences. As a result, although the majority of States in the international community do not impose the MDP for drug trafficking, this does not make the prohibition against the MDP a rule of CIL. Observance of a particular rule by a majority of States is not equivalent to extensive and virtually uniform practice by all States (see further [98] below). The latter, together with *opinio juris*, is what is needed for the rule in question to become a rule of CIL.

97 As for the Privy Council cases relating to Art 9(1) and the expert opinions of Ms Jahangir and Mr Alston, they are relevant, but they are not in themselves sources of CIL. Instead, they are a *subsidiary* means for determining the existence or otherwise of rules of CIL. This well-established proposition is encapsulated in Art 38(1)(d) of the Statute of the International Court of Justice (26 June 1945), 33 UNTS 993 ("the ICJ Statute"), which provides that:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as *subsidiary means* for the determination of rules of law.
>
> [emphasis added]

98 Hence, although "judicial decisions and the teachings of the most highly qualified publicists of the various nations" (*per* Art 38(1)(d) of the ICJ Statute) are relevant in determining the existence of rules of CIL, they are relevant only as a subsidiary means for such determination (see generally Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm, *The Statute of the International Court of Justice: A Commentary* (Oxford University Press, 2006) at paras 298–324). In the final analysis, as the International Court of Justice observed in *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v Malta)* [1985] ICJ 13 at [27], the substance of CIL "is to be looked for primarily in the actual practice and *opinio juris* of States". To establish a rule of CIL, the state practice accompanying the *opinio juris* of States must be "both extensive and virtually uniform" (see the seminal decision of the International Court of Justice on CIL in *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] ICJ 3 at [74]; see also *Case Concerning Right of Passage over Indian Territory (Portugal v India)* [1960] ICJ 6 at 40 and *Asylum Case (Columbia v Peru)* [1950] ICJ 266 at 276–277). As we stated above (at [96]), there is a lack of extensive and virtually uniform state practice to support Mr Ravi's contention that CIL prohibits the MDP as an inhuman punishment.

99 For these reasons, we are unable to accept Mr Ravi's contention that the content of the CIL rule prohibiting inhuman punishment is such as to prohibit the MDP. In our view, there does not presently exist a rule of CIL prohibiting the MDP as an inhuman punishment. Accordingly, we also reject Mr Ravi's arguments on the "contrary to CIL" limb of the Article 9(1) challenge. The Article 9(1) challenge therefore fails.

The Article 12(1) challenge: Whether the MDP provisions in the MDA are consistent with the right to equal protection in Article 12(1)

The Appellant's arguments

100 Turning now to the Article 12(1) challenge, this is a challenge to the constitutional validity of the MDP provisions in the MDA on the ground that these provisions, in using the 15g differentia (as

defined at [8] above) to determine when the MDP is to be imposed, cause arbitrary distinctions to be drawn between offenders who traffic in different amounts of controlled drugs and thus violate Art 12(1) of the Singapore Constitution.

101 Article 12(1) reads as follows:

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

In *Ong Ah Chuan*, the Privy Council commented on this provision (at 673–674) as follows:

> What article 12(1) of the [Singapore] Constitution assures to the individual is the right to equal treatment with other individuals in similar circumstances. It prohibits laws which require that some individuals within a single class should be treated by way of punishment more harshly than others; it does not forbid discrimination in punitive treatment between one class of individuals and another class in relation to which there is some difference in the circumstances of the offence that has been committed.
>
> … The questions whether [a] dissimilarity in circumstances justifies any differentiation in the punishments imposed upon individuals who fall within one class and those who fall within the other, and, if so, what are the appropriate punishments for each class, are questions of social policy. Under the [Singapore] Constitution, which is based on the separation of powers, these are questions which it is the function of the legislature to decide, not that of the judiciary. *Provided that the factor which the legislature adopts as constituting the dissimilarity in circumstances is not purely arbitrary but bears a reasonable relation to the social object of the law, there is no inconsistency with article 12(1) of the [Singapore] Constitution*.
>
> [emphasis added]

102 In relation to the specific drug trafficking offence which the Appellant was charged with (*ie*, the offence of trafficking in diamorphine), Mr Ravi has advanced six arguments as to why the 15g differentia bears no reasonable connection to the object of the MDA and is arbitrary.

103 Mr Ravi's first argument is that the application of the 15g differentia entails that the death penalty is mandatory for trafficking where the offender traffics in just slightly more than 15g of diamorphine (*eg*, 15.01g), but is unavailable altogether where the offender traffics in just under 15g of diamorphine (*eg*, 14.99g). This distinction, so Mr Ravi submits, is illogical, and, even if there is a quantitative and incremental increase in guilt or social mischief associated with trafficking in an additional 0.02g of diamorphine (taking the example just outlined), it is inappropriate for our sentencing regime to respond to this by a qualitative and non-incremental increase in the penalty prescribed for the offence.

104 The second argument advanced by Mr Ravi is that the death penalty is also unavailable altogether where an offender has multiple convictions for trafficking in less than 15g of diamorphine. In other words, if the offender is convicted of two counts of trafficking in 14.99g of diamorphine, the death penalty is unavailable even though the offender has demonstrated a more conscious assumption of risk and greater imperviousness to deterrence than a one-time offender who traffics in just slightly more than 15g of diamorphine (and, as a result, faces the MDP).

105 Mr Ravi's third argument is that the MDP, which precludes the court from considering, for

sentencing purposes, the circumstances in which the offence came to be committed, denies the Prosecution and the public the benefit of having information on the type of offenders who are more likely to re-offend. This impedes the Legislature's determination of whether the MDP is necessary or whether it is in fact superfluous.

106 The fourth argument put forth by Mr Ravi is that the sentencing regime under the MDA is too rigid because it denies the court the opportunity to consider any major factual differences between different cases of drug trafficking.

107 Mr Ravi's fifth argument is that the sentencing regime, although predicated on considerations of general deterrence, does not allow the court to take into account whether the offender in question voluntarily assumed the risk of trafficking in controlled drugs. It is contended that, since whether or not the 15g differentia is satisfied depends on the amount of pure diamorphine contained in the substance trafficked, it is unlikely that a drug courier would ever know whether the substance which he traffics contains the requisite amount of pure diamorphine needed to satisfy the 15g differentia and thus attract the MDP.

108 The sixth and final argument by Mr Ravi is that the sentencing regime fails to differentiate between an offender who traffics in just slightly more than 15g of diamorphine and one who traffics in multiple times that quantity since both offenders will, if convicted, be sentenced to death.

The Prosecution's response

109 In response to Mr Ravi's arguments, the AG has referred to *Nguyen*, where this court set out (at [70]) the two-step "reasonable classification" test for determining the validity under Art 12(1) of a differentiating factor prescribed by the Legislature for distinguishing between different classes of offenders for sentencing purposes, *viz*:

> A "differentiating measure" such as the 15g differentia is valid if[:]
>
> (a) the classification is founded on an *intelligible* differentia; and
>
> (b) the differentia bears a *rational relation* to the *object* sought to be achieved by the law in question.
>
> [emphasis in original]

In this connection, the AG has submitted that the 15g differentia is an intelligible differentia which bears a rational relation to the social object sought to be achieved by the MDA (which is to deter large-scale drug traffickers from plying their trade in or through Singapore).

110 We shall now consider these arguments in turn.

Our analysis of the Appellant's arguments

111 With regard to Mr Ravi's first argument as set out at [103] above, we agree that the difference between the punishment for trafficking in just slightly more than 15g of diamorphine and that for trafficking in just slightly under 15g of this drug is stark. This, however, does not mean that the 15g differentia is therefore arbitrary. The test for whether this differentia violates Art 12(1) is, as the AG has rightly pointed out, the two-step "reasonable classification" test outlined at [70] of *Nguyen*. Specifically, what we are concerned with in this appeal is the "rational relation" limb of this test

(referred to hereafter as "the 'rational relation' test" for short), *viz*: is there a *rational* relation between the 15g differentia (which is based on the quantity of diamorphine trafficked) and the social object of the MDA? (This test is, for all intents and purposes, the same as the "reasonable relation" test enunciated by Lord Diplock in *Ong Ah Chuan* at 673–674 (reproduced at [101] above).) Mr Ravi contends that, in applying this test, the court cannot take the view that so long as the 15g differentia goes *some* distance towards advancing the social object of the MDA, a rational relation will be found. If that were the case, Mr Ravi submits, even purely arbitrary differentiating factors could survive the "rational relation" test. For instance, it would be permissible to use the length of the offender's hair as the criterion for determining when the MDP is applicable because imposing the death penalty on all drug traffickers with short hair would go *some* distance towards eradicating the illicit drug trade. We agree with Mr Ravi on this point. The test is one of *rational* relation precisely to exclude the use of purely arbitrary differentiating factors. To take Mr Ravi's example, the length of the drug trafficker's hair clearly does not bear any rational relation to the social object of the MDA.

112 Where the MDA is concerned, it cannot be said that the 15g differentia is purely arbitrary. In *Ong Ah Chuan*, the Privy Council said (at 674) in relation to the question of whether the 15g differentia bore a "reasonable relation" (at 674) to the social object of the MDA:

> The social object of the [MDA] is to prevent the growth of drug addiction in Singapore by stamping out the illicit drug trade and, in particular, the trade in those most dangerously addictive drugs, heroin and morphine. The social evil caused by trafficking which the [MDA] seeks to prevent is broadly proportional to the quantity of addictive drugs brought on to [*sic*] the illicit market. There is nothing unreasonable in the legislature's holding the view that an illicit dealer on the wholesale scale who operates near the apex of the distributive pyramid requires a stronger deterrent to his transactions and deserves more condign punishment than do dealers on a smaller scale who operate nearer the base of the pyramid. It is for the legislature to determine in the light of the information that is available to it about the structure of the illicit drug trade in Singapore, and the way in which it is carried on, where the appropriate quantitative boundary lies between these two classes of dealers.

We agree with this observation. We would also add that the quantity of addictive drugs trafficked is not only broadly proportionate to the quantity of addictive drugs brought onto the illicit market, but also broadly proportionate to the scale of operations of the drug dealer and, hence, broadly proportionate to the harm likely to be posed to society by the offender's crime. For these reasons, we find that the 15g differentia bears a rational relation to the social object of the MDA.

113 Our finding that there is a rational relation between the 15g differentia and the social object of the MDA should not, however, be taken to mean that this differentia is the best and that there is no other better differentia which would further the social object of the MDA. In this regard, we appreciate the points made in Mr Ravi's second, third and fourth arguments at [104]–[106] above, all of which suggest possible reasons for expanding the differentia to take into account something more than just the quantity of controlled drugs trafficked. We should also point out that although a differentia which takes into account something more than merely the quantity of controlled drugs trafficked may be a better differentia than the 15g differentia, what is a better differentia is a matter on which reasonable people may well disagree. This question is, in truth, a question of social policy, and, as the Privy Council stated in *Ong Ah Chuan* at 673 (quoted at [101] above), it lies within the province of the Legislature, not the Judiciary. Our judiciary has to respect the constitutional role of our legislature as delineated in the Singapore Constitution (under Art 38), and this is why our courts will only act to ensure that the differentia employed in the MDA for determining when the MDP is to be imposed bears a rational relation to the social object of that statute. As mentioned in the preceding paragraph, we find that the 15g differentia does satisfy this test.

114 With regard to the fifth argument canvassed by Mr Ravi at [107] above, we do not agree that a drug courier who does not know the amount of pure diamorphine contained in the substance which he traffics is one who has not voluntarily assumed the risk of trafficking. There is no need for a drug courier to know the precise amount of pure diamorphine contained in the substance which he traffics in order to know that his act causes harm to society and is illegal, and that he will be punished if he is caught and convicted.

115 With regard to Mr Ravi's sixth argument at [108] above, we do not think it can be taken seriously. If this argument were accepted, it would apply even if the 15g differentia is changed such that a far greater amount of diamorphine must be trafficked before the MDP becomes applicable. For instance, if the MDP were to be imposed only if the amount of diamorphine trafficked exceeds 100kg, Mr Ravi would still be able to argue that the sentencing regime fails to differentiate between an offender who traffics in just slightly more than 100kg of diamorphine and one who traffics in multiple times that quantity. The reason why a more severe sentence is not imposed for a more egregious violation of our drug trafficking laws (in terms of trafficking in a larger quantity of controlled drugs) is that the death penalty is the ultimate punishment and there exists no punishment which is more severe. Parliament has set 15g of diamorphine as the threshold for imposing the MDP where the offence of trafficking in this drug is concerned; *ie*, it has decided that trafficking in any quantity of diamorphine more than 15g is sufficiently serious to warrant the imposition of the MDP. Hence, even though trafficking in even larger quantities of diamorphine (as compared to, say, just 15.01g of diamorphine) would be a more egregious violation of the law, there is no more severe punishment which may be imposed.

116 Before we conclude our analysis of the Article 12(1) challenge, we should briefly mention another argument made by Mr Ravi which has some bearing (albeit only tangentially) on the question of whether the MDP provisions in the MDA are consistent with Art 12(1) of the Singapore Constitution. This argument is that the MDP has in fact only a limited deterrent effect on drug couriers. To buttress this argument, Mr Ravi filed Criminal Motion No 7 of 2010 ("CM 7/2010") seeking leave for the Appellant to adduce an affidavit by Prof Jeffrey Fagan dated 3 March 2010 ("Prof Fagan's affidavit"), which states that the deterrent effect of the MDP for drug trafficking has not been established and that the utility of this penalty as a deterrence is limited where drug couriers are concerned. Mr Ravi sought to rely on this affidavit to argue that the imposition of the MDP on all offenders who traffic in more than 15g of diamorphine is of limited deterrent effect. In this regard, the AG has produced statistics (compiled by the UN Office on Drugs and Crime for the year 2008) to show that Singapore has one of the lowest drug addiction rates internationally, which suggests that the MDP does have a deterrent effect on drug trafficking here.

117 It is not within the purview of this court to determine the efficacy or otherwise of the MDP as a deterrent *vis-à-vis* the offence of drug trafficking. In *Ong Ah Chuan*, the Privy Council addressed this very point when it said (at 672–673):

> Their Lordships would emphasise that in their judicial capacity they are in no way concerned with arguments for or against capital punishment or its efficacy as a deterrent to so evil and profitable a crime as trafficking in addictive drugs.

118 We would add that, although there is room for arguing that there is insufficient evidence that the MDP deters serious offences like murder, it can equally be said that there is insufficient evidence that the MDP does not have such a deterrent effect. Surveys and statistical studies on this issue in one country can never be conclusive where another country is concerned. The issue of whether the MDP has a deterrent effect is a question of policy and falls within the purview of Parliament rather than that of the courts. Therefore, Prof Fagan's affidavit is of little practical relevance in this appeal.

Accordingly, CM 7/2010 is unnecessary and we make no order on it.

119 Given our ruling that the 15g differentia bears a rational relation to the social object of the MDA, this differentia is not arbitrary and, thus, not inconsistent with Art 12(1). In this regard, we note that the Privy Council in *Ong Ah Chuan* likewise found that a "reasonable relation" (at 674) existed between the 15g differentia and the social object of the MDA; we have no reason to disagree with its finding. For these reasons, the Article 12(1) challenge also fails.

Conclusion

120 To summarise, our ruling on the issues raised in this appeal is as follows:

(a) Art 9(1) of the Singapore Constitution cannot be interpreted as impliedly including a prohibition against inhuman punishment because of our constitutional history (in particular, because of the Government's conscious decision not to incorporate such a prohibition into the Singapore Constitution notwithstanding the recommendation of the Wee Commission);

(b) in view of our ruling in the preceding sub-paragraph, it is unnecessary for us to decide whether the MDP is an inhuman punishment;

(c) the expression "law" in Art 9(1) does not include CIL which has yet to be incorporated into domestic law;

(d) even if the word "law" in Art 9(1) includes CIL which has yet to be incorporated into domestic law, we are not persuaded that the CIL rule prohibiting inhuman punishment includes a prohibition against the MDP specifically;

(e) in view of our findings at sub-paras (a) and (d) above, the MDP is not contrary to the right to life set out in Art 9(1); and

(f) the 15g differentia in the MDP provisions in the MDA does not draw arbitrary distinctions between offenders who traffic in different amounts of drugs and thus does not violate the right under Art 12(1) of equal protection of the law.

121 It follows that the MDP is not unconstitutional as it does not contravene either Art 9(1) or Art 12(1). In view of this conclusion, it is unnecessary for us to consider Mr Ravi's submission as to the effect which the President's power to grant clemency under Art 22P of the Singapore Constitution has on the constitutionality of the MDP.

122 Finally, we would reiterate that, in the light of our constitutional history since Singapore became an independent sovereign republic on 9 August 1965, there is no room for the argument that MDP legislation is unconstitutional because it is not "law" for the purposes of Art 9(1). In our view, whether or not our existing MDP legislation should have been enacted and/or whether such legislation should be modified or repealed are policy issues that are for Parliament to determine in the exercise of its legislative powers under the Singapore Constitution. It is for Parliament, and not the courts, to decide on the appropriateness or suitability of the MDP as a form of punishment for serious criminal offences. In view of the decisive rejection of a constitutional prohibition against inhuman punishment in the evolution of the Singapore Constitution (see [61]–[72] above), any changes in CIL and any foreign constitutional or judicial developments in relation to the MDP as an inhuman punishment will have no effect on the scope of Art 9(1). If any change in relation to the MDP (or the death penalty generally) is to be effected, that has to be done by Parliament and not by the courts under the guise

of constitutional interpretation.

123 In the result, we dismiss the present appeal.